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Madison v Marshall: Constitutional Theory and the Original Intent Debate

By

Guy Padula

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York.

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Abstract

Madison v Marshall: Constitutional Theory and the Original Intent Debate

By

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Advisor: Professor Thomas Halper

Since 1787 Americans have debated whether the legal authority of the Constitution rests solely upon the consent of the people, or whether it also incorporate rules of justice, fairness and logic. Those who argue the former position, currently known as originalists, contend that constitutional meaning should adhere to an original understanding until the document is formally amended. Non-originalists respond that the founding generation never believed constitutional meaning would remain frozen in time and that the founders anticipated that constitutional meaning would evolve according to the dictates of justice and logic. Despite their disagreements, originalists and non-originalists both argue that their constitutional theory should prevail because it is in accordance with the founding generation's original understanding of the Constitution. This dissertation challenges the assumption that such an original consensus ever existed by examining the founding generation's two most respected constitutional authorities: James Madison and John Marshall. Legal scholars and jurists generally assume that Madison and Marshall shared a fully compatible constitutional jurisprudence. However, as I demonstrate, Madison and Marshall disagreed over the two questions that lie at the heart of today's constitutional debate: what is the basis of the Constitution's legal authority, and should its meaning remain fixed or evolve with the passage of time? Before examining the differences between Madison and Marshall, I first demonstrate that Madison's originalist

constitutional arguments from the 1790s onwards, which have been largely dismissed as politically driven, are in fact consistent with his previous arguments. I then compare Madison and Marshall's conflicting constitutional theories and explore the implications for today's debate original intent debate.

Acknowledgments

The solitary nature of my work has made me all the more indebted to my colleagues, friends and loved ones. I might never have discovered my interest in politics if not for my undergraduate professors Murray Levin and Howard Zinn. I will always associate the early years of graduate school with Susan and her wonderful generosity of spirit. Francis Piven, Burt Zwiebach, Robert Sullivan, and Bernard Brown all played their own important role in helping me get through the course work, exams, and the myriad number of requirements that comprise the graduate school process. I would like to thank everyone at John Jay, especially my friend, office mate, neighbor and editor, Roger McDonald. Jack Diggins, Jill Norgren, and Philippa Strum deserve a special note of appreciation. Piero Ribelli has been a wonderful friend. Just like the cavalry, Gerald De Maio arrived at the last possible moment and allowed me to get me through my dissertation defense. Two people, in particular, deserve special acknowledgement. Upon the completion of this work, Jennifer, who has always had more faith in me than I have had in myself, has once again been proven right. Finally, anyone who has written a dissertation realizes how important a role the advisor plays. No one has ever had a more gracious or supportive mentor than Tom Halper.

For my Mother and Father

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Abbreviations

Individuals

JM James Madison

TJ Thomas Jefferson

ER Edmund Randolph

CJM Chief Justice Marshall

Collections

POM *The Papers of James Madison.* 1962- Edited by William T. Hutchinson et al. Chicago and Charlottesville: University of Chicago Press and University Press of Virginia

PTJ *Papers of Thomas Jefferson.* 1950- Edited by. Julian P. Boyd et al. Princeton: Princeton University Press.

Federalist *The Federalist Papers.* 1961 Alexander Hamilton, James Madison, and John Jay. Edited with an introduction by Clinton Rossiter. New York: Mentor.

Annals *Annals of the Congress of the United States, 1789-1824.* 42 vols. Washington, D.C., 1834-56.

PJM *The Writings of James Madison.* 1900-1910. Edited by Gaillard Hunt. New York: G.P. Putnam's.

Chapter One:

All Countries Have Some Form of Government

Is the authority of the United States Constitution based on reason, logic and principles of justice or does it simply reflect the will of a sovereign power? The status of fundamental law has not only been a vital question throughout this nation's history, the debate extends as far back as seventeenth century England. The persistence of this dispute is explained by its relation to political power. If unwritten principles of justice and logic underpin the law, then a certain amount of interpretational discretion becomes justified. On the other hand, if law is the expression of a sovereign power, be it the Crown, Parliament, or the people, then that body should determine the meaning of the law and their political inferiors, in the words of Thomas Jefferson, should apply the law as would "mere machines."[1]

A second related question has been whether the meaning of constitutional provisions should remain fixed or evolve with the passage of time. Was there a consensual agreement embodied in the fundamental law of the Constitution that can be reconstructed --an idea expressed by Chief Justice Rehnquist in his opening statement in the recent *United States v Lopez* --"We start with first principles;"[2] or should we think of words not as crystals, "transparent and unchanging, but [as] the skin of a living thought."[3] It is unlikely that many people would take an absolutist stance in regard to either question. For example, a person who decries the argument that the Bill of Rights protects

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[1] TJ to Edmund Pendleton, August 26, 1776, in PTJ 1:505
[2] 115 S. Ct. 1624, 1626 (1995).
[3] Unattributed citation found in Novick 1992, 408.

individual autonomy and encompasses the right to secure an abortion might accept that the Fourth Amendment's protections can be logically extended against wiretapping by law enforcement agencies. Of course, questions concerning the evolutionary nature of the Constitution apply not just to prohibitions against the powers of government, but also to the powers themselves. Congress, for example, employed its power to regulate interstate commerce to put an end to segregation by commercial establishments.[4]

These two questions concerning constitutional law are at the heart of today's originalist dispute. "Originalists" - those who advocate a return to the founders' "original intent" - argue that constitutional meanings should remain fixed because the authority of the document rests upon the principle of popular sovereignty. As Chief Justice Rehnquist once wrote,

> The people are the ultimate source of authority; they have parceled out the authority that originally resided with them by adopting the original Constitution and by later amending it....A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution.[5]

Although originalists have disagreements concerning the implementation of their judicial philosophy, such as how one should go about reconstructing the original understanding,[6] exactly whose original understanding matters[7] and the degree to which

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[4] *Heart of Atlanta Motel v United States*, 379 U.S. 241 (1964) and *Katzenbach v McClung* 379 U.S. 294 (1964).

[5] Rehnquist 1976, 696.

[6] See the next footnote and Chapter Four, pages 99-102, for a discussion of the difficulties with the originalist approach to adjudication.

[7] There are at least three answers to the question of whose intent matters: the framers, the ratifiers, and the general public. For arguments that the intent of the framers should remain binding, see Berger, 1997, 4, 404-05 (page citations are to the reprint edition). As my discussion of Madison will demonstrate, not even the framers necessarily believed that their intent should take precedence over the understanding of the ratifiers; also see. Lofgren 1988, 77-113. And, as James Hutson has convincingly demonstrated, the integrity of the records of the ratifying conventions cannot be relied upon. Hutson 1986, 1-38. Hence, 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." Monaghan 1981, 375, note 130. For arguments that "what counts is what the public understood," see Bork 1990, 144. Finally it is also possible to argue that the framers

constitutional provisions may be adaptable, they share the belief that the original intent behind the constitution should remain authoritative. Non-originalists counter that the meaning of the Constitution changes with time.[8] The framers, it is argued, did not expect future generations to rely upon "the dead hand of the past," but expected the Court to adapt the principles embodied in the Constitution to a changing world. Although few, if any, non-originalists would dispute the idea that the Constitution is based upon the principle of popular sovereignty, they often argue that it also embodies a form of "higher law" or natural law. Proponents of this "Higher Law Background"[9] thesis of the Constitution argue that principles of justice can be adapted to changing circumstances through judicial interpretation. Thus, this higher law doctrine leads to an evolutionary conception of the law; the principles remain immutable, but their application evolves with the development of society.[10]

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expected that meaning would be established "as a product of the interpretive process rather than something locked into the text by its author," See Powell 1985, 899. I will leave it to the reader to decide whether this last argument should be labeled "originalist."

[8] See e.g., Bickel 1962; Grey 1975, 703-718; Brest 1980,; Tribe 1985a, 3-20, 29-44, 238-45; Tribe 1978, 47-52.

[9] Corwin 1928.

[10] This question, as do so many others, divides originalists and non-originalists not into two distinct camps, but across a broad spectrum of opinion. Thus, the degree to which constitutional meaning ought to evolve is debated not just between originalists and non-originalists, but within the two schools. Indeed, an interesting debate between two originalists occurred in the District of Columbia's Circuit Court's decision of *Ollman v. Evans* 750 F.2d 970 (1984). Bork, and future Supreme Court Justice Antonin Scalia, were sitting judges of that District Court at the time. The plaintiff had brought a defamation suit against the nationally syndicated columnists Rowland Evans and Robert Novak. In his concurring opinion, Bork argued that, although the framers may not have envisioned libel actions as a major threat to freedom of speech, "if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines?...We must never hesitate to apply old values to new circumstances, whether those circumstances are changes in traditional technology or changes in the impact of traditional common law actions....A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty....The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint. (at 996). "It seems to me," Scalia countered, "that the identification of 'modern problems' to be remedied is quintessentially legislative rather than judicial business--largely because it is such a subjective judgment; and that the remedies are to be sought through democratic change rather than through judicial pronouncement that the Constitution now prohibits what it did not prohibit before." (at 1038). Nonetheless, it is certainly true that originalists, as a whole, disagree with non-originalists over the extent to which constitutional meaning ought to evolve.

History is employed by proponents on both sides of the originalism dispute. Historical evidence can be divided into two categories.[11] The first is internal to the law and is composed of precedents, legal history (including legal terms and doctrine), legal systems, and judicial practices. The second type of historical evidence is more general, and external to the law, and includes political, social, economic, and cultural history. Both types of historical evidence enter into the originalism debate. For example, originalists argue that the very fact that the Constitution is a written document supports a fixed conception of the law, while non-originalists counter that the text of the document contains ambiguities and open-ended clauses that invite an evolutionary conception of the law.[12] Similar debates center on the interpretation of judicial precedent, as well as more general historical materials, such as the *Federalist*. And, of course, the question of whether constitutional meaning ought to evolve is applicable not just to the original document but to all of the subsequent amendments. The debate over how to interpret the fourteenth amendment has been particularly significant.

Although there are exceptions,[13] most originalists as well as non-originalists base their arguments upon two assumptions: the founding generation reached a consensus regarding how the judiciary should approach constitutional interpretation and we should abide by that understanding. This dissertation will attempt to demonstrate that it is impossible for us to forge a consensus over constitutional interpretation by returning to

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[11] Miller 1969.

[12] Of course it can be said that the Constitution is composed of two types of clauses: rules and standards. The age requirements for Congress and the President are seemingly fixed and open to no debate, while other clauses, such as the Fourth Amendment's protection against "unreasonable search and seizure," may have been intended to evolve according to changing circumstance. We are concerned with the latter type. This subject will discussed in chapters three and four.

[13] Whitman has argued that "the American Revolution, like most such upheavals, was inspired by a poorly-digested farrago of ideas, without inner logic--by a confused body of law that will never provide us with any single authoritative doctrinal legacy." Whitman 1991, 1367-68.

the interpretive intent of the founders because the founding generation disagreed over the same questions that divide originalists and non-originalists: what is the authority of the Constitution based upon, and are its principles to evolve or remain fixed? I will assert that the early American understanding of constitutionalism embodied conflicting legal paradigms. The Revolutionaries conceived of constitutions, and thus constitutional interpretation, as defined by the dictates of what is called England's "ancient constitution." We will soon examine ancient constitution theory in greater detail, but it can be briefly stated that England's unwritten constitution was understood to comprise all English law, as well as to encompass the government, social structure, and property arrangements of that society. Most importantly, because these institutions were understood to have arisen organically from immemorial custom, the concepts of natural law and natural rights were easily incorporated into the theory. When the colonists initially claimed that they were fighting to defend the "rights of Englishmen," they were referring to their inalienable rights as defined under the ancient constitution.[14]

However, ancient constitution theory proved more useful in challenging authority than in establishing it. Hence, after Americans declared independence and began erecting new governments, they began turning to John Locke's argument that the people are sovereign and that the powers of government must be based on the consent of the governed. These two theoretical paradigms naturally lead to different approaches to constitutional interpretation.

This dissertation examines the constitutional theories of James Madison and John Marshall to illustrate that the founding generation were divided over the same questions that separate originalists from non-originalists today. I hope to demonstrate that

[14] For illustrations of this argument see Adams 1850-56, 4:131, or PTJ 1:131-35.

Madison's belief in the principle of popular sovereignty led him to argue that constitutional meaning is to remain fixed, while Marshall's training in the English common law drove him to conclude that constitutional meaning rests on principles of logic and justice that evolve with the passage of time.

It is rarely suggested that the two most important constitutional authorities of the founding generation, Marshall and Madison, held conflicting conceptions of the Constitution.[15] Rather, it is typically assumed, even explicitly asserted, that the theories of Marshall and Madison were in concordance. For example, the historian Charles F. Hobson has written that the "constitutional vision that inspired Madison....was essentially the same one that animated Marshall as Chief Justice of the United States."[16]

Although Madison was a most reluctant critic of the Court, he and Marshall led opposing political parties and Madison's dearest friend and life-long political ally, Jefferson, was perhaps Marshall's most vocal critic. Furthermore, Madison not only left a considerable body of writing to indicate that he held a very different understanding of the Constitution from Marshall, he also directly criticized Marshall's most important constitutional decision, *McCulloch v Maryland* (1819).[17] It would be an exaggeration to claim that Marshall and Madison's constitutional theories were fundamentally

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[15] A rare exception, whom we will later discuss, is Powell, who argues that "in the course of their political guerrilla warfare against the dominant Federalists during the [John Adams'] administration...the two greatest Republican leaders, Jefferson and Madison, formulated [a new] theory of the Constitution, and its proper interpretation." Powell asserts that this new theory of interpretation conflicted with the interpretive intent of the founders and that Marshall's approach to constitutional interpretation was true to the original understanding. Powell 1985, 923-24.

[16] Hobson 1996, xii. Hobson does qualify this remark with the argument that he is referring to Madison's vision of the Constitution during the 1780's. I will challenge the view that Madison's offered a different theory of the Constitution beginning in the 1790's than he had during the 1780s. More importantly, as my discussion of *United States v. Lopez* 115 U.S. 1624 (1995) will demonstrate, members of the nation's highest court, including Chief Justice Rehnquist, have falsely assumed that the views of Marshall and Madison were in agreement. The same argument is made by those who challenge originalism. See, for example, Kelso 1995, 1079.

[17] 4 Wheat. (17 U.S.) 316.

incompatible. Like most proponents in the originalism debate today, their differences were more of degree than kind. However, the controversy generated by the originalism dispute indicates that such differences can have an enormous impact upon constitutional interpretation. Certainly, the differences between Marshall and Madison were substantial enough to make the quest to resolve today's dispute over constitutional interpretation by a return to the first principles of the Constitution a problematic endeavor at best.

This chapter is divided into two parts, each of which asks what is the basis of legal authority and should constitutional meaning evolve or remain fixed? Rather than immediately turning to Madison or Marshall, I will first examine the originalism dispute to demonstrate that these questions divide the present generation of scholars and constitutional decision makers. Madison and Marshall's constitutional theories remain vital today because originalists and non-originalists alike hope to resolve today's debates over constitutional interpretation by returning to the founders' "interpretive intent."

In the second half of this chapter, I will briefly discuss legal thought in seventeenth century England and demonstrate that the conflicting constitutional visions of Madison and Marshall were not only a precursor to today's originalist dispute, but were also a reflection of two competing theoretical paradigms that had been inherited from England. I will assume that the reader is already familiar with the writing of John Locke therefore focus on the theory of the ancient constitution. The ancient constitution not only provided the Revolutionaries with their principal justification for rebellion; in addition, an entire generation of American lawyers, including John Marshall, were educated by reading the theory's most eloquent spokesmen: Sir Edward Coke and Sir William Blackstone. After briefly examining how Locke and Blackstone offered

conflicting theories of legal authority, the remainder of the dissertation will explicate how Locke's principle of consent formed the cornerstone of Madison's constitutional theory and how Marshall brilliantly adapted the English common law approach to adjudication to the American context.

Originalism and the Debate Over the Authority of Fundamental Law

It is sometimes difficult to distinguish originalism from non-originalism because both sides ostensibly employ the same methods of adjudication. Laurence Tribe has noted that proponents of both sides recognize the Constitution as the fundamental law of society and agree that it must be interpreted by its text, the history behind it, the structure of power established by it, and judicial precedent.[18] Yet, this apparent consensus conceals a deep division that arises when these various considerations come into conflict. For example, there is an inverse relation between the weight assigned to original intent and the significance attached to judicial precedent. Numerous cases, especially in relation to the right to privacy, have centered on the question of which of the two interpretive tools should prevail.[19] The division between originalists and non-originalists is most clearly demarcated by the question of whether constitutional meaning ought to evolve. To paraphrase Holmes, do the words contained in the Constitution form a crystal or the skin of a living organism?

Perhaps the most memorable clash between the originalist and the non-originalist conception of fundamental law occurred during Judge Robert Bork's Supreme Court nomination hearings. Bork argued that the courts "invade the proper domain of democratic government" when they legislate judicially under the guise of protecting

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[18] Tribe 1985b, 99.
[19] See, *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 U.S. 833 (1992).

unenumerated constitutional rights.[20] To which Senator Biden (Dem. Delaware) responded,

> I believe all Americans are born with certain inalienable rights. As a child of God, I believe my rights are not derived from any government. My rights are because I exist. They were given to me and each of my fellow citizens by our Creator, and they represent the essence of human dignity.[21]

This exchange illustrates the conflicting conceptions of fundamental law that Americans hold today. Biden asserted that the Constitution incorporates inalienable natural rights and he rested his argument almost exclusively on intuitive evidence. However, it is entirely conceivable that the founding generation subscribed to the Lockean belief that man chooses to leave the state of nature to secure his rights to life, liberty and property, and that, therefore, it would be a "gross absurdity" to argue that man would consent to a government which could violate these rights.[22]

Instead of directly challenging these natural law assertions, Bork offered a positive law conception of the Constitution. The term "positive law" has been used in various ways since John Austin used the term over a century ago. Austin argued that law is a species of command and autonomous from considerations of religion, natural law, or justice. Law, simply put, is a command "set by political superiors to political inferiors."[23] This definition obviously separates law from morality. The only distinction between Austin's definition, and the manner in which I will use the term, is that the positive law legal conception in America has been constructed upon the recognition of a natural right: popular consent. I will also adopt the definition of natural law that Biden sets forth above. Inalienable rights are obviously central to this theory, as is the belief that an

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[20] Senate 1987, 30.
[21] *Ibid.*, 8.
[22] Locke, 1947, 82.

understanding of law entails consideration of universal principles of morality, justice, and logic.

These conflicting conceptions of fundamental law often determine a judge's approach to constitutional interpretation. For centuries observers have debated whether judges must interpret the letter or the spirit of the law. Legal positivists, interpretivists, and those who advocate a "strict" approach to interpretation, argue that judges should stick to the former, while those who believe that the Constitution incorporates natural law theory believe that the spirit of the law should also be considered. This debate over the letter versus the spirit, or interpretivism versus non-interpretivism, is the issue that most clearly divides originalists from non-originalists. According to Michael Perry, a court engages in non-interpretivism when,

> it makes the determination of constitutionality by reference to a value judgment other than the one constitutionalized by the Framers. Such review is "non-interpretive" because the Court reaches [the] decision without really interpreting, in the hermeneutical sense, any provision of the constitutional text (or any aspect of governmental structure)--although, to be sure, the Court may explain its decision with rhetoric designed to create the illusion that it is merely "interpreting" or "applying" some constitutional provision.[24]

Because originalists believe that judges should be guided by the principles of legal positivism and the founders' original understanding, an originalist would rarely, if ever, defend the practice of non-interpretivism. It should be noted that not all interpretivists, or those who emphasize an approach to constitutional interpretation based primarily upon a textual analysis of the document, would identify themselves as originalists. A strict interpretivist would confine their legal analysis to the Constitution, and many originalists, as we have already noted, rely on outside historical sources such as

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[23] Austin 1970, 1.

the *Federalist* to elucidate the meaning of constitutional provisions. Secondly, although there are non-originalist scholars who defend non-interpretivism, and though there have seemingly been non-interpretivist decisions, few if any judges admit to offering a constitutional decision that is not at least ostensibly grounded in some specific provision or combination of provisions. Originalists often contend that the clearest example of a non-originalist/non-interpretivist decision is *Griswold v. Connecticut* (1965),[25] the decision that established a constitutional right to privacy. Justice Douglas, who authored the Court's decision, argued that the "specific guarantees" contained in the Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance."[26] Justice Black, in a memorable response to Douglas, offered the following interpretivist argument: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[27]

One suspects that the most forthright defenses of non-interpretivism have come from academics and not legal practitioners because scholars are not burdened by the same institutional restraints as judges. Such scholars have not only rejected arguments for legal positivism, they have explicitly argued that "the Founders acknowledge[d] that natural law was superior to positive law."[28] Numerous theoretical defenses of the natural law origin of the Constitution have been offered. For example, Suzanna Sherry has argued that the founding generation never believed that "their new Constitution [would] be the sole source of paramount or higher law," and that they expected "courts to look

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[24] Perry 1981, 264-65.
[25] 381 U.S. 479.
[26] 381 U.S. 479, 484.
[27] 381 U.S. 479, 510.

outside the Constitution in determining the validity of...governmental actions...affecting fundamental rights of individuals."[29] Thomas C. Grey has made a similar argument, except he claims that although the judiciary's role may not have been anticipated, it did come to be generally accepted:

> [I]t was generally recognized that written constitutions could not completely codify the higher law. Thus in the framing of the original American constitutions it was widely accepted that there remained unwritten but still binding principles of higher law....As it came to be accepted that the judiciary had the power to enforce the commands of the written Constitution when these conflicted with ordinary law, it was also widely assumed that judges would enforce as constitutional restraints the unwritten natural rights as well.[30]

Non-originalists also argue that the text of the Constitution supports their theory. As Edwin Corwin once explained, the Constitution contains two types of clauses:

> It will generally be found that words [in the Constitution] which refer to governing institutions, like "jury," "legislature," "election" have been given their strictly historical meaning [by the Supreme Court], while other words defining the subject-matter of power or of rights like "commerce," "liberty," "property," have been deliberately moulded to the views of contemporary society."[31]

Drawing on this argument, Tribe has asserted that an open-ended clause of the Constitution, "invites us, and our judges, to expand on the....freedoms that are uniquely our heritage."[32] He believes that the Court should use these provisions to reinforce the fundamental values of American society. Finally, it has been argued that the purpose of the separation and the enumeration of powers was to protect individual liberty by placing constraints on government. H.N. Hirsch has written that these constraints offer strong

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[28] Brennan 1992, 981.
[29] Sherry 1987, 1127. Also see the convincing and highly critical response offered by Michael 1991.
[30] Grey 1975, 715-6.
[31] Corwin 1926, 659-660.
[32] Tribe 1985, 45. Of course, it can be asked why judges would necessarily expand rather than restrict freedom.

evidence that the "constitutional framers operated within a general philosophy of natural, unenumerated rights."[33]

A common element in these justifications for non-interpretivism is that they are all intentionalist arguments. The label "non-originalism" should not be taken to mean that non-originalists place less weight on the interpretive intent of the Founders than originalists do. Non-originalists agree that we should abide by the interpretive intent of the founders. Their claim is that the founders expected future generations to be guided not by a reconstruction of the original understanding, but by principles of justice and logic. The reason why originalists and non-originalists argue that we should return to the interpretive intent of the founders[34] is that both sides understand that the authority of fundamental law can not rest upon legal principles alone. Submission to legal authority is achieved, in part, through the veneration accorded to the document. Thus, originalists and non-originalists both recognize that tradition and veneration are essential to legal authority. And, both seek to claim the mantle of the "founding fathers" because whoever is defending the traditional approach to interpretation need not defend their constitutional hermeneutic.

Today's debate over what is the truly traditional method of constitutional interpretation has led to unprecedented interest in eighteenth-century legal thought as well as the question of whether or not the founders believed that the fundamental law of the Constitution incorporated forms of higher or natural law. Originalists and non-originalists alike have painstakingly researched the debates and writings of the state

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[33] Hirsch 1992, 50.

[34] This is not true of all the debate's proponents. For example, Michael has stipulated, "I advocate no position concerning whether the founding generation's understanding should control contemporary constitution interpretation." Michael 1991, 423.

constitutions and the Federal Constitution, early state and Federal court decisions, and the sources of American legal thought.[35] Although today's scholars have sought definitive proof of an earlier consensus, when the colonists adopted the English legal framework, they also inherited a debate that had characterized English legal thought for centuries. As Richard Cosgrove has observed, the question of "[w]hether law merely prescribes rules of conduct (the positivist tradition) or whether law contains other, often ethereal elements (the natural law tradition) has haunted English jurisprudence for the past two hundred years."[36] In fact, J.G.A. Pocock has shown that the debate extends even further back, to seventeenth century England.[37]

The War for Independence, as the reader is undoubtedly aware, began as a disagreement over Parliament's right to tax the colonies that escalated into a fascinating debate over the authority of law and government. The two sides held not only conflicting interests, but incompatible conceptions of legal authority. John Philip Reid has noted that "the eighteenth century can be termed the epoch of two constitutions in both Great Britain and North America, with the mother country eventually succumbing to the convenient simplicity of one of the two constitutions, and the American states consciously selecting the other."[38] Although I disagree with Reid's assertion that the founding generation consciously selected one of the two constitutional traditions, he is certainly correct in stating that,

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[35] Michael supported her argument that "founders did not even uniformly expect judges to engage in interpretive review of legislation based upon express constitutional terms, much less to void legislation based upon unwritten law" with a review of the legal theorists that influenced the founding generation, the first state constitutions, their judicial interpretation, and the records of the debates held in the state ratifying conventions for the U.S. Constitution (Michael 1991, 424). For the non-originalist side see Terry Brennan's article, which demonstrates that virtually all of the luminaries of the founding generation at one time or other "acknowledged that natural law was superior to positive law." Brennan 1992, 981.

[36] Cosgrove, 1996, 5.

[37] Pocock 1987; also see Veal 1970.

> the British imperialists who opposed the American Whig version of the constitution were "looking ahead," away from the ancient constitution of customary, prescriptive rights, to government by consent, to a constitution of parliamentary command, in which government was entrusted with arbitrary power and civil rights were grants from the sovereign. The Americans were "looking backward," not to government by representational consent but to government by the rule of law, to a sovereign that did not grant rights but was limited by rights, a sovereign that was, like liberty, and the constitution, created by custom, prescription, and conventional practice.[39]

The version of constitutionalism that the English eventually adopted is defined by the principles of legal positivism. The understanding that legal authority is based upon the will of a sovereign power has come to be almost unchallenged in England as demonstrated by the virtually unanimous acceptance of parliamentary sovereignty. Under the second paradigm, the theory of the ancient constitution, legal authority is based upon certain theoretical principles of natural law, justice, and logic that limit the power of the law making body. This model can much more easily incorporate judicial review, and its practice supports Reid's contention that the second version of constitutionalism was chosen on this side of the Atlantic. However, arguments over the legitimacy of judicial review, the controversies that have been generated by its exercise, the conflicts that have accompanied Supreme Court nominations and, of course, the existence of the originalism debate, all indicate that this second model of constitutionalism was never completely accepted in America.

The founders never achieved a consensus regarding the authority of fundamental law because they never fully agreed which legal paradigm they were enacting. Initially, the theory of the ancient constitution, and its recognition of numerous substantive natural rights, had been ubiquitously embraced by Americans. However, by 1776, a new legal

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[38] Reid 1993, 4.

paradigm based upon the doctrine of consent had begun to take root. Although this theory does recognize one natural right, the right of consent, this single right must logically preclude the recognition of all other natural rights.[40] Under the theory of popular sovereignty, the only rights that can exist are ones that the people choose to recognize. Thus, natural law theory and the principle of popular sovereignty are dichotomic, and they cannot both be logically incorporated into the same constitution. Rather than choosing one of these two theories, the Revolutionaries attempted to reconcile them. They attempted to erect governments that were based on contradictory principles: popular sovereignty and a belief in natural law. The Revolutionaries argued that the people are sovereign and that certain rights are inalienable. The originalism dispute is merely a continuation of this unresolved debate.

The Ancient Constitution and the Authority of Fundamental Law

Historians generally agree that the American pre-Revolutionary War understanding of constitutionalism was largely, if not wholly, shaped by the idea of England's "ancient constitution."[41] For example, J.R. Pole has observed that the revolutionaries "asserted repeatedly that they were engaged in the defense of ancestral English rights and privileges,"[42] and Gordon Wood has even written that "their interpretation of the English constitution was the point on which their understanding of the Revolution hinged."[43]

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[39] *Ibid.*
[40] Religious freedom might constitute an exception because government based on scripture or revelation threatens the right of consent. A second exception could be freedom of speech under the rationale that the people must be informed in order to exercise their right of consent. The right of suffrage, for obvious reasons, might also be considered to be an inalienable right under the principle of popular sovereignty.
[41] Bailyn 1969, 66-77; Wood 1969, 10-17;
[42] Pole 1979, 77.
[43] Wood 1969, 12.

The ancient constitution was a theory built upon an idealization and exaltation of custom, and is best understood by examining the needs that it served. In Europe, defenders of monarchy argued that laws were of more recent origin than the crown because "if the laws had come into being at a time when there was already a king, then nothing but the king's authority could have sanctioned them or made them law, and the king might assert a sovereign right to revoke what his predecessors had granted."[44] Constitutionalists responded by arguing "that the laws were of a practically infinite antiquity, immemorial in the sense of an earlier origin than the earliest king known."[45] The effect of this debate has been described by Pocock:

> There existed, therefore, in a number of European nations a kind of political thought which cannot satisfactorily be termed 'constitutionalism', since it involved a more intensive use of historical and antiquarian thinking than the use of that term normally implies. It may be provisionally defined as the attempt to settle fundamental political questions, notably those involving law, right and sovereignty, by appeal not directly to abstract political concepts, but to the existing 'municipal' laws of the country concerned and to the concepts of custom, prescription and authority that underlay them, as well as to the reverence which they enjoyed by reason of their antiquity - an attempt which necessarily involved the study, critical or otherwise, of their origins and history.[46]

Pocock's passage not only captures the European understanding of fundamental law, it helps explain why the colonists found the theory so appealing. The legal paradigm was created to challenge political authority. The English belief in the immemorial basis of the common law received its classical formulation in the writings of Sir Edward Coke.[47] Coke and other seventeenth century jurists argued that custom, embodying

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[44] Pocock 1987, 17.
[45] *Ibid.*
[46] *Ibid.*
[47] We will ignore the question of whether Coke created the theory that the powers of the King were limited by England's ancient constitution, see Plucknett 1926, 30; or whether he carried the development of England's fundamental law tradition to its natural conclusion. see McIlvain 1910.

lessons learned through centuries of usage, reflects a wisdom that any individual, no matter how clever, would be foolish to question. I have already noted that tradition still plays a role in establishing the authority of fundamental law today, but for Coke, the two concepts were inseparable. This conception of constitutionalism is much closer to the philosophy of Edmund Burke than to the framers of the U.S. Constitution. Consider the following passage taken from Coke's *Calvin's Case* (1608):

> Our days upon the earth are but as a shadow of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of light and truth) fined and refined, which not one man, (being so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto.[48]

A well known citation, taken from his interview with James I, aptly illustrates how Coke used the theory to defend judicial discretion and place limits on monarchical power:

> Then the king said, that he thought the law was founded upon reason, and that he and others had reason as well as the judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience that a man can attain in the knowledge of it.[49]

[48] Coke 1742, Seventh Report 36. Quoted in Pocock 1971, 214.
[49] Coke 1742, Twelfth Report 60. Quoted in Pocock 1971 214.

Perhaps the reader noted that Coke, in his interview, relied less directly on the concept of a universalistic higher law, or the European conception of an ancient constitution founded upon custom to resist the power of the king, than judicial precedent. He argued that although the monarch was wise he was, nonetheless, unfamiliar with the innumerable decisions and digests that formed the common law system. Coke transferred the wisdom embodied in custom to judicial precedent by presenting judicial decisions as reflecting piecemeal refinement and constant improvement. This is Coke's theory of "artificial reason."

This emphasis on judicial precedent and the argument that certain rights and privileges were recognized since time immemorial combined with the historical belief that England was governed by a rule of law, and ultimately resulted in the concept of "fundamental law." J.W. Gough studied the various ways in which the term "fundamental law" was used in England, and concluded that "it is impossible to pin seventeenth-century writers down to any one meaning and that the phrase was in fact very vague and ill-defined."[50] In fact, the distinction between the three forms of law that we distinguish today, natural or higher law, fundamental law, and statutory law, was very nebulous. Coke presented the fundamental law of England's constitution as emanating from distant events buried deep within the ancient Saxon past. The English tended to use the terms "fundamental" and "ancient" interchangeably, and Pocock has suggested that the "fundamental law or constitution was an ancient law or constitution," and that the "concept of fundamental law....rested on Coke's concept of ancient law."[51] Perhaps because Parliament was not considered as a legislature but as the highest court in the

[50] Gough 1955, 2.
[51] Pocock 1987, 49, 50.

realm,[52] parliamentary law was not clearly distinguished from constitutional law and was often considered to be a reaffirmation of fundamental law.

Coke's legal theory, not surprisingly, met with considerably less opposition in America than England, where Bacon, Hobbes, and Filmer all challenged the authority of immemorial custom. These competing legal paradigms ultimately established the conflict that would "haunt" English jurisprudence for centuries.[53] Bacon, Hobbes, and Filmer rejected the concept of a higher law based on justice or morality and instead advocated what has become know as legal positivism. Their aim was to strengthen prerogative and administrative law at the expense of the common law. Francis Bacon criticized the uncertainties and subjectivity of the common law in his battle against Coke. As a reform measure, he advocated not exactly the codification, but a restatement of the law. He proposed two digests be made, one of case law and the other of statute law, and that their interpretation and administration be kept separate.[54] Thomas Hobbes, in both *Dialogue of the Common Laws*[55] and *Leviathan,* denied that the law of England was immemorial custom and comprehensible only through Coke's "artificial reason:"[56]

> That law can never be against reason, our lawyers are agreed; and that not the letter, that is every construction of it, but that which is according to the intention of the legislator, is the law....but the doubt is of whose reason it is, that shall be received for law. It is not meant of any private reason...nor yet as Sir Edward Coke makes it, an artificial reason, gotten by long study, observation, and experience, as his was. For it is possible long study may increase, and confirm erroneous sentences.[57]

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[52] Gough 1955, 27.
[53] Cosgrove 1996, 5.
[54] Veal 1970, 70.
[55] Hobbes 1839-45.
[56] Hobbes 1839-45, 5-7, 14-15, 62-63 as cited in Pocock 1971 215 (note 15).
[57] Hobbes 1962, 201-202.

Hobbes and Filmer argued that the basis of law cannot be custom because custom has no binding authority:

> for every custom there was a time when it was no custom, and the first precedent we now have had no precedent when it began. When every custom began, there was something else than custom that made it lawful, or else the beginning of all custom were unlawful. Customs at first became lawful only by some superior power which did either command or consent unto their beginning.[58]

As Filmer argues, only a sovereign power can create law, and if custom became law, then a law making power must have already existed in society. "Therefore no law can be immemorial; before there can be law there must be a sovereign; and every law must have been made at a particular point in time."[59] The argument that any law or right must have originated at some point was then turned into an argument for the absolute power of the crown. Filmer's patriarchal doctrine held that the absolute sovereignty enjoyed by the first man, being inalienable, descended to his successor and ultimately to the king of England. The premise of Filmer and Hobbes' arguments was accepted by certain advocates of parliamentary sovereignty such as William Atwood[60] and William Petyt,[61] but they argued that Parliament was immemorial and therefore sovereign. In fact, political developments beginning in the late sixteenth century would eventually result in legal positivism triumphing over Coke's legal vision but in association with the Parliament, not the King. As numerous scholars have observed, "[o]ne of the underlying themes in the history of seventeenth-century political thought is the trend from the claim

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[58] Filmer 1949, 106-07. Hobbes succinctly wrote that "laws are made not by custom, but by the sovereign power." Hobbes 1962, 200.
[59] Pocock 1987, 163.
[60] Atwood 1680
[61] Petyt 1680.

that there is a fundamental law, with Parliament as its guardian, to the claim that Parliament is sovereign."[62]

Whether the doctrine of parliamentary sovereignty was fully accepted in England by the second half of the eighteenth century is a debate we can avoid by noting that the American Revolutionaries, rightly or wrongly, certainly disagreed with the idea.[63] Coke's theory of the ancient constitution was first propagated by his own work, *Commentaries on Littleton,* "which formed the foundation" of America's most influential legal scholar, first law professor and mentor to both Jefferson and Marshall, George Wythe. [64] Coke's work, Jefferson would remind Madison when they were considering the curriculum for the University of Virginia, was "the universal elementary textbook of law students and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British Constitution, or what were called English liberties."[65] The theory of the ancient constitution was strongly reinforced by the phenomenal success of Blackstone's *Commentaries on the Laws of England* in America. Indeed, the *Commentaries* replaced Coke as Wythe's primary text in his teaching, and according to Forrest McDonald, the work was studied "by virtually every American lawyer, and by many nonlawyers as well." Madison noted that it was a "book which is in every man's hand."[66] Even in England, Blackstone's popularity did not escape the attention of Burke, who observed that the work sold as well on the American as on the English side of the

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[62] Pocock 1987, 49.

[63] The debate whether parliamentary sovereignty had been fully established by the late eighteenth century and whether that authority extended to the various English colonies is complex and extends back at least seventy years to McIlwain 1923 and Schuyler 1929. Interested readers would do well to begin their inquiries with the review essay by Greene 1986, 56-75.

[64] Randall 1993, 52.

[65] As quoted in *Ibid.*, 52-53. Jefferson was somewhat less enthusiastic when he was actually studying the work as a young man. Jefferson, the law student, wrote that he wished the "Devil had old Coke," and that he was sure that even Job would begin "to whine a little under his afflictions." *Ibid.*, 55.

Atlantic.[67] Because Blackstone so strongly influenced Marshall, his work will be discussed in Chapter 7 with reference to the Chief Justice.

The American Understanding of Constitutionalism

If it could be convincingly demonstrated that the founding generation adopted the legal paradigm provided by the theory of the ancient constitution, it might be possible to resolve the originalism dispute. Perhaps the reader wonders if there is any doubt whether the founding generation would have accepted the writings of Coke and Blackstone or Filmer and Hobbes. However, in late 1775 and early 1776, Americans began turning to a third natural law theorist, Locke, and the logical implications of his theory led many to adopt a conception of the law that, remarkably enough, was more similar to the legal positivism of Filmer and Hobbes than to the theory of Coke and Blackstone.

As indicated, the American understanding of constitutionalism, at least during the initial stages of the conflict, largely reflected the theory of the ancient constitution and even "the idea of an enacted constitution was relatively novel in 1760."[68] The popularity of the theory is explained by the two types of justifications it offered for resisting English authority. It is well known that the colonists argued they were defending their rights as Englishmen as established by the ancient constitution. However, the colonists also believed they were obligated to resist any unconstitutional acts of Parliament. For example, Revolutionaries such as John Dickinson feared that acquiescence to the Stamp Act would establish a "detestable precedent" of American acceptance.[69] By looking backward to Coke, Dickinson concluded that the question of constitutionality would be

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[66] McDonald 1979, 57
[67] Burke 1865, 125.
[68] Grey 1978, 864.

determined by popular acceptance and the creation of a new custom. This type of reasoning, which transformed minor debates into major disputes, was described by Burke, who observed that while people of other countries "judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle."[70] However, both arguments immediately became moot when independence was declared. After July 4, 1776, Americans no longer needed to justify resistance but create new governments.

After the conflict with England became irreparable, the founders began turning to Locke, and the paradigm provided by the ancient constitution weakened its hold on the American mind. Considering his obvious influence on the *Declaration of Independence* and *Common Sense,* it may seem surprising that before 1776 Locke's ideas were "not generally drawn upon by Americans in their dispute with Great Britain."[71] However, this fact reflects the colonists' faith in the concept of the ancient constitution and the degree to which the American understanding of constitutionalism was transformed. That Locke was not essential to the debate between the colonists and the English before 1776-76 is demonstrated not only the observation that he was so rarely cited during the earlier stages of the conflict, but also the fact that Burke supported the American side.[72] If Burke had

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[69] Dickinson 1895, 1:202 as quoted in Grey 1978, 879. Samuel Adams made essentially the same argument. (Adams 1904-08, 2:52-53, 178.)

[70] Burke 1963, 227.

[71] Wood 1969, 283. There are those who would disagree with my argument concerning the impact that Locke's theory eventually had in America, whether "liberalism" or "republicanism" had the greater influence during the founding period. For an early, but still useful review article of the development of the republican school see Shalhope 1972. The three most significant texts for the republican synthesis are Bailyn, 1967; Wood 1969; Pocock 1975. This republican synthesis has been challenged by many including Diggins 1984; Appleby 1992; and Dienstag 1996.

[72] Further evidence can be drawn from the diary of John Adams. The members of the first Continental Congress apparently resisted abandoning the idea that they were fighting to protect their traditional rights as Englishmen in favor of Locke's more universalistic language of natural rights. Adams recorded a debate over "whether we should recur to the law of nature, as well as to the British Constitution, and our American charters and grants. Mr. Galloway and Mr. Duanne were for excluding the law of nature. I was strenuous

thought that the colonists were relying on abstract Lockean theory to justify their rebellion, and not the traditional and positive rights of Englishmen, it is inconceivable that he would have defended them. Locke was not cited in the debate with the English because, as Pocock has explained, his theory had been outside the discourse as it had been defined by the ancient constitution theory:

> If one thing is certain, it is that the attempt to understand English politics through the history of English law was an all but universal pursuit of educated men in the seventeenth century, so much so that to discover a man who did not engage in it is to discover something of a rarity. Yet Locke appears to be such an exception, perhaps the only one among the important political writers of his age.[73]

The novelty of Locke's arguments and the manner in which he completely ignored the interminable dispute over the English constitution[74] undoubtedly contributed to his popularity in America because it allowed the Revolutionaries to completely dismiss the claim of parliamentary sovereignty. Although his theory provided an escape from an endless historical debate over England's ancient constitution, it also nourished the seeds of a new dispute. Locke's theory is full of internal contradictions, not the least of which is his belief that a government based upon the doctrine of consent is compatible with the existence of natural or inalienable rights. As indicated, the doctrine of consent leads to the conclusion that the majority can choose not to recognize or uphold the most basic freedoms such as the right to property. Thus, the conflict that defines today's debate over constitutional interpretation is inherent in Locke's theory.

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for retaining and insisting on it, as a recourse to which we might be driven by Parliament much sooner that we were aware." Adams, 1850-56 2:374. (Adams' argument won out.)

[73] Pocock 1987, 237.

[74] The intractability of this discourse is perhaps best indicated by the fact that scholars are still debating the meaning of Coke's ruling in *Calvin's Case.* See, *ie.*, Black 1976, 1175-1194.

The need to establish the authority of their new governments had led the Revolutionaries to turn away from ancient constitution theory and to embrace the principle of popular sovereignty. Thus necessity, not ideological speculation, explains why the discourse in America shifted from the ancient constitution and the rights of Englishmen and towards a dialogue centered around the doctrine of consent. It took Americans a number of years to learn the nuances of a constitutional language in which fundamental law is based upon the sovereignty of the people. Even after Americans enacted their first state constitutions in 1775 and 1776, their conception of constitutionalism was still largely determined by the English model. The failure to place any real restrictions on their legislatures, the failure to provide for an amendment process, the failure to specify constitutional supremacy and other features are all explained by the continued belief that legal authority is established by traditional principles that do not need to be explicitly enunciated. Yet, as the following observation indicates, as early as 1776 some Americans were aware that a theoretical transformation had begun:

> A Constitution, and a form of government are frequently confounded together, and spoken of as synonymous things: whereas they are not only different, but are established for different purposes: All countries have some form of government, but few, or perhaps none, have truly a Constitution.[75]

Conclusion

Although this anonymous Pennsylvanian accurately predicted that a novel understanding of constitutionalism would soon be taking hold in America, it would take years to work out the details. The next two chapters will examine how Madison constructed his constitutional theory around the principle of popular sovereignty. His absolute adherence to this principle is best illustrated by the fact that he explicitly

accepted how the doctrine of consent is incompatible with the recognition of other substantive natural rights. It is no coincidence that Madison, who became politically active just as America irrevocably broke from England and participated in the creation of two constitutions,[76] chose a legal paradigm that was more conducive to erecting rather than challenging power. Nor is it surprising that Marshall, who read Blackstone's *Commentaries on the Laws of England* four times, adopted an approach to legal interpretation that reflected the ancient constitution theory. What is surprising is that few scholars recognize how the two greatest constitutional authorities from the Revolutionary period based their theories on conflicting legal paradigms.

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[75] *Four Letters on Interesting Subjects* 1776, 18-19. Quoted in Wood 1969, 267.

[76] In addition to the U.S. Constitution, Madison also participated in the writing of the 1776 Virginia State Constitution and, in fact, came out of political retirement to help Virginia write its second state constitution in 1829-30.

Chapter Two:

The Poisonous Tendency of Precedents of Usurpation

On the morning of June 28, 1836, just a few days shy of the sixtieth anniversary of the Declaration of Independence, the last of the founding fathers passed away. Madison had spent the previous day examining George Tucker's biography of Jefferson, and he offered this final summary of their lifelong friendship: "A sincere and steadfast co-operation in promoting such a reconstruction of our political system as would provide for the permanent liberty and happiness of the United States."[1] Madison's description of his "steadfast" devotion to the "reconstruction" of American government was overly modest. The octogenarian had begun his political career in 1774 as a member of the Committee of Safety in Orange County, Virginia, and over the next forty-three years he served in the Virginia state government, the Continental Congress, the Constitutional Convention, the Virginia Ratifying Convention, and the first four Congresses of the new government, after which he was Secretary of State in the Jefferson administration and, from 1809 to 1817, President of the United States. Madison also earned the title "Father of the Constitution" by providing the working model adopted at the start of the Constitutional Convention, compiling the most extensive notes of the proceedings, and co-authoring the *Federalist*.

These accomplishments begin to explain why I chose to use Madison as a central figure for my argument that the founders never achieved a consensus regarding the status of fundamental law. He was also a prolific writer, one of the era's most respected and

[1] Unattributed quotation found in Ketcham 1990, 669.

influential constitutional authorities, and he enjoyed great longevity. However, even more important for the purposes of this inquiry is the fact that Madison set forth a positive law conception of the Constitution. Constitutional decision makers, Madison believed, must approach the awesome task of interpretation with the understanding that the authority of the document rests solely and completely upon the doctrine of consent. Therefore, the Constitution should be seen as a series of commands "set by political superiors [the people] to political inferiors [the representatives of the people.]"[2]

The longer Madison lived the more clearly his arguments crystallized. There is no doubt that by the 1790s, Madison constitutional theory closely paralleled what originalists argue today.[3] However, it has long been asserted that these arguments should be discounted because Madison "formulated" a new constitutional theory during that period. Various charges against Madison have been offered by some of today's most respected historians and political scientists. He is most often accused of abandoning his earlier nationalistic views,[4] but it is also argued that Madison espoused the contradictory political theories of pluralism and participatory democracy,[5] and even that his constitutional arguments in the 1790s were simply "bogus."[6] Although these arguments are interrelated, the most important question for our purposes is whether Madison's

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[2] Austin 1970, 1. Of course, in Austin's model, the sovereign power is Parliament and the people are the "political inferiors." But, it has often been argued that the American Revolution substituted the people for the sovereign power of the King which explains why the model remains appropriate.

[3] As far as I am aware, not a single author who has examined Madison's constitutional theory in light of today's debate over constitutional interpretation has asserted otherwise.

[4] The argument that Madison was a strong nationalist in the pre-Constitutional era is best captured by the title of the second volume in Irving Brant's six volume biography of Madison: The Nationalist. In that volume Brant writes that Madison "endeavored to establish...national supremacy...by recognition of implied powers in the Articles of Confederation." Brant 1948 2:418. In fact, Brant even declares that Madison was "the acknowledged leader in every activity that bulwarked independence and pointed toward a strong, firm national union of the states." *Ibid.*, 301. Also see Ferguson 1969; Ketcham 1990, 132-36; and Peterson 1974, 51, 69-71. However, Banning 1995 convincingly refutes the argument that during the 1776 – 1787 period Madison was an ardent nationalist. (see especially pages 1-10.)

[5] Zvesper 1984.

approach to constitutional interpretation remained consistent. According to Forrest McDonald, Jack Rakove, Samuel Beer, and H. Jefferson Powell, the answer is no. Consider Powell's argument taken from his highly influential law review article:

> Federalists like Hamilton, applying the traditional tools of statutory construction to the Constitution's sweeping generalities, found in the text the basis for an expansive view of federal power. The Republicans, in contrast, took up the cudgels of the religious and philosophical opposition to interpretation and warned that the "wiles of construction" could be controlled only by a narrow reading of the Constitution's expansive language. It was in the course of their political guerrilla warfare against the dominant Federalists during the administration of Washington's successor, John Adams, that the two greatest Republican leaders, Jefferson and Madison, *formulated* the theory of interpretation that became the basis of consensus for a quarter-century of constitutional discourse. In addition, the constitutional hermeneutic they proposed became, remotely and rhetorically, the precursor of modern intentionalism.[7] (emphasis added)

If such arguments are correct, originalists are violating the most important premise of their theory by relying on this second Madisonian legacy. Rather than returning to the original understanding of 1787, they should be understood as resurrecting a discredited and politically inspired approach to constitutional interpretation. And we should conclude that it is today's non-originalists who have interpreted the Constitution according to the intent of the founding generation. Although the charges against Madison's are of great significance, his critics have largely ignored his political career as well as the constitutional arguments that he made before 1787. It is certainly true that if one examines Madison's party affiliation or his stance regarding the balance of power in our federal system, an evolution in his thinking occurred. However, did Madison really experience a constitutional conversion in the 1790s?

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[6] McDonald 1979, 198.

[7] Powell 1985, 923-24. McDonald's arguments are discussed on pages 121-138 ; Rakove's on pages 97-102; and Beer's on pages 148-154.

This chapter will examine Madison's understanding of constitutionalism from the start of his political career in 1774 until spring, 1787, in order to demonstrate the consistency of Madison's constitutional arguments during the first quarter century of his political career. Although Madison exhibited remarkably little interest in the subject of constitutionalism during this period he consistently argued that legal authority must rest upon the basis of popular sovereignty. Although not all the implications of this doctrine were immediately evident to Madison, his exceedingly rational mind led him slowly, but inexorably, to adopt the principles of legal positivism. Except for the right of religious freedom, "the most sacred of all [rights],"[8] Madison always rejected the idea that abstract principles of natural law, justice, or logic should be considered "superior to positive law."[9]

Background

Before we turn to the constitutional theory of Madison, a few words about his background may be appropriate. Born into a wealthy Virginia family on March 16, 1751, Madison received formal tutoring for seven years before he departed in 1769 from his home in Orange County for the College of New Jersey in Princeton. John Witherspoon, who later signed the *Declaration of Independence,* had just become president of the college, and he fostered an atmosphere in which students felt comfortable delivering commencement orations on such subjects as the necessity of resisting tyrannical kings.[10] After graduation, Madison stayed an additional six months to study under Witherspoon who encouraged his students to read such thinkers as Grotius,

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[8] "Property," written for the *National Gazette* March 27, 1792, POM 14:267.
[9] The reader will recall that Brennan argues that the founders "acknowledge[d] that natural law was superior to positive law." See page 11.
[10] Ketcham 1990, 37.

Puffendorf, Selden, Burlamaqui, Hobbes, Machiavelli, Harrington, Locke, Sidney, Montesquieu, Adam Ferguson, Hume, Plato, Aristotle, and Mandeville.

Madison displayed the same assiduous work habits as a college student that later marked his political career. While he attended Princeton Madison limited his hours of sleep "to the least number consistent with his health,"[11] yet still worked so hard that he became ill.[12] Despite his longevity, Madison suffered numerous ailments throughout his life.[13] He desired to fight in the Revolutionary War and was commissioned a colonel in the Orange County militia in the fall of 1775, but his feeble health and propensity to sudden attacks forced his resignation.

Not only did Madison, unlike Marshall, never fight in the Revolutionary War; he also never practiced law. Madison studied law in 1773 upon his return from Princeton and again at various points during the years 1784 through 1786. However, he never intended to practice, nor ever qualified as a counsel-at-law.[14] Although Madison was uncomfortable with having to rely on his family to supplement his income from public service, Ralph Ketcham has concluded that the "quibbling, devious nature of a lawyer's practice....plus Madison's weak voice and lack of confidence in his oratory, persuaded him that a legal career was not the way to be free of dependence on the family plantation."[15]

Politics

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[11] Schultz 1970, 171.
[12] In fact, it is possible that he remained in Princeton after he graduated not just to read under Witherspoon, but because he was not well enough to travel. Ketcham 1990,, 51.
[13] Madison even predicted that he could not "expect a long or healthy life" at the age of twenty two. Madison to William Bradford, November 9, 1772, POM 1:74-76. Apparently, Madison did have some type of nervous disorder which he refused to call epilepsy but which manifested itself in epileptic-like seizures during times of stress. Ketcham has argued against Madison having epileptoid hysteria - Ketcham 1990, 51.
[14] Ketcham 1990, 55-56, 144-45.
[15] *Ibid.*, 145.

If Madison had not become a politician, he might have entered the ministry. As a young man Madison was "profoundly religious" and when he returned home from Princeton, "he plunged into religious studies, wrote commentaries on the gospels, and acquired an extensive knowledge of theological literature."[16] In fact, his first engagement in politics occurred in 1773 when he protested the persecution of religious dissenters in Culpeper County. In December 1774 he won election to the Orange County Committee of Safety, which functioned as a precursor to an independent state government, and in April 1776, Madison was elected to represent Orange County at the general convention which was to meet in Williamsburg.

The convention must have greatly impressed the twenty-five year old, for it made three lasting contributions to American history. It instructed the Virginia delegates to the Continental Congress "to propose to that respectable Body to declare the United Colonies free and independent states,"[17] a call which resulted in the writing of the *Declaration of Independence;* it framed the Virginia Constitution, which was not replaced for another half century; and, as part of that Constitution, it offered a Declaration of Rights, which Jefferson relied on when he wrote the *Declaration of Independence* and later was used as a model for the U.S. Bill of Rights. Although Madison was not yet a respected leader, he authored the article on religious freedom in the Virginia Declaration of Rights. (Madison's contribution will be examined later in this chapter.)

In April 1777 Madison suffered his only electoral defeat after refusing to engage in the habit of buying drinks for the electorate. Although he was not re-elected to the Virginia House of Delegates, that body appointed him to serve on the highly influential

[16] Ketcham 1990, 70. Madison never disclosed his own personal religious beliefs and "his doctrinal convictions are....an enduring scholarly enigma." WJM 1:xxii.

Governor's Council in the winter of 1777. The Virginia Constitution had created a weak executive, who was forced to work closely with this council. As a member of Governor Patrick Henry's council, Madison was immediately forced to confront the difficulties of supplying the Continental Army, and was given an unusual perspective on how complex the problem was. Ketcham has noted that Madison had to contend with "disputes between state and Continental supply agents; the power of Congress, the army, and the states to impress goods and services needed for the war; difficulties in purchasing supplies with inflated currency; and increasing resistance, after more than two years of strife, to making sacrifices for the war effort."[18] It was also due to his seat on this council that Madison came to cement his friendship with Jefferson, who was elected Governor in June 1779. Madison's tenure on the council ended when he was appointed to serve as a Virginia delegate to the Continental Congress in December 1779.

Continental Congress

Although it is frequently asserted that Madison's constitutional arguments in the 1790s violated his earlier principles, few if any scholars have offered a systematic analysis of the development of Madison's constitutional thought. It is hardly surprising that it took Madison a number of years to arrive at the theory that he later advanced in the *Federalist*. However, one principle clearly guided his thinking during interpretive debates over the Articles of Confederation: an adversion to what he called the "poisonous tendency of precedents of usurpation."[19] Indeed, the questions of how to prevent the national government from overstepping its constitutional powers and how to insure that each branch of the Virginia state government not encroach upon the powers of the others

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[17] Peter Force, comp. *American Archives*, 4th ser. V, 1035 as quoted in Ketcham 1990, 70.
[18] Ketcham 1990, 80.

were vital to the development of his entire constitutional theory. Not only did Madison always advocate a strict approach to constitutional interpretation, he even defended this principle in his very first debate on the subject.

Madison first confronted questions concerning constitutional interpretation during his first stint in the Continental Congress, which lasted from March 1780 through October 1783. Denied the power to tax by the states, Congress was preoccupied with raising revenue and servicing the national debt. Remarkably, the Continental Congress had been given the power of the sword but not the purse. The paper medium that it had been issuing directly to individuals had depreciated greatly, and Congress halted the practice at the end of 1779.[20]

Beginning in 1780, through a system of requisitions, the states were asked to assume the responsibility of paying for the army. The army was already poorly supplied, and many soldiers had not been properly paid. In fact, George Washington was afraid that when their three year enlistments began to expire, his troops would soon disband. Madison's first letters from Philadelphia reflect this concern:

> General Washington writes that a failure of bread has already commenced in the army; and that, for anything he sees, it must unavoidably increase. Meat they have only for a short season; and as the whole dependence is on provisions now to be procured, without a shilling for the purpose, and without credit for a shilling, I look forward with the most pungent apprehensions.[21]

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[19] JM to Edmund Pendleton Jan. 8, 1782, POM 4:23.
[20] According to E. James Ferguson, the exchange rate of Continental paper to specie changed from 1.25 to 1 in January of 1777, to 4 to 1 in January 1778, 8 to 1 by January 1779, 42.50 to 1 in January of 1789, and finally 100 to 1 in January 1781 (Ferguson 1961, 320). Ferguson has shown how momentous an impact the decision to shut down the printing press had: As long as paper money lasted, it allowed Congress to assume and discharge the main burdens of war, conferring upon the central government a power and freedom of action out of character with its constitutional position under the Articles of Confederation. *Ibid..*, 46.
[21] JM to TJ Mar. 27, 1787, POM 2:6.

Madison was so distraught that he wrote if the states did not meet their financial obligations, "we are undone." The problem, Madison recognized, was directly linked to the new system of finance:

> It is to be observed that the situation of Congress has undergone a total change from what it originally was. Whilst they exercised the indefinite power of emitting money on the credit of their constituents, they had the whole wealth and resources of the continent within their command, and could go on with their affairs independently and as they pleased. Since the resolution passed for shutting the press, this power has been entirely given up, and they are now as dependent on the States as the King of England is on the Parliament. They can neither enlist, pay nor feed a single soldier, nor execute any other purpose, but as the means are first put into their hands. Unless the legislatures are sufficiently attentive to this change of circumstances, and act in conformity to it, every thing must necessarily go wrong, or rather must come to a total stop.[22]

Although Madison clearly understood that the revenue problem was a tremendous obstacle, he nonetheless insisted that the Continental Congress not transgress its powers. His interpretation of the Articles of Confederation closely parallels arguments he later offered concerning the Constitution and thus demonstrates that he did not formulate a new method of constitutional interpretation in the 1790s, but merely maintained the same approach that he had defended as a member of the Continental Congress during the 1780s. In fact, not only did Madison's approach to constitutional interpretation remain the same, some of the same issues that were first raised in the 1780s later resurfaced in the 1790s.

It is well known that as Secretary of the Treasury, Hamilton proposed a national bank be incorporated in the early 1790s, but it is sometimes forgotten that the idea was first proposed by Robert Morris, the Congress' superintendent of finance, a decade earlier. Madison had favored Morris' appointment to the position and he generally

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[22] JM to TJ May 6, 1780, POM 2:20.

supported Morris' attempts to rescue public credit.[23] However, when Morris urged the creation of a national bank in May 1781, Madison was one of only four Congressmen to oppose the resolution endorsing the plan. Madison later wrote Edmund Pendelton in January 1782 explaining his initial position on the bank:

> When the scheme was originally proposed to Congress for their approbation and patronage, a promise was given that as soon as it was ripe for operation the company would be incorporated....The competency of congress to such an act had been called in question....but the subject not lying in so near and distinct a view, the objections did not prevail.[24]

Seven months later, in December 1781, representatives of the Bank asked Congress for "the fulfilment of the promise." Congress therefore again debated the question of incorporation except this time the subject was nearer at hand and greater opposition surfaced. According to Madison:

> the general opinion, though with some exceptions, was, that the Confederation gave no such power, and that the exercise of it would not bear the test of a forensic disquisition, and consequently, would not avail the Institution.[25]

Congress now agreed that it did not have the power of incorporation but it felt obligated to fulfill its earlier commitment:

> The Bank....urged the engagement of Congress; that on this engagement the subscriptions had been made, and that a disappointment would leave the subscribers free to withdraw their names. These considerations were re-inforced by the Superintendent of Finance [Morris], who relied on this Institution as a great auxiliary to his department; and in particular, expected aid from it in a payment he is exerting himself to make to the army. The immediate interposition of Congress was rendered the more essential too, by the sudden adjournment of the Assembly of this State, to whom the Bank might have been referred for the desired incorporation which, it was the opinion of many, would have given them sufficient legal existence in every State.[26]

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[23] Banning 1995, 22.
[24] JM To Edmund Pendelton January 8, 1782, POM 4:22
[25] *Ibid.*, 22.
[26] *Ibid.*, at 22-23.

Congress was desperate for a source of revenue and the states were proving themselves either unwilling or incapable of supplying the necessary resources. Yet Madison remained reluctant to violate the limits of power as stipulated by the Articles of Confederation. In the end, Congress issued "A charter of incorporation...with a recommendation to the States to give it all the necessary validity within their respective jurisdictions." Even though in Madison's view this constituted "Something like a middle way...an acquiescing, rather than an affirmative, vote," he still expressed misgivings. Madison voted for this compromise measure but explained, "You will conceive the dilemma in which these circumstances placed the members who felt on one side the importance of the Institution, and on the other a want of power, and an aversion to assume it." Madison even added that since the adopted compromise was "a tacit admission of a defect of a power, I hope it will be an antidote against the poisonous tendency of precedents of usurpation."[27]

Madison also advocated a strict interpretation of the federal charter on a second question: the power of coercion. On March 6, 1781, Madison was named to serve on a committee "to prepare a plan to invest the United States in Congress assembled with full and explicit powers for effectually carrying into execution in the several states all acts or resolutions passed agreeably to the Articles of Confederation."[28] At this point in the war, the South had been invaded and Southerners believed that the New England states were remiss in offering necessary support. Questions arose concerning the national government's power to coerce state compliance through force. Madison explained the problem in a letter to Jefferson:

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[27] *Ibid.*, at 23.

> The necessity of arming Congress with coercive powers arises from the shameful deficiency of some of the States which are most capable of yielding their apportioned supplies, and the military exactions to which others already exhausted by the enemy and our own troops are in consequence exposed. Without such powers too in the general government, the whole confederacy may be insulted and the most salutary measures frustrated by the most inconsiderable State in the Union.[29]

Madison revealed his belief that "there is an implied right of coer[c]io[n] against the delinquent party"[30] both in his letter to Jefferson and in the proposal offered by the committee. However, rather than relying on this implied power, Madison advocated that the Articles of Confederation be amended to make the power explicit. The committee's proposal, written in Madison's hand, states that while the power is implied, it should be made explicit by an amendment for two reasons. "Want of such provision may be made a pretext to call into Question the Legality of measures;" and "it is....most consonant to the spirit of a free constitution that on the one hand all exercise of power should be *explicitly and precisely warranted*" (italics added).[31] Madison was fully aware that his call for an amendment could backfire. As he explained to Jefferson, if the states refused, "Congress will be in a worse situation than at present" because it could no longer argue it had the power by implication.[32]

There is no better proof that Madison's later arguments for upholding the original understanding of the Constitution were neither newly formulated nor politically motivated than his position on Morris' bank and the coercion issue. The Revolution was probably never in greater danger than during this period. The American army was in

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[28] Continental Congress 19: 236, as quoted in POM 3:19 note 1.
[29] Letter to Jefferson, April 16th 1781, POM 3:71
[30] *Ibid.*, 72. The first time that Madison addressed the concept of implied constitutional powers was probably in this context. POM 3:19 note 3.
[31] "Proposed Amendment of Articles of Confederation" March 12 1781, POM 3:18.
[32] POM 3:72.

tatters, relations among the states were strained to the breaking point, and the national government had experienced an alarming dissolution of its powers. Madison clearly took his constitutional responsibilities seriously and the anguish it caused him is perhaps best evidenced in a letter he wrote to Edmund Pendleton on January 22, 1782. Citizens of northern New York had formed the "state" of Vermont and were seeking recognition by the Continental Congress. The issues involved were complex and bore upon the conflicting claims to the territory north and west of the Ohio River made by Virginia, New York, Massachusetts, Connecticut, and various land companies.[33] Madison reported that the Vermont situation exhibited "every symptom [sic] of approaching hostility" and that "the interposition of Congress is again called for & indeed seems to be indispensable." Once again, Madison feared that necessity might force Congress to assume unconstitutional powers:

> It is very unhappy that such plausible pretexts if not necessary occasions of assuming power should occur. Nothing is more distressing to those who have a due respect for the constitutional modifications of power than to be obliged to decide on them.[34]

1783 was a particularly difficult year for the Continental Congress. Not only did the treasury remain "virtually empty,"[35] but a plan for restoring the public credit that Madison was largely responsible for was "disregarded, only partially approved, or wholly rejected by Virginia and all the other states except for Delaware and Pennsylvania."[36] Perhaps the event which best symbolized the declining fortune of the Continental Congress occurred in June, when a group of soldiers frustrated by Congress' inability to

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[33] For Madison's summary of the complexities involved see "Observations Relating to the Influence of Vermont and the Territorial Claims of the Politics of Congress," POM 4::200-203; also see the first editor's note in the same essay.
[34] JM to EP, January 22, 1782 POM 4:39.
[35] POM 7: xviii.

pay them gathered outside the Pennsylvania State House. When the men began drinking, the delegates were forced to flee to Princeton where Madison found the accommodations wanting:

> Mr. Jones and myself...were extremely put to it to get any quarters at all, and are at length put into one bed in a room not more than 10 feet square...without a single accommodation for writing. I am obligated to write in a position that scarcely admits the use of any of my limbs.[37]

During this same period, Madison suffered a second indignity when Catherine (Kitty) Floyd broke off their engagement. Not surprisingly, the normally "methodical and conscientious" Madison exhibited a "striking change in [his] customary conduct as a delegate," and attended "only about forty of ninety-four sessions" and discontinued his "invaluable notes" of the congressional debates.[38] Madison completed his term of office in Philadelphia, returned to Virginia in December 1783, and was re-elected as the Orange County delegate to the Virginia Assembly in 1784, 1785, and 1786.

Constitutional Reform in Virginia

Before Madison's return to Virginia in late 1783, there were few indications that he would one day be remembered for his constitutional theory. Despite his participation in the writing of the Virginia Constitution and his proposal to amend the Articles of Confederation, he had exhibited little interest in constitutional theory. Madison's argument that incorporating a national bank exceeded the constitutional powers of Congress certainly demonstrated an appreciation of the modern distinction between fundamental and statutory law. However, he had yet to articulate some of the most basic tenets of the modern American understanding of constitutionalism: constitutions should

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[36] *Ibid.*

[37] JM to TJ, September 20, 1783, and to JM to Edmund Randolph, August 30, 1783, POM 7:353, 296; as uoted in Ketcham 1990, 142.

be written by a convention specifically chosen for that purpose and subsequently ratified by the people. Secondly, he had still not criticized the Virginia Constitution for violating these principles as well as for allowing legislative alterations.

Jefferson provoked Madison to consider these questions when he enlisted his friend in the struggle to revise the Virginia Constitution through a letter written in June 1783.[39] Although that Constitution contained the highly influential Declaration of Rights, it was nonetheless deeply flawed. The document perpetuated the rule of the same planter oligarchy that had dominated Virginia for over a century, and most of the powers of government were concentrated in the hands of the speaker of the House of Delegates. Madison had called the Governor's Council "a grave of useful talents," while Jefferson, after serving as Governor, complained that the Constitution contained "very capital defects."[40] In 1783 Jefferson was at the forefront of a movement to revise the Constitution and he undoubtedly viewed Madison's return to Virginia as providing him with an important ally.

Jefferson had not participated in the writing of the Virginia Constitution because he was in Philadelphia in 1776. Disappointed and frustrated, he asked to be recalled from the Congress: "It is a work of the most interesting nature and such as every individual would wish to have his voice in."[41] Jefferson even began drafting a plan of government as he awaited a response. However, because events unfolded in Virginia more rapidly than the delivery of the post, Jefferson was never recalled and his proposed constitution was received too late to be given consideration. Of course, Jefferson's loss was America's

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[38] POM 7: xvii.
[39] TJ to JM, June 17, 1783, POM 7:156-57
[40] POM 8:75.
[41] TJ to T. Nelson, May 16, 1776, PTJ 1:292.

gain, for his continued residence in Philadelphia meant that he was available to help write a pamphlet declaring American independence.

Unsatisfied with the Constitution that was adopted, Jefferson campaigned for its revision, discussing the subject at some length in his *Notes on Virginia.* When Madison returned to Virginia, he joined Jefferson's efforts by giving a speech for constitutional reform in June 1784. Unfortunately, the only remaining records of Madison's thinking are the bare outlines of this speech. However, it is safe to assume that Madison was closely aligned with Jefferson because the "line of reasoning" in Madison speech "bears the heavy stamp of Jefferson's earlier writings."[42]

The speech contained two basic arguments. One half centered on problems related to the institutions of government, including its violation of the separation of powers and the need for stronger executive and judicial branches. The other half contended that the authority of the Constitution should rest on the will of the people. Madison argued that the convention which produced the document was "without due power" because it had not been specifically elected to do so, plus the Constitution had not been popularly ratified.[43] It is very telling that even this speech, Madison's first articulation of the popular basis of legal authority, has been critiqued as an argument based less on principle than politics. Irving Brant has concluded that since Madison had participated in the enactment of the Virginia Constitution, but had never made these arguments before, his objections disingenuously concealed his political objectives: "Madison and Jefferson, disliking the Constitution, argued against its validity simply as a

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[42] POM 8:76.

[43] The outline reads, with changes made at some later date written in brackets, if [no change be made in the] prest. Constitution be [it is advisable to have it] ratified by them, more stable [and secured agst. The doubts & implications under which it now labours]. POM 7:78.

maneuver to aid its revision."[44] The argument was certainly unprecedented for Madison. However, if we view the speech in a prospective rather than a retrospective light, it clearly marked a significant step in the development of Madison's constitutional thought and was entirely consistent with principles that he subsequently defended until his death.

Madison left one final clue that his understanding of constitutional government was evolving and that he was beginning to think through the implications of the doctrine of consent: "Constitution rests on acquiescence, dangerous basis."[45] Because the question of constitutional revision had "been the topic of conversation for some time,"[46] Madison probably anticipated that opponents of constitutional reform would argue that although the Constitution had not been popularly ratified, "the people have acquiesced, and this has given it an authority superior to the laws."[47] When Madison wrote in his notes that having the Constitution rest on "acquiescence" was a "dangerous basis," he was most likely thinking of Jefferson's argument, offered in *Notes on Virginia*, that this would force people to resort to "a rebellion, on every infraction of their rights, on the peril that their acquiescence shall be construed into an intention to surrender those rights."[48] Madison had clearly begun formulating the modern understanding of constitutionalism. Nonetheless, he still had not thought through a number of ideas. He did not criticize the fact that the Virginia Constitution left the door open for the legislature to alter the Constitution, nor did he consider the question of judicial review.

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[44] Brant 1941, 1:256.
[45] "Notes for a Speech Favoring Revision of the Virginia Constitution of 1776" POM 7:78. Madison later inserted the words "a bad" before "dangerous basis" See POM 7:79 (editor's note.)
[46] TJ to JM June 17, 1783, POM 7:156
[47] Jefferson 1993, 225.
[48] Jefferson, 1993, 230.

Memorial and Remonstrance

All of Madison's arguments during this period were entirely consistent with his later positions with one possible exception. In 1784 Madison fought to extend the right of religious freedom. The reader will recall that Madison was a very junior member of the convention that wrote the Virginia Constitution in 1776 and that he authored an article for religious freedom in the Declaration of Rights. The article that was originally proposed read that "all men shou'd enjoy the fullest *Toleration* in the Exercise of Religion, according to the Dictates of Conscience."[emphasis added]. Madison convinced Patrick Henry to propose that it be changed to read, "all men are equally entitled to the full and free exercise of [religion] according to the dictates of Conscience; and therefore that no man or class of man ought, on account of religion to be invested with peculiar emoluments or privileges." This proposal was rejected because it would have eliminated religious establishment which caused some alarm within the convention. As a compromise measure, the convention agreed to another proposal also written by Madison:

> That religion, or the duty which we owe our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[49]

Madison continued the drive to deny public funding of the clergy during the first session of the Virginia House of Delegates and the policy was eventually adopted in 1779.[50] In 1784, when Henry and his supporters attempted to secure passage of a new religious assessment bill, Madison responded by renewing the fight for Jefferson's Bill for Religious Liberty, which had been first proposed in 1779. Madison then wrote

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[49] POM 1:172-75.

"Memorial and Remonstrance," probably in June 1785, to support the passage of Jefferson's bill.

"Memorial and Remonstrance" was Madison's most extended analysis of a constitutional question to date. The essay touches upon the subject of constitutional interpretation, including the conflict between natural and positive law, yet it is perhaps the most uncharacteristic argument that Madison ever offered. Not only does he argue for an interpretation of the Virginia Constitution that violated the original understanding of its framers, he also declared religious freedom to be a natural right. So much attention has been paid to Madison's defense of property rights that it is often forgotten that it was religious persecution that first inspired Madison to enter into politics and religious freedom was the personal right that he held above all others. Madison divided the essay into fifteen numbered arguments. If the paragraphs are listed in order of importance, Madison awarded most weight to the assertion that religious freedom is a natural and therefore inalienable right.

> This right is in its nature an unalienable right...It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.[51]

Interestingly, the same paragraph acknowledges a fact that natural law theorists usually ignore: in a democracy rights are decided by the will of the majority. Madison's defense of religious freedom apparently rests on the somewhat qualified argument that is a natural but also, and unfortunately, an alienable right:

> True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the

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[50] Meyers 1973, 8.
[51] "Memorial and Remonstrance" June 20 1785, POM 8:299

> majority; but it is also true, that the majority may trespass on the rights of the minority.[52]

It is quite telling that even though Madison was attempting to convince his fellow Virginians that they should consider the right inalienable, he did not refrain from recognizing the principle of popular sovereignty:

> If religious freedom be exempt from the authority of Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and viceregents of the former. Their jurisdiction is both derivative and limited; it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority from them, and are slaves.[53]

Finally, Madison argued that not only is religious freedom protected under natural law, but that the Declaration of Rights also prohibited religious assessments. Quoting from the first article in the Declaration of Rights, which read that "all men are by nature equally free and independent," Madison asserted that men therefore enter into Society "retaining...their natural rights." Of man's natural rights, Madison declared:

> Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of conscience"....As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions.[54]

Madison's argument that the Declaration of Rights prohibited religious assessments was clearly at odds with what could be called the original intent of its authors. The convention had rejected Madison's first proposal specifically because it

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[52] *Ibid.*
[53] *Ibid.*, 299-300.

banned religious assessments. Could Madison have forgotten this? Brant has noted that there was "not a chance" that Madison's first proposal that no religion "be invested with peculiar emoluments or privileges" would have gotten through a convention.[55] Moreover, Madison's adopted proposal was offered by Edmund Pendleton, "one of the most conservative churchmen in the convention," and a man who "never would have sponsored such an amendment on his own initiative, but he no doubt welcomed it as a means of getting rid of Madison's first proposal, which would have disestablished the church."[56] One could argue that perhaps Madison took a position analogous to today's non-originalists, viewing the protections awarded by the Declaration of Rights as capable of evolving with changing social values. However, as a "stream of petitions to the legislature" indicated, social values had not radically changed, and many Virginians still favored tax-supported churches.[57]

We have already seen that as a member of the Continental Congress, Madison was most reluctant to violate what could be considered the original understanding of the Articles of Confederation. Although his argument in "Memorial and Remonstrance" apparently breaches this principle, it does not necessarily mean that Madison would have defended an expansive approach to constitutional interpretation. He may have resisted broadening the powers of government but favored the expansion of civil liberties. More likely, he believed that religious liberty was a right that should be immune to majority infringement. Madison returned to the subject of religious freedom in 1792 in an essay entitled, "Property and Liberty," writing that man has a "peculiar value in his religious

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[54] *Ibid.*, 300. Madison is quoting from the Sixteenth Article of the Virginia Declaration of Rights.
[55] Brant 1941, 246.
[56] Brant 1941, 247
[57] Meyers 1973, 8.

opinions," and that that right is "natural and inalienable" and "the most sacred of all."[58] His belief that religious freedom is a natural right may have convinced him that in this particular instance, natural law should triumph over positive law. In fact, of all his early accomplishments as a legislator, Madison took greatest pride in the successful enactment of Jefferson's "Bill for Establishing Religious Freedom."[59] However, it is important to note how uncharacteristic this argument was for Madison. Moreover, Madison may have realized that a government based on the beliefs of any particular religion would be incompatible with the doctrine of consent. In any event, the only other right that Madison ever declared to be natural and inalienable was the people's sovereign right to alter or abolish government, which is entirely compatible with the theory of popular sovereignty and legal positivism.

Advice for Kentucky

Shortly after writing "Memorial and Remonstrance," Madison responded to Caleb Wallace's request for advice on framing a constitution for the proposed state of Kentucky. Although the reply contains "no profound thoughts on politics,"[60] it reveals that Madison had continued to question how to establish the authority of fundamental law and preserve the distinction between constitutional and statutory law. In fact, much of the seven page letter concerns this topic. After noting that the problem is exceedingly complex, especially as it pertains to the legislative branch, Madison rejects an enumeration of powers, and instead recommends a declaration or bill of rights:

> If it were possible it would be well to define the extent of the Legislative power but the nature of it seems in many respects to be indefinite. It is

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"[58] Property," March 27, 1792, POM 14:266-67.
[59] JM To TJ, January 22, 1786, PTJ 9:194-96.
[60] Meyers 1973, 45.

> very practicable however to enumerate the essential exceptions. The Constitution may expressly restrain them from meddling with religion....[61]

Madison proceeds to list a number of specific rights, and he then suggests that Kentuckians also consider a council of revision,[62] as well as the idea that "standing committee composed of a few select & skillful individuals should be appointed to prepare bills on all subjects which they may judge to be proper to be submitted to the Legislature at their meetings & to draw bills from them during their Sessions."[63]

Responding to the question of "How far may the same person with propriety be employed in the different departments of Government in an infant Country where the counsel of every individual may be needed," Madison returned to the subject of the "dangerous poison of precedent."

> Temporary deviations from fundamental principles are always more or less dangerous. When the first pretext fails, those who become interested in prolonging the evil will rarely be at a loss for other pretexts. The first precedent too familiarizes the people to the irregularity, lessens their veneration for those fundamental principles, & makes them a more easy prey to Ambition & self Interest. Hence it is that abuses of every kind when once established have been so often found to perpetuate themselves."[64]

Finally Madison addressed the following question, "Can a Census be provided, that will impartially point out the deficiencies of the constitution, and the violations that may happen?"[65] Madison responded that although the idea had its theoretical merits, it

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[61] JM to Caleb Wallace August 23, 1785, POM 8:351.
[62] The Constitutions of Pennsylvania and Vermont established a "Council of Censors," while New York's Constitution labeled the device a "Council of Revision." In Pennsylvania and Vermont, the inquisitory body was to be elected periodically by the people and endowed with the power to recommend legislative repeal of any laws considered inconsistent with their Constitutions. In New York, the Council performed the same function, but it was to be composed of at least two state supreme court judges, the Governor, and the Chancellor, and it could be overruled by a two thirds majority of both legislative houses. Adams 1980, 268.
[63] JM to Caleb Wallace August 23, 1785, POM 7:351-352.
[64] *Ibid.*, 355.
[65] George Muter to J.M. January 6 1785, POM 8:218.

had not proven very effective in Pennsylvania, the only state that had attempted it. A second plan that "might perhaps Succeed better" Madison wrote, "is that a Majority of any two of the three departments should have authority to call a plenipotentiary convention whenever they may think their constitutional powers have been Violated by the other Department or that any material part of the Constitution needs amendment."[66] Madison had clearly begun to consider how the other two branches of government could function as a check on the legislative branch. He was moving towards a new conception of constitutionalism, one based on a clear distinction between fundamental and statutory law. Secondly, he was also considering how the legislative branch could be checked by the other branches of government. The last important step in the evolution of his thinking in the pre-constitutional era occurred when he began to consider how to reform the Articles of Confederation.

Federal Reform

We have already seen that Madison considered amending the Articles of Confederation during his service in Congress. After his return to Virginia, as early as March 1784, Madison began collecting "treatises on the antient or modern foederal republics - on the law of nations - and the history of natural & political of the New World"[67] and, in May, he met with a few other prominent Virginians to consider a "Plan for giving greater Powers to the federal Government."[68] Although Madison had advocated amending the Articles, he did not initially support proposals for the Annapolis

[66] JM to CW August 23, 1785, POM 8:355.
[67] JM to TJ March 16, 1784, POM 8:11; JM to TJ April 27, 1785, POM 8:266.
[68] William Short to TJ, May 15, 1784, PTJ 7:257-58, as quoted in Ketcham 1990, 159. The plan quickly proved unfeasible due to opposition in the Virginia House of Delegates.

convention of 1786, the precursor to the Philadelphia Convention.[69] In fact, it was not until August 7, 1785, that Madison wrote that Congress might need to be replaced by a "better medium." Warming to the idea of reconstituting Congress, Madison had yet to consider exactly how the change could be brought about or the form a new government might take. Referring to Congress' inability to regulate trade and counter the punitive measures of Great Britain, he wrote:

> If Congress as they are now constituted, can not be trusted with the power of digesting and enforcing this....let them be otherwise constituted: let their numbers be encreased [sic], let them be chosen oftener, and let their period of service be short[e]ned; or if any better medium than Congress can be proposed, by which the wills of the States may be conentrated, let it be substituted...But let us not sacrifice the end to the means: let us not rush on certain ruin in order to avoid a possible danger....the defects of the foederal system should be amended, not only because such amendments will make it better answer the purpose for which it was instituted, but because I apprehend danger to its very existence from a continuance of defects which expose a part if not the whole of the empire to severe distress.[70]

In March 1786, after concluding that attempts to amend the Articles and bring "about a correction thro' the medium of Congress have miscarried," Madison gave his lukewarm endorsement to the Annapolis convention: "Let a Convention then be tried."[71] During the previous year not a single state had complied with Congress' requisitions, and New Jersey had even passed a resolution to make its opposition an official policy.[72] In April 1786, after being told of New Jersey's actions, Madison asked whether a better example of the "impotency in the federal system" was possible, and predicted that "A Government cannot long stand which is obliged in the ordinary course of its

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[69] "Debates and Resolutions Related to the Regulation of Commerce by Congress...."(editorial note) POM 7:406.
[70] JM To James Monroe August 7, 1785, POM 8:334.
[71] JM to James Monroe March 19, 1786, POM 8:505.
[72] William Grayson to JM March 22, 1786, note 1 POM 8:510.

administration to a court a compliance with its *constitutional* acts, from a member not of the most powerful order."[73]

Madison spent the first months of 1786 feasting on the "literary cargo" that Jefferson had sent from France.[74] This research prepared Madison for "the most creative and productive year of [his] career as a political thinker."[75] First, in the spring 1786, Madison wrote "Of Ancient and Modern Confederacies" which outlined the history of the Lycian and Amphictyonic confederacies of ancient Greece, and of the Holy Roman Empire, the Swiss Confederation, and the United Provinces of the Netherlands. This essay was transcribed into a forty-one page pocket size booklet that probably traveled with Madison to the Federal Convention and the Virginia ratifying convention and later became incorporated into the eighteenth, nineteenth, and twentieth *Federalist Papers*. Whether it was these historical examples of failed confederacies, the continued deterioration of the federal government's powers, or the increasing tendency of sectionalism, by early summer, 1786, Madison had become unreservedly convinced of the need for radical reform.

Madison was undoubtedly shaken by the outburst of violence in Massachusetts that has come to be known as Shay's Rebellion. When a band of Revolutionary War veterans who had never been properly paid began to find their farms being forced into foreclosure for the nonpayment of taxes and debt, they began a series of guerrilla war-like raids and shut down court houses. Yet, even though Shays' Rebellion has always loomed large in the historical imagination, an even greater concern for Madison was

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[73] JM to James Monroe April 9, 1786, POM 9:25.
[74] The two trunks of books that Jefferson sent included Diderot's *Encylopedie Methodique*, Abbe Millot's Elements *d'Histoire Generale* (11 volumes), Abbe de Mably's *De L'Etude of de l'Histoire*, and Jacques-Auguste de Thou's *Histoire Universelle* - POM 8:3 (editorial note.)

Spain's control of the Mississippi. Spain viewed the United States as a threat to her empire and had denied Americans the privilege of shipping from New Orleans, thus effectively closing off the navigation of the river. In spring 1786, Foreign Secretary John Jay proposed that the United States agree to this demand in exchange for a commercial treaty guaranteeing American fishermen access to the considerable Spanish market. This would have disproportionately affected Southerners, and it spurred serious talk about dividing the Confederation in two.[76] In fact, Kentucky, which was still part of Virginia, threatened to secede if the proposal was approved, and it is claimed that Madison resumed his service in the Continental Congress in 1787 in order to fight the proposal.[77]

Madison returned to Congress in February 1787, regained his leadership position, and resumed his habit of taking notes on the debates. The same day that Madison took his seat, he reported that Shays' Rebellion was "on the point of being extinguished."[78] A week later, a motion was introduced to rescind an order for the further enlistment of troops raised by Congress the previous October to quell the insurrection. The question was whether "an interference of Congress in the internal controversies of a State [was] within the tenor of the Confederation which does not authorize it expressly, and leaves to the States all powers not expressly delegated."

Madison made a number of arguments supporting the enlistment of the troops. He argued that even if the "insurgents had been dispersed it was by no means certain that

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[75] "Vices of the Political System of the United States," (editorial note), POM 9:346.
[76] See Whitaker 1927. For Madison's understanding of the question see JM to TJ August 20, 1784, POM 8:100-110; and JM to James Monroe June 21, 1786, 9:82-83.
[77] Ketcham 1990, 176-79; In a letter to Edmund Randolph February 18, 1787, Madison listed the measures that he expected Congress to consider. They were, in the order Madison offered: (1) the navigation of the Mississippi; (2) violations of the Treaty of Peace with Great Britain; (3) the proposed convention in May; (4) Shays' Rebellion. The editors of the POM write that "To JM the Mississippi question was by far the most serious and urgent of these matters." "Madison in Congress February - May 1787," POM 9:262.
[78] "Virginia Delegates to Edmund Randolph" February 12, 1787 POM 9:266.

the spirit of the insurrection was subdued" and that the delegates from Massachusetts "tell us that the measures taken by Congress have given great satisfaction & spirits to their Constituents." Nonetheless, Madison was once again unwilling to be disingenuous, and he "admitted" that it was "rather difficult" to argue that the power was constitutional, and that he "would not examine whether the original views of Congress in the enlargmet. of their military force were proper or not, nor whether it were so to mask these views with an ostensible preparation agst. The Indians." Madison, avoiding the constitutional argument, concluded that the better policy would be simply to suspend the order, since "it was probable the enlistments for the reasons given would be suspended without an order from Congrs. in which case, the inconveniency suggested would be saved to the U.S. and the wishes of Massts. satisfied at the same time."[79]

During 1787, the future of the Continental Congress was in doubt. Despite the increasing threats of sectionalism and civil insurrection, the delegates, frustrated by the institution's impotence, were frequently absent, and a quorum was often not achieved. Denied the power to tax and confronting the states' refusals to fulfill its requisitions, Congress had been unable to meet the interest on the public debt and the states had begun assuming payment. E. James Ferguson has explained the danger of this development:

> From the Nationalist viewpoint...it had been gratifying to think that economic self-interest must prompt creditors to support the federal government, but now it was discovered that self-interest worked two ways. The demonstrations took a malignant turn when the creditors appealed to the states.[80]

If the states were to have taken over payment of the national debt, there would have been few functions left for Congress to perform, and, therefore, few reasons to

[79] "Notes on Debates," February 19, 1787, POM 9:277-79.
[80] Ferguson 1961 221.

justify its existence. Madison's criticism of the federal government and his support for radical reform now became unequivocal:

> The present System neither has nor deserves advocates; and if some very strong props are not applied will quickly tumble to the ground. No money is paid into the public Treasury; no respect is paid to the federal authority. Not a single State complies with the requisitions, several pass them over in silence, and some positively reject them....It is not possible that a Government can last long under these circumstances.[81]

By March 1787, Madison had decided that the new constitution would have to be founded upon a higher authority than that of the Articles of Confederation. As Madison wrote Jefferson, the "expedient" of a "ratification of the people" would clearly render the new system paramount to the state governments. Madison understood that if the authority of the federal government were to be supreme over the state governments, the new constitution would need to be based upon the sovereign power of the people. Furthermore, national supremacy could be maintained from state infringement only by arming "the federal head with a negative *in all cases whatsoever* on the local legislatures." Madison argued that "Without this defensive power experience and reflection have satisfied me that however ample the federal powers may be made, or however Clearly their boundaries may be delineated, on paper, they will be easily and continually baffled by the Legislative sovereignties of the States."[82]

Madison's letter to Jefferson was a clear precursor to the larger essay, "Vices of the Political System of the United States."[83] Written between February and April 1787, "Vices" applied the lessons that Madison had learned in his study of "Ancient and

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[81] JM to Edmund Pendleton February 24, 1787, POM 9:294-95.
[82] JM to TJ March 19, 1787, POM 9:318.
[83] The editors of the POM state that Madison "probably" began working on the essay in February of 1787 even though Madison dated it April 1787. "Vices of the Political System of the United States," (Editorial Note) POM 9:346.

Modern Confederacies" in a systematic analysis of the Articles of Confederation. Madison returns to the themes he had outlined in the letter to Jefferson, the need for constitutional and national supremacy, and also offers an argument that he later returned to in Federalist 10, the problem of majority faction.

Madison first explains that the difficult relations between state and federal governments were directly tied to the Articles of Confederation's "Want of ratification by the people:"

> In some of the States the Confederation is recognized by, and forms a part of the constitution. In others however it has received no other sanction than that of the Legislative authority. From this defect two evils result: 1. Whenever a law of a State happens to be repugnant to an act of Congress, particularly when the latter is of posterior date to the former, it will be at least questionable whether the latter must not prevail; and as the question must be decided by the Tribunals of the States, they will most likely lean on the side of the State.[84]

In the first chapter, I noted that some non-originalists claim that the founders viewed constitutional reform as a means to protect individual liberty.[85] Madison's essay, focusing on the injuries suffered at the hands of the state government, offers some support to this argument. However, Madison never appeals to natural law. In fact, Madison accepts the legal positivist premise that law expresses the will of a sovereign, and is not constrained by principles of justice or morality. As Madison stated, "[i]n republican Government the majority however composed, ultimately give the law."[86] In fact, a large part of Madison's essay asks how a government based on the principle of popular sovereignty can prevent the violations of justice and morality that had occurred in the various states. What was truly "alarming" about all the unjust laws that the states

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[84] *Ibid.*, 352.
[85] See pages 12-14.
[86] POM 9:354, 357.

had enacted was that "it brings into question the fundamental principle of republican Government." [87]

No framer was more interested in alleviating the danger of what Tocqueville would later call the tyranny of the majority and Madison had clearly begun to consider the question. As he struggled to arrive at how one could make a "modification of the Sovereignty as [to] render it sufficiently neutral between the different interests and factions," Madison did not turn to natural law and proclaim that certain "inalienable" rights should be protected in a bill of rights. Instead, he searched for an answer that was fully compatible with the principles of popular sovereignty. And it was in "Vices," not Federalist Ten, that Madison first offers his famous solution: "to enlarge the sphere."[88] The emphasis that Madison placed on the doctrine of consent, and his acknowledgment that a sovereign power cannot be understood as limited by rules of justice or morality, make it almost impossible to believe that he would have accepted the practice of non-interpretivism. In fact, Madison had yet to argue that the judiciary should even have the power to overturn clearly unconstitutional laws. In other words, it is not even clear that when Madison entered the Philadelphia Convention he would have supported the idea of allowing judges to overturn laws that were in clear violation of the Constitution, let alone engage in non-interpretive judicial review as some non-originalists claim.

Conclusion

Perhaps the most intractable dilemma that Madison faced in his political career during the pre-Constitutional era was how to establish the basis of political authority.

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[87] *Ibid.*, 354.
[88] *Ibid.*, 356-357.

The question was fairly easily resolved in Virginia because its citizens recognized the legitimacy of the state government. However, Madison's time in the Continental Congress demonstrated to him that the real challenge was how to get the states to submit to the authority of the federal government. Madison was not the first to call for a new federal government nor was he the most fervent nationalist. However, once he came around to the idea of constitutional reform, Madison was among the first to articulate how indispensable popular ratification would be in securing the success of any future government. And even though Madison himself described the ideas as politically "expedient,"[89] it would be a mistake to underestimate his faith in this principle. As the next chapter will demonstrate, Madison's entire constitutional theory was constructed around it.

[89] JM to TJ March 19, 1787, POM 9:318.

Chapter Three:

We the People: An Assembly of Demigods

The greatest obstacle in challenging the assertion that Madison formulated a new approach to constitutional interpretation during the 1790s is that the subject was so rarely considered before the United States Constitution was ratified. Political necessity defined the early American understanding of fundamental law, and there was no need for a national debate over constitutional interpretation before 1787. Nonetheless, because positions on constitutional interpretation are largely determined by conceptions of legal authority, an examination of the latter subject allows us to assess the consistency of Madison's approach to constitutional interpretation.

The second chapter demonstrated that Madison began to forge a constitutional theory based upon the principle of popular sovereignty during the pre-Constitutional era. Thus, it is logical that Madison's approach to constitutional interpretation was defined by the tenets of positive law. This chapter will continue reconstructing the development of Madison's constitutional theory, and it will also address the evolution of the larger American understanding of fundamental law during the short period that encompassed the writing and ratification of the Constitution. (I refer to the delegates to the Constitutional Convention as the Framers, the men who assembled in the state ratifying conventions as the Ratifiers, and the term the "Founders" to denote the entire Revolutionary generation).

The focus of this chapter will be the four debates that most directly touched upon the subject of constitutional interpretation. The first two occurred during the Constitutional Convention and centered on Madison's proposals for a national legislative

veto and a council of revision. I will argue that during the first debate, which was driven by the need to establish the supremacy of the Constitution and the national government, the delegates fully embraced the principle of popular sovereignty. And, during the discussion over the proposed council of revision, the Framers explicitly accepted the full of implications of positive law theory.

The last two disputes that will be discussed occurred during the Federalist-Antifederalist debates. The first stemmed from the Antifederalist call for the inclusion of a bill of rights and the second resulted from the Federalists' defense of judicial review. Once again, political necessity proved to be the driving force behind the American conception of fundamental law. When the Framers adopted the principle of popular sovereignty they explicitly accepted the postulate that law must be considered separate from considerations of morality and justice. However, the Federalists' interest in securing the ratification of the Constitution forced them to abandon such an admission when they argued against the need for a bill of rights. The last dispute that will be addressed concerned the power of judicial review. This question led to the first national debate over the subject of constitutional interpretation. And, it demonstrated that whether or not most Americans agreed with the principles of positive law, a broad based consensus against judicial discretion did exist.

Two caveats must be raised before our attempt to reconstruct the founders' conception of fundamental law. First, the federal system of government complicates matters. We have to consider not just the relation between the Supreme Court and Congress, but also that of the national judiciary and the state legislatures. Most delegates, especially Madison, believed that any state legislation that threatened the legitimate

power of the national government must be overturned. However, his argument was not that "natural" rights must be protected, but that national and constitutional supremacy must be maintained. And, as we shall see, Madison offered a provision that explicitly empowered the most democratic branch of government, the national legislature, to have the prerogative to overturn state legislation. Madison's view of whether, and when, the federal judiciary should be allowed to overturn federal legislation is a different question entirely and one that we will leave aside for now.

Although the Framers' "primary problem was not to provide a basis for future interpretation or construction," their debates over the national legislative veto and the council of revision directly touched upon topics closely related to constitutional interpretation: the basis of legal authority and the question of judicial review.[1] Therefore, my examination of the Constitutional Convention will focus exclusively on these two provisions, even though both were ultimately rejected. These proposals not only provide insight into the Framers' interpretive intent, they also reveal a great deal about Madison's constitutional understanding. Madison argued that both proposals were indispensable, and even considered the legislative veto to be the linchpin to his entire plan of government.

The Philadelphia Convention

James Madison was not only the best prepared delegate, he was amongst the first to arrive in Philadelphia. He left New York, where Congress was then meeting, and arrived eleven days before the May 14 date of commencement. In addition to Madison, Virginia sent six other delegates, including Washington, Edmund Randolph who was Governor of Virginia and one of Madison's most regular correspondents, George Mason

who had been primarily responsible for the construction of Virginia's state Constitution, and George Wythe.[2] Once again poor timing resulted in Jefferson being unable to attend a constitutional convention; he was in Paris at the time. But when he read the names of the fifty-five delegates who attended the proceedings, he memorably proclaimed it to be "an assembly of demi-gods."

Before the "demi-gods" could begin their deliberations, they had to arrive, and the delegates from Georgia had as far as eight hundred miles to travel, while rain had clogged the roads in Pennsylvania with mud. The inevitable delays explain why the Convention did not officially begin until May 29. Madison, as was his habit, made productive use of the time. The Virginians met during the mornings and jointly produced a plan of fifteen resolves. In the afternoons they were joined by delegates from Pennsylvania, so that they could "grow into some acquaintance with each other."[3]

Randolph opened the Convention by giving a speech that critiqued the Articles of Confederation and offered the fifteen resolutions that his state delegation had prepared. While these resolutions, known as the "Virginia Plan," had been drafted jointly by that state's delegation, all the key provisions had been previously suggested by Madison, and he is recognized as the principal author. The provision for a legislative veto is found in the sixth resolution: "The National Legislature ought to be impowered [sic]....to negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union."[4]

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[1] Lofgren 1988, 92.
[2] The reader will recall that after mentoring Jefferson in his study of the law, Wythe became the nation's first law professor and taught the young Marshall as well as James Monroe.
[3] Unattributed quotation taken from Bowen 1966, 18.
[4] Koch 1966, 31.

Madison believed that a legislative veto was indispensable because he saw it as the only tool capable of preserving national supremacy. Without it, Madison argued, the states would "continually fly out of their proper orbits and destroy the order & harmony of the political System."[5] Madison had first aired the idea in a letter to Jefferson two months before the Convention convened:

> Without this defensive power experience and reflection have satisfied me that however ample the federal powers may be made, or however Clearly their boundaries may be delineated, on paper, they will be easily and continually baffled by the Legislative sovereignties of the States.[6]

Madison also argued that peaceful relations between states would be maintained through the veto. As he explained to Jefferson, it would work to "restrain the States from thwarting and molesting each other." Finally, as we will later discuss, Madison asserted that the provision would empower the national government to counteract the pernicious effects of faction.

Although Madison envisioned that the legislative veto would serve three purposes, the delegates focused solely on the matter of national supremacy. This goal provoked no protest, but objections were immediately raised concerning the proposed means. As Gunning Bedford noted on June 8, Madison's idea seemed completely impractical:

> How can it be thought that the proposed negative can be exercised? Are the laws of the States to be suspended in the most urgent cases until they can be sent seven or eight hundred miles, and undergo deliberations of a body who may be incapable of Judging of them? Is the National Legislature too to sit continually in order to revise the laws of the States?[7]

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[5] *Ibid.*, 88-89
[6] JM to TJ March 19, 1787, POM 9:318.
[7] Koch 1966, 91-92.

When the proposal was first considered, Madison argued that the only alternative "would lie in an appeal to coercion." Although the Virginia Plan had actually included a provision providing that Congress be granted the power "to call forth the force of the Union against any members of the Union failing to fulfill its duty under the articles thereof,"[8] Madison had quickly realized that any constitution containing the "ingredient" of coercion, "seemed to provide for its own destruction." "Any Government for the United States formed on the supposed practicability of using force against the unconstitutional proceedings of the States," Madison predicted on June 8, "would prove visionary & fallacious as the Government of Congress."[9] The debate over the national legislative veto ended after it was voted down.

Exactly a week later, on June 15, William Paterson of New Jersey proposed an alternative set of resolutions which he hoped would replace the Virginia Plan as the basis of debate. The New Jersey Plan, as it is sometimes referred to, would have kept two features from the Articles of Confederation that particularly appealed to the small states: the unicameral Congress and the rule of equal voting by the states. Although this plan would ultimately be rejected, Paterson did make at least one suggestion that was adopted: maintain national supremacy by granting the judiciary the power to overturn state laws:

> All Acts of the United States in Congress made by virtue & in pursuance of the powers hereby & by the articles of Confederation vested in them, and all Treaties made & ratified under the authority of the United States shall be the supreme law of the respective states so far forth as those Acts or Treaties shall relate to the said States or their Citizens and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding; and that if any States, or any body of men in any State shall oppose or prevent the carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth the power of the

[8] *Ibid.*, p.31.
[9] *Ibid.*, 888.

> Concerted States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an observance of such Treaties.[10]

The above provision, after undergoing revision, eventually evolved into the Supremacy Clause which is found in Article VI of the Constitution, and reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[11]

The Supremacy Clause, in short, requires that state judges overturn state legislation that conflicts with either the Constitution, federal law, or treaties. The reader may have noted two primary differences between Paterson's proposal and the Supremacy Clause. In the former, the executive is granted the power to use force against non-compliant states and the supremacy of the Constitution is not specified. Nonetheless, the fact that Paterson offered a provision to insure the supremacy of the national government indicates consensus on the issue. The question now became which branch -- Congress or the Judiciary -- should enforce the principle of national supremacy.

The Convention considered that question on July 17. That day's debate reveals that the delegates' understanding of constitutional law had progressed. Arguments that had previously been made against the national legislative veto had centered on its impracticality. For example, John Lansing had asked: "Is it conceivable that there will be leisure for such a Task? There will on the most moderate calculation, be as many Acts sent up from the States as there are days in the year."[12] On this day, however, opponents of the legislative veto, including Gouverneur Morris, Roger Sherman, and Luther Martin,

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[10] *Ibid.*, 121.
[11] US Constitution, art. VI.
[12] Koch 1966, 156.

offered a new argument; they asserted that the legislative veto "involves a wrong principle....that a law of a State contrary to the articles of the Union, would if not negatived, be valid & operative."[13] Ironically, Madison is recorded as the only delegate who disagreed. Madison argued that the state tribunals could not be trusted, and he reminded the delegates that judges in Rhode Island had been "displaced" when they refused to execute an unconstitutional law.[14] When the question was put to a vote, six out of nine states voted against the legislative veto. Immediately afterwards, Luther Martin proposed, and the Convention adopted, the following resolution:

> the Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all Treaties & ratified under the authority of the U.S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants - & that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.[15]

Martin's proposal not only excluded Paterson's verbiage, it dropped his idea of granting the power of coercion to the executive. It was still not specified that the Constitution would be the supreme law of the land, but as debate had demonstrated, the delegates were now making that assumption. On July 23, Madison became the first fully to articulate the relationship between supremacy and constitutional authority. Madison's speech was offered in the context of debating the question of who should have the power to ratify the Constitution. Even though his plan for a national legislative veto had been rejected in favor of judicial nullification, Madison quickly incorporated the logic of the new proposal to argue that the Constitution should be ratified by conventions specifically assembled for that purpose, rather than by state legislatures. There were, of course, vital

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[13] *Ibid.*, 305 (Speech of Roger Sherman.)
[14] *Ibid.*, 304-305.

political considerations involved. State governments were sure to reject any plan that threatened so much of their power. Ignoring this, Madison explained that a Constitution based on any basis other than popular sovereignty would not be considered the supreme law of the land:

> He considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a Constitution. The former in point of moral obligation might be as inviolable as the latter. In point of political operation, there were two important distinctions in favor of the latter. 1. A law violating a treaty ratified by a pre-existing law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null & void.[16]

If any one speech from the Constitutional Convention marked the advent of the modern understanding of constitutionalism, it may well have been this one. Although Americans had been writing constitutions for thirteen years, it is difficult to argue that they had previously arrived at a coherent theory. As previously noted, most of the state constitutions ignored questions as vital as the amendment process. These constitutions reflect how pervasive the ancient constitution legal paradigm remained even after independence had been declared. Perhaps the ancient constitution changed over time, but certainly never through a formal amendment process. Perhaps because they were at war, Americans had not fully considered the basis of governmental authority during their construction of state constitutions.

The federal Constitution, on the other hand, was constructed over a four month period by many of America's foremost political and legal minds. The delegates were able to draw upon their thirteen years living under constitutional government in the various

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[15] *Ibid.*, 305-06.
[16] *Ibid.*, 352.

states. In the end, the Framers produced more than a constitution, they offered a new theory of constitutionalism. Where the first state constitutions reflected, even incorporated, the principles of the ancient constitution, implicit in Madison's speech is the argument that the proposed Constitution will be the supreme law of the land for no reason other than the people's decision. Americans, who had begun a revolution in defense of the ancient constitution, had now written a new constitution based not on the pillars of the old –natural law, justice, logic, tradition, and custom – but upon a new foundation - the doctrine of consent.

There can be no doubt that a constitution based squarely upon the principle of popular sovereignty would have no room for the practice of non-interpretivist judicial review. It could be argued that during the debates over establishing national and constitutional supremacy, the Framers never debated whether the judiciary would overturn state legislation that violated natural law because they viewed that question as a state, and not a federal, concern. Perhaps their silence should not be taken as an indication that they rejected incorporating principles of natural law. However, when the Framers turned to federal law, the dilemma of how protect against statutes that violated natural, but not fundamental law, did arise. During these debates, the delegates explicitly argued that the judiciary would not engage in non-interpretive judicial review.

The Council of Revision

When the Framers considered Madison's proposal for a council of revision they once again confronted the question of how legislation should be overturned, except the legislation in question was now federal and not state. Of all the topics that were discussed during the Constitutional Convention, the debates over the council of revision

offer the clearest indication of how the Framers expected the judiciary to approach constitutional interpretation. The Virginia Plan's eighth resolution stipulated that,

> The Executive and a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final: and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by _____ of the members of each branch.[17]

The Framers debated and voted on this proposal on four different occasions. Each time, the delegates asked whether it would not be better to rely on the executive to overturn federal law. Some delegates argued that the council of revision would be unnecessary because judges would automatically overturn federal legislation that violated the Constitution. For example, when the proposal for the council was first debated on June 4, Elbridge Gerry asserted that as expositors of the law, the judiciary would have a "sufficient check against encroachments on their own department." Therefore, he suggested that the "National Executive" should be granted the power to "negative any Legislative acts."[18] A number of delegates seemed to assume that, unlike state judges, federal judges could be trusted to overturn unconstitutional legislation. Gerry, an obvious proponent of judicial review, said that in "some States the Judges had actually set aside laws as against the Constitution," and that this had been done "with general approbation."[19]

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[17] *Ibid.* The reader will note that Madison's proposal for a council of revision included a check on the national legislative veto.
[18] *Ibid.*, 61.
[19] *Ibid.* The reader will recall that Paterson was given credit for first suggesting that state judges, instead of the national legislature, should be responsible for overturning unconstitutional state legislation. It could be that Gerry's above observation influenced Peterson's thinking.

The problem with adopting a council of revision, according to Gerry, was that having judges review laws before their enactment would, in effect, make them "judges of the policy of public measures," which he believed was "quite foreign from the nature of the office."[20]

Not all the delegates accepted Gerry's reasoning, and even the idea that judges should engage in *interpretive* judicial review was contested. Gunning Bedford argued that he supported neither a council of revision nor an executive veto because

> he was opposed to every check on the Legislature...He thought it would be sufficient to mark out in the Constitution the boundaries to the Legislative Authority, which would give all the requisite security to the rights of the other departments. The Representatives of the people were the best Judges of what was for their interest, and ought to be under no external controul whatever. [21]

In the end, the delegates voted in favor of the proposal for an executive veto with a two third majority legislative override. The council of revision was rejected for a second time on June 6, and a month later, on July 21, the proposal was submitted for a third time. Acknowledging that the proposition "had been made before and failed," Wilson now offered a new argument. The problem with relying on "the Judges as expositors of the laws," Wilson said, was that they could not protect against "enchroachments on the people." Wilson repeated Gerry's argument that judges would only defend "their own constitutional rights," or in other words, employ judicial review as a means to protect their constitutional powers. Such an approach to adjudication would mean that "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to

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[20] *Ibid.*, 61.
[21] *Ibid.*, 64.

give them effect."[22] George Mason offered further support for the argument that judges would never go beyond the text of the Constitution:

> It had been said [by Mr. L. Martin] that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course.[23]

Madison seemed to support Mason's contention that judges would not go beyond the text of the Constitution in declaring laws unconstitutional, by saying that a council of revision, "would be useful to the Community at large as an additional check against a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities."[24] Significantly, no one challenged the argument that judges should defer from practicing non-interpretivism.

On the first three occasions that the question of a council of revision arose, it was debated in the context of whether laws that violated the rules of justice, but not the Constitution, would be best checked by the council of revision, or an executive armed with the veto power. And, on each occasion, it was decided to grant an exclusive power to the executive. Nonetheless, on August 15, Madison stubbornly raised the question for a fourth time. Once again, the idea would be rejected, and this time two more delegates argued that judges should not even have the power of judicial review.[25]

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[22] *Ibid.*,336-337.
[23] *Ibid.*, 341.
[24] *Ibid.*, 337.
[25] John Francis Mercer noted that he "disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrulable." *Ibid.*, 462-463.

The evidence that the Framers adopted a positive law conception of legal authority would and that they never expected judges to engage in non-interpretivism would appear overwhelming. The supremacy of the national government was established by the principle of popular sovereignty, and the very fact that delegates argued for a council of revision, so that judges could overturn "unjust, oppressive, or pernicious" laws, strongly undermines the claim that the Framers anticipated judges overturning laws that violated the rules of justice. Four times the question of how to protect against such laws was debated, and all four times the delegates decided to rely on the executive veto. The assertion that judges could not overturn laws unless they explicitly violated the Constitution was never challenged. On the other hand, Bedford, Mercer and Dickinson, all questioned whether judges should have the power to overturn congressional statutes that were in explicit violation of the Constitution. Interestingly, the proponents of judicial review never responded to these assertions, nor did they propose that the power of judicial review be explicitly set forth in the Constitution. Perhaps these delegates made a tactical decision to leave the question unresolved.

1776-1787: The Legal Reform Movement

Although the need to establish the supremacy of the national government was the most important factor driving the delegates towards embracing the principle of popular sovereignty and hence the tenets of positive law, a second contributing factor that should be considered briefly was a broad-based legal reform movement. Between 1776 and 1787, there had been efforts in all thirteen states to limit the judicial discretion that America's chaotic legal system had fostered. Wood has described the state of the law in America:

> much of the colonists' law (and no one was sure how much) came from outside their society, in English statutes, legal authorities, and court precedents, and mingled confusedly with their own colonial law in court systems...With no printed indigenous decisions than those in memory, there could be little reliance on local precedents other than those in memory.[26]

This legal system not only encouraged judicial freedom, but it also resulted in "a profound fear of judicial independence and discretion reflected in [the] repeated resort to written charters and to legislative intervention either by direct interference in the process of adjudication or by the correction and amendment of court-administered law by statute."[27] Consider John Dickinson's frustration with the Pennsylvania courts: "every judgment, every verdict is a confused mixture of private passions and popular error, and every court assumes the power of legislation."[28] Revolutionaries, such as William Henry Drayton, began quoting Beccaria, who had written, "in republics, the very nature of the constitution requires the judges to follow the letter of the law....Let the rule of right be not matter of controversy, but of fact through codification and strict judicial observance so that the people did not become 'slaves to the magistrates.'"[29] And, it was stated repeatedly that "no axiom is more dangerous than that the spirit of the law ought to be considered, and not the letter."[30]

Americans had long argued that judges "must take the law as it is and by all due and proper means execute it, without any pretense to judge of its right or wrong,"[31] but now they began attempting to insure this outcome through legal reform. The most

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[26] *Ibid.*, 296-97.
[27] Wood 1969 298.
[28] Dickinson to father, Aug. 2, 1756, Colbourn, editor, "Pennsylvania Farmer," *Pennsylvania Magazine of History and Biography* 86 (1962), 450-51 as quoted in Wood 298.
[29] William Henry Drayton, Speech to General Assembly of South Carolina, Jan. 20, 1778, in *Principles and Acts of the Revolution in America* ed. Hezekiah Niles (New York, 1876), 359, quoted in Wood 1969 301.
[30] Boston *Independent Chronicle*, Sept. 4, 1777.
[31] Trenton, New Jersey *Gazette*, April 18, 1781 as quoted in Wood 1969 302.

dramatic attempt occurred in Virginia, and Jefferson and Madison were at the forefront.[32] In 1776 Jefferson embarked upon what Julian Boyd has called "one of the most far-reaching legislative reforms ever undertaken by a single person."[33] Over the next three years, almost single handedly, Jefferson drafted and submitted for legislative approval some 126 laws. Most of these proposals would be ignored for five years until Madison's strenuous efforts resulted in a substantial part of the neglected bills in the Report of the revisors getting enacted into law in 1785 and 1786." The goals of Madison and Jefferson were varied and complex. At the time Jefferson did argue that if "the interpretation of the law" was dependent on "the will of the Judge," then "the government is very emphatically a despotism."[34] However, Jefferson's claim that the effort was directed at limiting judicial discretion and turning judges into "mere machines"[35] is quoted so frequently that his other goals are sometimes forgotten. Creating greater legal certainty was undoubtedly important, but Madison and Jefferson were also interested in liberalizing the state's penal code and protecting religious freedom. And, as mentioned above, efforts towards legal reform extended well beyond Virginia to encompass:

> attempts in all of the states to eliminate "*useless British statutes*" and to systematize and put into statute form parts of the common law in order to make the judge a "mere machine" and to ensure that "the laws may be executed upon the strictest principles of *equity*."[36]

The Text of the Constitution

A final argument that the Constitution is based upon the principles of positive law is found in the common portrayal of the Framers as sculptors who whittled away at the

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[32] On legal reform in Virginia see Boyd 1950- II 305-24.
[33] *Ibid.*, I 605;
[34] TJ to Philip Mazzei, Nov. 1785, PTJ 9:68-71, as quoted in Wood 1969 304.
[35] TJ to Edmund Pendleton, August 26, 1776, PTJ 1 505.
[35] 115 S. Ct. 1624, 1626 (1995).

text of their document while as they constantly strove to achieve greater clarity. Indeed, the almost pedantic debates over language that characterized the Constitutional Convention would seemingly support the claim that the framers hoped to limit the future discretion of constitutional decision makers. Jack Rakove has observed that the delegates "repeatedly labored over the wording of [the Constitution,] down to the last day of debate."[37]

However, as many non-originalists have noted, the Constitution contains two types of clauses: rules and standards. The age qualification for the President is an example of the former, the "privileges and immunities" clause illustrates the latter. If the Framers wanted to limit future discretion, why were ambiguous or open-ended provisions included? And even if the nature of a constitution dictates a certain amount of flexibility and elasticity, couldn't less time have been spent debating the basis of representation in Congress and more time devoted to textual definition? Consider, for example, the brief debate over the "Necessary and Proper" clause. The words "necessary and proper" first appeared in Wilson's "fourth and decisive" draft of the Constitution for the Committee on Detail.[38] When the clause was read to the general convention, the following debate ensued:

> Mr. Madison and Mr. Pinkney moved to insert between "laws" and "necessary" "and establish all offices," it appearing to them liable to cavil that the latter was not included in the former.
> Mr. Govr. Morris, Mr. Wilson, Mr Rutlidge and Mr. Elseworth urged that the amendment could not be necessary.

After this remarkably brief exchange, the Convention voted against Madison's proposed amendment, without ever questioning how the "Necessary and Proper" clause was to be

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[36] Wood 1969 301.
[37] Rakove 1996, 342.

interpreted. Perhaps a certain amount of omission was inevitable, but, in some cases, the Framers deliberately chose ambiguity over perspicuity. In fact, their handling of the slavery question could even be called duplicitous.[39] Despite repeated references to America's "peculiar institution," the word "slave" is not to be found in the Constitution. It is claimed that the Framers did not want the stain of slavery to tarnish their work, but it is also the case that "the Convention avoided the term because of a very clear perception that using the word 'slave' would harm the chances of ratifying the Constitution in the North."[40]

It is evident that ambiguous constitutional provisions can be explained by a number of factors, both intentional and unintentional. However, non-originalists' arguments that such clauses were intended to invite judicial discretion are completely unsupported by the records of the Federal Convention. The widespread efforts towards legal reform that occurred in America before 1787 make this explanation even more dubious. On the other hand, it is not possible to claim that the Framers hoped to limit judicial discretion. Their assumption was that the judiciary would not have a great deal of discretion and their focus was on problem solving. Thus, they virtually ignored questions over how their words would be interpreted in years to come.

The Ratification Debates

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[38] Farrand 1937, 3:375.

[39] This argument, as well as the following footnote, draws upon Finkelman 1996.

[40] Finkelman 1996, 447. Also consider how the framers avoided the difficult question of how to deal with slaves who escaped from bondage. Article IV, section 2 of the Constitution deals with two types of fugitives -- escaped slaves and criminals. It is stipulated that criminal fugitives "shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime," which strongly implies a direct governor-to-governor extradition process. The question of how escaped slaves were to be returned was left considerably more ambiguous. While it is stipulated that such unfortunate men and women are to be "delivered up," there is no indication of who is responsible for the deed – state officers, federal officials, or private individuals. This constitutional ambiguity naturally led to great deal of legal uncertainty.

The first chapter noted how important the ideas of Coke and Blackstone were to the American Revolutionaries and it was observed that it might appear absurd even to question whether Americans would have rejected ancient constitution theory in favor of the legal paradigm offered by Hobbes and Filmer. Yet, if it is true that the American Revolution replaced the sovereignty of crown with that of the people, then one would expect that Americans would have adopted the principles of positive law, not natural law theory. And, if we were to consider just the Constitutional Convention, we could conclude that the founding generation understood the authority of constitutional law to be based solely upon the doctrine of consent. However, the Framers were but a handful of men. If the Constitution is based upon the principle of popular sovereignty, then as Madison explained in *Federalist* 40, the Framers' understanding is not binding.

In that essay, Madison argued that constitutional authority derives from the ratifiers and the entire founding generation, that the Framers' plan was "merely advisory and recommendatory," and that even the proposed Constitution "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."[41] Therefore, we must consider not just the clues left by Madison and the other Framers, but the wider understanding of the Constitution that prevailed during the ratification debates. The reader will no doubt be little surprised to learn that not all Americans were willing to abandon their belief in the existence of natural law.

If there was one topic that most clearly accentuated how the Federalists avoided discussing this conflict between natural and positive law, it was the argument over the Bill of Rights. The Framers' biggest mistake was not including some type of declaration

of rights. Antifederalists frequently argued that "all men have a natural and unalienable right to worship Almighty God...that the trial by jury in civil causes as well as criminal...shall be held sacred...that the liberty of the press be held sacred...that the people have a right to hold themselves, their houses, papers and possessions free from search or seizure..." the Federalists never responded that natural law theory can play no role in a political system based upon the principle of popular sovereignty. Nor did they point out that whether or not their adversaries considered certain rights to be "sacred," only those rights that the people recognized would be protected. The Federalists simply avoided the natural versus positive law debate by claiming that the powers of the national government would be strictly interpreted, and such rights would therefore remain secure.

Many Federalists, including Madison, opposed the idea of including a bill of rights because they feared that attaching amendments to the proposed Constitution would considerably complicate the ratification process. Thus, Federalists offered at least five arguments against including a declaration of rights. In *Federalist* 84 Hamilton notes that not only do a number of state constitutions not have one, but that a number of rights, such as the privilege of habeas corpus, are recognized in the Constitution. Then, contradicting the latter argument, Hamilton writes that the inclusion of a bill of rights would have been not only "unnecessary ....but...dangerous."[42] Hamilton reasoned that a declaration of rights "would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted."[43] Indeed, Hamilton even argued that "the Constitution is itself, A Bill of Rights."[44]

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[41] Federalist 40 252.
[42] Federalist 84 513.
[43] *Ibid.*,
[44] *Ibid.*, 515

Perhaps the most popular response was the argument that the powers of the national government would be strictly interpreted and therefore natural rights would not be threatened. Consider, for example, a widely cited speech by James Wilson's which made the case that there is an essential difference between state and federal constitutions:

> When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve...But in delegating foederal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union. Hence... in the former case every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given, is reserved.[45]

Wilson's argument, that the powers of Congress will be strictly confined to the explicit provisions set forth in the Constitution, supports the conclusion that it would have been "superfluous and absurd to have stipulated with a foederal body of our creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act, that has brought that body into existence." [46] Wilson is not arguing against the existence of natural rights. He is simply attempting to reassure the Antifederalists that such rights will not be threatened. Like Hamilton, Wilson is arguing that the powers of the federal government will derive "not from tacit implication, but from the positive grant expressed in the instrument." In other words, the limits on the constitutional powers of the federal government are defined not by their prohibition, but their declaration. Because none of the powers that are defined in the Constitution can threaten natural rights, natural rights will not be threatened.

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[45] Wilson1993, 63-64.
[46] *Ibid.*, 64.

Compare Wilson's argument with what Madison said during the Convention on June 19. Referring to the "Republican Theory" that "Right & power being both vested in the majority, are held to be synonimous,"[sic] Madison pointed out that the existence of slavery proved it be "fallacious." In other words, establishing a government upon the basis of popular sovereignty means that the people's "natural" rights can, indeed, will be violated. Perhaps Madison would have agreed with Churchill's observation that "Democracy is the worst form of government ever invented by man, except for every other form." Of course, arguing that not only could "natural" rights be violated, but that the concept had no place in a government based upon popular sovereignty, was unlikely to convert many opponents. Therefore, the Federalists relied upon the argument that the Constitution would be strictly interpreted. This argument does not refute natural law theory; perhaps, it even tacitly acknowledges "natural" rights. Yet, if the Federalists implicitly acknowledged the existence of natural rights, it is also the case the Antifederalists contended that the Constitution should not be ratified because judges would use their power of judiciary review to violate the principle of popular sovereignty. This assertion was made in the context of discussing how the judiciary would approach constitutional interpretation.

Judicial Review

Of all Publius' opponents, the most worthy adversary was "Brutus," who, it is generally agreed, was Robert Yates, one of the two New York delegates who refused to sign the Constitution. Brutus may have had trouble matching the output of Publius, but he was still the only Antifederalist who troubled Madison.[47] Of Brutus's fifteen essays,

[47] JM to ER October 21, 1787, POM 10: 199.

the last five focus on Article III of the Constitution, and they probably comprised the most systematic and effective of any of the Antifederalist critiques upon the judiciary.

In his eleventh essay, Brutus laid out the same postulates that are found in Hamilton's *Federalist* 78: the people are sovereign, their will is expressed in the Constitution and, therefore, any law that transgresses this sovereign power must be overturned. Brutus also reasons that because Article III extends the authority of the Supreme Court to "all cases in law and equity arising under this constitution," the judiciary is "to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law."[48] The power of constitutional interpretation, in other words, is granted to the judiciary. Brutus and Hamilton also agree that not only will the judiciary have the power of judicial review, barring constitutional amendment, judges will have the final word in disputes over constitutional interpretation:

> The legislature must be controuled by the constitution, and not the constitution by them. They have therefore no more right to set aside any judgment pronounced upon the construction of the constitution, than they have to take from the president, the chief command of the army and navy, and commit it to some other person. The reason is plain; the judicial and executive derive their authority from the same source, that the legislature do theirs; and therefore in all cases, where the constitution does not make the one responsible to, or controulable by the other, they are altogether independent of each other.[49]

The only substantive difference between *Federalist* 78 and *Brutus* XI occurs after he notes that many of the provisions in the Constitution are ambiguous: "Most of the articles in this system which convey powers of any considerable importance, are conceived in general and indefinite terms, which are either equivocal, ambiguous, or

[48] Brutus XI in Bailyn 1993 131.
[49] *Ibid.*, 132.

which require long definitions to unfold the extent of their meaning."[50] Such provisions, according to Brutus, will result in judges interpreting not just the letter, but also the spirit of the Constitution: "in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution."[51] Although Hamilton refused to admit that he held any doubt whether judges would employ such an approach to constitutional interpretation, in *Federalist* 81 he explicitly argued that it would be improper: "there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution."[52] (Hamilton's emphasis)

The reader will notice the parallel between Brutus and today's non-originalists. Both argue that constitutional ambiguity indicates an anticipation of non-interpretive judicial review. However, as we saw in the first chapter, non-originalists argue that the inclusion of such clauses "invites us, and our judges, to expand on the...freedoms that are uniquely our heritage."[53] Laurence Tribe believes that such an approach to constitutional interpretation serves to reinforce the fundamental values of American society. This argument was certainly never offered during the Constitutional Convention. And, though it is true that Brutus argued that judges would interpret the spirit of the Constitution instead of its letter, he did so in the context of arguing that such behavior would be improper because it would transgress the principle of popular sovereignty. Brutus argued that if the Constitution is to be understood as expressing the will of the people, the people must be allowed to play an active role in the inevitable debates over its meaning. Not

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[50] *Ibid.*, 133.
[51] *Ibid.*, 132.
[52] *Federalist* 81 482
[53] Tribe 1985 45.

only does the Constitution give the power of interpretation to the judiciary, it immunizes them from the democratic process:

> A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; but in order to enable them to do this with the greater facility, those whom the people chuse[sic] at stated periods, should have the power in the last resort to determine the sense of the compact; if they determine contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil; but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not constitutionally accountable for the opinions, no way is left to controul them but with a high hand and an outstretched arm.[54]

Brutus' argument raises one of the theoretical conundrums that arises when a constitutional democracy is based upon the principle of popular sovereignty. Who should have the final word in disputes over constitutional interpretation? Over a century ago, James Bradley Thayer attempted to answer this question in his classic, "The Origin and Scope of the American Doctrine of Constitutional Law." After examining the decades that followed the ratification of the Constitution, Thayer concluded that there had been an overwhelming consensus that the Court would use the power of judicial review only when Congress had not only made a mistake, but when it had made "a very clear one." As Thayer wrote:

> This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgement; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.[55]

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[54] Brutus XV 1993, 376.
[55] Thayer 1972, 22.

It is perfectly logical that if a constitution is understood as the supreme law of the land and as an expression of the sovereign will of the people, then unconstitutional laws should be overturned. As Hamilton noted in the celebrated *Federalist* 78, this conclusion does not

> suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and 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 former rather than the latter.[56]

However, Hamilton's argument in *Federalist* 78 is based on the assumption that the hypothetical law in question is clearly unconstitutional, and he thus avoided asking what the proper standard for judging constitutionality should be.[57] The real question is not whether an unconstitutional law should be overturned, but how courts should determine its constitutionality. Of course, Hamilton's statement in 81 that "there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution," supports Thayer's contention that only those laws that clearly violate the Constitution should be overturned. The statement also echoes Wilson's assertion that the Constitution would be very strictly interpreted. But as virtually all the Antifederalists noted, many clauses in the Constitution are vague or ambiguous, and cannot be interpreted literally. Brutus' argument was that if such clauses end up being defined by the judiciary, the most undemocratic branch of government would be determining "the sense of the compact" and the principle of popular sovereignty would be compromised.

James Madison and Judicial Review

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[56] Federalist 78 468.

Unfortunately, it is somewhat difficult to reconstruct Madison's views on the subject of judicial review because he never directly discussed the question in the *Federalist*. It was Hamilton who assumed the responsibility of defending the "least dangerous" branch of government. Therefore, we must piece together Madison's understanding of the subject from scattered remarks and logical inferences. This evidence indicates that Madison strongly sympathized with Brutus' fears.

The reader will recall Madison's argument that if judges are to enforce constitutional supremacy and strike down unconstitutional state legislation, then the document must be popularly ratified. Although it might seem that the same principle would support judicial nullification of federal legislation, Madison apparently rejected this conclusion.

It has been noted that the delegates who supported extending judicial review to federal legislation may have refrained from proposing a constitutional provision that they feared would be rejected. Despite the absence of an explicit constitutional stipulation, it was later argued that the Court does have the power of judicial review because under Article III, Section 2, its jurisdiction was extended to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States...." If this provision was indeed intended to sanction the power of judicial review, how should we interpret Madison's argument against adopting it during the Convention? According to his notes, Madison

> doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution & whether it ought not be limited to cases of Judiciary Nature. The right of expounding the

[57] On page 467 Hamilton does refer to "irreconcilable variances," but that still begs the question of how the irreconcilability between a law and the Constitution is to be determined.

> Constitution in cases not of this nature ought not to be given to that Department.[58]

It is uncertain exactly what Madison meant by "cases of a Judiciary Nature," but he may well have been referring to the claim, made by both Gerry and Wilson, that the Court would only use judicial review to defend "their own constitutional rights."[59] We know that during the Convention, Madison supported having the judiciary overturn unconstitutional state legislation. However, the statement above illustrates Madison's aversion for allowing the Court to overturn federal law. One sees the same federal-state dichotomy in *Federalist* 44, where Madison offers a defense of the Supremacy clause arguing that "the authority of parts" must be subordinate to "the authority of the whole society."[60] However, Madison also asks, what would occur if Congress were to use the "Necessary and Proper" clause to exceed its constitutional powers. He argues that the people, not the courts, must assume the primary responsibility for preserving the Constitution:

> in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers. The truth is, that this ultimate redress may be more confided in against unconstitutional acts of the federal than the State legislatures, for the plain reason, that as every such act of the former will be an invasion of the rights of the latter, these will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives.[61]

Perhaps Madison's most definitive and candid statement concerning the subject of judicial review was made in a letter written shortly after the Convention. As indicated, Madison had been asked during the summer of 1785 for his advice on constructing a

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[58] Koch 1966, 286
[59] *Ibid.*, 336-337
[60] Federalist 44 287.
[61] *Ibid.*, 286.

constitution for the district of Kentucky. In a follow-up letter written to John Brown, Madison once again suggested that Kentucky adopt a council of revision to review statutes before their enactment. Madison then made the following observation concerning the question of constitutional interpretation:

> In the State Constitutions & indeed in the Fedl. One also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making their decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This make the Judiciary Dept. paramount in fact to the Legislature, which was never intended, and can never be proper.[62]

Madison's statement supports the argument that the Framers left the question of judicial review unresolved. Apparently, he anticipated that the judiciary would exert this power by default. However, his statement that this would "make the Judiciary Dept. paramount in fact to the Legislature" is exactly what Brutus warned!

It should also be noted that if Madison had supported judicial nullification of federal legislation, he should have discussed the subject in *Federalist* 51. That essay, as the reader surely knows, concerns the subject of the separation of powers and the system of checks and balances. Madison notes in a republican government the legislative authority will necessarily predominate. Therefore, the question is how to keep that branch from exceeding their rightful powers. He lists all the various remedies that the Constitution employs, including the federal system of government, the bicameral division of Congress, and the executive veto. Yet, he fails to list judicial review as one of the checks. A second paper in which the power of judicial review would naturally have arisen is *Federalist* 10.

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[62] JM to John Brown October 15, 1788, POM 11:293.

In *Federalist* 78, Hamilton argued that judicial review would help safeguard private rights from the momentary passions of the people. In *Federalist 10*, Madison's famous essay on the subject of factions, he addresses the question of how "to secure the public good and private rights against the danger of [majority faction], and at the same time to preserve the spirit and form of popular government." Not only is judicial review never listed as a possible solution in *Federalist* 10, but when Madison switches back to the subject of factions in the last half of 51, he lists a cure that he never mentioned in the famous Federalist 10: "creating a will in the community independent of the majority." Because the Court is immune to majoritarian pressures, it is in a position to counteract majority faction. Yet Madison never mentions this as a possibility. According to Madison, only two types of governments contain such an independent will: monarchies and dictatorships, or as he put it, "governments possessing an hereditary or self-appointed authority."

It may be worth a brief digression to note that Madison had hoped that the national legislative veto would establish "a will in the community" that would have been independent of the majority of any particular state. Although Madison's discussion of faction in *Federalist* 10 is widely recognized as his greatest contribution to political theory, it is not generally understood that Madison had to omit an essential link in that argument. As Madison explained in a letter written to Jefferson after the Convention had ended, he believed that the key to combating faction was not just to "extend the sphere," but to also assemble representatives from all parts of the country and empower them to overturn state laws. In this manner, the federal government could actively and directly

combat the evils of faction.[63] It was this belief that the national legislative veto would preserve national supremacy while combating the evils of faction that explains why Madison valued his provision so highly.

Thus, Madison was not only acutely aware of the benefits of having a will in the community independent of the majority, he had proposed creating such a will. Nonetheless, he did not support having the judiciary play this role. Brutus had argued against the ratification of the Constitution precisely because he believed that the judiciary would become a will independent of the community, and this is virtually the same charge by originalists who claim that we now have a *Government by Judiciary.*[64] Non-originalists frequently assert that the independence of the courts allows for the protection of "discrete and insular minorities" against an overbearing majority. Yet, Madison anticipated this argument in *Federalist* 51 when he wrote that creating a power immune from the pressures of the majoritarian process "is at best, a precarious security; because a power independent of the society may as well espouse the unjust views of the major as the rightful interest of the minor party."[65] Or, as Madison might have added, the unjust views of a minor party can also be advanced. No founder more clearly recognized the dangers of majority faction than did Madison. If Madison had believed that the judiciary could be relied on to use their power of judicial review to secure this end, it is difficult to imagine that he would not have listed this as one of the possible cures to the mischiefs of faction.

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[63] JM to TJ October 24, 1787, POM 10:209-214.
[64] Berger 1997.

Conclusion

Although Jefferson proclaimed that the authors of the Constitution were "demi-gods," they referred to themselves as "We the People." They constructed a constitution that was based squarely upon the doctrine of consent, not principles of logic, justice, or fairness. However, certain political considerations during the ratification process transformed the debate over fundamental law. Antifederalists demanded that natural rights be protected and the Federalists failed to point out that such demands were incompatible with the form of government that had been offered. Indeed, as Terry Brennan has demonstrated, at one point or another, virtually all the great luminaries adopted natural law rhetoric.[66]

The next chapter will demonstrate that as soon as the Constitution was ratified, before there was even an Executive or Judicial Branch to speak of, Americans' conflicting conceptions of fundamental law clashed. And, in the very first constitutional dispute, congressmen debated whether, and to the degree to which, constitutional meaning was intended to remain fixed according to the original understanding of the people. Thus, the same questions at the heart of today's originalism dispute were asked during the nation's first debate over how the Constitution should be interpreted.

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[65] Federalist 51 324.
[66] Brennan 1992.

Chapter Four
Colonel H deserted me

The reader will recall that the first chapter asked two questions: what is the basis of constitutional authority and did the founders expect that the meaning of constitutional provisions would remain fixed or evolve with the passage of time? These questions underpin today's dispute between originalists and non-originalists and both sides argue that their position reflects the original understanding of the founding generation. Our examination thus far has led to the conclusion that Madison, and virtually all the Framers, argued that legal authority is based upon the principle of popular sovereignty. Nonetheless, it is highly unlikely that this consensus extended to the rest of the founding generation. Federalists and Antifederalists alike defended the principle of popular sovereignty, but at the same time both sides recognized the existence of natural law and natural rights. The contradictions in these arguments were generally either not perceived or ignored.

Where the previous three chapters focused primarily on the topic of constitutional authority, I will now begin to address the question of constitutional meaning. The focus will shift to the interpretive intent of the founding generation. Although debates that centered on specific constitutional provisions will be discussed, I am more interested in reconstructing the founders' original understanding of constitutionalism than of the Constitution. How were future generations expected to derive meaning from the words contained in the Constitution?

It will be helpful to begin by identifying three interrelated debates that will arise in the discussion. The first, which was discussed briefly in Chapter One, is whether the

founders anticipated that constitutional meaning would evolve or remain fixed. Even though originalists and non-originalists disagree over this question, both sides employ similar methods in deriving constitutional meaning. The methodology of constitutional interpretation will be a second topic, and three approaches in particular will be discussed: textualism – emphasizing the text of the Constitution; intentionalism – focusing on the intention of its agents; and structuralism – targeting the structure and relation of the institutions erected. The third topic is exactly whose understanding should be reconstructed, the Framers, the Ratifiers, or the entire founding generation?

The Interpretive Intent of the Founders

In the previous chapter I observed that the founding generation can be separated into three groups -- the Framers, the Ratifiers, and the Founders -- and I concluded that the Framers held a more uniform view of the basis of constitutional authority than did the rest of the founding generation. At first, originalists such as Raoul Berger argued that the intent of the Framers should remain binding.[1] One advantage of this theory is that because the Framers largely agreed that popular sovereignty forms the basis of constitutional authority, they achieved a rough consensus concerning how the Constitution should be interpreted. However, as Madison once explained, the principle of popular sovereignty logically leads to the argument that it is the understanding of the Ratifiers, not the Framers that should remain binding.[2] Thus, most originalists now seem to refer to the original understanding of not just the Framers but the entire founding generation.

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[1] Berger 1997, 4, 404-05.
[2] *Annals of Cong.*, 1789, 776. (Madison's statement is quoted on page 152.)

Yet if we accept the view that it is the interpretive intent of the Ratifiers that should be upheld, the next question becomes whether useful conclusions can be drawn concerning the understanding of the nearly two thousand men who served in the various conventions that ratified the Constitution, and whether that understanding matched the expectations of the electorate that they represented. As my examination of the ratification debates demonstrated, the Constitution was understood to embody conflicting principles. A second obstacle is the unreliability of the documentary evidence. Although James Hutson concluded in his careful investigation of Madison's notes at the Constitutional Convention that he cannot be charged with having altered them to reflect later views, Hutson wrote that the records of the ratification debates are "too corrupt...[to] be relied upon to reveal the intentions of the Framers."[3] For example, Thomas Lloyd, who recorded the Pennsylvania and Maryland debates, was paid by Federalists to delete all the Anti-Federalist speeches. Even the selected Federalist speeches he reported seem to have been significantly revised.[4] Not surprisingly, some originalists have concluded 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,"[5] or that "what counts is what the public understood."[6] However, is it any more possible to reconstruct the understanding of the entire founding generation than it is to return to the interpretive intent of the ratifiers? Although the integrity of the newspaper articles, pamphlets and public speeches is certainly not in dispute, attempting to discern a commonly shared understanding from

[3] Hutson 1986, 33-34.
[4] Ibid., at 24.
[5]. Monaghan 1981, 375 at note 130.
[6] Bork 1990, 144.

this surfeit of materials seems only to compound the difficulties of deciphering what principles were generally agreed upon.[7]

Non-originalists argue that not only do these methodological problems render the originalist approach unviable,[8] but that the founders expected constitutional meaning to be defined through usage as it had been under the English common law system. I have already noted that constitutional thinking during the early stages of the American Revolution largely reflected the English theory of the ancient constitution and that Americans lawyers were trained by reading Coke and Blackstone. These men were taught to view the law as resting on principles of justice and logic that were elucidated through the judicial process. Certainly some of the founders, especially lawyers, would have anticipated that this English approach to constitutional interpretation would persist. However, we must also remember that resistance to judicial discretion manifested itself through legal reform movements in all thirteen states. And it was argued during the ratification debates that the principle of popular sovereignty would be subverted if the judiciary, immune to the democratic process, has the final word on constitutional interpretation.[9] The non-originalist claim that the founding generation anticipated that the common law approach to ajudication would be adopted may be just as improbable as the originalists' hope to reconstruct an original understanding.

A problem for originalists and non-originalists alike is that during the pre-constitutional era the founders rarely debated whether constitutional meaning ought to

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[7]The reader can decide whether these methodological problems are best surmounted by examining the understanding of individuals, not groups.

[8] The challenge of reconstructing an original understanding on any specific constitutional question is so great that even one of most prominent originalists, Justice Antonin Scalia, has admitted that "It is, in short, a task sometimes better suited to the historian than the lawyer." (Scalia 1989, 857.) In fact, Scalia writes

evolve or remain fixed. However, as we have seen, opinions were expressed concerning the nature of legal authority. I have already challenged the contention that the founding generation agreed upon the basis of constitutional authority and concluded that it is highly unlikely that a nation which failed to achieve a consensus on the former could agree on the latter. Yet the whole originalist debate is predicated on the belief that there was an "interpretive intent" that can be reconstructed through either textual or historical analysis.[10] Now I will attempt to demonstrate that there was also no common consensus concerning the degree to which constitutional meaning should evolve. Indeed, if the founders had formed a consensus, why was the first decade of the new government marked by debates over constitutional interpretation? Although it has long been contended that political considerations, not constitutional principles, caused the disputes between the Federalists and the Democratic-Republicans, the conflicting beliefs concerning the basis of constitutional authority made battles over constitutional interpretation inevitable.

Madison's Interpretive Intent

Chapters two and three examined Madison's early political career not only to establish his understanding of constitutional and legal authority, but also to refute the argument that Madison, together with Jefferson, "formulated" a new constitutional theory during the "the course of their political guerrilla warfare against the dominant

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that he could imagine decisions taking "thirty years and 7,000 pages" if the originalist approach were done "perfectly." (*Ibid.*, 852)

[9] Brutus XV 1993, 376.

[10] As I noted on page 99, a third method of adjudication is structuralism. Proponents of this approach focus on both text of the Constitution as well as historical sources.

Federalists."[11] Although it has long been claimed that political considerations explain why Madison broke from the Federalist party and that he went from being a nationalist to a defender of states' rights, H. Jefferson Powell and Jack Rakove have both specifically claimed that Madison went from arguing that constitutional meaning ought to evolve in the 1780s to contending that it should remain fixed during the 1790s. The reader will recall Powell's contention that Federalists and Antifederalists alike expected constitutional meaning to be defined much as it had been in the English common law system "through the usual judicial process of case-by-case interpretation."[12] Rakove has supported Powell's argument by claiming that "most Federalists," including Madison, thought that the "real interpretation of the Constitution would occur as decisions taken within government gradually settled its operations in regular channels."[13]

Yet if Madison's constitutional theory did rest upon the principle of popular sovereignty, as I contend, is it likely that he would have accepted the idea that constitutional meaning should evolve through the adjudicatory process? Indeed, the reader will recall that shortly after the Constitutional Convention ended, Madison explicitly opposed the power of judicial review saying that it would make the "Judiciary Dept. paramount in fact to the Legislature, which was never intended, and can never be proper."[14] Nonetheless, Powell and Rakove both quote the following passage from *Federalist* 37 to defend the argument that in the 1780s Madison shared the "common law assumption....that the 'intent' of any legal document is the product of the interpretive

[11] Powell 1985, 923. It appears that Powell differs from Rakove in that the former argues that constitutional meaning was to be defined specifically by the judiciary and the latter contends that meaning would be derived by the operation of all three branches. See Rakove 1996, 345.
[12] Powell 1985, 904.
[13] Rakove 1996, 345.
[14] JM to John Brown October 15, 1788 POM 11:293.

process and not some fixed meaning that the author locks into the document's text at the outset."[15]

> 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.[16]

This passage would seemingly suggest that Madison anticipated an evolutionary conception of constitutional meaning. However, as Charles A. Lofgren has noted, "[t]he context of the quoted passage....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." Lofgren even contends that "[t]he passage itself says nothing about how future interpreters would give the Constitution its meaning."[17] Perhaps both interpretations of Madison are overstated. In *Federalist* 37 Madison is not arguing that constitutional meaning ought to evolve, but merely that it is impossible to anticipate and resolve the myriad number of questions that will arise concerning the interpretation of the Constitution. A certain amount of constitutional uncertainty is inevitable. Thus, Madison did anticipate that *some* questions would have to be resolved through the daily operations of government.

In *Federalist* 37 Madison explained that the Constitution contains a certain amount of uncertainty because the framers had to contend with "the interfering pretensions of the larger and smaller States," and since "neither side would entirely yield to the other...the struggle could be terminated only by compromise."[18] Secondly, the "cloudy medium" of language made it impossible to delineate, unequivocally, the

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[15] Powell 1985, 910; for Rakove 1996, 341.
[16] *Federalist* 37 229.
[17] Lofgren 1988, 86.

demarcation between federal and state jurisdictions and the division of power among the three branches of government.[19] Therefore, certain questions will "daily occur in the course of practice."[20] However, to admit that constitutions must invariably contain a certain amount of ambiguity and that some questions will have to be resolved through the day to day operations of government, is not to endorse the view that constitutional meaning ought to evolve. Madison agrees that constitutional meaning should be as clear and unequivocal as possible, and he clearly prefers clarity to ambiguity. He is simply asking the Antifederalists to recognize the challenges that confronted the Framers.

Rakove also points to *Federalists* 49 and 50 to support the view that Madison expected constitutional meaning to be defined through the operation of government. However, these essays, which set up the famous *Federalist* 51, discuss how to maintain the separation of powers, not how to interpret the Constitution. It is certainly true that Madison argues against the idea of making *frequent* or *periodical* appeals to the people as "the proper and adequate means of *preventing and correcting infractions of the Constitution.*"[21] The former had been suggested by Jefferson,[22] and the latter had been unsuccessfully attempted in the state of Pennsylvania.[23] The reason that Madison opposed these ideas is that he feared that they would undermine governmental stability. But the question of how the Constitution *is* to be interpreted is never addressed. What is

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[18] *Federalist* 37 229-230
[19] *Ibid.*,
[20] *Ibid.*, 228
[21] Federalist 50 317.
[22] Jefferson had written a constitution that he hoped would replace the one that Virginia had adopted in 1776. It read as follows, "whenever any two of the three branches of government shall concur in opinion, each by the voices of two thirds of their whole number, that a convention is necessary for altering the Constitution, or correcting breaches of it, a convention shall be called for the purpose." As quoted in *Federalist* 49 313.
[23] Section 15 of the 1776 Pennsylvania Constitution provided for all bills to be referred to the people-at-large before they became law.

discussed is whether frequent or periodical appeals to the authority of the people would best preserve the separation of powers.

I have already noted that although popular sovereignty was the cornerstone of Madison's constitutional theory, he fully recognized the dangers of majority rule. He even acknowledged that this "republican" principle allows for the violation of justice as proven by the institution of slavery.[24] Just as Madison recognized the dangers of basing constitutional authority upon popular sovereignty, he also feared involving the people too regularly in the interpretive process. Madison is repeating an argument in *Federalists* 49 and 50 that he had already offered in response to Jefferson's famous letter, "The Earth Belongs to the Living." Madison recognized that legal authority must rest on more than just theoretical principle because "a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato."[25] Madison hoped to temper his generation's enthusiasm for revising their forms of government because such "experiments are of too ticklish a nature to be unnecessarily multiplied."[26]

Madison's argument may be better understood with reference to Max Weber's three part model of the legitimacy of power. Weber argues that "all ruling powers" are "variations or approximations to" the following structures: rational-legal authority, charismatic authority, or traditional authority.[27] Weber explains that under the first model, "the legitimacy of the power-holder to give commands rests upon rules that are rationally established by enactment, by agreement, or by imposition. The legitimation for establishing these rules rests, in turn, upon a rationally enacted or interpreted

[24] Convention speech of June 19 in Koch 1966, 144.
[25] *Federalist* 49 315.
[26] *Federalist* 49 315.
[27] Weber1946, 294.

'constitution.'" [28] Weber also observes that some ruling powers have been established upon the basis of charisma: "the governed submit because of their belief in the extraordinary quality of the specific *person.*"[29] Although the United States Constitution ostensibly erects a system of government based upon the first model, it clearly would never have been ratified if America's most charismatic figure, Washington, had not endorsed it. The last model, traditional authority, rests "on the belief in the everyday routine as an inviolable norm of conduct," and is best illustrated by England's ancient constitution.

Madison recognizes the need for all three elements in *Federalist* 49. He fears frequent constitutional revision because "every appeal would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability." Madison is recognizing that the foundation of government cannot be erected solely on theoretical grounds. Legal authority will be more widely accepted the less it is challenged and the more "traditional" it becomes. And, the magic of charismatic authority, or "veneration," will be transferred from the "Founding Fathers" to the document that they have bequeathed to their descendents.

Madison's constitutional hermeneutic incorporated theoretical and political considerations and reflected a broad array of principles and desires that sometimes conflicted. He desired constitutional clarity, but accepted that a certain amount of ambiguity would be necessary to secure ratification. Popular sovereignty was his highest

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[28] *Ibid.*,
[29] *Ibid.*, 295

principle, but he recognized that other factors are involved in establishing governmental stability. The complexity of his political thought allows for misinterpretation and manipulation. This complexity also prevents a purely "objective" assessment of whether he allowed political considerations to override his previous principles because he never advocated a dogmatic adherence to theoretical principle. However, after having so thoroughly explored the foundation of his constitutional thought, we can now assess whether Madison formulated a new constitutional theory in the 1790s.

The First Congress

After starring in the defeat of Henry and the Antifederalists forces at the Virginia Ratifying Convention, Madison was placed in nomination for the Senate against his expressed desire. United States Senators were originally appointed by their state legislatures, and there was little chance that Henry, whose control over the state government has been likened to a "monarch who had 'only to say let this be Law – and it was Law,'"[30] would have awarded Madison that honor. Henry's vengeful actions against Madison indicate that the famous orator was still aggrieved at having been bested at the Virginia ratification convention. In fact, it is alleged that Henry even claimed that Madison's election would "terminate in producing rivulets of blood throughout the land."[31] Despite Henry's opposition and his own reluctance, Madison ran a "strong third to Henry's handpicked choices – Richard Henry Lee and William Grayson."[32] Henry also tried to prevent Madison's election to the House by placing him in a district in which only two of a total of eight counties had voted in favor of ratification. In addition, Madison had to contend with rumors that he was against adopting a bill of rights. But, by

[30] POM 11:301.
[31] *Ibid.*

pursuing a campaign strategy that included speaking to the "freeholders on the various county court days, [writing] to influential county leaders, and [publishing] a formal address to the people," Madison successfully explained why he had opposed the idea of amending the Constitution prior to its ratification and how he supported the idea of congressionally sponsored amendments.[33] On February 2, 1789, on a day of sub-zero temperatures and almost a foot of snow, Madison narrowly defeated the man who would one day succeed him as President of the United States, James Monroe. On March 14, 1789, Madison took his seat at the First Congress which assembled at Federal Hall in New York City.

Madison's narrow victory was historically significant because the First Congress, especially the lower body, was largely responsible for constructing the other two branches of government. Though the Senate did provide the impetus behind the Judiciary Act, the initiative behind "every other substantive matter" -- revenue, the amendments which eventually became the Bill of Rights, and the creation of the executive department -- all lay with the House.[34] And, not only was Madison the leader of the House, he served as one of President Washington's most trusted advisors, even writing many of the President's speeches including his inaugural address. Not surprisingly, this was probably the busiest period in an exceptionally productive life. As Madison told Edmund Randolph, "I never had less time that I could truly call my own than at present."[35]

The Removal Power of the President

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[32] *Ibid.*
[33] *Ibid.*, 303
[34] POM 12:53.
[35] JM to ER May 31 1789, POM 11: 293.

Remarkably, the nation's first constitutional debate centered on a proposal that had been submitted by, fittingly enough, Madison. On May 19, 1789, Madison offered a motion to establish the foreign affairs, treasury, and war departments. The Secretaries of these departments were "to be appointed by the President, by and with the advice and consent of the Senate; and to be removable by the President."[36] Congressman William L. Smith of South Carolina quickly argued that the first part of the clause was superfluous and that the latter was unconstitutional because offices should be held during good behavior. The House would spend that day and four more, June 16-19, debating the question of whether the President has the constitutional power to dismiss the heads of the executive departments. Interestingly, the House not only conducted its inquiry before an actual conflict had arisen, nine of its members had served as delegates to the Constitutional Convention.[37]

Smith questioned the President's removal power because the Constitution stipulates how the "Heads of Departments" are to enter, not to exit office. Smith's contention that the secretaries only be removed only through the impeachment process was shared by at most one or two others. The vast majority of the participants took one of the following three positions: the Congress was free to decide where to confer the power, it was intended to be exercised jointly by both the President and the Senate, or the power is to be exercised by the President exclusively.[38]

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[36] *Annals of Cong.* 1789, 372.

[37] In addition to Madison, the following delegates to Constitutional Convention served in the House of Representatives: Abraham Baldwin (Ga.); Daniel Carrol (Md.); George Clymer (Penn.); Thomas Fitzsimmons (Penn.); Elbridge Gerry (Mass.);Nicholas Gilman (N.H.); Roger Sherman (Conn.); and Hugh Williamson (N.C.).

[38] Madison summarized the various arguments in a letter to Edmund Pendleton: The Constitution....omitted to declare expressly by what authority removals from office are to be made. Out of this silence four constructive doctrines have arisen 1. That the power of removal may be disposed of by the Legislative discretion. To this it is objected that the Legislature might then confer it on themselves, or even

The congressional debate was guided by questions of expediency as well as constitutional principle. In terms of the former subject, which is of little interest to the purposes of this inquiry, the longer the discussion continued the clearer it became that the power should be reserved exclusively for the President. In regards to the latter topic, a number of questions relevant to today's originalism debate were raised, including the doctrine of implied powers, judicial review, and even original intent.

Madison, who clearly did not anticipate objections to his proposal, first argued that the question should be left to the discretion of the legislature because if "Congress may establish offices by law; therefore, [they can] say upon what terms the office shall be held, either during good behavior or during pleasure."[39] Yet he also accepted that Congress could not decide the question merely on the grounds of expediency. Though he disagreed with Smith's impeachment argument, Madison acknowledged that "if the Constitution means this by its declarations to be the case, we must submit; but I should lament it as a fatal error interwoven into the system, and one that would ultimately prove its destruction."[40]

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on the House of Reps. Which could not possibly have been intended by the Constitution. 2. That the power of removal can only be exercised in the mode of impeachment. To this the objection is that it would make officers of every description hold their places during good behavior, which could have still less been intended. 3. That the power of removal is incident to the power of appointment. To this the objections are that it would require the constant Session of the Senate, that it extends the mixture of Legislative & Executive power, that it destroys the responsibility of the President, by enabling a subordinate Executive officer to intrench [sic] himself behind a party in the Senate, and destroys the utility of the Senate in their legislative and Judicial characters, by involving them too much in the heats and cabals inseparable from questions of a personal nature....4. that the Executive power being in general terms vested in the President, all power of an Executive nature, not particularly taken away must belong to that department, that the power of appointment only being expressly taken away, the power of Removal, so far as it is of an Executive nature must be reserved. In support of this construction it is urged that exceptions to general positions are to be taken strictly, and that the axiom relating to the separation of the Legislative & Executive functions ought to be favored. To this are objected the principle on which the 3d. construction is founded, & the danger of creating too much influence in the Executive Magistrate. JM to Edmund Pendleton June 21, 1789, POM 12:252.

[39] *Annals of Cong.* 1789, 374-75.

[40] *Ibid.*, 372

Congress put the matter aside for a month and various members obviously studied the question during the interim. When the debate resumed, they arrived armed with copies of the *Federalist,* and arguments incorporating all three approaches to constitutional interpretation: textualism, intentionalism, and structuralism. Although the three methods are generally accepted, in some disputes the most important question may be the decision of which approach to employ. The first method, which is also associated with interpretivists, focuses solely on the text of the Constitution. The second method, intentionalism, awards greater weight to the general understanding of either the Framers, the Ratifiers, or the entire founding generation.[41] With this approach decision makers examine not just constitutional text, but historical materials, such as the *Federalist*, which shed light on the meaning of the document. Finally, structuralism relies on "inference from the structure and relationships of government institutions."[42]

When the President's removal power was debated on June 16, Smith quickly announced that "[a] publication of no inconsiderable eminence in the class of political writings on the Constitution" supported his position. The first originalist argument was thus offered. Smith noted that the work he was referring had been published under the name "Publius." Indeed, *Federalist* 77 explicitly supports Smith's contention: "The consent of [the Senate] would be necessary to displace as well as appoint."[43] Smith concluded a long argument with the somewhat contradictory contention that because the

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[41] The two most important extra-constitutional historical sources are *The Federalist* and the records of the First Congress. For the latter see, Williams 1970. The Court has indicated that the express consideration and resolution of difficult constitutional issues by the First Congress "provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of [its] Members ... 'had taken part in framing that instrument,' " *Bowsher v. Synar*, 478 U.S. 714, 723-724, (1986) [quoting *Marsh v Chambers*, 463 U.S. 783, 790, (1983)].

[42] Brest 1980 205. The three part model is borrowed from Grey.

[43] *Federalist* 77 459.

Constitution was silent, Congress should simply avoid the matter and allow the judiciary to decide it at a later date.

This last assertion changed the focus of the debate. During the first day, Congress had primarily focused on questions of expediency and the assertion that the power of appointment logically confers the power of dismissal. However, the delegates now began asking broader questions relating to constitutional interpretation. Smith's argument that Congress should exercise only those powers that are expressly enumerated raised what had been the most contentious question during the Federalist-Antifederalist debate: how strictly should the powers of Congress be interpreted? Congressman Huntington supported Smith, by asserting that "[t]he Constitution, I think must be the only rule to guide us on this occasion; as it is silent with respect to the removal, Congress ought to say nothing about it, because it implies that we have a right to bestow it, and I believe this power is not be found among the enumerated powers delegated by the Constitution to Congress."[44]

When Madison spoke, he ignored Smith's reference to the *Federalist*, and instead addressed the question of which branch should exercise the power of constitutional interpretation: "I suppose an exposition of the Constitution may come with as much propriety from the Legislature, as any other department to the Government."[45] How the Constitution should be interpreted, strictly or loosely, was a question he avoided. He explained that some might contend "that where the Constitution is silent, it becomes a subject of legislative discretion," but Madison would, as he put it, leave this consideration "untouched." Having defended the propriety of congressional constitutional

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[44] *Annals of Cong.* 1789, 459.
[45] *Ibid.*, 461.

construction, Madison then argued that he had changed his initial view of the matter. No longer did he think the question was left to the discretion of Congress. He now argued that the power was constitutionally lodged in the hands of the President, thus eliminating Congress' discretion:

> I have my doubts whether we are not absolutely tied down to the construction declared in the bill...so far as the Constitution has separated the powers of these great departments, it would be improper to combine them together; and so far as it has left any particular department in the entire possession of the powers incident to that department, I conceive we ought not to qualify them further than they are qualified by the Constitution.[46]

Madison's argument illustrates the third method of constitutional interpretation: structuralism. He reasoned that the principle of the separation of powers is incorporated into the Constitution and although there are constitutional exceptions to the principle, Congress cannot create any further qualifications. Because the power of dismissal is an executive power, it must be exercised exclusively by the President. The debate now turned into an inquiry of how Congress should deal with constitutional omissions. Smith had turned to the *Federalist* to establish what had been the Framers' original intent. Yet, even in 1789 there were problems with the originalist approach (although of a somewhat different nature than today's obstacles). According to Smith:

> The next day Benson sent me a note across the House to this effect: that Publius had informed him since the preceding day's debate, that upon mature reflection, he *had changed his opinion* & was now convinced that the President alone should have the power of removal at pleasure; He is a Candidate for the office of Secretary of Finance![47]

Perhaps Madison ignored Smith's reference to the *Federalist* because he had prior knowledge that Publius had had a change of opinion upon more "mature reflection."

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[46] *Ibid.*, 462-63
[47] Smith to Edward Rutledge, June 21, 1789, Smith 1968, 8.

However, Madison's structuralist argument was also vulnerable to attack, and Smith claimed it was contradictory:

> It is said, we ought not to blend the legislative, executive, or judiciary powers, further than is done by the Constitution; and yet the advocates for preserving each department pure and untouched by the others, call upon this House to exercise the powers of the judges in expounding the Constitution. It is the duty of the Legislature to make laws; your judges are to expound them.[48]

At this point all three methods of constitutional interpretation had been employed to no avail. The question could not be resolved by the text of the Constitution because the matter had been omitted; the founders' intent, *Federalist* 77 notwithstanding, was thin and inconclusive; and the structuralist method led to opposing conclusions. Certain members argued that the question should therefore be left for the judiciary "to establish the true construction of the Constitution."[49] While others asserted that the House should take a stab at it, "if we declare improperly, the judiciary will revise our decision."[50]

The members who argued that the question should be, or could be, ultimately decided by the judiciary shared a common assumption: there must be a "correct" answer to the question and that the judiciary could best ascertain and declare it. The argument reflects the continued influence of the ancient constitution and its presumption that fundamental law rests upon principles of logic that can be derived judicially. Others countered that the question had been omitted, and, therefore that the judiciary was in no better position to resolve the question. Congressman Lawrence attacked the assumption underpinning the argument that "the Constitution must contain in itself the power of

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[48] *Annals of Cong.* 1789, 470.
[49] *Ibid.*, 467 (statement of Rep. White).
[50] *Ibid.*, 477 (statement of Rep. Ames).

removal, and have given it to some body or person of the Government to be exercised."[51] Was it possible that the question had simply escaped the attention of the Framers? If it had, why should the judiciary decide the question? Lawrence not only supported Madison's argument for legislative constitutional construction, but he also argued that Congress should have exclusive power over constitutional interpretation:

> With respect to this and every case omitted, but which can be collected from the other provisions made in the Constitution, the people look up to the Legislature, the concurrent opinion of the two branches for their construction; they conceive those cases proper subjects for the legislative wisdom; they naturally suppose, where provisions are to be made, they ought to spring from this source, and this source alone.[52]

After Lawrence had spoken, Madison once again addressed the charge that "it would be officious in this branch of the Legislature to expound the Constitution."[53] Madison responded to the argument that it is the judiciary's responsibility to interpret the Constitution by saying that "[t]he Constitution is the charter of the people to the Government; it specifies certain great powers as absolutely granted, and marks out the department to exercise them."[54] Why then, Madison asked, should one branch "have any more right than another to declare their sentiments" on question of constitutional interpretation?[55] Whereas others had used the term "omitted case" to refer to the question of the President's removal power, Madison now used the same term in reference to the broader issue of which branch should be responsible for maintaining the constitutional division of power:

> Perhaps this is the omitted case. There is not one Government on the face of the earth, so far as I recollect, there is not one in the United States, in

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[51] *Annals of Cong.* 1789, 482.
[52] *Ibid.*, 484-85.
[53] *Ibid.*, 500 (statement of Rep. Madison).
[54] *Ibid.*
[55] *Ibid.*

> which provision is made for a particular authority to determine the limits of the Constitutional division of power between the branches of the Government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the Constitution, or one dictated by the necessity of the case.[56]

If the Constitution rests upon the principle of popular sovereignty, should the representatives of the people resolve disputes over constitutional interpretation? Of course, this principle can logically be extended one step further. Elbridge Gerry, a prominent Antifederalist, now contended that the people should decide all disputes over constitutional interpretation. If the President's removal power "is an omitted case, an attempt by the Legislature to supply the defect, will be in fact an attempt to amend the Constitution. But," Gerry said, "this can only be done in the way pointed out by the fifth article of that instrument, and an attempt to amend it in any other way may be a high crime or misdemeanor, or something worse."[57] Gerry reminded the members of Congress that the question of implied powers had been the subject of much debate before the Constitution was ratified, and that a "strong objection to the Constitution" had been that "that it was remarkably obscure." For Congress to decide this omitted case would be tantamount to amending the Constitution and "would render the most important clause in the Constitution nugatory." Allowing Congress such a power "would be repugnant to the very principles of the Revolution."[58]

It must be admitted that Gerry's argument was more theoretically consistent with the principle of popular sovereignty than Madison's. However, as we have already seen, Madison had anticipated that certain questions would have to be resolved in the day to

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[56] *Ibid.*, 500-01.
[57] *Ibid.*, 503.

day operations of government and he had previously admitted that it would be unwise for the people to be regularly involved in the process of constitutional interpretation. A similar argument was made by Benson:

> Can the gentlemen be serious who tells us, that this is a case to be proposed as an amendment to the Constitution? Does he suppose, whenever a doubt arises in this House, (and it will be a doubt, if an individual doubts,) with respect to the meaning of any part of the Constitution, we must take that mode? Or does he really suppose that we are never to take any part of the Constitution by construction? This I conceive to be altogether inadmissible; for it is not in the compass of human wisdom to frame a system of Government so minutely, but that a construction will, in some cases, be necessary.[59]

Congress would continue discussing the question for another two days, but no new arguments were offered. As previously noted, the President's removal power debate is unique in that there may never have been a less politicized constitutional dispute. Of course, there were important political implications concerning the separation of powers and even federalism.[60] However, the Republican and Federalist party lines had not even begun to form, no personal interests were involved, and no actual conflict had arisen. Yet, even with the presence of nine Framers and under ideal conditions, there was no consensus regarding questions of constitutional interpretation. In fact, it could even be argued that there was less consensus then, than there is today, when we no longer ask whether Congress or the judiciary should have the final word on constitutional interpretation. Indeed, a century and a half later the question resurfaced and was resolved by the Court in *Myers v United States* (1926).[61] Secondly, although today's judiciary

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[58] *Ibid.*, 503. The "clause" that Gerry was referring to is actually not a clause, but Article V.
[59] *Ibid.* 505.
[60] If the Senate were to be involved in the process it would greatly diminish the power of the President to control his officers and thus weaken the entire federal government.
[61] 272 U.S. 52. Chief Justice William Howard Taft's majority opinion placed attached a great significance to the 1789 congressional debates, and also examined Madison's notes of the Constitutional Convention,

does consider certain questions to be "political" and therefore unjusticiable, Madison's argument that questions concerning the separation of power should be decided by Congress would have vastly diminished the Court's power. And the same question that lies at the heart of the originalist dispute, whether the meaning of the Constitution should remain fixed according to the original understanding of the document, clearly surfaced. One could claim that arguments against the doctrine of implied powers were little more than the Antifederalists' last hurrah, but as White reminded his fellow delegates:

> This was the ground on which the friends of Government supported the Constitution....and I venture to say it could not have been supported on any other. If this principle had not been successfully maintained by its advocates in the convention of the State from which I came, the Constitution would never have been ratified.[62]

White even referred to the transcript taken at the Virginia convention to support his argument, thus implicitly supporting the contention that the Ratifiers' understanding should remain binding. Significantly, no one argued against this intentionalist argument of referring back to the ratifying conventions or the arguments of Publius. Perhaps Madison could be interpreted as having supported the doctrine of implied powers and an evolutionary conception of meaning because he opposed resolving the question through a constitutional amendment. On the other hand, this conclusion would surely have led to quick demise of the federal government. Should Congress have stopped their construction of the executive branch and set the precedent of going to the people to resolve all "omitted" constitutional questions? All the members of Congress agreed that the power of dismissal was absolutely necessary, and virtually everyone believed the power must be exercised either by the President exclusively, or by the President and the

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and state constitutions written before 1787. Thus, the thoroughly researched opinion can be cited as an excellent example of an originalist employing the intentionalist approach to constitutional interpretation.

Senate jointly. Even if the question had escaped the consideration of the Framers, did this issue truly warrant a constitutional crisis? The principle of popular sovereignty must, at times, give way to other considerations. Furthermore, Madison explicitly avoided the question of implied powers, and after the first day's debate, argued that the question was not discretionary but resolvable in reference to the system of separation of power.

The Bill of Rights

There has certainly never been a more tepid endorsement for legislation than Madison's contention that his proposal for a bill of rights would be "neither improper nor altogether useless."[63] Despite his decided lack of enthusiasm, Madison took a series of measures to insure that the First Congress propose a bill of rights. Both President Washington's inaugural address and the House's reply supported the idea. (Madison was the author of both.) Having thus secured the public endorsement of both the President and Congress, Madison then sifted through the 210 amendments that had been submitted by the state ratifying conventions,[64] winnowed the list down, and added one proposal of his own. This stipulated that "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." Finally, on June 8, Madison presented his plan to the House. After a select committee made some minor revisions, the House began considering the report in mid-August. It is clear that without Madison's leadership the "amendments would not have gained a hearing in the First Congress."[65] The Federalists viewed Madison's proposed amendments as unnecessary and a waste of

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[62] Annals of Cong. 1789, 514.

[63] Annals of Cong. 1789, 436; For general studies of the Bill of Rights and its background see Brant 1965; Dumbauld 1957; Rakove 1996 288-338; Rutland 1955; and Schwartz 1977. For a study of its legislative history see Bowling 1988. For analysis of Madison's role and motivations see Finkleman 1991; Leibiger 1993; Rakove 1990; Wilmarth 1989.

[64] A compilation of these amendments can be found in Dumbauld 1957, 173-205. For an analysis of their political and theoretical implications see Kenyon 1966.

time, while the Antifederalists saw them as a threat to their plan to return power to the states. The lack of support from both the Federalist majority and the Antifederalist minority explains why the House spent more time arguing over whether there was enough time to debate Madison's plan, than on considering the actual merits of the proposal. In the end, the most important House revision was an alteration of form. Madison had originally envisioned that his amendments would be incorporated directly into the Constitution rather than appended to it. When the Senate considered the plan, they dropped the amendment that Madison had authored, consolidated others, and in the end reported back a list of twelve amendments.[66] The House largely approved the Senate's changes and the twelve amendments were then sent to the states for their consideration.

I have already demonstrated that the Federalists handled the Framers' omission of a bill of rights by arguing that such a declaration of rights was "unnecessary" and even "dangerous."[67] Madison made few public pronouncements on the issue during the ratification debates and his statements were contradictory.[68] Madison's most complete contemporaneous explanation of his position is found in a letter to Jefferson dated October 17, 1788:

> My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission to be a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by

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[65] POM 12:57 (editorial note).

[66] There is unfortunately no record of the Senate debate. For a record from the House debates see either the *Annals of Congress* or Veit 1991.

[67] Federalist 84 513.

[68] At the Virginia Ratifying Convention Madison stated that "he would be the last to oppose" a declaration of rights, but he also argued that "a solemn declaration of our essential rights" was unnecessary, even possibly pernicious. JM speech of June 24, 1788, Jensen 10:1507.

> others. I have favored it because I suppose it might be of use, and if properly executed could not be of disservice.[69]

When Congress reacted to his efforts with inaction, delay, and outright scorn,[70] Madison became frustrated and at one point wrote to a friend that "the nauseous project of amendments had not yet been either dismissed or despatched."[71] Perhaps the reader wonders why Madison would have gone through so much trouble to secure congressional approval for a declaration of rights when he harbored such ambivalent feelings on the matter. The incongruity between Madison's words and his actions is best explained by his belief that he and the other Federalists were bound to honor their pledges to offer such a plan and that it would also be politically wise for them to do so. Madison had specifically promised to support a declaration of rights during his campaign, and he felt that by approving such a plan the Federalists could prove to the opponents of ratification that they were "sincerely devoted to liberty and a Republican Government."[72]

Although the debate over the Bill of Rights offers surprisingly little insight into original understanding of the proposed amendments, Madison's speeches in support of his proposed amendments strongly reinforce my contention that his constitutional theory was based on the principle of popular sovereignty. The debate provided a perfect opportunity to expound on the "inalienable" rights of the people. Yet there was only one right that Madison described as such, and this right is supported by the theory of popular sovereignty. Madison proposed that the following statement be included in a preface to the Constitution: "the people have an indubitable, unalienable, and indefeasible right to

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[69] JM to TJ Oct. 17, 1788, POM 11:297.
[70] Aedanus Burke even declared Madison's propsed amendments "were little better than whip-syllabub, frothy and full of wind, [and] formed only to please the palate." *Annals of Cong.* 1789, 745.
[71] JM to Richard Peters August 19, 1789, POM 12:347.
[72] Annals of Cong. 1789, 431-32.

reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution."[73] Even when he examined the right to jury trial, which he listed as one of the "great rights,"[74] and one of only three that he hoped to protect against state government infringement, Madison explicitly argued that it was a "positive right."[75] "Trial by jury," Madison explained, "cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of a community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[76] Madison not only refrained from describing the amendments as protecting inalienable rights, but also once again reiterated the importance he assigned to the constitutional understanding of the Ratifiers:

> I appeal to the gentlemen who have heard the voice of their country, to those who have attended the debates of the state conventions, whether the amendments now proposed, are not those most strenuously required by the opponents to the constitution? It was wished that some security should be given for those great and essential rights which they had been taught to believe were in danger. I concurred, in the convention of Virginia, with those gentlemen, so far as to agree to a declaration of those rights which corresponded with my own judgement, and the other alterations which I had the honor to bring forward before the present congress.[77]

Not only do Madison's arguments support the contention that he held a positive law conception of the law, but there is also evidence that it is a mistake to point to his opposition to the national bank as the defining moment in his break from the Federalists. It was during the debates over the Bill of Rights, not the national bank, that Madison first publicly abandoned Federalist arguments concerning the doctrine of implied powers. The reader will recall that during the ratification debates, the Federalists had claimed that a

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[73] Annals of Cong. 1789, 434.
[74] *Ibid.*, 436.
[75] *Ibid.*, 437.
[76] Ibid., 437.

declaration of rights would not only be "unnecessary," but even "dangerous."[78] They argued that civil liberties would not be threatened under a government of delegated powers, and that "the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union."[79] Madison, in a speech delivered on June 8, abandoned this Federalist argument on which other members of Congress were still relying:

> I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been supposed. It is true, the powers of the General Government are circumscribed, they are directed to the particular objects; but even if Government keeps within those limits; it has certain discretionary powers with respect to the means, which may admit a abuse to a certain extent...because [of the Necessary and Proper Clause]....Now, may not laws be considered necessary and proper by Congress...which...in themselves are neither necessary nor proper....I will state an instance, which I think in point, and proves that this might be the case. The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature; may not general warrants be considered necessary for this purpose.[80]

By admitting that the federal government's implied powers could be abused and civil liberties violated, Madison contradicted the standard Federalist arguments concerning both the bill of rights and the "necessary and proper" clause. He was acknowledging the legitimacy of Antifederalists' fears and staking a middle ground between their warnings that the implied powers of Congress were vast and limitless, and the Federalists' claims that no abuses of power were possible.

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[77] Speech August 15 1789, POM 12:341-42.
[78] Federalist 84 513.
[79] Wilson 1993, 63-64.
[80] Annals of Cong. 1789, 438.

Discrimination, Assumption, and the National Bank

Madison had not only been on the winning side of the first two constitutional debates, he dominated the first session of the First Congress so completely that he became known as the "first man" of the House.[81] However, during the First Congress' next two sessions, Madison found himself unsuccessfully opposing a legislative agenda that had been advanced by the Secretary of the Treasury, Alexander Hamilton. Immediately before the second session convened in January 1790, Hamilton submitted his "First Report on Public Credit," which "laid out a breathtaking scheme for funding the public debt," and provided that the federal government would assume not only the foreign and domestic debt but also the state Revolutionary War debts.[82] When the third session began in December 1790, Hamilton submitted his second report, which called for the establishment of a national bank. Hamilton's plans led to three interrelated debates that divided Congress along sectional and ideological lines.

The first of the three disputes over Hamilton's plans involved the question of whether to discriminate between the present holders of the public debt and the original holders, many of whom had sold their securities at a fraction of their face value. Although the debate over discrimination only involved policy considerations, Madison's opposition is seen as marking the beginning of his break from the Federalist party. A number of scholars, including E. James Ferguson, noting that Madison had opposed the idea when it had been proposed in 1783,[83] have argued that Madison "completely reversed his former position" on the issue of discrimination and have concluded that his

[81] Fisher Ames to George Minot, May 31 1789, *Ames* 1854, 1:35. Quoted in POM 12:53.
[82] POM 13:xvii (editorial note).
[83] While serving in the Continental Congress Madison had chaired a committee that issued a plan for restoring public credit that specifically rejected discrimination.

opposition was "probably a tactical maneuver....dictated by political expedience."[84] Madison attributed his change of heart to a number of factors including different circumstances, the "outrageous speculations on the floating paper,"[85] and most importantly, his desire to justly compensate the many soldiers who had sold their certificates for a mere fraction of their nominal value. He countered Hamilton's plan with a proposal for giving the highest market price that had prevailed to the present holders and the remainder of the nominal value to the original holders. Even if political considerations did play a part in Madison's argument, it is difficult not to sympathize with the plight of the army veterans. As Madison was surely aware, many Virginian army veterans had sold their certificates for forty, even thirty three per cent of their nominal value.[86] It was, as Madison noted, "a great and extraordinary case."[87] Perhaps the other members of the House simply disagreed with Madison or maybe they believed that the practical considerations involved with his proposal would prove insurmountable. In any event, Madison's motion for discrimination was defeated by a 36-13 vote. Congress next considered Hamilton's proposal that the federal government assume the debts of the individual states.

The assumption debate, which was closely linked to the establishment of the nation's credit, was the most important issue during the First Congress' second session. Although constitutional objections were raised by some, Madison formulated his arguments on the grounds of expediency. Madison undoubtedly believed that Hamilton's

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[84] Ferguson 1961, 297-99; also see Bowling 1972; and McDonald 1979, 171-176, 199-201. Madison's biographers have offered a considerably more sympathetic portrayal of his motivations. See Brant 1941-61 2:217, 3:300; and Ketcham 1990, 311-12, 314-315.
[85] Adair 1945, 204-205
[86] McDonald 1979, 172.
[87] POM 13:49.

plan "would bear particularly hard on Virginia" because the state had already faithfully discharged a considerably portion of its obligation.[88] However, Madison's critics, including McDonald, have argued that he led the fight against assumption as part of a larger strategy to attack the most vulnerable parts of Hamilton's plans in order "to engineer....[a] political trade," and ensure the location of the federal capital on the Potomac river.[89] The history behind the Compromise of 1790 is still debated,[90] and though the "paucity of documentation makes it impossible to reconstruct the tangled web of political maneuvering that ended so happily in compromise,"[91] some type of bargain was eventually reached that linked the passage of assumption with the location of the federal capital. The agreement, which may have been engineered by Hamilton and Madison at Jefferson's dinner table,[92] secured the passage of the assumption bill for the North and, in return, the South was promised that the North would not interfere with plans for the establishment of the nation's permanent capital on the Potomac.[93] The capital, according to the agreement, would temporarily remain in Philadelphia for ten years. The many mysteries behind the Compromise of 1790 make it impossible to establish whether it was linked to the debate over the incorporation of a national bank as some historians claim. The fullest attempt to establish a connection between the two issues is found in Bowling's "The Bank Bill, the Capital City and President

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[88] JM to Edmund Pendleton March 4, 1790 POM 13:86.
[89] McDonald 1979, 175.
[90] Cooke 1970; Bowling 1971; and Cooke 1971, 640-648. Madison's role in the bargain is particularly difficult to reconstruct. As the editors of the Papers of James Madison noted, "The only surviving evidence in [Madison's] papers that explicitly links location of the national capital with the proposal to assume the state debts is a [rather cryptic] note from fellow Virginian Josiah Parker." POM 13:245.
[91] POM 13:243 (editorial note).
[92] PTJ 17:205-208. Because this memorandum is the only surviving record left by the three participants, it is impossible to prove that the dinner produced more than just scintillating conversation.
[93] The assumption bill was also modified to the financial benefit of Virginia.

Washington."[94] Bowling argues that after the second session of Congress adjourned the Southerners became "insecure about obtaining their part of the bargain," and that Virginians, in particular, "feared that something would happen during the [intervening] decade to prevent or retard removal from Philadelphia."[95] Bowling claims that when the Virginians returned for the third session not only did they hear Pennsylvanians claim that it would be robbery to deny the permanent capital to Pennsylvania, but

> [t]he more they thought about it, the more certain they became that the bank would act to anchor Congress at Philadelphia. They reasoned by 1800 the bank would be so entrenched in Philadelphia's financial world that its leaders would desire to remain and would use their political power in conjunction with that of the Potomac's site's other enemies to prevent removal southward.[96]

Although it would be a mistake to analyze Madison's constitutional arguments against the national bank without acknowledging the political considerations that were possibly involved, it is exceedingly difficult to gauge their importance. Not only is the historical record incomplete, even Madison may not have realized whether his arguments had become corrupted. As he once so famously observed, "[a]s long as [a] connection subsists between [man's] reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves."[97] However, should we assume that Northerners were any less self-interested than Southerners?

Benjamin B. Klubes has closely examined the contemporaneous evidence that Madison fashioned his constitutional arguments against the bank according to political

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[94]Bowling 1972, 59-71.
[95] Bowling 1972, 60. Virtually the same argument can be found in McDonald 1979. For more sympathetic portrayals of Madison, see Banning 1995, 328-330; Brant 1950 3:331-31; and Ketcham 1990, 321-22.
[96] Bowling 1972, 61.
[97] Federalist 10 78.

considerations and observed that "almost every assertion of a connection between the capital and the bank by southerners came from northern members."[98] Klubes argues that those who claim that Madison's motivations are best explained by self-interest place entirely too much weight on the single issue of the capital. Indeed, the debate over the bank continued to rage years after Madison had moved his belongings out of the White House and retired from politics.[99] The dispute clearly involved more than just conflicting political considerations: it pitted opposing ideological beliefs.

Over the past thirty years, historians have debated the "Ideological Origins of the American Revolution."[100] It has been argued that the founding generation was united by its belief in Lockean liberalism,[101] that humanistic republicanism was dominant,[102] and that a struggle between the two ideological camps was waged before,[103] during,[104] and after the war with England.[105] J.G.A. Pocock has argued that the founders were divided into two groups, the believers in commercial and historical progress, "the court" thinkers, and the "country" party that was united by a fear of corruption and historical decline.[106] Although wading into these treacherous waters threatens to steer our inquiry off course, it is clear that Madison and Jefferson's opposition to Hamilton, especially Jefferson's deep

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[98] Klubes 1990, 33. Bowling's argument has apparently determined McDonald's interpretation of the events. McDonald claims that "Jefferson and Madison were more or less indifferent to the matter of the bank as such, but they had become alarmed over a tangential implication of its creation. When they first arrived in Philadelphia, they were shocked to hear the Pennsylvania members of Congress declare openly "that they never intended to aid in a removal" of the capital to the Potomac....placing the Potomac was an object dear to the Virginians' hearts, and Madison had had a sizable financial stake in the objective." McDonald 1979, 199-200.

[99] It should also be remembered that although Madison is accused of using all three issues - discrimination, assumption, and the national bank - to engineer the transfer of the national capital to the Potomac, the only constitutional objections he raised were against the bank.

[100] Bailyn 1967.

[101] See Hartz 1955 and Hofstadter 1948.

[102] See Pocock 1975.

[103] See Bailyn 1967

[104] Wood 1969.

[105] Banning 1978.

personal hatred, was rooted in conflicting ideological visions of the nation's future course. Hamilton's dreams of an American empire built upon the riches of commerce and manufacturing collided head on with what Richard Hofstadter has called the "The Agrarian Myth." As Hoftstadter explains, the War for Independence appeared "to many Americans as the victory of a band of embattled farmers over an empire, [and it] seemed to confirm the moral and civic superiority of the yeoman, [and it made] the farmer a symbol of the new nation." This agrarian myth eventually became entwined with "patriotic sentiments and republican idealism."[107] As Joseph Ellis more recently noted, while Jefferson articulated this vision,[108] "Madison implemented the tactics."[109] Perhaps the conflict between Publius' alter egos is best explained by the conflicting theories of human nature and history that divided the "country" and "court" parties. As Michael Lienesch has noted:

> Although today it seems hard to conceive, eighteenth-century Americans did not all believe in progress. Indeed, by education and inclination, they were predisposed to hold that history, far from progressing upward, followed a downhill course of degeneration and decay.[110]

While Hamilton presented the bank as providing an engine of progress and prosperity, Madison believed that it would threaten to unleash the destructive forces of self-interest and hasten the inevitable demise of the American republic.[111] Perhaps, the

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[106] Pocock 1972.
[107] Hofstadter 1955, 28.
[108] In "Notes on Virginia" Jefferson eloquently summarized his pastoral dream, which was closer to fantasy than ideology, in his "Notes on the State of Virginia": "Those who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit of genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth." His fear of commerce and city life is expressed in the same paragraph, "The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body." (Jefferson 1993, 259-260.)
[109] Ellis1998, 145.
[110] Lienesch 1988, 40.
[111] For a comparison of Hamilton's optimism versus Madison's pessimism, simply compare their initial contributions to *The Federalist*, numbers 1 and 10, respectively. In 1, Hamilton looks towards the future,

clearest expressions of Madison's pessimistic historical outlook are found in his Malthusian analysis of population growth:

> There is one indelible cause....of pressure on the condition of the labouring part of mankind; and that is, the constant tendency of an increase of their number, after the increase of food has reached its term. The competition for employment then reduces wages to their minimum and privation to its maximum."[112]

Although our focus has been on ideology not psychology, a belief in the inevitability of historical decline would lead to the originalist position. Perhaps Madison defended the original understanding of the Constitution because he shared Jefferson's fear that, "From the conclusion of this war we shall be going down hill."[113] Certainly optimism is a characteristic rarely attributed to Madison. And, it also follows that faith in historical progress would serve to reinforce a belief that the law ought to change and evolve along with society.

If the national bank did indeed touch upon these deeply rooted ideological and psychological beliefs, it would explain why the issue became such a watershed moment in this nation's history. It helped lead to the split of the Federalist party and the formation of the Democratic-Republicans; it remained the most hotly contested constitutional question until the Civil War and it produced the most important decision ever handed down by the Supreme Court, *McCulloch v Maryland.* The debate not only encompassed conflicting political considerations, ideological beliefs, and psychological outlooks, but it also directly touched upon the most contentious issue of the period and

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and argues that by ratifying the Constitution Americans will forever establish that men are capable of establishing government from "reflection and choice." Madison, on the other hand, focuses on "the mortal diseases under which popular governments have everywhere perished," factions. *Federalist* 1 33 and *Federalist* 10 77.

[112] JM to N.P. Trist, April 1827, Quoted in Ketcham 624.

[113] Jefferson's *Notes* in Jefferson 1993, 257. (Although Jefferson clearly had a pessimistic streak, it he was also an incredible optimist. The best attempt to unravel his many contradictions is found in Ellis 1998.)

the most long-lasting source of conflict in our political system: the demarcation between state and federal authority. The dispute over the bank is often treated today as if it were foreordained, and McDonald has unequivocally argued that "[I]n rising as a champion of the doctrine of strict construction, Madison contradicted himself."[114] However, the question of a national bank was raised during the First Congress when the government was so new that every action set a precedent and every major decision created a landmark principle. At the time Madison admitted to Jefferson that he felt as if the men elected to serve in Congress were "in a wilderness without a single footstep to guide us."[115] Hindsight offers the illusion that the division of power between the two levels of government was more clearly demarcated than it actually was, and the powers that the national government exercises today makes the debate over the national bank appear almost quaint in retrospect. Yet, we must remember the significance that the participants attached to the question and that the outcome was always very much in doubt. President Washington was so undecided whether the bank was constitutional that he had Madison draw up a veto message and signed the bill only at the last possible moment.

Hamilton submitted his plan for the bank on December 23, 1790.[116] He argued that the bank offered three principal advantages: it would provide for the augmentation of the active or productive capital of the country; it would allow for greater facility in obtaining pecuniary aids, especially in emergencies; and it would facilitate the payment of taxes. The bill went first to the Senate, and the House received it on January 21, 1791.

The proponents of the bank offered at least three arguments in favor of its constitutionality. They argued that there were a number of clauses from which the power

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[114] McDonald 1979, 201.
[115] JM to TJ June 30, 1789, POM 12:268.

to incorporate a bank as "necessary and proper" could be deduced, including the powers to tax, spend, borrow money, and regulate trade.[117] Secondly, it was asserted that the existence of implied powers were generally necessary for the effective functioning of the Constitution,[118] and it was also pointed out that the Bank of North America had been instituted by the Continental Congress and that the new government had powers at least equal to those of the old.[119] Its opponents offered a number of arguments against the bank including the charges that it created a monopoly,[120] that the benefits of the bank would be local and partial,[121] and that the twenty year charter was far too long.[122] However, the real question was simply whether the Constitution grants Congress the authority to incorporate a national bank.

The bank bill was read three times before Congressman Jackson raised the first constitutional objection on February 1. A short debate ensued over whether the time for raising such objections had already passed, but the next day the discussion quickly resumed. Madison began the February 2 proceedings by offering an ostensibly disinterested analysis of the advantages and disadvantages of banks. Then he got to the heart of the matter. Madison claimed that "from the date of the Constitution," he believed that the Congress did not have the power to incorporate a national bank because "he well recollected that a power to grant charters of incorporation had been proposed in the General Convention and rejected."[123] Having thus relied upon his personal

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[116] *Annals of Cong.* 1791, 1875, 1890-1960, covers the House debate on the bank bill.
[117] *Ibid.*, 1892 (statement of Rep. Lawrence); 1904-1907 (statement of Rep. Ames).
[118] *Ibid.*, 1904-1907 (statement of Rep. Lawrence).
[119] *Ibid.*, 1892 (statement of Rep. Lawrence).
[120] *Ibid.*, 1892 (statement of Rep. Jackson).
[121] Ibid., 1892 (statement of Rep. Tucker).
[122] This issue was the most contentious issue in the Senate and led to an amendment to limit the bank's charter to 1801 instead of 1811. Senate, *Annals* of Cong. 1791, 1738-48.
[123] *Ibid.*, 1896.

recollection of events to establish the Framers' original understanding, Madison then supported his intentionalist argument with a structural analysis of the Constitution and "the peculiar manner in which the [power of] the Federal Government is limited"

> It is not a general grant out of which particular powers are excepted; it is a grant of particular powers only, leaving the general mass in other hands. So it had been understood by its friends and its foes, so it was to be interpreted.[124]

Madison was reminding congressmen that the Federalists had repeatedly argued, especially in reference to the debate over the Bill of Rights, that the powers of the federal government are defined "not from tacit implication, but from the positive grant expressed in the instrument of the union."[125] Then, anticipating that the central point of contention in the bank debate over the coming decades would be how to interpret the Constitution and particularly the necessary and proper clause, Madison proceeded to enunciate his rules of constitutional interpretation. Although this speech constitutes Madison's first systematic analysis of the subject, as we have already noted, his critics claim that his argument contradicted what he had previously advocated as a member of the Continental Congress and as a propagandist in *The Federalist*.

The reader will recall that I have termed the precise dictates of the Constitution "rules," and the more vague commands, "standards." Madison began his argument on constitutional interpretation by acknowledging that these two types of clauses demand different approaches to interpretation: "Where a meaning is clear, the consequences, whatever they may be, are to be admitted – where doubtful, it is fairly triable by its consequences." As we have seen, Madison had previously recognized that the Constitution contains uncertainty, and he now claimed that when the constitutional

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[124] *Ibid.*,

meaning is unclear and disputes arise, "the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide." "Contemporary and concurrent expositions," Madison asserted, "are a reasonable evidence of the meaning of the parties."[126]

This argument, which so clearly parallels the position of originalists today, is entirely consistent with what Madison had advocated in the past. Although Madison had previously anticipated that some constitutional uncertainty would be resolved in the daily operations of government, he certainly never questioned the propriety of referring back to the original understanding of the founding charters to establish constitutional meaning. Madison had already cited the "poisonous tendency of precedents of usurpation"[127] in his opposition to the first national bank in the early 1780s, and he had fought for his Bill of Rights amendments less because he personally supported them than simply because he wanted to fulfill promises made to the Antifederalists. In both of these issues, Madison's position was largely determined by his perception of the original understanding.

Continuing his two pronged -- intentionalist/structuralist -- attack, Madison next examined the specific case at hand and his opponents' claim that the bank was a necessary and proper exercise of Congress' power to tax and borrow money. Madison noted that the bill laid "no tax whatever," and was not created to borrow because it did "not borrow a shilling."[128] The question that the bank raised, Madison explained, was the extent of Congress' implied powers. Madison first compared the extent of implication

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[125] Wilson 1993, 63-64.
[126] *Annals of Cong.*, 1791, 1896.
[127] JM to Edmund Pendleton Jan. 8, 1782, POM 4:23.
[128] *Annals of Cong.* 1791, 1897.

that the bank bill demanded, with the level of specificity used in the powers delegated to Congress.

> Congress have the power to "regulate the value of money;" yet is expressly added, not left to be implied, that counterfeiters may be punished.
>
> They have the power "to declare war," to which armies are more incident than incorporating banks to borrowing; yet the power to "raise and support armies" is expressly added...
>
> The regulation and calling out of the militia are more appertinent to war than the proposed Bank to borrowing; yet the former is not left to construction.
>
> The very power to borrow money is a less remote implication from the power of war, than an incorporated monopoly Bank from the power of borrowing; yet, the power to borrow is not left to implication.[129]

"The latitude of interpretation required by the bill," Madison concluded, was "condemned....by the Constitution itself," as well as by the arguments that had been offered in support of its ratification. As Madison noted, "[t]he explanations in the State Conventions all turned on the same fundamental principle.... that the terms necessary and proper gave no additional powers to those enumerated." Madison then proceeded to read "sundry passages from the Debates of the Pennsylvania, Virginia, and North Carolina Conventions."[130] Having concluded that the bank violated both the structure of the Constitution and the original understanding of the Ratifiers, Madison asked,

> With all this evidence of the sense in which the Constitution was understood and adopted, will it not be said, if the bill should pass, that its adoption was brought about by one set of arguments, and that it is now administered under the influence of another set?[131]

Although I am less interested in defending Madison's opposition to the bank, than in demonstrating that his mode of interpretation was consistent with previously stated

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[129] *Ibid.*, 1899

[130] *Ibid.*, 1901 Madison even noted that even though the integrity of the records could be questioned and specific arguments and statements may have been incorrectly recorded, "the complexion of the whole," coincided with the memory of "what he himself, and many others must recollect." *Ibid.*,

principles and positions, an examination of the former question serves to demonstrate the extent to which the founders failed to establish an "interpretive intent." The reader will recall that Madison read from the records of the state ratification conventions to establish what had been the understanding of the Ratifiers on the issue, but that he also noted parenthetically that "a power to grant charters of incorporation had been proposed in the General Convention and rejected."[132] Now, if constitutional authority rests on the consent of the governed, the understanding of what the governed believed that they had consented to is what should remain legally binding. In fact, as previously noted, Madison had argued that the Framers had not exceeded their legal authority to revise and amend the Articles of Confederation because their plan for a new government was "merely advisory and recommendatory," and the proposed Constitution "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."[133]

Yet even if the understanding of the Framers is not binding, their debate over this issue, as Madison knew, offers considerable support to his argument. When Madison told Congress that he could remember that "a power to grant charters of incorporation had been proposed in the General Convention and rejected,"[134] he failed to mention that it was he who had in fact authored the proposal. It had been referred to the Committee on Detail on August 18, 1787, and provided for a power "to grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent." However, that committee did not report an incorporation resolution

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[131] *Ibid.*,
[132] *Ibid.*, 1896.
[133] Federalist 40 252.
[134] *Annals of Cong.* 1791, 1896.

back to the convention. On September 14, Franklin suggested that Congress be granted the authority "to provide for cutting canals where deemed necessary," and Madison then introduced a motion that Congress be authorized "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." Madison's "primary object" in offering the proposal was "to secure easy communication between the States which the free intercourse now to be opened, seemed to call for." [135] In other words, he viewed it as facilitating not the incorporation of banks, but the building of canals.

This proposal was opposed by Rufus King, who found it to be not only "unnecessary," but likely to cause controversy in Philadelphia and New York where "[I]t will be referred to the establishment of a Bank, which has been a subject of contention in those cities." "In other places," King warned, "it will be referred to mercantile monopolies." [136] King was not arguing against Congress exercising these powers; he was simply resisting the idea of making such powers explicit. Wilson, who supported Madison's motion, argued that it would not cause contention because banks would not "excite the prejudices & parties apprehended," and he understood mercantile monopolies to be "already included in the power to regulate trade."[137] Mason, a future leader of the Antifederalist cause who refused to sign the Constitution, responded to Wilson's remark by stating that "[h]e was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson." He suggested that the proposal be limited to "the single case of Canals." [138] The Convention

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[135] Koch 1966, 638. For analysis of this debate see Levy 1988, 7-9 and Klubes 1990, 29-33.
[136] Koch 1966, 638.
[137] *Ibid.*
[138] *Ibid.*

then voted down this modified version of Madison's proposal. If the positions of King, Wilson, and Mason were representative of other delegates, then Madison's proposal was defeated because some delegates believed that the power of incorporation was already implied by other provisions and that making the power explicit would excite opposition, while other members neither understood Congress to have the power nor wished it to be granted. Perhaps the most interesting aspect of this brief debate is the duplicitous implication of King's argument. He never stated that he was against the power of incorporation, but only that it was "unnecessary" and likely to generate opposition. His claim that opposition could be avoided by not making the power explicit is an argument for deception. When the national bank was later proposed by Hamilton, King did indeed vote for it.

A second example that illustrates how the Framers held very conflicting understandings of the extent of Congress' implied powers is found in their debate over the "Necessary and Proper" clause. The words "necessary and proper" first appeared in Wilson's "fourth and decisive" draft of the Constitution for the Committee on Detail. After the clause was read to the general convention, Madison (and Pinkney) moved to insert "and establish all offices" between the words "laws" and "necessary," but four delegates urged that the amendment "could not be necessary."[139] Here again, Madison had moved to make the powers of Congress more explicit only to be told that such specificity was "unnecessary."

Did the Framers understand that Congress would have the power to incorporate a national bank? Some probably did, some probably did not. Madison's critics contend that in *Federalist* 44 he "enunciated the doctrine of implied powers," and thus anticipated

that Congress could exercise such powers as incorporation.[140] However, *Federalist* 44 is less an argument for the doctrine of implied powers, than another analysis of the difficulties involved in framing a constitution. Just as Madison explained that it was impossible precisely to delineate federal and state jurisdiction in *Federalist* 37, Madison argues in *Federalist* 44 that it is was not possible to make a comprehensive list of Congress' powers. Referring to the Antifederalist objections to the "necessary and proper clause," Madison asks, "have they considered whether a better form could have been substituted?"[141] He then proceeds to list the "four other possible methods which the Convention might have taken on this subject," and points out that they all are even more objectionable. However, it is possible to ignore the context of the argument and cite the following passage:

> No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.[142]

Madison's next essay, Federalist 45, demonstrates that it would be a mistake to read too much into this single sentence. In 45 Madison offers a more complete analysis of Congress' powers:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in ordinary course of affairs, concern the lives, liberties,

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[139] *Ibid.*, 489. The four delegates were Morris (Gouverneur), Wilson, Rutlidge, and Elseworth.
[140] McDonald 1979, 201.
[141] *Federalist* 44 284.
[142] *Ibid.*, 285

> and properties of the people, and the internal order, improvement, and prosperity of the State.[143]

Even if we focus solely on the former passage and ignore the latter, as well as Madison's prior opposition to the first national bank, his arguments for more explicit powers in the Constitutional Convention, and his admission during the Bill of Rights debate that the doctrine of implied powers could lead to an abuse of power, it is still far from clear that Madison's opposition to the Bank was contradictory. Madison's argument against the bank was that it was not being used as a means to implement any of the enumerated powers. "It laid no tax whatever," and was not created to borrow, because it did "not borrow a shilling."[144] The problem, according to Madison, was that the bank was not "an accessory or subaltern power, to be deduced by implication; it was in its nature a distinct, an independent and substantive prerogative, which not being enumerated in the Constitution, could never have been meant to be included in it, and not being included, could never be rightfully exercised."[145] Madison did not argue against the existence of implied powers. His argument was that the power of incorporation was a general and not a particular power, and, therefore, it needed to be explicitly granted. Madison feared that passing the bill would be tantamount to "levelling [sic] all the barriers which limit the powers of the General Government, and protect those of the State Governments."[146] An assessment of Madison's prediction will be offered, when I examine *McCulloch v Maryland.* I must first conclude my examination of whether Madison offered a novel approach to constitutional interpretation in his opposition to the bank.

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[143] *Federalist* 45 292-93.
[144] *Annals* of Cong. 1791, 1897.
[145] *Ibid.*, 1900

Perhaps the strongest evidence in support of my contention that the early American understanding of constitutionalism incorporated clashing constitutional paradigms is the fact that in this debate, the founders' first extended analysis and debate on the subject of constitutional interpretation, the call for a return to the original understanding was rejected by those who specifically urged the adoption of the common law approach to statutory interpretation. On one side were those who argued for a mode of constitutional analysis based upon the principle of popular sovereignty, and on the other were those who urged the adoption of Blackstone's rules of statutory interpretation.[147]

It is uncanny how closely the bank dispute parallels today's originalist debate. The discussion not only centered on whether constitutional meaning was to remain fixed or to evolve with the passage of time, it was even argued that the originalist position is unviable. Fisher Ames contended that "[t]heir rules of interpretation by contemporaneous testimony, the debates of Conventions, and the doctrine of substantive and auxiliary powers, will be found as obscure, and of course as formidable as that which they condemn; they only set up one construction against another."[148] And, Gerry warned against relying upon Madison's recollection: "This would be improper because the memories of different gentlemen would probably vary, as they had already done, with respect to those facts; and if not, the opinions of the individual members who debated are not to be considered as the opinion of the Convention."[149]

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[146] *Ibid.*, 1902
[147] *Ibid.*, 1998-2002.
[148] *Ibid.*, 1905
[149] *Ibid.*, 1952.

The fact that even the "Father of the Constitution" confronted methodological hurdles in 1791, when he attempted to reconstruct the Constitution's original understanding should certainly give pause to originalists today. Even if what Madison advocated was impractical, those who urge that his argument was more novel than his opponents, must recognize that the bank's biggest defender in the House was none other than the old Antifederalist leader, and one of the three men who refused to sign the Constitution, Elbridge Gerry. It was Gerry who quoted Blackstone to support a loose construction of the Constitution and the doctrine of implied powers. Madison, clearly exasperated, noted that in 1787, Gerry had "said the powers of the Constitution were...dark, inexplicable, and dangerous; but now, perhaps as the result of experience, they are clear and luminous."[150]

Was Gerry's common law approach to constitutional interpretation really more consistent with what had been argued during the ratification debates? Compare the last of the five rules of statutory construction that Gerry quoted from Blackstone's *Commentaries* with Hamilton's argument in *Federalist* 81: Gerry - "[T]he most universal and true meaning of a law, when the words are dubious, is by considering the reason and spirit of it,"[151] and Hamilton - "there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution."[152]

The debate over the bank, the third constitutional debate of the First Congress, marked the third time that Madison was accused of advancing a politically inspired constitutional theory. Yet even if Madison's constitutional arguments coincided with his

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[150] *Ibid.*, 1958.
[151] *Ibid.*, 1950.

political interests, it would be unfair to assume that the latter necessarily determined the former. The fact that Gerry suddenly converted to the Federalists' side strongly indicates that political considerations were involved on both sides of the dispute. Hamilton once said that Madison broke from the Federalists due to his "expectation of popularity, and possibly by the calculation of advantage to the State of Virginia."[153] Yet the records of the Constitutional Convention, and particularly King's argument against including the power of incorporation, supports Madison's contention that

> Colonel H. deserted me...from his wishing to...administer the Government...into what he thought it ought to be, while, on my part, I endeavored to make it conform to the Constitution as understood by the Convention that produced and recommended it and particularly by the state conventions that *adopted* it.[154]

The Jay Treaty

The first Congress was marked by three historical constitutional conflicts; the next great debate would not occur for another four years. We can only speculate whether there was any connection between the sudden absence of constitutional controversy and the entrance of Dolly Payne Todd into Madison's life during this period. All that can be said with any certainty is that in September 1794, Madison entered into a union that would last just one year shy of the forty-three that he had already lived. And, in March 1795, Madison was re-elected to Congress for the fourth time.

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[152] *Federalist* 81 482.

[153] Hamilton 1961- 11:514-515. For contemporary scholars who agree with this interpretation, see McDonald 1979, 198-200, and Bowling 1972.

[154] Farrand, 1937 3:533-34. It should be noted that some scholars including Adair 1944; and Mason 1952 claim that the split between Madison and Hamilton can be traced as far back as their collaboration on the *Federalist*, and that "the two statesmen's radical divergence on what constituted good government gave Publius truly a split personality." (Adair 1974, 55.) However, this thesis was convincingly refuted by Cary 1984. Indeed, the fact that Madison and Hamilton argued over who abandoned whom supports Carey's argument that "whatever plausibility" Adair and Mason's arguments have, "would appear to derive from the differences between Hamilton and Madison over matters political, economic, and otherwise that arose either before or after ratification." (Carely 1984, 18-19)

Perhaps the greatest weakness in the claim that Madison offered a "bogus"[155] or "formulated" a new approach to constitutional interpretation[156] when he opposed the national bank is that during the next great constitutional debate – the dispute over the Jay Treaty – it was the Federalists who made the strongest appeals for a return to the original understanding of the Constitution. The Jay Treaty first reached Philadelphia after the Third Congress had adjourned, but President Washington who was anticipating its arrival, had called for a special session of the Senate. Thus Madison, who had just finished his third congressional term, was with Mrs. Madison in Montpelier when the Treaty was ratified by the Senate and signed by the President. Republicans opposed the Jay Treaty because in their view not only did it make too many commercial concessions to the English, but it also repudiated the Franco-American alliance that had been forged during the Revolutionary War.[157]

Even though the Republicans had won a majority of the House seats in the Fourth Congress, they were clearly in a weak position to oppose the treaty. Not only had it already been ratified and approved, but also the Constitution clearly grants no role to the House in the treaty-making process. The Republicans began their attack by requesting that the President lay before the House a copy of Jay's instructions "together with the correspondence and other documents relative to the said Treaty."[158] Their rationale was

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[155] McDonald 1979, 198.
[156] Powell 1985, 923-24.
[157] Perhaps the two most respected works on the Jay Treaty are Bemis 1962 Combs 1970. The "more balanced consensus of posterity," according to at least one historian, "is that the Jay Treaty...avoided a war with England at a time when the United States was ill prepared to fight one....effectively postponed the Anglo-American conflict....until 1812, when America was economically stronger and politically more stable...and it linked American security and economic development to the British fleet, which provided a protective shield of incalculable value throughout the nineteenth century." Ellis 1998, 189.
[158] *Annals* of Cong. 1796, 426 (Statement of Rep. Livingston)

that the House's participation in the treaty-making process was required when the treaty created an obligation to appropriate funds.

The House debate lasted an entire month, from March 7 to April 7. Reading the "357 closely printed columns of the *Annals*"[159] that were produced by this "marathon ordeal,"[160] has clearly tried the patience of more than one historian. Fortunately, there is no reason to examine these debates with the same degree of attention to detail that I have applied to first three debates because even Madison's strongest critics concede that the "originalist interpretation....appears to have become legitimate by the winter of 1796," and that it was during the Jay Treaty debates that "Madison delivered a speech which can be cited as a definitive early statement of the theory that the original understanding of the Ratifiers of the Constitution can indeed provide an essential guide to its interpretation."[161] Ironically, however, it was during the Jay Treaty that Madison offered his most disingenuous constitutional argument since his "Memorial and Remonstrance" defense of religious freedom in 1784.

Although his constitutional arguments during these debates demonstrate that Madison's interpretation of the Constitution was not always immune to political considerations, they also illustrate that Madison was both a reluctant and an inept propagator of sophistical arguments. Madison refused "to enter into the newspaper wars raging over the treaty throughout the summer and fall of 1795," and his cautious tactics during the Fourth Congress led other Republicans to question his "lukewarm

[159] Badde 1991, 1014.
[160] POM 16: 145.
[161] Rakove 1996, 342.

patriotism."[162] In fact, historians tend to agree that Madison generally opposed the Republican strategy of raising a constitutional objection.[163]

Madison's discomfort during these debates is best illustrated by comparing his speeches with those that he had offered against the bank. In his first speech against the bank, Madison had vehemently concluded his argument by proclaiming that it "was condemned by the silence of the Constitution; was condemned by the rule of interpretation arising out of the Constitution; was condemned by the expositions of the friends of the Constitution whilst depending before the public; was condemned by the apparent intention of the parties which ratified the Constitution; was condemned by the explanatory amendments proposed by Congress themselves to the Constitution; and he hoped it would receive its final condemnation by the vote of this House." [164] In the Jay Treaty, in his first substantial speech, instead of defending the House's treaty-making powers, Madison offered an abstract and convoluted analysis of how to interpret the Constitution when the powers of the different branches were in apparent contradiction. Even then, Madison meekly concluded his argument with the admission that it was "not perfectly free from difficulties," and that he would not enter any further into the subject because it "had been brought before the House rather earlier than he had expected, or than was perhaps necessary; and his observations, therefore might not have been as full, or as well digested as they ought to have been."[165]

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[162] The comment is attributed to Edward Livingston. See POM 16: 142 (editorial note).
[163] See POM 16: 144, and Rakove 1996, 358.
[164] *Annals of Cong.* 1796, 1901.
[165] *Ibid.*, 494.

The first stage of the Jay Treaty debates was marked, like the bank debate before it, by references both to Blackstone[166] and the state ratifying conventions.[167] Because the original understanding of the Constitution was in dispute and since he was sure that it had never been intended for the House to play a role in the treaty making process, William Vans Murray, who was a defender of the treaty, made a direct appeal to Madison to clear up the issue. Stating that it was his belief that "from one end of America to the other it [had been] taken for granted that this House had nothing to do in the making of Treaties," Murray "confessed himself extremely surprised that the gentleman from Virginia who was in that Convention...had not favored the Committee with the view which either they or others had taken of this important point in the Convention."[168] Murray's sarcastic words indicate that he had been unpersuaded by Madison's poorly digested and "not perfectly free from difficulties" speech:

> Would it not be desirable if there are doubts, if we wander in the dark, the gentleman should afford us light, as he has it in abundance? If the Convention spoke mysterious phrases, and the gentleman helped to utter them, will not the gentleman aid the expounding of the mysteries? If the gentleman was the Pythia in the temple, ought he not to explain the ambiguous language of the oracle?[169]

Murray mockingly proclaimed that there was "no man's expositions [that he] would listen to with more deference."[170] Not only did Murray make an explicit endorsement for returning to the original understanding of the Framers, he then noted

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[166] *Ibid.*, at 467 (statement of Rep. Gallatin); at 552 (statement of Rep. Holland); at 633 (statement of Rep. Livingston); at 647 (statement of Rep. Williams); at 705-710 (statement of Rep. Buck); and at 751-54 (statement of Rep. Harper.)
[167] *Ibid.*, 495 (statement of Rep. Smith); at 503 (statement of Rep. (Giles); at 524-27 (Statement of Rep. Sedgwick); at 566-73 (statement of Rep. Bourne); at 578-82 (statement of Rep. Brent); at 616-617 (statement of Rep. Tracy); at 604, 608 (statement of Rep. Lyman) at 667-68 (statement of Rep. Hillhouse); and at 734-37 (statement of Rep. Gallatin).
[168] *Ibid.*, 700-01 (statement of Rep. Coit)
[169] *Ibid.*, 701.
[170] *Ibid.*,

how fortunate Americans were for not having to rely on the common law approach to constitutional interpretation. As Murray explained, the American Constitution was a written document and not based on tradition:

> In the construction of other Constitutions, some formed by mere charters of privileges, others rising from practice, we find the historian and the commentator obliged, in the support of theory, to resort to records unintelligible, from a change of manners or to the uncertain lights of mere tradition. But, in construing our Constitution, in ascertaining the metes and bounds of its various grants of power, nothing at the present day is left for expediency or sophistry to new-model or to mistake. The explicitness of the instrument itself, the contemporaneous opinions still fresh from the recency [sic] of its adoption; the Journals of that Convention which formed it still existing, though not public, all tend to put this question in particular beyond the reach of mistake. [171]

Madison did not respond to Murray before the House approved the resolution calling for the President's papers and presented it to Washington on March 25. Not surprisingly, Washington rejected the request, noting that a motion to require treaties to be ratified by Law had been "considered by the Convention" but was "overruled."[172] Washington had been reminded of this fact by Hamilton, who is identified by at least one non-originalist as having "applied the traditional [common law] tools of statutory construction" in his approach to constitutional interpretation. [173]

Washington's noncompliance led to the second stage of the debate. Republicans continued to push the issue and Madison offered his second major address on April 6, again declining to develop a constitutional defense of the House's right to use its legislative powers to reject treaties. He chose instead to refute Washington's arguments and to fulfill Murray's request to shed his "abundant light" onto the House proceedings. Conceding that the records from the Constitutional Convention seemed to contradict his

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[171] *Ibid.*

[172] Washington to Hamilton, Mar. 31, 1796, Hamilton 1961-79, 20:100, as quoted in Ketcham 1966, 361-61.

position,[174] Madison attacked the idea of returning to the intent of the Framers as opposed to the Ratifiers:

> Whatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never be regarded as the oracular guide in expounding the constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the 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.[175]

The emphasis that Madison now placed on the Ratifiers, at least some of whom appeared to have anticipated the House's involvement in the treaty-making process, has been characterized by even supporters of Madison as marked "perhaps with as much ingenuity as plausibility,"[176] while his critics contend that there is "palpable evidence of inconsistency."[177] At the risk of sounding like an apologist for Madison, it would seem fair to note that his only prior violation of appealing to the authority of the Framers had been when he had, in his own words, "incidentally remarked" in the bank debate that a motion for the incorporation had been rejected by the Convention. Whether the Ratifiers' as opposed to the Framers' understanding should remain binding had never been an issue before the Jay Treaty. And, during the bank debate, Madison had not argued that the

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[173] Powell 1985, 923-24.
[174] The debate on the question occurred at the end of the day on August 23. The delegates were clearly rushing to finish their business and go home. So, once again, the records hardly provide a definitive explanation. Madison recorded the following: After Gouverneur Morris proposed that Treaties should be ratified by law, Madison "suggested the inconvenience of requiring a legal *ratification* of treaties of alliance for the purposes of war," and he later also "hinted for consideration, whether a distinction might not be made between different sorts of Treaties – Allowing the President & Senate to make Treaties eventual and of Alliance for limited terms – and requiring the concurrence of the whole Legislature in other Treaties" Koch 1966, 520-21.
[175] *Annals* of *Cong.* 1789, 776.
[176] POM 16: 147.
[177] Baade 1991, 1021.

framers' understanding should be taken over the Ratifiers' understanding, but only that the former seemed to confirm the latter, which was indeed the case.

Considering that the Revolutionary generation erected the world's first constitutional government, one might expect even constitutional luminaries to make an occasional theoretical *faux pas*. The emphasis that Madison placed on the ratifiers conformed perfectly with his argument that they were the sole source of constitutional authority in the Federalists and, as Donald Odell Dewey has noted:

> [Madison] continued to advocate the ratifying conventions as the prime source of constitutional studies long after he ceased to have any political motives for depreciating the Convention of 1787. In fact, if he had wanted to, he could have assumed Washington's position by expounding upon the Constitution Convention with the added assurance that no one could refute him, for Madison lived nearly four decades longer than Washington and several years longer than any other delegate, and he possessed the only reliable transcript of its proceedings.[178]

The Jay Treaty debate was the most "worrying & vexatious"[179] business that Madison said he ever encountered. He had served as the Republicans' "floor manager"[180] during the debate, and was observed by John Adams to look "worried to death. Pale, withered, haggard."[181] After the Republican party coalition fell apart and the day was lost, Madison told Jefferson that his only "consolation" was the effect the affair had "in riveting my future purposes."[182] Madison, after twenty continuous years in politics, retired when the Fourth Congress ended.[183]

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[178] Dewey 1971, 40.
[179] JM to TJ May 1 1796 POM 16: 343.
[180] Ellis 1998, 192.
[181] John Adams to Abigail Adams, April 28, 1796 as quoted in *Ibid.*, 193.
[182] POM 16: 343.
[183] Facing an opponent in the presidential election who had also once retired, President Adams cynically noted that "Mr Madison is to retire. It seems the Mode of becoming great is to retire. Madison I suppose after a Retirement of a few Years is to become President or V.P. It is marvellous (sic) how political Plants grow in the Shade." Adams' observation was not far off the mark. Even in his "retirement" Madison continued to help organize the Republican political party, by the winter of 1798 he was again writing

The last great battle between Madison, Jefferson and the Federalists raised the most momentous of questions: what should be done if the federal government violates constitutionally protected civil liberties? Although there is no doubt that the Alien and Sedition Acts were unconstitutional, Madison is attacked for having asserted that states can challenge unconstitutional federal actions because the same arguments, as the reader is undoubtedly aware, were later advanced by advocates of secession.

Historians have noted not only the "brutal high-handedness" of the acts, but, also, the "almost comic clumsiness, [and] sheer political ineptitude, with which the Federalists went about their work of trying to silence the opposition press."[184] The Alien Act, passed on June 25, 1798, stipulated that any non-naturalized persons of foreign birth whom the President judged to be "dangerous to the peace and safety of the United States," could be expelled forthwith without even the benefit of a hearing. The law was aimed at immigrants, especially the Irish, whom it is said, "were of a naturally subversive temper, had pro-French sympathies, and were drawn into Republican politics in America."[185] Although the law was never invoked by President Adams, one would assume that it encouraged a number of immigrants to leave the country.

The Sedition Act of July 14, 1798, was an even more draconian attempt to stifle political opposition, but, unlike the Alien Act, 14 people were prosecuted under it and at least two Republican newspapers were shut down.[186] The law made it a crime to utter or publish "any false, scandalous, and malicious writing or writings against the Government

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political tracts, in March of 1799 he agreed to stand as a representative to the Virginia House of Delegates, in 1801 he became Jefferson's Secretary of State, and in 1808 was elected President.

[184] Elkins & McKitrick 1993, 703-04.

[185] *Ibid.*, 591.

of the United States, with intent to defame...or to bring them into contempt or disrepute."[187] Not only was a Congressman, Matthew Lyon, arrested and sentenced to prison, the Senate even took it upon itself to try William Duane, the Republican editor of the *Philadelphia Aurora*, for violating the act. Duane had published a pending Federalist bill that would have established a "Grand Committee" "to determine which electoral votes to count and which to throw out in the approaching presidential election."[188] Seeking to avoid the possibility of a jury acquittal, the Senate created a special committee to discover grounds upon which they themselves could punish Duane. And, after Duane asked to be allowed representation by counsel, the Senate ruled that his lawyers would not be permitted to "question the Senate's jurisdiction, call witnesses, or undertake – as even the Sedition Law allowed – to prove the truth of any of the editor's statements."[189] Thus, the Federalists first violated the First Amendment when they passed the Sedition Act, and then ignored the constitutional prohibition against bills of attainder, the Fifth Amendment's guarantee of due process of law, and the constitutional system of the separation of powers in their plan to enforce the measure. (Rather than subjecting himself to certain detention at the hands of the Senate, Duane went into hiding and even managed to continue publishing his newspaper.)

The humorous anecdotes that are sometimes remembered, the fact that men were prosecuted for actions as trivial as drunkenly boasting that the President's hind quarters should be struck by cannonball or erecting liberty poles, tends to somewhat trivialize the episode in our historical memory. We must also remember that Vice-President Jefferson

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[186] The two papers were New York City's *Time Piece* and the *Argus*. Banning 1995, 385.
[187] As quoted in Elkins & McKitrick 1993, 592.
[188] *Ibid.*, 704.
[189] *Ibid.*, 705.

was trailed by self-appointed spies who hoped to find cause for his arrest, and several fearful Republican congressmen abandoned the nation's capital altogether.[190] The Alien and Sedition Acts were more than just unconstitutional. They threatened our democratic form of government. And, if Madison and Jefferson entertained any hopes that federal judges would declare the Sedition Act unconstitutional, such expectations were surely dashed by the prosecution of Congressman Lyon.[191] With all three branches of the national government supporting these unconstitutional acts, Madison and Jefferson sought refuge in the authority of the states. Madison's "Virginia Resolutions" may have been more cautiously worded than Jefferson's "Kentucky Resolutions," but both documents clearly challenged the principle of national supremacy. Madison asserted that the "powers of the federal government [result] from the compact to which the states are parties," and declared that "the states who are parties therefore have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them."[192]

Perhaps the strongest claim that the Virginia Resolutions violated Madison's prior arguments concerning the federal division of power is found in the work of Samuel Beer. In *To Make a Nation,* Beer notes that two conflicting theories of federalism have existed throughout this nation's history. The first theory, "the national idea,...embraces a view of where the authority of government comes from and what it should be used for." In the second theory, compact federalism, it is argued that "the federal government was brought into existence not by the act of a sovereign people but by a compact among sovereign states." And, "from this compact theory inferences follow that radically contradict the

[190] Banning 1995, 386.
[191] *U.S. v Matthew Lyon* 1798.

conclusions of the national theory."[193] According to Beer, the former theory of federalism is correct for it represents the "principles of democracy and nationalism on which the Constitution is based."[194] And, he argues that the two components of the national idea of federalism – the authority and purpose of the national government – were set forth, respectively, by Madison and Hamilton in the *Federalist*. Once again we must confront the question of whether there are really two Madisonian constitutional theories. Did Madison's argument for "interposition" constitute a refutation of his earlier nationalism?

Demonstrating an appreciation for the subtle distinctions of Madison's political thought, Beer does not argue that the Virginia Resolutions represented a refutation of his earlier nationalism because Madison had clearly anticipated the argument in *Federalist* 39. However, if the compact theory of federalism can be traced back to Publius, the argument becomes considerably more legitimate. Therefore, Beer identifies the argument in *Federalist* 39 as representing a "fatal gap" in Madison's thinking and contradictory to what he later wrote in *Federalist* 46. Beer argues that according "to *Federalist* 39, the Constitution derives its authority from 'the people....as composing the distinct and independent States,' but according to *Federalist* 46, from 'the great body of citizens of the United States' – that is, from 'the people....as individuals composing one entire nation.'"[195] The "fundamental flaw" of 39, according to Beer, is demonstrated by the fact

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[192] "Virginia Resolutions," POM 17: 189.
[193] *Ibid.*, 1-2.
[194] Beer 1993, 20.
[195] Beer 1993, 316

that what "a constituent sovereign gives it can also take away," and the next generation's advocates of secession "took advantage of this fatal gap in Madison's reasoning."[196]

A problem with Beer's assertion is that Madison's argument in 39 is virtually incontrovertible. In that essay, Madison explored questions relating to the source of federal authority. Consciously adopting the language of the Antifederalists, Madison asked whether the Constitution would preserve the "federal form." Is the Union to be "a *Confederacy* of sovereign states," or a "*consolidation* of the states."[197] Or, in Beer's language, is it to be founded on the principles of the national view or the compact theory of federalism. Madison's answer, in short, was both. How can one dispute his argument "the Constitution is be founded on the assent and ratification of the people of America...but....this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong," or that each "state, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act"?[198] The Constitution originally reserved an enormous amount of power for the states. The electoral college, the composition of the Senate, the amendment process, and the fact that Senators were originally chosen by their state legislatures, indicate that the federal government, as Madison repeatedly said, is not "wholly national." Madison was not contradicting his belief that the authority of the Constitution rests on the principle of popular sovereignty, he was merely pointing out that

[196] Beer 1993, 316.
[197] *Federalist* 39 243.
[198] *Ibid.*, 243-244.

the source of the federal government's power was the people, but the people "as forming so many independent States, not as forming one aggregate nation."[199]

Not only is it difficult to find any flaws in Madison's reasoning in 39, it is hardly certain that the argument in 39 actually conflicts with 46. In fact, *Federalist* 46, not 39, offers the strongest support for Madison's arguments in the Virginia Resolutions. In 46 Madison unequivocally argues that the states can resist unconstitutional federal actions. As Madison warned, "should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand."[200] Not only would the federal government have to contend with "the disquietude of the people," and "the frowns of the executive magistracy of the States,"[201] but

> ambitious encroachments of the federal government on the authority of the State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted.....The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; *and unless the projected innovations should be voluntarily renounced, the same appeal to trial of force would be made in one case as was made in the other.* [202] (Italics added)

It is wrong to argue that proponents of southern secession exploited a 'flaw" or "gap" in the reasoning of *Federalist* 39, because Madison undoubtedly believed that state governments might play a legitimate role in protecting civil liberties. For example, as I have already noted, in *Federalist* 51 Madison never mentions judicial review as a

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[199] *Ibid.*, 243.
[200] *Federalist* 46 297.
[201] *Ibid.*,

potential check against unconstitutional congressional actions; instead, Madison points to the executive veto and the federal division of power:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. the different government will control each other, at the same time that each will be controlled by itself.[203]

Madison's argument that the states might legitimately protect constitutional rights rests on the same principle that Hamilton employs in *Federalist* 78: popular sovereignty is the basis of legal authority. Or as Hamilton argues, the Constitution represents the will of the people, and laws passed by Congress represent the will of the agents of the people. Therefore, as Hamilton explained, "No legislative act....contrary to the Constitution can be valid....To deny this would be to affirm...that the representatives of the people are superior to the people themselves."[204] The principle of popular sovereignty outweighs even the principle of national supremacy. Undoubtedly, the argument that the states can legitimately uphold the constitutional protections is a dangerous one. However, the southern nullificationists' arguments were flawed not because they rested on a "gap" in Madison's reasoning, but because they were offered in opposition to the legitimate and wholly constitutional powers of the federal government. The people have a right to resist a tyrannical national government, but it was nullificationists not the national government who were acting tyrannically.

The question is not whether the Virginia Resolutions violated Madison's earlier arguments, but whether Madison and Jefferson's appeal to the right of revolution was

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[202] *Federalist* 46 298.
[203] *Federalist* 51 323.
[204] *Federalist* 78 467.

justified. By passing laws that stifled political dissent, and by considering the adoption of laws that would empower Congress to invalidate electoral college votes, the Federalists incontrovertibly threatened the majoritarian basis of political power. It is not hyperbolic to argue that the Sedition Act threatened all the civil liberties protected under the Bill of Rights because, as Madison wrote, free speech is "the only effectual guardian of every other right."[205]

Yet, perhaps Madison and Jefferson overreacted because after Kentucky and Virginia adopted their respective resolutions, the documents were sent to the governor of every state and were uniformly rejected. The two sets of resolutions were seen as a threat to the Union. Madison, therefore, felt compelled to enter the next session of the Virginia Assembly and offer a lengthy defense - the "Report of 1800." In this second document Madison argued that when he had written that "the states are parties to the Constitution or compact," he had meant the term "states" to mean not the actual state governments, but "the people composing those political societies, in their highest sovereign capacity."[206] And, he also asserted that the Resolutions were nothing more than "declarations...expressions of opinion, unaccompanied with any other effect, than what they may produce on opinion, by exciting reflection."[207] However, his strongest argument was not that he had been misunderstood and that he was not actually advocating resistance, but that under certain circumstances, the practice of "interposition" is justified:

> If the deliberate exercise, of dangerous powers, palpably withheld by the constitution, could not justify the parties to it, in interposing even so far as to arrest the progress of the evil, and thereby to preserve the constitution

[205] Virginia Resolutions, POM 17: 190.
[206] Report of 1800 POM 17: 309.
[207] *Ibid.*, 348.

> itself as well as to provide for the safety of the parties to it; there would be an end to all relief from usurped power, and a direct subversion of the rights specified or recognized under all the state constitutions, as well as a plain denial of the fundamental principle on which our independence was declared. [208]

It may appear contradictory that Madison, who had so persuasively argued that liberty would be protected best by Union, appealed to the states to protect freedom of speech, but what were his other choices? The laws, which were not set to expire until after the 1800 elections, were clearly adopted to help insure a Federalist electoral victory. Neither the electoral process nor the courts seemed to offer an avenue of appeal, and individuals who protested were subject to arrest. Although we associate the doctrine of states rights with the horrors of the Civil War and the evils of racial oppression, the act of appealing to state assemblies to combat tyranny was first employed by American revolutionaries. Perhaps we should ask if the federal government were to subvert the Constitution today, arrest protestors, contemplate a corruption of the electoral process and imprison Congressman, would an appeal to the authority of the states to reestablish the principle of popular sovereignty and freedom of speech be unjustified? Or, to use a more concrete example, would it have been wrong for state governments to have stood up to Senator McCarthy or for California to have resisted the federal government's policy of interning Japanese citizens during World War II? The Virginia Resolutions, as Madison points out, were based on the principle contained in the Declaration of Independence that under certain circumstances the people have not only a right, but a duty to rebel.

Conclusion

Of all the constitutional battles during the 1790s, the dispute over the Alien and Sedition Acts offers the best proof that it was not Madison who abandoned the principles

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[208] *Ibid.*, 311.

of 1787. Scholars who accuse him of apostasy or changing his constitutional theory fail to appreciate the extent to which his constitutional jurisprudence was guided by the principle of popular sovereignty. There is no doubt that Madison's political theory evolved during the 1790s. Not surprisingly, Madison changed his views on the threats posed by faction. In *Federalist* 10 Madison dismissed the danger posed by minority faction by arguing that if "a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."[209] However, by 1792, in an unsigned essay written for the *National Gazette,* Madison indicated that he had revised the above argument: "experience shews [sic] that in politics as in war, stratagem is often an overmatch for numbers." The republican party had greater numbers, but he feared that the "rival party" had in its advantage some "peculiarities, some temporary, others more durable, which may favour that side in the contest."[210]

Of course it is possible to cite snippets of *The Federalist* and argue that Madison went from being an ardent nationalist to a defender of states' rights. However, such claims are exaggerated because the centralization of power was nothing more than a means used to achieve other ends. As his argument in *Federalist* 10 demonstrates, Madison believed that a stronger national government could better advance the public good and protect civil liberties. Thus, it was consistent for him to later protest against federal laws that he believed to be not only unconstitutional, but designed for the benefit of the few over the many (the National Bank), or intended to abridge constitutionally protected rights (the Alien and Sedition Acts.)

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[209] *Federalist* 10 80.
[210] "A Candid State of Parties," POM 14: 372.

Although Madison's political theory certainly evolved, he remained steadfast in his belief that constitutional analysis must begin with the understanding that legal authority emanates from the people. And, as the years progressed, adherence to this principle inexorably led him to formulate a constitutional theory that strongly parallels what originalists argue today. He emphasized that constitutional interpretation must be guided by the original historical understanding of the document and that the meaning of provisions should remain fixed until they are formally altered by the people.

After leading the struggle to write and ratify the Constitution, Madison was involved in every constitutional battle for a dozen years. Yet he suddenly turned remarkably quiet on the subject when he became Jefferson's Secretary of State. As one student of Madison has observed, "If he ever gave the Constitution much consideration between 1801 and 1817 he left few records of it."[211] Of course, at exactly the same time that Madison exited the stage of constitutional conflict, a new actor entered. Jefferson liked to call his electoral victory in 1800 a "revolution," but it may well be that Marshall's ascension to the Supreme Court in 1800 had an even greater historical impact on American history. The Federalists, to be sure, had won the last few constitutional battles but suffered a major defeats when they lost both the Presidency and the Congress to the Republicans in 1800. If their electoral misfortunes had been accompanied by the appointment of a new Chief Justice by Jefferson, perhaps Spencer Roane, a mode of constitutional analysis very different from Marshall's would have been written and perhaps studied for years to come.

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[211] Dewey 1960, 1.

Chapter Five:

I believe I must nominate you

Few records remain from John Marshall's childhood. Born four years after Madison, on September 24, 1755, the Chief Justice burned many of his private papers and was exceptionally reticent in relating information concerning himself. In fact, when Justice Joseph Story requested biographical material for a review he was writing of Marshall's *History of the Colonies,*[1] Marshall summarized his childhood experiences in but two paragraphs.

Marshall's paternal lineage can be traced no further than his grandfather who was a poor man known pejoratively as "John of the forest." Marshall's father, Thomas, although poorly educated, followed a path taken by many enterprising young men of the day. He was a land surveyor who "married up." Raised in the tidewater's Westmoreland County, Thomas Marshall was childhood friends with another ambitious youth, George Washington. In fact, in 1753 Washington helped Thomas get a lucrative job working for Lord Fairfax. The job provided Marshall with a generous income, it boosted his social standing, and the Lord even allowed Thomas access to his library. In 1754 Thomas married Mary Randolph Keith, of the famous Randolph family, whose descendants included not only Marshall, but Jefferson, Robert E. Lee and others.

Although Thomas was a remarkably successful man, his family had to endure the hardships of frontier life nonetheless. The family moved several times, but always in the same direction: west. The formative years of John's childhood were spent on the eastern slope of the Blue Ridge Mountains in a log cabin built by his father and the conditions

[1] Marshall 1824.

are best captured by John Marshall's recollection that during his childhood the absence of pins forced ladies to secure their dresses with thorns.[2]

Despite these primitive condition, the Marshalls managed to educate their children and the first born, John, even received two years of formal schooling. In addition, Thomas borrowed the works of Livy, Horace, Pope, Dryden, Milton, and Shakespeare from the Fairfax estate. The future Chief Justice was also fortunate enough to have an educated, highly intelligent mother. Mary Keith Marshall, the daughter of a Scottish cleric, was known as "a woman of more than ordinary intellect and character." Indeed, as Justice Joseph Bradley once noted, many believed that Marshall "got his brains from his mother's side."[3]

Although John became the historical figure, all the Marshall children achieved great success. For example, Alexander became a prominent lawyer in Kentucky, Louis was a noted physician and early president of Washington College (now Washington and Lee University), and Jane founded one of the first schools for young women in Virginia.[4] Marshall rarely spoke of his mother, but one of the few childhood episodes that Marshall did recollect in his Autobiographical Sketch was his fond memory of transcribing Pope which was done undoubtedly with his mother's assistance. The Chief Justice was much more forthcoming concerning his father. During his eulogy of Marshall on October 15, 1835, Justice Joseph Story repeated the following Marshall statement: "My father was a far abler man than any of his sons. To him I owe the solid foundation of all my success

[2] Cooke 1859, 165-69 as quoted in Smith1996, 29.
[3] *Bradley*, June 17, 1886. Quoted in Smith 1996, 32.
[4] Ibid., 30-31.

in life."[5] Indeed, Thomas became a trusted advisor to Washington and one of the largest landowners on the Virginia frontier by the time of his death in 1802.

We may infer that Marshall's childhood affected him in a number of ways. As the eldest son of fifteen children, he may well have learned early the leadership, negotiating, and management skills that would later prove so helpful as Chief Justice. Second, his exposure to the classics, and his transcription of Pope in particular, undoubtedly contributed towards his powerful and epigrammatic writing style. Furthermore, frontier experiences seemed to impart a powerful disdain for affected gentility. A contemporary of Marshall once noted that "his habits were convivial almost to an excess; and he regarded as matters beneath his notice those appliances of dress and demeanor which are commonly considered not unimportant to advancement in a public profession."[6] Indeed, his appearance was such that it is said that one day, while making his daily food purchases in Richmond, a young gentlemen, new to town, asked the poorly dressed Chief Justice whether he would be his delivery boy and carry his turkey:

> Marshall obligingly added the turkey to his own provisions and trudged respectfully behind his new employer to a house not far from his own, whereupon he handed the bird to its owner and pocketed the coin flipped in his direction. The incident, witnessed by many at the market, sent the city into gales of laughter, although Marshall kindly noted that "we were going the same way" and it seemed only neighborly.[7]

Although we know little of Marshall's childhood, the most essential clue for reconstructing how Marshall arrived at his constitutional theory was preserved. In 1771, Robert Bell, a Philadelphia printer, offered the first American edition of Blackstone's

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[5] Story 1835. Quoted in Dillion 1903, 330.
[6] Grigsby 1890-91, 176-77. Quoted in Smith 1996, 131.
[7] Smith 1996, 376.

Commentaries on the laws of England.[8] At least 1,000 sets of the *Commentaries* had already been sold in America.[9] An additional 1500 sets were ordered by men like John Adams, Nathaniel Green, John Jay, Gouverneur Morris, Robert Morris, Roger Sherman, St. George Tucker, James Wilson, and George Wythe,[10] and "sixteen of the subscribers became signatories of the Declaration of Independence, six were delegates of the 1787 Constitutional Convention, one was elected President of the United States and another became Chief Justice of the Supreme Court."[11] Alongside the names of these luminaries in American history, is the signature of Thomas Marshall, who bought the work for his teenage son, John. The future Chief Justice read Blackstone with his father for several years before their studies were interrupted by the outbreak of the Revolutionary War.

The Chief Justice once wrote that "from my infancy I was destined for the bar."[12] There are at least two possible explanations for why Marshall took such a strong interest in law as a teenager. He was an ambitious person, and perhaps the family realized that by becoming a lawyer John could achieve even greater success than had his father. Or, maybe Marshall, one of the most intellectually gifted men of his generation, was just naturally drawn to Blackstone's "scientific" approach to the law. Indeed, the English jurist's assumption that the law is governed by reason closely paralleled Pope's belief that nature was perfect and reason supreme.

When the Revolutionary War broke out, John, together with two of his brothers and their father, volunteered to serve in the Revolutionary army. Thomas had already served as an officer in the Virginia militia which may be why the future Chief Justice was

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[8] Blackstone 1771-72.
[9] Hicks 1921, 126. Quoted in Nolan 1976, 737 (note 35).
[10] Hicks 1921, 128-129. Quoted in Nolan 1976 743. Also see Smith 1996, 77.
[11] Nolan 1976, 743-44.

appointed a first lieutenant in the summer of 1775. The younger Marshall saw action in the battle of Great Bridge, a small but significant engagement in the Virginia theater, experienced the horrors of the brutal winter at Valley Forge, and was eventually promoted to the rank of captain. Yet, even in the midst of war, the future Chief Justice maintained his interest in law and when granted a furlough in the winter of 1779-80, attended two courses at William and Mary College: one on natural philosophy taught by Reverend James Madison, a cousin of the future President, and the second, a series of law lectures, taught by George Wythe. Wythe, as the reader will remember, had subscribed to the first American edition of the *Commentaries*, and had just been awarded the nation's first professorship of law. In fact, Marshall attended just the second series of law lectures ever offered in America. Marshall's previous work with his father, undoubtedly, was excellent preparation because Professor Wythe "was wedded to Blackstone in his teaching, and his inaugural lecture was cast in Blackstonian terms, stressing the fundamental principles of the law."[13]

Marshall's legal training coincided with the courtship of his future wife, Polly Ambler, and there is reason to believe that he did not apply himself with the same rigor that Madison had demonstrated as a college student.[14] However, his extensive compilation of statutes and legal precedents, which later proved useful in his law practice, indicates that Marshall did more than idle the days away in amorous reverie. After being examined by two Virginia lawyers, Marshall earned his credential to practice

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[12] CJM to Joseph Delaplaine, March 22, 1818, Smith 1996, 75 citing Oster 1914, 197-98.
[13] Smith 1996, 78; Also see, Blackburn 1975, 103-05 and Cullen 1972.
[14] The notes Marshall took during his training in the law reveal that he was somewhat distracted by thoughts of the young lady that he would soon marry, as the names "Ambler," "Polly Ambler," and "Miss M. Ambler-J. Marshall," are scribbled in the margins. Smith 1996, 80.

law on August 28, 1780. Marshall would then spend another year in the army before he returned to civilian life.

Early Nationalism

The experiential differences between Marshall and Madison during this period clearly influenced the development of their constitutional theories. For example, Marshall was in the army for a total of six years and his military experience undoubtedly contributed to his becoming so ardent a nationalist. As he recalled in his *Autobiographical Sketch*:

> I had grown up at a time when a love of union and resistance to the claims of Great Britain were the inseparable inmates of the same bosom; - when patriotism and a strong fellow feeling with our suffering fellow citizens of Boston were identical; - when the maxim "united we stand, divided we fall" was the maxim of every orthodox American; and I had imbibed these sentiments so thoughrougly [sic] that they constituted a part of my being. I carried them with me into the army where I found myself associated with brave men from different states who were risking life and everything valuable in a common cause believed by all to be most precious; and where I was confirmed in the habit of considering America as my country, and congress as my government.[15]

The reader will recall that his poor health prevented Madison from serving in the army. Thus, while army life drove Marshall in one direction, Madison was experiencing the frustration, but also the accomplishments, of the Virginia state government. As indicated, one of Madison's earliest political experiences occurred when he took part in the famous 1776 Virginia Convention that issued the call for the Continental Congress "to declare the United Colonies free and independent states,"[16] which resulted in the writing of the *Declaration of Independence;* framed the Virginia Constitution, which was

[15] Marshall 1973, 9-10.
[16] Force 1837-53, 5:1035. Quoted in Ketcham 1990, 70.

not replaced for another half century; and, offered a Declaration of Rights that influenced the writing of both the *Declaration of Independence* as well as the Bill of Rights.

In February 1781, perhaps frustrated by the Virginia government's failure to provide him with troops, Marshall resigned his military commission and left the army.[17] Unfortunately for Marshall, the war had forced the closing of the Virginia courts, which precluded any chance of beginning a law practice. Therefore, largely because his preferred career path was blocked, Marshall ran for and won election to the Virginia legislature. Like Madison, Marshall served just one session in the House of Delegates before he won election to the Governor's council in 1782. Marshall later explained how his experiences in state government fortified his nationalism: "My immediate entrance into the state legislature opened to my view the causes which had been chiefly instrumental in augmenting those sufferings [of the army], and the general tendency of state politics convinced me that no safe and permanent remedy could be found but in a more efficient and better organized general government."[18]

During Madison's tenure on the Governor's council the American army had been desperate for food, supplies, and men, forcing him to contend with "disputes between state and Continental supply agents; the power of Congress, the army, and the states to impress goods and services needed for the war; difficulties in purchasing supplies with inflated currency; and increasing resistance, after more than two years of strife, to making sacrifices for the war effort."[19] Marshall would not have been confronted with such complexities because he served after General Cornwallis had surrendered at the close of

[17] It is not entirely clear why Marshall resigned when he did. See Smith 1996, 84-85 for several possible explanations.
[18] Marshall 1973, 10.
[19] Ketcham 1990, 80.

the Yorktown Campaign the previous October and the fighting had been brought to a close. Perhaps, if he had served on the council earlier, Marshall would have realized that the difficulties of financing the war were virtually insurmountable, and that they could not have been solved simply by transferring more power to the national government.

In any case, Marshall used his career in politics to advance his law practice, for he could not rely on income from a family plantation to supplement his meager government salary. His talent and connections with some of Virginia's most powerful men allowed him to quickly establish a thriving law practice. His luck began when Edmund Randolph, who was Richmond's leading attorney at the time, offered the future Chief Justice the use of his chambers. Afterwards, Marshall's father, who in 1780 had been authorized by Governor Jefferson to undertake a survey of the part of Virginia which is now Kentucky, opened the state's survey office in 1782, and Marshall became an intermediary for investors wishing to convert their land office warrants into surveyed acreage. Finally, Marshall's father-in-law, who held the important position of Virginia state treasurer, made sure to assist both Marshall's political and legal career.[20]

The biggest boost to Marshall's law practice occurred in 1784, when the cousin of his wife and future brother in law, John Ambler, perhaps the richest man in Virginia, decided to entrust his complex legal affairs to Marshall. Thus, he had already achieved considerable success when Randolph, upon his election as governor in 1786, turned his law practice over to Marshall. His rapidly growing practice - Marshall's income exceeded 1,000 pounds in 1786 - helps explain why he declined to run for reelection after the legislature adjourned in January of 1785.

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[20] Smith 1996, 90-93.

Marshall's law practice was largely devoted to property disputes of one kind or another. This included litigation over the ownership of land or slaves, disputes arising out of complicated arrangements created in trusts, mortgages, and wills, and cases that dealt with bonds, bills of exchange, and promissory notes. Charles Hobson has noted that in Virginia, "the courts functioned as a collection agency of last resort for creditors."[21] Thus, Marshall's legal practice largely consisted of contractual disputes between creditors and debtors. His first major case involved the dispute over the estate of Lord Fairfax which, after being in litigation for decades, would eventually reach the Supreme Court.

Although Marshall frequently represented Virginia debtors in his law practice,[22] he was greatly concerned over the role they were playing in state politics. In January 1787, Shays' Rebellion had been defeated by the Massachusetts militia but its reverberations were felt across America. There was reason to believe that debtors would again try to pass paper money legislation when the Virginia legislature reconvened, and a letter from this period indicates that Marshall was worried about Virginia's state of affairs: "The debtors are as usual endeavoring to come into the Assembly and as usual I fear they will succeed."[23] His fears were evidently strong enough to persuade him to return to public office. As it turned out, by the time the Virginia House of Delegates convened in October 1787, the debates over the ratification of the Constitution had already begun. Elected to serve as a delegate, Marshall did not play as major a role as Madison or Patrick Henry, but the future Chief Justice made his first statement on the

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[21] Hobson 1996, 30.

[22] For example, in all of the over one hundred federal cases Marshall handled which involved disputes between British creditors and Virginian debtors, Marshall always represented the latter party. See Hobson 1996, 30.

Constitution by offering a competent defense of Article III, which outlined the powers of the national judiciary. He asserted that the judiciary would be obligated to nullify unconstitutional laws, and apparently his debating skills were impressive enough to win him the respect of Federalist as well as Antifederalist leaders.[24]

Marshall's Political Career: 1787- 1800

Marshall's performance at the Virginia ratifying convention led the Federalists to urge him to seek election to the U.S. House of Representatives. After he declined to do so, they appointed him United States attorney for Virginia without even consulting him. Marshall declined this post because, as he recounted, "I felt that those great principles of public policy which I considered essential to the general happiness were secure by this measure & and I willingly relinquished public life to devote myself to my profession. My practice had become very considerable, and I could not spare from its claims on me so much time as would be necessary."[25] Although Marshall would resist pressures to run for office until 1795, he did remain politically active. As the Federalist-Republican split spread from Washington to Virginia, Marshall defended the Washington Administration by organizing an important public meeting in Richmond that praised the administration's foreign policy stance. He also wrote articles under the pseudonym "Aristides" on the same subject.[26]

In 1795, Marshall returned to the Virginia House of Delegates. He preferred serving in state government because it allowed him to continue his law practice and, as he

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[23] Smith 1996, 111.
[24] Henry and Marshall soon began a collaborative legal practice, and George Mason as well as Madison retained Marshall to handle their private legal affairs.
[25] Marshall 1973, 11.
[26] Smith 1996, 173-175.

later recounted, "The public & frequent altercations in which I was unavoidably engaged gradually weakened my decision never again to go into the legislature."[27] Marshall's defense of the Washington Administration's attempts to steer a neutral course between Britain and France only increased his value to the Federalist party. He declined an offer to become America's minister to France, but when he was offered the position by President Adams in 1797, he accepted. He was finally willing to suspend his law practice because he hoped that in Europe he would be able to raise the necessary capital to finance his land speculations.[28] In 1792 Marshall had purchased 215,000 acres from the Lord Fairfax estate at a cost of 20,000 pounds sterling. Ownership of the land was contested because Virginia had taken possession of the land during the Revolutionary War under authority of a state statute permitting the confiscation of loyalists' property. The state legislation conflicted with both the Treaty of Paris (1783) and Jay's Treaty (1794). Marshall purchased the land at a great discount, betting on his belief that the Supremacy Clause would be used to overturn the Virginia law.

Upon his arrival in France, Marshall was pressured to submit to the established tradition of paying a douceur or bribe to French statesmen as part of the negotiating process. Marshall refused French Foreign Minister Talleyrand's demands for close to $250,000 to commence negotiations, explaining the diplomatic delay to President Adams in two long dispatches. Republicans in Congress, suspicious that the American envoys might be sabotaging the negotiation process due to the Federalist party's hostility to France, demanded that this correspondence be made public. When Adams complied with their demands, it not only caused the Republican Party considerable embarrassment, but

[27] Marshall 1973, 15.
[28] Smith 1996, 186.

also turned Marshall into a nationally recognized political figure. When Marshall returned home in summer 1798, he was given a hero's welcome, and, once again, was pressured by Federalists to seek a seat in the House.

While in Europe, Marshall had not raised the funds needed to complete his purchase of the Fairfax estate, and thus remained hesitant, but on this occasion Washington personally intervened. Marshall spent three days at Mount Vernon politely rejecting the General's pleas. Finally, on the morning of September 6, Marshall awoke before dawn, planning to leave Mount Vernon and avoid further discussion, only to be confronted once again by Washington who, according to some reports, was waiting for him in the stable, wearing his old military uniform to make one last appeal.[29] Marshall could not refuse.

On April 24, 1799, Marshall won election to the House of Representatives. Repeatedly called upon to defend the Adams administration, Marshall displayed a skillful loyalty that led Adams to nominate him Secretary of State. Marshall decided to accept the nomination because he had already lost many of his clients due to the interruptions in his practice. Also, the salary he would receive as Secretary of State would cover the interest payments due on the Fairfax estate, and his earlier success at diplomacy made the office particularly attractive. Thus, in June 1800, Marshall became a member of President Adams' cabinet. However, the job ended ten months later when Adams lost the 1800 election to Jefferson. At this point, Marshall expected to retire from politics, return home, and pick up the pieces of his law career.

After Adams was defeated, Chief Justice Oliver Ellsworth, in ill health, announced his resignation. The lame duck Federalist party had already been planning to

reduce the number of Supreme Court Justices from six to five.[30] Rather than leave the nomination to President-elect Jefferson, Adams asked Jay to return to the bench and become Chief Justice once again. Neither Jay nor Ellsworth had enjoyed much success in the office, however. In fact, one legal historian has described their tenures as marked by three phenomena: "the minimal extent of Court business; the disorganization and disunity of the Court itself;....and the increasing involvement of the Court in partisan politics."[31] Whether Jay would accept Adams' offer was hardly a foregone conclusion, and when Jay's letter arrived in mid-January, it was personally delivered to the President by Marshall. Marshall waited as Adams opened the letter, and read Jay's explanation for declining his offer:

> I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential...nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system.[32]

Adams did not want to leave the nomination for Jefferson to make, and, therefore, had to nominate another candidate immediately. It is said that after reading Jay's letter,

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[29] Smith 1996, 231.

[30] The rationale behind the bill was to prevent tie votes. However, by filling Ellsworth's vacancy, Adams could also deny the new Republican president the opportunity to fill the first vacancy. See Crosskey 1953, 2:759.

[31] White 1988, 8.

[32] John Jay to John Adams, January 2, 1801, Jay 1890, 4:285-86. Quoted Smith 1996, 530, (note 73). When Jay had been appointed the nation's first Chief Justice, he had hoped that the Court would be able to ensure the supremacy of federal law and force state compliance with key obligations, such as the war debts addressed in the Treaty of Peace. However, the Court's ruling against Georgia's claims of state sovereignty in *Chisholm v. Georgia* (1793) 2 Dall. 2 U.S. 419, produced defiance, and, ultimately, the Eleventh Amendment. The Amendment narrowed the Court's jurisdiction by restricting the power of federal courts to hear suits against states brought by citizens of other states. Jay retired a few months after the Amendment's passage. (The amendment was ratified by the required number of states by February 7, 1795, but was not formally declared part of the Constitution until a presidential message to Congress on January 8, 1798. Because it is now recognized that the president has no role in the amendment process, 1795 is gaining recognition as its effective date. Jay's term of office officially ended June 29, 1795.) On Jay's stewardship of the Court, see Morris 1967 and Van Burkleo 1984.

the President exclaimed, "Who shall I nominate now?" and after a moment's hesitation said to Marshall, "I believe I must nominate you."[33] Thus, not only did Marshall join a Supreme Court that had accomplished little, he was faced with the additional burden of having to contend with a hostile Republican President and Congress. Yet near the end of Marshall's career, Tocqueville observed that "a mightier judicial authority has never been constituted in any land."[34]

Early American Legal Thought

The phenomenal rise in the Court's power under Marshall's stewardship can be directly attributed to his common law approach to constitutional interpretation. The reader will recall that the revolutionary period was characterized by two competing legal paradigms. At the beginning of the conflict with Britain, colonists cited ancient constitution theory to dispute the sovereign power of Parliament. Citing Coke, Blackstone and other English jurists, Americans made historical arguments that certain principles and rights had been recognized since time immemorial. However, after the break from Britain became irrevocable and Americans no longer sought to challenge legal authority but to establish it, they turned to Locke. The use of Locke's arguments represented a significant paradigmatic shift because, unlike virtually all other English theorists, he completely ignored judicial precedent and historicism, substituting social contract theory in its place.

Locke's argument that governmental authority must be based on popular consent drove some Americans, and Madison in particular, to formulate a new legal paradigm based on the principles of legal positivism, not natural law theory. It is perhaps worth

[33] Marshall 1973, 30; also see Turner 1960.
[34] Tocqueville 1969, 149.

repeating that my argument is not that Locke was a legal positivist, but that the doctrine of consent can easily lead to the construction of a constitutional theory that is very similar to legal positivism. This principle of popular sovereignty, in combination with the American innovation of establishing written constitutions, led to the conclusion that constitutional decision makers must be guided by the original understanding of the document. Thus, the Revolutionaries may have abandoned the ancient constitution when they turned to Locke, but they did not reject legal historicism.

We have already examined how Madison's constructed his entire constitutional theory around the Lockean premise that government must be based upon the consent of the governed. Because no previous society had used a written document to establish governmental authority, it is not surprising that certain theoretical wrinkles needed to be ironed out and it is possible to look back and find snippets of arguments made by Madison that contradict this legal paradigm. Nonetheless, Madison consistently espoused a constitutional theory based on the principles of legal positivism and he unfailingly used what we would call the original understanding as a guide to constitutional interpretation.[35] Except for the "indubitable, unalienable, and indefeasible right to reform or change their government,"[36] Madison avoided using natural law arguments to defend any of the provisions when he proposed that a Bill of Rights be amended to the Constitution, and even during the Jay Treaty debates, Madison lamely tried to argue that the ratifiers of the Constitution expected the House to partake in the treaty making

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[35] The only exception is Madison's defense of religious freedom during the pre-Constitutional era (See pp. 45-51). Madison's opponents were not nearly as consistent. Compare, for example, Elbridge Gerry's arguments in the debate over the President's removal power (p. 111) with his argument in the Bank debate (pp. 136-137); also, see Hamilton's sudden reliance on historical argument in the Jay Treaty debates (p.143).

[36] *Annals of Cong.*1789, 434.

process despite overwhelming evidence to the contrary. On this occasion, and perhaps others, Madison may have manipulated the historical record for political purposes, but he never renounced the postivist/historicist approach to constitutional interpretation.

We will now examine how Marshall rejected Madison's mode of constitutional interpretation and instead relied upon principles of natural law, justice, and logic to guide his reading of the Constitution. Marshall's constitutional jurisprudence differed from Madison's because the Chief Justice never abandoned the common law approach to judicial interpretation as set forth in Blackstone's *Commentaries*. After first encountering the *Commentaries* as the age of sixteen with his father, Marshall studied it again in law school and read through the work a total of four times by age of twenty-seven.[37]

A number objections could be raised against the assertion that Marshall adapted the common law methodology of adjudication to the American context. Prima facie, the claim contradicts the earlier assertion that Americans abandoned the theory of the ancient constitution when they turned to Locke. Second, why would Blackstone's dissertation on England's unwritten constitution interest a former colony that had enacted the world's first written constitution? Third, why would Blackstone's defense of parliamentary sovereignty[38] be relevant to a nation based, at least ostensibly, on popular sovereignty and structured on the basis of the separation of power?

Blackstone in America

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[37] Warden 1938, 328. Quoted in Nolan 1976, 757 (note 168).

[38] Perhaps the best illustration of how a positive versus natural law divide has "haunted English jurisprudence for the past two hundred years" is found in Blackstone's *Commentaries* where the author declares that there is a "law of nature, coeval with mankind," which "is of course superior in obligation to any other:...no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and their authority...from this original," but then immediately asserts that, "there is and must be in all [forms of government] a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside." Blackstone 1871 1:39 and 1:47.

When Gordon Wood wrote that the American "interpretation of the English constitution was the point on which their understanding of the Revolution hinged," he might have added that ancient constitutional theory also provided the basis of Americans' understanding of law.[39] No English jurist was more widely read or more highly revered than Blackstone. Obviously the *Commentaries*, designed to be an elementary textbook for the elite students of Oxford, was not originally written for the Revolutionaries in America. After being refused an Oxford Professorship of Civil Law because of his political beliefs, Blackstone had decided to offer lectures without a formal connection to the University. But rather than concentrating on the civil or canon law, he taught a course on the common law, a subject which previously had never been offered in a British university.

The Revolutionaries' enthusiasm for Blackstone was undoubtedly tempered by his political opposition to their claims,[40] as well as his denial that Americans enjoyed the common law rights of the British.[41] The *Commentaries* divides all colonies into two groups: those "claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country:" and those claimed by conquest.[42] Blackstone argued that the laws of England and the rights of Englishmen would apply to those colonies created by occupancy, but that the King could change or alter the ancient laws of England in conquered territories. Jefferson,[43] James Wilson,[44]

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[39] Wood 1969, 12.
[40] In 1766, while serving in Parliament, Blackstone voted against repeal of the Stamp Act. (Jones 1973, 28.)
[41] Blackstone 1871 1:5 and 1:106-107.
[42] Blackstone 1871 1:105.
[43] For an analysis of Jefferson's criticism of Blackstone see Waterman 1932, 629-659.
[44] In 1774 Wilson challenged Blackstone's views of Parliamentary supremacy in his address, see Wilson 1804, 21-22. Also see *Chisholm v. Georgia* 2 U.S. (2 Dall.) 419, 458 (1793) where Justice Wilson argued Blackstsone's declaration that the King cannot be sued in any court proved he was "if not the introducer at least the great supporter" of "a plan of systematic despotism."

and others attacked Blackstone for arguing that the American colonies belonged in the latter as opposed to the former group.

Although Blackstone is not often considered to have been as influential as Locke or Montesquieu, he became so highly regarded by the Revolutionaries that it was studied "by virtually every American lawyer, and by many nonlawyers as well."[45] In fact, the *Commentaries,* according to Madison, was a 'book which is in every man's hand.'"[46] Blackstone's initial reception in America is partly explained by the overwhelming demand for legal sources. As Mary Ann Glendon has noted, "Blackstone's work was much more fully absorbed into legal thinking here than in England, where legal resources were both more diverse and more readily available."[47] It would even seem that for a period the *Commentaries* was virtually the *only* law book in America. Chancellor James Kent claimed that "he owed his reputation to the fact that, when studying law...he had but one book, Blackstone's *Commentaries,* but that one book he had mastered."[48]

The *Commentaries* was appealing on both sides of Atlantic because it presented England's legal system as governed by rules and principles. The English constitution is an amorphous body of law, both written and unwritten, based upon custom, tradition, the laws of nature, divine law, reason, enacted statutes, and judicial precedent. Although this nebulous body of material was susceptible to multiple and contradictory interpretations, under Blackstone chaos was replaced by order. Yet, the success Blackstone enjoyed in England paled in comparison with the reception he received in America where, not surprisingly, the need for the systematization of the law was even greater because English

[45] McDonald 1979, 57.
[46] *Ibid.*.
[47] Glendon1991, 23.
[48] As quoted in Boorstin 1941, 3.

law had become intermingled with indigenous, and often contradictory, decisions and statutes.

Thus, even though the founding generation rejected the theoretical framework of the English common law – the belief that the authority of law is based on custom and tradition - English precedent had already been embedded in the very foundation of the American legal system. Moreover, the Revolutionaries originally claimed to be fighting for the rights of Englishmen under the ancient constitution. The first Continental Congress in 1774 maintained that Americans were "entitled to the common law"[49] as well as to English statutes existing at the time of colonization, and "eleven of the thirteen original states adopted, directly or indirectly, some provisions for the reception of the common law as well as of limited classes of British statutes."[50]

It is impossible to explain the exact status of the common law during the early years of the United States. As White has pointed out, the questions of whether Americans were to remain governed by English common law rules and whether judicial decisions handed down before the Revolution were to remain in effect were commonly answered with the claim that Americans, having been British subjects before the revolution, took "as much of....the common law of England...with [them] as the nature of things will bear."[51] Thus, for aspiring lawyers, the *Commentaries* retained its canonical status for decades. In fact, fifty years after the work was published, a prospective law student named Abraham Lincoln was told that the first book that he should read was the *Commentaries*,[52] and twenty five years later, when Lincoln in turn

[49] Continental Congress 1774, 1:69.
[50] Horowitz 1977, 4.
[51] Richard West 1720 quoted in White 1991, 128 citing Sioussat 1903, 21.
[52] Sandburg 1926, 163.

offered a law student his advice, the *Commentaries* received his highest recommendation.[53]

The influence of the *Commentaries* initially extended well beyond legal circles because it provided the Revolutionaries with theoretical ammunition. More than just another endorsement of natural law, the *Commentaries* offered the colonists a legal theory in which the rights of Englishmen are always and everywhere present. No jurist placed a greater emphasis on rights than Blackstone. As Ernest Barker put it, "They are not only the foundation: they are the very stones of the building."[54] The first chapter of the first book was entitled "Of the Absolute Rights of Individuals," and Blackstone even offered the Revolutionaries an argument that the purpose of society is to protect the absolute rights of man:

> For the principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals.[55]

Blackstone's eloquence must also be mentioned as an important factor in his success. Before the *Commentaries* were published, most aspiring lawyers in America read the more cumbersome and disorganized Coke. When Jefferson was studying the law in the years before Blackstone's work had been published, he exasperatedly declared his wish that "the Devil had old Coke" and that even Job would begin "to whine a little under his afflictions."[56] Students after Jefferson were offered a book that had been twelve years

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[53] Abraham Lincoln to James T. Thornton December 2, 1858 in Lincoln 1946, 485.
[54] Barker 1951 138.
[55] Blackstone 1871 2:5.
[56] PTJ 1:5.

in the making as Blackstone had lectured from and revised his manuscript during his time at Oxford.[57]

All these explanations notwithstanding, the greatest appeal of the *Commentaries* was that it presented the study of law as if it were a science. Blackstone, like other great thinkers in the eighteenth century, had been profoundly influenced by the work of Sir Issac Newton, who, in Berlin's words:

> had performed the unprecedented task of explaining the material world, that is, of making it possible, by means of relatively few fundamental laws of immense scope and power, to determine, at least in principle, the properties and behavior of every particle of every material body in the universe, and that with a degree of precision and simplicity undreamt of before. Order and clarity now reigned in the realm of physical science:
>
> Nature and Nature's Laws lay hid in the Night:
> God said, Let Newton be! And all was Light![58]

Just as Newton had employed the scientific method to unveil the secrets of the physical world, it was thought that Locke had done the same to reveal man's ability to understand himself.[59] Newton and Locke had become symbols of the age, and it was only natural that someone next attempt to methodize England's chaotic legal system. Boorstin explains how Blackstone sought to transform not only the study of law but the law itself into a science by infusing it with immutable principles that govern the universe:

> Blackstone began by taking for granted that since the law was worth studying, it must be capable of being rationalized and reduced to principles. And he passed quite imperceptibly to a very different assumption, that because the laws of England ought to be studied, these laws themselves contained such principles. He had taken up "the task of examining the great outlines of the English law, and tracing them up to their principles." The discussion of every section of the law became the exposition of "rational principles."...Everywhere in English law "principles" were waiting to be found.[60]

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[57] Nolan 1976, 736.
[58] Berlin 1984, 15.
[59] Boorstin 1941, 14.
[60] Boorstin 1941, 20.

The best example of how Blackstone's depiction of the English constitution self-consciously mirrors Newtonian physics is his description of England's division of power. Directly drawing upon Newton's law of gravity, Blackstone wrote that the king, the lords spiritual and temporal, and the House of Commons "form a mutual check upon each other" and "[l]ike three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either acting by itself would have done but at the same time in a direction partaking of each and formed out of all."[61] The law, as Blackstone repeatedly explained, "is to be considered not only as matter of practice, but also as a rational science."[62]

Thus, a number of factors help account for the popularity that Blackstone enjoyed in America: the continued relevance of English precedent, the dearth of printed legal texts, his strong defense of natural rights, and his systematic or scientific approach to the law. Blackstone's popularity was so great that during "the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law."[63] Thus, an inquiry into Marshall's jurisprudence must begin with an overview of Blackstone's *Commentaries*.

The Admiring Science

Remarkably, few scholars have asked how Blackstone may have influenced Marshall. The two most respected works on Marshall's constitutional theory are Robert Faulkner's *The Jurisprudence of John Marshall*[64] and G. Edward White's *The Marshall*

[61] Blackstone 1871 1:153.
[62] *Ibid.*, 2:2
[63] Boorstin 1941, vii.
[64] Faulkner 1968.

Court and Cultural Change, 1815-35.[65] The former cites Blackstone as "Marshall's great judicial collaborator," but in the framework of "embodying Lockean liberalism."[66] Faulkner argued that Marshall's lodestar was Locke, not Blackstone: "Marshall viewed the Lockean political understanding as the true political perspective."[67] Thus, Faulkner devotes scant attention to Blackstone. White, on the other hand, does offer a thorough and insightful analysis of how the Marshall Court adopted the common law's "scientific" approach to adjudication. However, he still offers no specific discussion of how Marshall may have been influenced by his reading of the *Commentaries.* But, in fairness to White, his work examined the last twenty years of the Marshall Court and he may have considered an extended inquiry into the subject inappropriate.

While Blackstone may be enjoying a revival of interest of late,[68] the best analysis of the English jurist remains Daniel Boorstin's *The Mysterious Science of the Law.* In fact, though Marshall's name never appears, Boorstin's book may even be considered one of the finest works on Marshall's jurisprudence because the Chief Justice's approach to adjudication was so similar to the method set forth in the *Commentaries,*. Yet, if Americans created a new source of constitutional authority by replacing the principles of natural law, justice, logic, tradition, and custom with the doctrine of consent, how can it be that Marshall's approach to constitutional interpretation paralleled Blackstone's? Would the establishment of a new basis of legal authority also require a new approach to constitutional interpretation? We already know Madison's answer.

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[65] White 1991.
[66] Faulkner 1968, 58.
[67] *Ibid.*, 195
[68] At least one scholar has noted that "more serious research on Blackstone jurisprudence appeared in the 1980's than in any other decade of the twentieth century....The older pejorative attitude toward the *Commentaries*, has given way to more favorable estimates. The major positive reappraisal Blackstone

Madison's approach to constitutional interpretation was determined by his belief that the authority of government rests upon the principle of popular sovereignty. The doctrine of consent led Madison to conclude that constitutional meaning ought to remain anchored in the original understanding of the document. Both Blackstone and Marshall, on the other hand, viewed the law as erected less upon consent, than reason. And because the proper application of rational principles can lead only to a fair and reasonable outcome, they viewed constitutional meaning as capable of evolving. As Blackstone explained, "it is an established rule to abide by former precedents...Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law."[69]

During the nation's first debate over constitutional interpretation, Madison's fundamental legal assumptions contradicted the arguments set forth in the *Commentaries*. The reader will recall that the dispute over the removal power of executive officers began when Congressman Smith argued that they would have to be removed through an impeachment process. Madison responded by saying that "If the Constitution means this by its declarations to be the case, we must submit; but I should lament it as a fatal error interwoven in the system, and one that would ultimately prove its destruction."[70] This view that the people's will must be obeyed, consequences be damned, has always formed an essential part of American constitutional jurisprudence, and was most memorably

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enjoyed centered on his ability to convey a sense that the common law stood as a unified whole., a belief that the law consisted of related legal doctrines." Cosgrove 1996, 27-28.

[69] Boorstin 1941, 22.

[70] *Annals of Cong.* 1789, 372.

expressed by Holmes: "If my fellow citizens want to go to Hell I will help them. It's my job."[71]

However, during the removal debate it was also argued that the Constitution had to contain an answer to the dispute, and that that the best way "to establish the true construction of the Constitution"[72] would be to allow the judiciary to resolve the debate. This view reflects an "elegentia juris" understanding of the law - the belief that the law is logical, self-contained, and internally consistent. The reader will recall that one member even argued that the if the House were to interpret the Constitution incorrectly, or "declare improperly, the judiciary will revise our decision."[73]

The next two chapters will demonstrate that Marshall adopted Blackstone's elegentia juris methodology of adjudication and adapted it to the American context. Although cases centering on the claims of racial minorities were an important exception, Marshall's approach to constitutional interpretation was based upon two common law assumptions: fundamental law contains immutable principles of reason and justice, and these principles are capable of evolving as society develops. And, like Blackstone before him, Marshall defended these assumptions through a particular historical technique.

The Uses of History

The centrality of custom and tradition to common law theory was discussed in Chapter One. That chapter examined how Coke, by equating fundamental law with natural law, contended that certain rights had been recognized since time immemorial. Coke asserted that any man would be foolish to challenge these rights because they had been established through customs that embodied the wisdom of the ages. Years later,

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[71] Oliver Wendell Holmes to Harold Laski n.d. Quoted in Rosen 1999, 29.
[72] *Annals of Cong.* 1789, 467 (statement of Rep. White).

Blackstone used the same conception of custom to defend not personal rights, but the English constitution. As Blackstone argued, "our admirable system of laws," had been "built upon the soundest of foundations, and approved by the experiences of the ages."[74]

A second difference between Coke and Blackstone was that the latter endeavored to demonstrate the link between custom and law in a systematic fashion. "The treatment of every subject in the *Commentaries*," Boorstin has observed, "begins with an historical exposition."[75] Blackstone sought to prove that English law was built upon universal principles that reflected God's will and human nature, and he believed that all human history, like law, was driven by forces of reason and morality. Indeed, Blackstone's belief in "the uniformity of human nature made it possible...to refer to other legal systems to find the rationale of the English rule."[76] Thus, the English jurist referred not just to the history of England, but also to "the majestic ruins of Rome or Athens, or Balbec or Palmyra."[77]

The most powerful aspect of this theory is its ability to justify the existence of particular law. Blackstone assumed that the historical origins of any law would always reveal a rational justification for its existence. And, although the origins for so many laws have been lost, the student is led to assume that a rule would never have been introduced without a reason.[78] Through this historical technique, "Blackstone invested what had been an expedient solution of a problem with the inevitability of an absolute prescription of Nature."[79]

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[73] *Ibid.*, 477 (statement of Rep. Ames).
[74] Blackstone 1871, 1:4.
[75] Boorstin 1941, 36.
[76] Boorstin 1941, 54.
[77] Boorstin 1941, 36.
[78] Blackstone 1871, 1:70.
[79] Boorstin 1941, 55.

The greatest challenge that Marshall faced in adopting the common law assumption that fundamental law contains immutable principles that are capable of evolving was that he could not draw upon the "experiences of the ages," in the same manner that Blackstone had before him.[80] The obscurity behind the origin of laws had allowed Blackstone to reinforce the power of reason with the power of faith. Blackstone dealt with laws that seemed to have no rational purpose or explanation by asserting that since reason is the driving force behind history, the law's purpose, while obscure, must exist. Marshall, on the other hand, was awarded no such luxury.

Though Marshall could not refer back to a mythical past, the Chief Justice managed to provoke the same "unquestioning reverence" towards fundamental law in America by transferring the wisdom that Blackstone argued was embodied in custom to the minds of the Framers. Under Marshall, the Framers became demigods. Marshall approached the interpretation of every single word in the Constitution as if it had been purposefully inserted to uphold a fundamental law of nature. Commentators have long noted that America practices a "cult of constitution worship."[81] However, in arguing that Americans have transformed the Constitution into a secular bible, it is rarely observed that Americans merely repeated what the English had done before them.

According to Boorstin, Blackstone's portrayal of the English constitution provoked that "feeling of awe which men have had for the ancient pyramids."[82] For example, Blackstone wrote that "when....a body of laws, of so high antiquity as the

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[80] Blackstone 1871, 1:4

[81] The phrase was used by Louis Hartz 1955, 5-14; Also see Grey 1984; Levinson 1979; Lerner, Constitution and Court as Symbols, *Yale Law Journal* 46 (1937); and, Corwin "The Worship of the Constitution," and "The Constitution as Instrument and Symbol," in 1 *Corwin on the Constitution* ed. R. Loss (1981) 47-55, and 168-79.

[82] Boorstin 1941, 58-19.

English, is in general so clear and perspicuous, it argues deep wisdom and foresight in such as laid in the foundations, and great care and circumspection, in such as have built the superstructure."[83] By assuming that the same "great care and circumspection" also went into what he often called our "sacred" Constitution, Marshall transformed the document into a force of nature that, as he so famously put it, "was intended to endure for ages to come."[84] Even when Marshall was confronted with obvious shortcomings in the work of the Framers, such as in *The United States v Maurice*, (1823), which examined a constitutional provision that can be interpreted in two different ways, Marshall began his argument by noting, "I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause."[85] Thus, under Marshall the Constitution became the nation's secular bible, constitutional principles were elevated to a status similar to that of religious doctrine, and the Court, acting as the self-appointed guardians of the temple, went from being an institution marked by "disorganization and disunity,"[86] to being considered, just thirty years later, the most powerful court in the world.

Like Blackstone before him, Marshall used history in a way that limited "the importance of time and place,"[87] shattered "the self-confidence of individual reason, and [limited] the range of possible criticism."[88] The Chief Justice transformed the Constitution by "recasting" certain critical words in the Constitution so that they took on a universalistic meaning.[89] By so convincingly arguing that the framers had anticipated

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[83] Boorstin 1941, 71-72 III 328.
[84] *McCulloch v Maryland* 4 Wheat 316, 415 (1819).
[85] United States v. Maurice, 2 Brockenbrough 96, 100 (1823).
[86] White1988, 8.
[87] Boorstin 1941, 47
[88] *Ibid.*, 50.
[89] White 1991 makes this argument throughout.

the types of conflict that the Court was being asked to resolve and contending that specific constitutional provisions were written to uphold the "general principles"[90] of government, Marshall created decisions that have a timeless quality and read as if they were supported both by the doctrine of consent and by the principles of justice.

[90] As the next chapter will demonstrate, this term was used by Marshall in, among other cases, *Fletcher v Peck* 6 Cranch 87, 139 (1803).

Chapter Six:

Never Give Him an Affirmative Answer

Although much of Marshall's rhetoric ostensibly supports originalism, he rejected an historicist approach to constitutional interpretation in favor of the common law method of adjudication. Indeed, it is even possible to accuse Marshall of practicing that great originalist bugbear: non-interpretive judicial review. That is, making "the determination of constitutionality by reference to a value judgment other than the one constitutionalized by the Framers."[1] However, because of Marshall's eminence and unassailable character, originalists often ignore Marshall's natural law approach to adjudication and instead argue that Marshall offered a positive law approach to constitutional interpretation.

It is true that Marshall successfully bridged the divide that "haunted English [and American] jurisprudence for the past two hundred years"[2] by arguing that the Framers inserted specific constitutional provisions to uphold immutable principles of law. Thus Marshall offered a portrayal of the Constitution as based upon abstract principles of reason, justice *and* the doctrine of consent. By normally avoiding the positive versus natural law debate, Marshall also circumvented the dispute over whether constitutional meaning is to remain fixed. According to Marshall, the framers "intended" the Constitution to be "adapted to the various crises of human affairs."[3]

A second problem in arguing that Marshall's ahistorical/natural law mode of adjudication contradicted Madison's approach to constitutional interpretation is that in

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[1] Perry 1981, 264-65.
[2] Cosgrove 1996, 5.

adjudication. In fact, although Madison is more often accused of theoretical inconsistency, it is really Marshall who indulged in conflicting approaches to constitutional interpretation. However, for Marshall the divide occurs not over time, but across different types of disputes. As we shall see, although Marshall argued that the Contract Clause protected man's "natural right" to enter into contract, the Chief Justice turned to historical evidence and positive law arguments when considering disputes centered on the rights of racial minorities.

Finally, there is the sheer power of Marshall's intellect. As Henry Adams once said, the Chief Justice was "a man who in grasp of mind and steadiness of purpose had no superior, perhaps no equal."[4] Even some of Marshall's contemporary critics were intellectually intimidated by him. When the states' rights advocate John Randolph of Roanoke read yet another Marshall decision curtailing state power he despaired, "All wrong, all wrong, but no man in the United States can tell why or wherein."[5] Randolph could not find the errors in Marshall's reasoning because of the formula that the Chief Justice always followed. Marshall would offer a seemingly universally accepted premise, demonstrate how that premise is embodied in the Constitution, and then, in a series of steps, reveal the link between the premise and the specific dispute all the while drawing a seemingly inevitable conclusion. At least one of Marshall's contemporaries, Jefferson, recognized that the key to Marshall was to be found in his deductive reasoning ability. According to Justice Joseph Story, Jefferson once offered the following advice for dealing with Marshall:

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[3] *McCulloch* at 415.
[4] Adams 1986, 131.
[5] As quoted in Corwin 1921, 124.

> When conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry you must never give him an affirmative answer or you will be forced to grant his conclusion. Why, if he were to ask me if it were daylight or not I'd reply, "Sir I don't know. I can't tell."[6]

Because most people never go beyond Marshall's account of the most controversial and disputed questions of the early constitutional era, his decisions have become so elevated that, as W. Melville Jones once noted, Marshall's "opinions live almost as if they were a part of the Constitution itself."[7] To understand how Marshall's approach to constitutional interpretation differed from Madison's, we must examine Marshall's legal assumptions. And, as have noted, Marshall's legal assumptions stemmed from the common law rules of adjudication that he adopted from Blackstone.

The Contract Clause

It is possible to assign Marshall Court rulings to the century in which they had the greatest influence. The types of decisions that were most important to the nineteenth century were those dealing with the Contract Clause and cases in which the rights of racial minorities were involved. We begin our analysis with the former, specifically a series of four Contract Clause cases which are considered to be "among the most important opinions, economic as well as legal, which have ever come from the Supreme Court:"[8] *Fletcher v Peck* (1810),[9] *Trustees of Dartmouth College v Woodward* (1819),[10] *Sturges v Crowinshield* (1819),[11] and *Ogden v Saunders* (1827).[12] Although since *Home*

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[6] Warren 1922, 1:182.
[7] Haskins 1971, 167.
[8] Wright 1938, 28.
[9] 6 Cranch 87.
[10] 4 Wheat 518.
[11] 4 Wheat 122.
[12] 12 Wheat 213.

Building and Loan Association v. Blaisdell, (1934),[13] the Court has "all but forgotten the clause,"[14] during the nineteenth century the Contract Clause was invoked in almost forty percent of all cases challenging the validity of state legislation. Indeed, if we exclude the commerce clause, we can say that the Contract Clause provided the constitutional justification for more cases involving the validity of state laws than all the other clauses of the Constitution combined.[15] The clause is found in Article I, Section 10, of the Constitution, which lists a number of prohibitions on state power, and reads as follows: no state shall "pass any...Law impairing the Obligation of Contracts."

Although a few Contract Clause disputes had already reached the circuit courts,[16] *Fletcher v Peck* marked the first time that the Supreme Court considered the clause. The history behind *Fletcher* is well known.[17] In January of 1795, the Georgia legislature passed an act selling 35 million acres of land – an area comprising most of present-day Alabama and Mississippi - to four land companies for one and a half cents per acre. Although all the legislators with one exception voting for the transaction personally profited from the deal and several made fortunes, the deal was not completely without merit.[18] Be that as it may, the corruption soon became public knowledge, and in the next election a new legislature repealed the 1795 sale act and declared it, and all subsequent sales made under it, null and void. However, because innocent third parties throughout

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[13] 290 U.S. 398.
[14] Kmiec 1992, 194.
[15] Wright 1938, 3.
[16] Three cases can be cited: *Champion and Dickason v Casey* 1792 – [The decision is not printed in the reports but was discovered in the records of the Federal District Court for Rhode Island by Charles Warren. (See Warren 1922 1:67)]; *Vanhorne's Lessee v. Dorance 2 Dallas 304 (1795);* and *Wales v. Stetson, Treasurer of the Blue Hill Turnpike Corp.*, 2 Mass. 143 (1806).
[17] For a history of the dispute see Magrath 1966.
[18] As one author notes, "Georgia's treasury was empty; the Indian-fighting militia was clamoring for its pay; the state's meager population was poor; the public reputation of the new investors was unblemished; and they were offering $500,000 in hard currency for unsettled land in the wilderness." Smith 1996, 389.

the United States had already purchased tracts of the land, a national controversy soon erupted.

Marshall begins his decision in *Fletcher* by considering the question of whether "the constitution of the state of Georgia prohibit[ed] the legislature to dispose of the lands."[19] Marshall then proceeds to enunciate what Thayer later termed the "doctrine of clear mistake":

> The question of whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case....it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. [20]

Though Marshall was here considering whether the original grant could be overturned because it was tainted by corruption and though he clearly wanted to avoid that question, he voiced the clearest possible argument against non-interpretivism. Marshall steered clear of the corruption issue because it should be addressed through elections and the political process and not constitutional litigation.[21] After affirming the constitutionality of the original grant, Marshall proceeded to examine whether Georgia's second act, which rescinded the first, violated the Contract Clause. Three questions were pivotal. Is a grant a contract? Does the contract clause extend to contracts whose terms have already been fulfilled? And does the clause extend to contracts in which the state is a party?

In addition, there were also a number of conflicting claims to the land held by Indian Tribes, Spain, and the Federal Government.

[19] *Fletcher* at 128.

[20] *Ibid.*,

Marshall answered the first question easily enough by citing the *Commentaries* explanation that a grant is contract that has already been fulfilled or "executed." But if a grant is an "executed" contract, does not his definition mean that the obligation had been fulfilled, and, therefore, could not be impaired? The Constitution prohibits the impairment of the *obligation* of contract. To impair a pending obligation is not the same thing as to rescind a contract that has already been completed. Marshall notes this distinction, but asserts that it "would be strange if a contract to convey is secured by the constitution, while an absolute conveyance remained unprotected."[22]

Perhaps Marshall was wrong to dismiss the question because it would appear that the Constitution explicitly distinguishes between impairing the obligation of contract, and seizing property. Article I, Section 10, of the Constitution prohibits the states from doing the former, the Fifth Amendment, by stipulating that no person shall be deprived of their property "without the due process of law," specifically restricts the latter. It is considerably easier to argue that Georgia's act violated the protection accorded by the Fifth Amendment as opposed to the Contract Clause. The problem for Marshall was that at that time the Fifth Amendment, as he later ruled, restrained only Congress.[23] It may seem "strange," but the words of the Constitution do seem to indicate that impairing a "contract to convey," is prohibited, but "an absolute conveyance" is left "unprotected."

Indeed, the distinction was recognized by another member of the Court. In his concurring opinion, Justice Johnson did not dispute that a grant is a contract: "there can be no solid objection to adopting the technical definition of the word 'contract,' given by

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[21] Or, as Marshall asked, "Must it be direct corruption, or would interest or undue influence of any kind be sufficient?" *Ibid.*, 130.
[22] *Ibid.*, 247.
[23] *Barron v Baltimore* 7 Pet. 242 (1833).

Blackstone." However, as he noted, "the difficulty arises on the word 'obligation,' which certainly imports an existing moral or physical necessity."[24] Georgia's grant had been fully executed. What obligation was Georgia's law impairing? It was because Johnson was unconvinced that the law was in actual violation of the contract clause that he wrote a concurring opinion. He wanted it "distinctly understood" that the law could not be overturned on the basis "of the provision in the constitution."[25] Johnson would have overturned the law because in his view it violated natural law principles: "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things."[26]

If we put aside this objection to Marshall's ruling on the second question, a different type of objection arises concerning the last question: was the clause intended to apply to public as well as private contracts? Marshall noted that the words of the clause are "general" and contain "no such distinction," and he argued that a broad interpretation of the clause was expected by both the framers and the general public: "the framers viewed with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."[27] After this brief allusion to the historical intent behind the Contract Clause, Marshall argued that "the restrictions on the legislative power of the states," such as those prohibiting the states from passing a bill of attainder or an *ex post facto* law, could be considered "a bill of rights for the

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[24] *Ibid.*, 144.
[25] *Ibid.*, 144.
[26] *Ibid.*, 143.
[27] *Ibid.*, 137-38.

people of each state."[28] Surprisingly, Marshall then asserts that the *ex post facto* clause can be used as justification to overturn the law.

> The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law...Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate?...The rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?[29]

Rather than strengthening his argument, Marshall's surprising turn to the *ex post facto* clause reveals that he truly questioned whether the contract clause prohibited Georgia from rescinding the land grant. As Marshall surely knew, the Court had previously ruled that the *ex post facto* clause applies only to laws imposing retroactive criminal punishment and is, therefore, not applicable in civil disputes.[30] No one in *Fletcher* had been accused of a crime. Why would Marshall turn to the *ex post facto* clause unless he genuinely doubted whether the law violated the Contract Clause? Marshall's uncertainty as to which constitutional clause Georgia's law violated is implicit in his concluding argument that the law violated either "particular provisions" of the Constitution or "general principles." Marshall's reference to more than one provision is explained by his uncertainty as to which provision was instrumental to the case. Finally, there is additional evidence that Marshall's concluding reference to the "general principles" of government was more than just rhetoric.

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[28] *Ibid., 138.*
[29] *Ibid.*, 138-39.
[30] *Calder v. Bull* 3 Dall 386 1798.

Before he asked whether a grant is a contract, Marshall asserted, in a rather convoluted argument, that it "may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be *seized* without compensation."(italics added)[31] This statement not only reinforces the idea that Marshall believed that the law violated "natural" property rights, but also offers further evidence that the Chief Justice viewed the effect of the law not as impairing a contract, but as seizing property. And if Marshall did view the dispute as a takings case, it would not only explain why the Chief Justice offered the *ex post facto* argument, but would reveal why he made an appeal to the "general principles" of government.

The Ratifiers' Understanding of the Contract Clause

Marshall's reliance on general principles of justice led him to reach a very different conclusion than he would have done if he had followed Madison's approach to constitutional interpretation. Madison and Marshall certainly agreed that the most important tool in constitutional interpretation was provided by the text of the document. However, as Madison said in 1821, although the "legitimate meaning of the instrument must be derived from the text itself....if a ray of light is be sought elsewhere it must be....in the sense attached to it by the people in their respective State Conventions when it recd. All the authority which it possesses."[32]

Marshall makes a rhetorical appeal to intent of the framers, but the records of the ratification debates offer almost no support whatsoever for the idea that there had been a

[31] See *Fletcher* at 135.

general understanding that the Contract Clause would apply to agreements in which the state was a party. Discussion of the Contract Clause "both in the state ratifying conventions and the mass of pamphlet literature was relatively rare."[33] Nonetheless, historians agree that "most of the discussion involving the Contract Clause came in connection with the debate over Section 10 Article I, of which the clause is a part, and the debate was almost invariably focused upon the currency provision of that section....the contract clause was discussed, where it was mentioned at all, as if it were part of the monetary restrictions imposed upon the states by the Constitution."[34] The "most common view" of the Contract Clause, according to Forrest McDonald, "was that the prohibition against legislative impairment of contractual obligations [was] simply a catchall extension of the bans on paper money and legal-tender laws."[35]

The historical evidence establishes that virtually no one expected the clause to apply to contracts in which the state was a party. According to Benjamin Fletcher Wright, who perhaps has conducted the most extensive inquiry into the background of the clause, there were only two instances during the ratification debates in which it was suggested that the clause might extend beyond private contracts. Both these assertions were made by Antifederalists and both were immediately contradicted. When Patrick Henry said that "the expression includes public contracts as well as private contracts between individuals,"[36] Governor Randolph, who had attended the Constitutional Convention, replied that the clause was included because of the "frequent interferences of

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[32] JM to Thomas Ritchie, Sept. 15, 1821, WJM 9:72 (note 1).
[33] Wright 1938, 12
[34] *Ibid.*
[35] McDonald 1985, 274.
[36] Elliot, *Debates*, 1861, 3:474. Quoted in Wright 1938 16-17.

the state legislatures with private contracts."[37] And, when James Galloway of North Carolina offered a similar assertion in his state's ratification convention, [38] W.R. Davie answered, "The clause refers merely to contracts between individuals."[39]

After conducting a "careful search," Wright "failed to unearth any other statements even suggesting that the Contract Clause was intended to apply to other than private contracts."[40] Moreover, two Antifederalists who had attended the Convention, Luther Martin and George Mason, both assumed that the clause would apply only to private contracts. And, as indicated, in the two instances in which it was argued that the clause would be given a broader meaning, the argument was made in relation to the problem of depreciated paper currency, and both these assertions were immediately denied by members of the Convention. One last piece of evidence indicating that the clause was understood as applying only to private contracts is that although seven states proposed lists of amendments to the Constitution, none mentioned the Contract Clause. Considering the paranoid style of the Antifederalists and their propensity to contest even the most obviously necessary restrictions on state power, it is inconceivable that they would have silently assented to the Contract Clause if they had anticipated that it would apply to public contracts.

Because the historical record of the ratification debates contradicts the notion that the Contract Clause was intended to make state contracts inviolable, one would naturally expect that Madison would have disagreed with Marshall's ruling. Madison never publicly commented on *Fletcher*, but his position on the questions involved had already

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[37] *Ibid.*, 3:477-78. Quoted in Wright 1938 16.
[38] *Ibid.*, 4:190, as quoted in Wright 1938 16.
[39] *Ibid.*, 4:191, as quoted in Wright 1938 16.
[40] Wright 1938 16.

been known for years. In 1801 President Jefferson had appointed Madison, together with Secretary of the Treasury Albert Gallatin and Attorney General Levi Lincoln, to a commission to negotiate a solution among the various parties involved. The commission's proposal completely dismissed the legal and constitutional claims of the land speculators. "Under all the circumstances which may affect the case," it declared, "the title of the claimants cannot be supported." The commission did think that the speculators should be compensated, but only on the grounds of expediency: "the interest of the United States, the tranquillity of those who may thereafter may inhabit the territory, and various equitable considerations...render it expedient to enter into a compromise on reasonable terms."[41] Although the actual negotiations between the various factions involved had been left to Gallatin, there should be no doubt that Madison agreed with the commission's findings. Indeed, as Henry Adams described it, the "Yazoo Compromise was Madison's measure."[42]

Trustees of Dartmouth College v. Woodward

In the annals of American constitutional law very few cases approach the importance of *Dartmouth College*.[43] By ruling that charters of incorporation are to receive constitutional protection against legislative infringement, the Marshall Court left an indelible stamp on the development of the American economy. Dartmouth College had been incorporated in 1769 through a royal charter that established a trust fund to be administered by a self-perpetuating board of trustees. A quarrel between John Wheelock,

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[41] American State Papers, Public Lands 1:126. Quoted in Magrath 1966 36.
[42] Adams 1986, 444.
[43] The Court had a difficult time arriving at a decision and, after the case was heard during the 1818 term, it was announced that it would be continued to the next term. However, after some internal maneuverings, the Court announced on the second day of the 1819 term that a decision had been reached. In addition to Marshall's "opinion of the Court," Justices Story and Bushrod Washington wrote concurring opinions and

the president of the college, and the board of trustees ended up dominating the 1816 New Hampshire elections. The Republicans, who sided with the president, won both the legislative and gubernatorial election, and subsequently adopted statutes revising the college's charter and effectively transforming it into a state school, Dartmouth University. The number of trustees was increased from twelve to twenty-one, with new members appointed by the governor, and the trustees were placed under the control of a board of overseers, who were also appointed by the governor.

In many ways, the structure of Marshall's decision in *Dartmouth* mirrors his ruling in *Fletcher*. Marshall begins his decision by reiterating the clear mistake doctrine: "On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that, in no doubtful case would it pronounce a legislative act to be contrary to the constitution."[44] Having professed his adherence to the principle of judicial restraint, Marshall proceeds to analyze the facts of the case. The first question had to do with Dartmouth College's founding charter: did it create a civil institution of government or a private charitable institution. If the former were found to be the case, then the state legislature's actions would have been fully justified. Although Marshall's argument that the college was a private institution was an essential element in his decision, it was not particularly important for the development of American constitutional law. *Dartmouth College* is remembered because of Marshall's ruling on the second question: are charters of incorporation constitutionally protected against legislative infringement. The first problem in offering an affirmative answer to this question is that once again Marshall was

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Justice Gabriel Duvall dissented without opinion. There were seven members of the Court at the time, but Justice Thomas Todd took no part due to illness. So, out of the six members, four opinions were produced.

dealing with a classic takings situation: New Hampshire was attempting to alter property rights that had already been granted.

Although it was not in their interest his do so, even the counsel for the Trustees conceded that the case was a dispute over whether a legislature can 'take away from one...rights, property, and franchises, and give them to another.'"[45] Because Daniel Webster, who represented the trustees, feared that the contract clause did not prohibit such actions, he had privately expressed a concern that the case should be argued, not just as a violation of the contract clause but on the "general principles" of government. "The question we must raise," Webster said, "is whether, by the general principles of our government, the state legislatures be not restrained from divesting vested rights." In fact, Webster explicitly stated that the issue was "independent of the constitutional provision respecting contracts,"[46] and devoted thirty pages of his forty-nine-page argument to demonstrating that the "object and effect" of the state's action was "to take away from one, rights, property, and franchises, and grant them to another."[47]

The second hurdle in arguing that corporate charters are constitutionally protected via the contract clause was that, again, the scope of the clause needed to be expanded beyond its original historical understanding. Even Marshall had to admit that no one had anticipated that the clause would cover corporate charters. This argument was doubly difficult to make because it was unclear whose property rights were at stake. As Marshall noted, "Neither the founders nor the youth for whose benefit the college was founded complain of the alteration made in its charter, or think themselves injured by it.

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[44] White, 1988, 614; See *Dartmouth* 4 Wheat at 625.
[45] Ibid., 558.
[46] Daniel Webster to Jeremiah Mason, Apr. 28, 1818 in Webster 1857, 1:282-83. Quoted in White 1988 615.

The trustees alone complain, and the trustees have no beneficial interest to be protected."[48]

It was easier for Marshall to argue that New Hampshire was constitutionally prohibited from seizing property, than it was to arrive at the conclusion that the contract clause encompassed corporate charters. Even though Webster's arguments indicate that the principles of *Fletcher* had not yet been fully digested, that case had already established the precedent that the Contract Clause prevents a legislature from taking one's property. However, in answering the second question, Marshall was navigating uncharted waters, and his destination was largely determined by his common law approach to constitutional interpretation. As we will see, if the Chief Justice had chosen historical evidence as his guide, he would have offered a very different ruling. Thus, once again, we arrive at the crossroad that separates Madison from Marshall.

Before Marshall could argue that corporate charters are constitutionally protected against state infringement, the Chief Justice had to answer the question of exactly whose property rights were at stake in the dispute. Marshall ruled that although neither the students nor the President had a vested interest at stake, the original contract would have been "deemed sacred" at the time it was created, and that this contract created an "artificial, immortal being," which was the recipient or the "assignee" of the rights of the original founders and donors.[49] By arguing that this "artificial, immortal being" was "capable of receiving and distributing forever, according to the will of the donors, the donations which should be made," Marshall not only solved the question of whose vested

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[47] See *Dartmouth* 4 Wheat. at 550-51.
[48] *Ibid.*, 641.
[49] *Ibid.*, 642.

interests were at stake, but reinforced the argument that the state was impairing an obligation of contract as opposed to seizing property.

After offering this conception of corporations, he had but one sticky question remaining: was the Contract Clause originally intended to protect corporate charters? The Contract Clause was first proposed on August 28, during a vote on whether to enact the following: "no state shall coin money, nor emit bills of credit, nor make any thing but gold & silver coin a tender in the payment of debts." Rufus King proposed to add, "a prohibition on the States to interfere in private contracts."[50] King's proposal was greeted with a decidedly mixed reaction. Gouverneur Morris argued that the restriction "would be going too far," and that "within the State a majority must rule."[51] Madison used the occasion to make another belated argument for his doomed national legislative veto proposal, a plea that obviously fell on deaf ears, and Wilson supported the clause with the claim that "retrospective interferences only are to be prohibited."[52] Madison then asked, "Is not that already done by the prohibition of *ex post facto* laws, which will oblige the Judges to declare such interferences null & void."[53] Rutledge responded to Madison's question by moving to insert "nor pass bills of attainder or *ex post facto* laws," into the currency restriction clause which had begun the discussion. Rutledge's motion was agreed to by a vote of seven to three.

During the next day's proceedings, John Dickinson announced that he had consulted his trusty Blackstone and found that the term "'*ex post facto*' related to criminal cases only; and they would not consequently restrain the States from

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[50] Koch 1966, 542.
[51] *Ibid.*, 542
[52] *Ibid.*, 543.
[53] *Ibid.*

retrospective laws in civil cases, and that some further provision for this purpose would be requisite."[54] Remarkably, although the full Convention never even considered the proposal again and thus never voted to include it, the clause appeared in the final draft of the Constitution after the committee of style finished its task of arranging the agreed upon provisions. So, how was this clause, which was never agreed to, included in the final document? Forrest McDonald has offered an explanation:

> That the committee would presume to include in the finished document features that the convention had either not approved or had expressly rejected can be explained by two circumstances. First, the delegates had no list of what they had agreed to: they had only a general record of votes and proceedings, which made detailed checking on the committee of style tedious and difficult. Second, by the time the committee had finished its draft, the delegates were tired, harassed, and eager to finish the work and go home. In any event, the contract clause was apparently the work of the five members of the committee of style rather than of the body of the convention.[55]

Thus, the records of the Convention support the argument that the clause was originally understood as merely prohibiting the states from meddling with private contractual debts or issuing paper money. Obviously the clause should carry no less legal weight because of its peculiar history. But the Framers' generally negative reaction to the proposal and their initial failure even to recognize a distinction between the meaning of that clause and the *ex post facto* prohibition offers no support to Marshall's contention that the Framers intended for the clause to establish an immutable principle concerning property rights. Furthermore, it is highly improbable that the Framers expected the

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[54] *Ibid.*, 547.

[55] McDonald 1985, 272. (citations deleted) The five members of the committee were Madison, Hamilton, King, Gouverneur Morris, and William Samuel Johnson. An interesting question is whether Madison, as a member of the committee, ever realized what had occurred, or if he himself had any role in the matter. McDonald speculates that the most likely culprit to have inserted the clause would have been Hamilton. See McDonald 1985, 272-273. Hamilton's concern for the protection of contracts was later demonstrated by an opinion he wrote at the behest of some of the land speculators involved in Fletcher. In fact,

clause to cover corporations because they were exceedingly rare at the time. According to Morton Horwitz, as "late as 1780, colonial legislatures had conferred charters on only seven business corporations, and a decade later the number had increased to but forty."[56]

It would be grossly unfair to accuse Marshall of having reached the wrong decision because he failed to take the internal proceedings of the Constitutional Convention into consideration. Marshall would have been considerably less familiar with those events than we are because, as the reader will recall, Madison's notes were not published until after his death. However, as an ex-member of the Virginia Ratifying Convention, Marshall was no doubt familiar with what the Ratifiers' understanding of the clause had been. Had he been so inclined, Marshall could have relied upon that historical evidence in answering the question of whether the clause was intended to protect corporate charters from state infringement. Instead, Marshall explicitly rejected the idea that constitutional interpretation should be guided by an original understanding. The Chief Justice explicitly conceded that the Framers had not considered the question of corporate charters: "It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was introduced into that instrument."[57] And Marshall also implicitly acknowledged that the clause was primarily seen as a prohibition against currency and debt relief legislation: "It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more

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Marshall's argument in *Fletcher* closely follows the reasoning that Hamilton offered. Hamilton's opinion, as well as many other documents related to the dispute, are found in Magrath 1966.

[56] Horwitz 1977, 112.

[57] *Ibid.*, 644.

extensive, constituted the great motive for imposing this restriction on the state legislatures."[58]

Perhaps the reader wonders how the Chief Justice, who professed an adherence to the doctrine of clear mistake, arrived at his conclusion that the New Hampshire law violated the Constitution if the application of the Contract Clause to charters of incorporation had not even been considered by the Framers? Marshall did so through an adjudicatory process that was guided, not by history, but by an assumption that immutable principles of law are incorporated into every provision, indeed every word, in the Constitution. Marshall's training in the law, especially his reading of Blackstone, explains the origin of this belief. As Boorstin repeatedly demonstrates in his study of the *Commentaries*, because Blackstone viewed the law as a science, "the discussion of every section of the law became the exposition of 'rational principles.'...Behind every legal term, as behind every rule of law, there lurked a rational principle which the student must try to discover."[59]

This assumption was crucial to all of Marshall's Contract Clause rulings. Even the most ignored provision was considered as if it undoubtedly had been inserted to uphold the immutable right to property. Marshall assigned little importance to the fact that no one had recognized its full implications when the Constitution was ratified because he reasoned that the principle he was upholding was one of the indisputable "general principles" of government: "If every man finds in his own bosom strong

[58] *Ibid.*
[59] Boorstin 1941, 20-22.

evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were strangers to it."[60]

Therefore, even if the Framers had not considered the question of corporate charters, they had enacted the Contract Clause to uphold general property rights which would naturally include protection for numerous categories of property including corporate charters. This reasoning led Marshall to ask not whether the Court would be broadening the application of the Contract Clause by applying its protection to corporate charters, but why the Court should restrict the application of the Contract Clause by ruling that it did not apply to corporate charters. Is there any reason, Marshall asks, why the Court should make this case an "exception" to the rule? The next two sentences repeat the idea that by upholding the law, the Court would be creating an "exception," which implies that by overturning the law the Court was adhering to the doctrine of judicial restraint. Rather than defending adding a new category of contract to the scope of the clause, Marshall asks, "On what safe and intelligible ground can this exception stand? There is no exception in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it."[61]

Yet the argument that since the framers left no indication that chartered corporations should be considered to be an "exception," such contracts must be considered constitutionally protected, is rather curious because of Marshall's specific acknowledgment that "this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted."[62] The argument

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[60] *Dartmouth* at 647-48.
[61] *Ibid.*, 645.
[62] *Ibid.*, 644.

turns on the fact that the framers failed to provide "an exception" for an unanticipated question.

Madison and the Inviolability of Contract

One difficulty in proving that Madison's approach to constitutional interpretation differed substantively from Marshall's approach is that Madison suddenly stopped recording his views of constitutional disputes at exactly the same time the Marshall was appointed Chief Justice. After taking a leading role in the debate over every important constitutional question for the republic's first dozen years, Madison turned silent on the subject for the next sixteen years during his tenure as Secretary of State and President. Incredibly, one will not even find in all the volumes of his records any mention of his reaction to *Marbury v Madison* (1803). A number of factors help explain Madison's sudden reticence. If he had not been in such close proximity to his closest friend and political ally during the first eight years, more of his thoughts undoubtedly would have been set down on paper. In addition, the demands of his work left little time for theoretical inquiries, and perhaps he found it best to ignore some questions such as whether the Louisiana Purchase was constitutional. Finally, Madison always avoided personal attacks. Even during the most heated political moments, such as his legendary debate with Henry during the Virginia Ratification Convention, Madison was quite ill but he never lost his temper. And, not only was Madison always reluctant to criticize others, he would have been especially reluctant to criticize the Court if he had believed that it would weaken America's constitutional system of government.

Madison found considerably more time to comment on constitutional questions after his retirement, but he still usually refrained from directly attacking the Marshall

Court. However, he did write a letter that contradicted the most essential principles in *Dartmouth College*. Several years after Dartmouth was decided, Madison and Jefferson became involved in a similar dispute. Their efforts to found the University of Virginia were opposed by supporters of the College of William and Mary.[63] The two institutions would be obvious rivals, and friends of the University talked of having the state legislature move the College from its Williamsburg site. In fact, Jefferson even suggested that the College might be combined with his own University. Jefferson's plan was to use the endowment of William and Mary to establish a system of intermediate schools in Williamsburg and Richmond, and he went so far as to draft a bill for the Virginia government to consider entitled, "A bill for the discontinuance of the College of William and Mary, and the establishment of other colleges in convenient distribution over the state." Not surprisingly, many Virginia state legislators pointed out that such an action would be unconstitutional under Marshall's ruling in *Dartmouth College*.

Madison's reaction to Jefferson's plan dispels any notion that he entertained the same concern for property rights as Marshall. Although he supported Jefferson's plan, Madison predicted that it would not work. He noted, sensibly enough, that there could be little hope that the College "would accede to any arrangement which is to take from it a part of its funds, and subject it to the Legislative Authority." And, any state action would be doomed to a legal defeat because the "perpetual inviolability of Charters and of donations both Public and private, for pious & charitable uses, seems to have been too deeply imprinted on the Public mind to be readily given up." The next sentence leaves no doubt that not only did Madison reject the principle of inviolable property rights, but

[63] The discussion of this incident draws upon Malone 1981, 411-413.

also specifically disagreed with Marshall's holding that corporations can be said to enjoy a vested right to property:

> ...the time surely cannot be distant when it must be seen by all that what is granted by the Public Authority for the Public good, not for that of individuals, may be withdrawn and otherwise applied, when the Public good so requires; and with an equitable saving or indemnity only in behalf of the individuals actually enjoying vested emoluments.[64]

Although Madison is so often portrayed as an uncompromising advocate of property rights, this letter proves the fallacy of such arguments. Indeed, the letter compares Marshall's idea that corporations can have perpetually vested property rights with the tradition of primogeniture and entail, a practice that had been abolished in Virginia in 1776 largely as a result of Jefferson's efforts:

> Nor can it long be believed that Altho' the owner of property cannot secure its descent but for a short period even to those who inherit his blood, he may entail it irrevocably and forever on those succeeding to his creed however absurd or contrary to that of a more enlightened Age. According to such doctrines, the Great Reformation of Ecclesiastical abuses in the 16th Century was itself the greatest of abuses; and entails or other fetters attached to the descent of property by legal acts of its owners, must be as lasting as the Society suffering from them.[65]

Perhaps the reader wonders whether Madison made this argument simply to appease a dear and aged friend. Madison was always exceedingly courteous with Jefferson in their exchanges. In fact, when secessionists cited the Kentucky Resolutions as supportive of their cause after Jefferson's death, Madison warned that it had always been necessary to make "allowances" for "a habit in Mr. Jefferson, as in others of great genius, of expressing in strong and round terms impressions of the moment."[66] However,

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[64] JM to TJ, Dec. 31, 1824, WJM 9:213.
[65] *Ibid.*,
[66] JM to Nicholas Trist, May__ 1832, WJM 9:479.

Madison was never deferential when they differed over politics,[67] and he even fully criticized one of Jefferson's ideas in *Federalist* 49.

Second, when this letter was written Madison had already begun to view his epistolary missives as a correspondence with posterity. As a student of Madison has noted, "The extremely complete file of copies [of his letters] which he retained throughout his retirement and the avidity with which he sought to regain the originals or copies of his earlier correspondence show that he anticipated that they would someday be printed."[68] Madison never offered a systematic analysis of the Constitution during his retirement years, and he limited his writings to questions that were specifically asked of him. However, the nature of his responses indicate his expectation that his letters would be read after his death. By 1831 he had outlived all the other members of the Constitutional Convention and almost all the other illustrious survivors of the

[67] The best example of how Madison would courteously refuse to placate Jefferson occurred in their most famous epistolary exchange which began with Jefferson's letter - "The Earth Belongs to the Living." Jefferson wrote that because the dead have no rights they should not be able to bind future generations "with a perpetual constitution or even perpetual law." Therefore, he suggested, a new constitution should be written every 19 years. TJ to JM Sep. 6 1789, POM 12:382-87. One can only imagine the reaction that Madison must have had when he read the letter. Nonetheless, Madison begins by praising Jefferson's idea as "a great one," and one that would suggest "many interesting reflections to Legislators." However, Madison immediately warns, "Whether it can be received in the extent to which your reasonings carry it, is a question which I ought to turn more in my thoughts than I have yet been able to do, before I should be justified in making up a full opinion on it. My first thoughts lead me to view the doctrine as not *in all respects*, compatible with the course of human affairs." Madison then offers a ruthlessly logical assault on Jefferson's entire argument. (Koch 1950 devotes an entire chapter to this particular correspondence). Finally, although Madison is often described as Jefferson's junior collaborator, Jefferson seemed to realize that Madison was the more logical thinker. For example, in the same letter he writes, "Turn this subject in your mind...& develop it with that perspicuity & cogent logic so peculiarly yours." POM 12:386.

[68] Dewey 1960, 10. Madison clearly expected for his private papers, as well as those of his contemporaries, to be of lasting historical importance. He discussed the matter in a letter written in 1823. "On reviewing my political papers & correspondence, I find much that may deserve to be put into a proper state for preservation; and some thing that may not in equal amplitude be found elsewhere. The case is doubtless the same with other individuals whose public lives have extended thro' the same long & pregnant period. It has been the misfortune of history, that a personal knowledge and an impartial judgment of things rarely meet in the historian. The best history of our Country therefore must be the fruit of contributions bequeathed by contemporary acts & witnesses, to successors who will make an unbiased use of them." JM to Edward Everett, March 19, 1823, WJM 9:125.

Revolution. Consequently, Madison's thoughts were sought by an exceedingly diverse range of people:

> Anyone who sought advice on matters governmental or constitutional – and personal, as well – felt free to write the former President. Letters came from unemployed men inquiring what profession Madison advised for them, students seeking his advice on a course of reading in law and government, pamphleteers imploring him to read and approve their offerings, nullificationsts and consolidationists, men and women seeking charity, debating societies, and even a student imploring him to make a few comments to serve as the basis of a college thesis.[69]

Although Madison usually responded, he would often perfunctorily cite his age or health as preventing him from fulfilling requests or answering questions. Yet sometimes Madison would compose "a long and carefully considered answer" for a complete stranger. Why? Because that person had had the luck "to strike upon a point which Madison wished to expound upon and which his regular correspondents had not mentioned."[70] Would a man who took such care to record his views on constitutional questions not have considered the constitutional implications of his argument concerning property rights? It would have been out of character for Madison to have directly criticized Marshall's Contract Clause decisions, but his letter leaves no doubt that he did not agree with the ruling in *Dartmouth College*. And although he did specifically critique the Chief Justice's approach to constitutional interpretation, Madison had already made that argument in a previous letter critiquing *McCulloch v Maryland* (1819). That letter will be examined in the next chapter.

Sturges v Crowinshield (1827)

Of the four laws considered in this series of cases, the statute that most clearly violated the express meaning of the Contract Clause was the measure considered in

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[69] Dewey 1960, 8.

Sturges v Crowinshield. The case, which centered on a New York bankruptcy law, was heard by the Court during the financial panic of 1818-19. Commodity prices had collapsed after the close of the war, and land values had plummeted. As a result, many debtors were unable make payments on their loans. And although the Constitution gives Congress the authority to establish "uniform laws on the subject of Bankruptcies,"[71] no federal statutes had been enacted. Because the only relief available to debtors was via state legislation, interest in the case extended well beyond New York.

Marshall answered the first question - whether the bankruptcy power is exclusive to the federal government - by asserting, "If, in the opinion of congress, uniform laws concerning bankruptcies ought not be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease."[72] After deciding that the Bankruptcy Clause does not necessarily preclude the states from passing such laws, the Court had to consider whether the particular law in question was in violation of the Contract Clause. The states and the colonies had always enacted "insolvency" laws - statutes that freed debtors from imprisonment on assignment of their assets to creditors. However, the counsel for Sturgis,[73] the creditor, argued that bankruptcy laws, or statutes that discharged persons from the liability of debts, were unconstitutional. The question of whether the Contract Clause would prohibit bankruptcy laws had been the subject of little if any debate during the ratification process, and thus the Court was being asked to broaden the application of the Contract Clause to yet another category of laws.

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[70] Ibid., 9
[71] Article I, Section 8.
[72] *Sturges* at 196.
[73] Sturgis' name was misspelled by the Court reporter.

However, such a broad ruling was unnecessary because it seems fairly clear that the particular statute in question was unconstitutional. New York had failed to exempt contracts that had been formed prior to the passage of the law. The agreement between Sturgis and Crowinshield, in fact, had predated the statute. Although even Sturgis' counsel conceded that the law violated "the very words of the constitution," he nonetheless argued that it was "not within its spirit, because such acts have been passed by colonial and state legislatures from the first settlement of the country, and because we know from the history of the times that the mind of the convention was directed to other laws which were fraudulent of character, which enabled the debtor to escape from his obligation, and yet hold his property, not to this, which is beneficial in its operation."[74] Marshall had little difficulty refuting the argument that historical evidence should overrule a clear and unambiguous textual meaning:

> Although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation.[75]

Madison most likely supported this argument and agreed with the decision. Nonetheless, the *obiter dicta* contained in this relatively simply decision are important to our inquiry. First, Marshall again asked whether the interpretation of the contract clause should be historically guided. The Court would not, Marshall warned, limit the application of the clause to the types of laws that had caused so much consternation during the pre-Constitutional era. Referring to that difficult economic period, Marshall wrote:

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[74] *Ibid.*, at 202.
[75] *Ibid.*, 202.

> To relieve this distress, paper money was issued, worthless lands, and other property of no use to the creditor, were made a tender in payment of debts; and the time of payment, stipulated in the contract, was extended by law. These were the particular evils of the day....To laws of this description therefore, it is said, the prohibition to pass laws impairing the obligation of contracts ought to be confined.[76]

After conceding that the "attention of the convention [was] directed to" such acts as these, Marshall offered a new historical justification for why the application of the clause should not be limited to those measures. As previously noted, Marshall had contended in *Dartmouth College* that the Contract Clause protects corporate charters because the Framers had left no indication that such contracts should be considered an exception to the rule. This argument was hardly convincing because the Chief Justice had also acknowledged that the Framers had never actually considered the question of corporate charters. Marshall refined this argument in *Sturges* by contending that the Framers *had* considered the full implications of the Contract Clause. He wrote that if "nothing more [had] been intended, nothing more would have been expressed."[77] Then, in an excellent example of his ability to recast or greatly expand the original understanding of a particular provision, Marshall asserted:

> In the opinion of the convention, much more remained to be done. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The constitution therefore declares, that no state shall pass "any law impairing the obligation of contracts."[78]

Although Marshall argued that the Framers "intended to establish a great principle," he offered no specific historical evidence to support this claim. One is

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[76] *Ibid.*, 204.
[77] *Ibid.*, 206
[78] *Ibid.*

reminded of Michael Perry's definition of non-interpretivism in which a judge reaches a decision "without really interpreting" the Constitution but uses "rhetoric" to create the illusion of actual textual interpretation. Marshall makes an historical argument but fails to offer even a cursory examination of the historical record. Instead, the Chief Justice simply claims that if the Framers had wanted to limit the application of the provision to only those measures that had been occurring within the various states, "terms more directly applicable to the subject, more appropriately expressing the intention of the convention, would have been used."[79]

The obvious question which arises is why Marshall argued that the Framers "intended [the Contract Clause] to establish a great principle" when the New York statute so clearly violated the express meaning of the provision. In *Sturges*, the Court was finally presented with a law that *was* impairing a contractual obligation. The Chief Justice could have simply written that the Court was obligated to overturn laws that clearly violate the Constitution, and then he could have shown that there was little doubt that the New York statute was such a law. In fact, it was exactly the type of contract that the Framers had intended to protect: a contractual agreement between two private parties. Even more surprising is Marshall's failure to note specifically the critical distinction between bankruptcy laws that apply retroactively as opposed those that apply prospectively. Indeed, Marshall concealed this distinction so effectively that the "general impression" at the time was that the ruling left the states with "no power to pass any bankruptcy or insolvency legislation."[80] To understand this unusual opinion we must

[79] *Ibid.*, 205.
[80] White 1991, 639.

discuss certain practices of the Court, as well as a specific disagreement among the Justices that was not immediately evident in the *Sturges* decision.

It is generally agreed that one of the most important factors in the transformation of the Supreme Court's power under Marshall's tenure was the ability of the Justices to forge unanimous decisions. For example, during the period between 1816 to 1823, there were only twenty-four dissents and eight concurrences from a total of 302 majority opinions.[81] A number of factors help explain how such broad agreement was achieved. First, when Marshall became Chief Justice he quickly instituted the practice of having the Justices live together in a boarding house. This custom not only allowed the Justices great opportunity to discuss informally and moot decisions together, but also the close living quarters encouraged the Justices to try to reconcile any professional differences in the interest of maintaining cordial personal relations.[82]

However, as White has shown, sometimes a fractious Court hid behind a false mask of unanimity. Two practices in particular helped forge the impression of unanimity. During the early years of the Marshall Court, opinions were delivered strictly upon a seniority basis. White explains that under "this system, one could not tell whether the judge who delivered the opinion in Court had actually written the opinion or even joined in the result." And, although "there is some evidence that by 1815 seniority had ceased to become an overwhelming consideration in the delivery of opinions, as late as 1810 only four opinions were delivered by Justices when more senior Justices were present."[83]

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[81] White 1991, 184.
[82] See White 1991, 190-91.
[83] *Ibid.*, 186. Citations deleted.

The establishment of the "opinion of the Court" also helped conceal any internal disagreements because the "practice of openly revealing unrecorded dissents seems to have been followed sporadically and frowned upon generally."[84] According to Justice Johnson, under this custom a Justice was designated "to deliver the opinion of the majority," and other Justices were given "discretion to record their opinions."[85] Although a number of dissents and concurrences were offered, many such disagreements went unrecorded.[86] In fact, as Justice Johnson once explained to Jefferson, even Marshall did not always agree with the opinion he wrote:

> When I was on our State bench I was accustomed to delivering seriatim opinions in our appellate Court, and was not a little surprised to find our Chief-Justice in the Supreme Court delivering all the opinions in cases in which he sat, even in some Instances when contrary to his own Judgment & vote. But I remonstrated in vain; the answer was, he is willing to take the Trouble, & it is a Mark of Respect to him.[87]

There is no doubt that Marshall encouraged the Court to adopt a façade of unanimity in order to solidify its institutional power. Nor surprisingly, Marshall's efforts were resisted by his adversaries, especially President Jefferson who explicitly complained that Marshall had "succeeded in getting the court to appoint some one to deliver the opinion of the majority and leave it to the minority's discretion to record its opinion or not."[88] Jefferson hoped to thwart his rival by appointing William Johnson to the Supreme Court in 1805. Even if Johnson could not turn around a Federalist-dominated Court, Jefferson expected that the new Justice would at least publicly defend the "Republican"

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[84] White 1991, 187.
[85] Justice William Johnson to TJ Dec. 10 1822. Quoted in White 1991, 186.
[86] See White 1991, 187 (note 131).
[87] According to Johnson the "real cause" of the practice was that "Cushing was incompetent, Chase could not be got to think or write, Patterson was a slow man & willingly declined the trouble, & the other two Judges [Marshall and Bushrod Washington] you know are commonly estimated as one Judge." Justice William Johnson to TJ Dec. 10, 1822, as quoted in WJM 9:116.
[88] TJ to JM Jan. _, 1823, WJM 9:116 note 1.

principles of government. However, after an initial period in which the Justice offered several concurrences and dissents, Johnson soon became as silent as the other members of the Court. And, when Jefferson later implored him to resume the practice of recording his opinion, Johnson recounted what had occurred after he had recorded one of his early dissents:

> During the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other, & the loss of reputation which the Virginia appellate court had sustained by pursuing such a course etc. At length I found that I must either submit to circumstances or become a cypher in our consultations as to effect no good at all. I therefore bent to the current.[89]

Marshall's skills at forging unanimous decisions were never more sorely tested than in *Sturges*. Before the decision had even reached the Supreme Court, four of the Justices had already issued conflicting circuit court rulings concerning the constitutionality of bankruptcy laws: two of the four had opposed the type of legislation at stake in *Sturges*, while the other two had supported it.[90] How the Court did eventually reach a unanimous decision was later explained in *Ogden v Saunders* (1827). In that case, which tested the constitutionality of prospective state bankruptcy legislation, Justice Johnson wrote that the decision in *Sturges* had partaken "as much of a compromise as of a legal adjudication." According to Johnson, the Justices had been "greatly divided in their views of the doctrine," and "the minority thought it better to yield something than risk the whole." The "minority," consisting of Johnson, Livingston and Duvall, had

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[89] *Ibid.*

[90] Justice Story had previously asserted that the constitutional power to enact bankruptcy legislation was probably exclusive to Congress [*Babcock v. Wetson*, 2 F. Cas. 306 (1812); *Van Reimsdyck v Kane*, 28 F. Cas. 1062 (1812)]; Justice Bushrod Washington had also argued that the power was exclusive [*Golden v Prince*, 10 F. Cas. 542 (1814)]; Justice Brockholst Livingston, sitting on the New York circuit court, had actually upheld the specific law being considered [*Adams v. Story* 1 F. Cas. 141 (1817)]; and Justice William Johnson had indicated that he believed the bankruptcy power to be concurrent, [Hannay v. Jacobs,

wanted the Court to declare the bankruptcy power to be concurrent, and in return for this concession these three Justices acceded to the proposition that the contract clause invalidated bankruptcy laws that were applied retroactively. "[D]enying the power to act on anterior contracts," Johnson later explained, "could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the construction."[91]

The anomalies in Marshall's decision in *Sturges* are largely explained by the constraints imposed by the compromise forged by the Justices. The Chief Justice wanted to argue that the Contract Clause prohibited the states from enacting even forward looking bankruptcy legislation. Indeed, as the next case demonstrates, the "great principle" that Marshall wanted to establish was that the Contract Clause prohibited almost any type of state "interference" with contracts. However, Marshall's compromise with the other Justices meant that he could not explicitly make such claims. Therefore, Marshall avoided the distinction between retroactive and prospective bankruptcy laws, and admitted only that the "opinion is confined to the case actually under consideration."[92]

Ogden v Saunders (1827)

In *Ogden v Saunders* the Court confronted the issue that it had previously avoided: can the states pass prospective bankruptcy legislation? A bare majority of four Justices ruled such legislation to be constitutional. The Justices in the majority, Bushrod Washington, Johnson, Smith Thompson, and Robert Trimble, issued seriatim opinions

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an unreported case, cited by counsel for *Crowinshield*, 4 Wheat. at 135.] I am indebted to White 1996 633-34 for this information.

[91] See *Sturges* 4 Wheat at 272-273 (Justice Johnson seriatim opinion.)

[92] See *Sturges* 4 Wheat at 207.

that have been described as "massive, idiosyncratic, and repetitive."[93] However, these opinions are also quite revealing because they offer a rare glimpse of how different the institution of the Supreme Court would have been if not for Marshall. The certitude and strength that was so characteristic of Marshall's writing would have been replaced by vacillation and disagreement. For example, Justice Washington begins his decision by stating that although he had attempted to determine which ruling would best conform to "the intentions of those who framed the constitution of the United States," he felt that he could not be certain whether he had determined the correct answer:

> I am far from asserting that my labours have resulted in entire success. They have led me to the only conclusion by which I can stand with any degree of confidence; and yet, I should be disingenuous were I to declare, from this place, that I embrace it without hesitation, and without a doubt of its correctness. The most that candour will permit me to say upon the subject is, that I see, or think I see, my way more clear on the side which my judgment leads me to adopt, than on the other, and it must remain for others to decide whether the guide I have chosen has been a safe one or not.[94]

Although such self-doubt is never found in the writings of the Chief Justice, the difference between him and Justice Washington was more than stylistic. The two men held different conceptions of the law.[95] Because Marshall believed that the law is a science and that its principles can be logically proven, he wrote with a confidence more characteristic of mathematicians than jurists. And this conceptual paradigm led Marshall to conclude that the Framers must have intended certain natural rights, including the right to enter into contract, to be constitutionally protected. Nowhere is the natural law basis of Marshall's thinking more evident than in *Ogden*. In fact, the reason the Court was

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[93] White 1991 653.
[94] See *Ogden* 12 Wheat at 256.

divided in *Ogden* is that the majority held a positive law conception of the Constitution, while the minority believed that the Constitution incorporated principles of natural law.

The seriatim opinions make the same argument offered in reference to both *Fletcher* and *Dartmouth College*: there is a distinction between a "law which impairs a contract, and one which impairs its obligation."[96] The reader will recall that Justice Johnson argued this in his *Fletcher* concurrence, and that Marshall seemingly conceded that the law did not necessarily violate any of "the particular provisions of the constitution of the United States."[97] It is very telling that the Chief Justice offered an extended natural law argument when he was confronted with considerably greater opposition in *Ogden*. Marshall's argument in *Ogden*, in short, demonstrates that his natural law reference in *Fletcher* cannot be dismissed.

As the seriatim opinions in *Ogden* indicate, the Contract Clause protects the obligation of contract, and contractual obligations are derived from the municipal laws of society: "it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge."[98] And if the obligation of contracts is derived from the municipal law of the state, then the municipal law of the state forms "a part of the contract and travels with it wherever the parties to it may be found."[99] Or, as Justice Thompson wrote, "parties must be understood as making their contracts with reference to existing laws, and impliedly

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[95] It is somewhat difficult to characterize Justice Washington's conception of the law because during his thirty one years on the Court he wrote only three dissents, two concurrences, and seven seriatim opinions. However, his seriatim opinion in *Ogden* should leave no doubt that he held different views from Marshall.
[96] See Ogden 12 Wheat at 256.
[97] See *Fletcher* at 139.
[98] *Ibid.*, at 267.
[99] See *Ogden* 12 Wheat at 259 (Justice Washington seriatim opinion.)

assenting that such contracts are to be construed, governed, and controlled, by such laws."[100] Unfortunately for Marshall, he himself had made the same argument in *Sturges*. As three of the four seriatim opinions point out,[101] Marshall had written in *Sturges* that a "contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of contract."[102]

If the Constitution secures the obligation of contracts, and if contractual obligations are derived from state laws, then, by definition, the state has the right to define prospectively the terms of contractual obligations. This conclusion, as the seriatim opinions note, is supported by the existence of any number of state laws including usury law, statutes of fraud, statutes of limitations, and just compensation laws that govern contractual obligations.[103] Another example, offered by Justice Thompson, is a state stipulation that a person under the age of twenty-one cannot legally enter into a contract:

> No one will pretend, that a law exonerating a party from contracts entered into before arriving at such age, would be invalid. And yet, it would impair the obligation of the contract, if such obligation is derived from any other source than the existing law of the place where made. Would it not be within the legitimate powers of a State legislature to declare prospectively that no one should be made responsible, upon contracts entered into before arriving at the age of *twenty-five* years. This, I presume, cannot be doubted. But, to apply such a law to past contracts, entered into when *twenty-one* years was the limit, would clearly be a violation of the obligation of the contract. No such distinction, however, could exist, unless the obligation of the contract grows out of the existing law, and with reference to which the contract must be deemed to have been made.[104]

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[100] See *Ogden* 12 Wheat at 297 (Chief Justice Marshall in dissent.)
[101] Justices Thompson and Trimble quote Marshall on pages 302 and 317 respectively. Justice Washington refers to Marshall's statement at 256
[102] See *Sturges* 4 Wheat. at 197.
[103] See *Ogden* 12 Wheat at 261-263 (Justice Washington seriatim opinion).
[104] See *Ogden* 12 Wheat. at 300 (Justice Thompson seriatim opinion).

In his opinion, which is the only dissent that the Chief Justice ever offered in a constitutional dispute, Marshall argued that the "error" of such a claim "lies at the very foundation of the argument. It assumes that contract is the mere creature of society, and derives its obligation from human legislation."[105] Marshall argued that the obligation of contract was a right "anterior to, and independent of society," and that it is "like many other natural rights, brought with man into society,"[106] This claim led Marshall to offer a rather unusual argument. The Chief Justice speculated about how man in the state of nature might be willing to exchange skins for food: "Is this contract without obligation? If one of them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it?"[107] Marshall concludes his philosophical foray by asserting:

> individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge him self for a future act. These rights are not given by society but are brought into it.[108]

Such a direct appeal to natural law principles was clearly unprecedented for Marshall. Why, it must be asked, did it occur in this case. I have previously contended that Marshall was brilliantly successful at bridging the divide between positive and natural law principles by incorporating the latter into the text of the Constitution. The "natural" right that Marshall valued most highly was, no doubt, the right to property and the Chief Justice had previously been able to protect that right from state government

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[105] See *Ogden* 12 Wheat. at 344 (Chief Justice Marshall in dissent.)
[106] *Ibid.*, at 345.
[107] *Ibid.*,
[108] *Ibid.*, at 346.

infringement via the Contract Clause. Even though the Constitution does not prohibit the states from seizing property, Marshall had managed to read that principle into the clause. We know that at least one Justice, Johnson, recognized that Marshall's argument in *Fletcher* is not supported by the text of the Constitution. The majority of the other Justices, whether or not they actually believed the prohibition to be explicitly listed in the Constitution, agreed that states should not be allowed to seize property. Thus, that principle was read into the Constitution via the *Fletcher* and *Dartmouth College* decisions.

In *Ogden*, Marshall hoped to broaden the application of the Contract Clause still further. Marshall wanted to establish that man has a right "to pledge himself for a future act," which would have radically changed the constitutional system of government. Marshall, in other words, wanted to have the Contract Clause apply not just retrospectively but prospectively. The idea that man has a right to enter into a contract and that its terms cannot be set by the state was essentially the same principle that the Court later defended in the Lochner era via the Fourteenth Amendment – the "liberty of contract."[109] This was clearly too much of a leap for at least four members of the Court. Thus, Marshall was finally forced to confront the question of whether his reading of the Contract Clause was supported by the words of the Constitution. And, because Marshall understood that he could not rest his argument on either the text of the Constitution or the intent of the Framers, he was forced to rely on a natural law type argument.

It would be unfair to contend that Marshall did not make both textual and historical arguments in his opinion. For example, Marshall analyzes Article One, Section 10, of the Constitution and contends that two of the provisions, the *ex post facto* clause

and the Bill of Attainder Clause, apply to criminal cases. The other provisions, such as the Contract Clause and the Tender Law Clause, apply to civil transactions. The former category, Marshall argued, was directed to retrospective legislation, but, in terms of the latter category, the "prohibition has been considered as total."[110] Although Marshall's argument is logical enough, the Contract Clause was not listed with the civil transaction prohibitions but with the *ex post facto* and Bill of Attainder prohibitions. Both of these prohibitions, as Marshall had pointed out, are directed at retrospective legislation. As Justice Washington put it, "members of the same family [were] brought together in the most intimate connexion with each other."[111]

In addition to this textual argument, Marshall claimed that the Framers expected the Contract Clause to prohibit any type of state bankruptcy legislation. Expanding upon his Sturges argument that the Framers intended the Contract Clause to establish a "great principle," Marshall not only claimed that the Contract Clause was of "great importance" to the Framers, but made it seem as if the Constitution was erected primarily for the purpose of establishing the principle of the inviolability of contract:

> We cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of a whole people by their representatives in Convention, in order to unite thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair

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[109] See *Lochner v New York* 198 U.S. 45 (1905).
[110] See *Ogden* at 336 (C.J. in dissent).
[111] See *Ogden* at 266 (J.Washington seriatim opinion).

> commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.[112]

Marshall's narrative is so powerful and full of common sense that it is easy to ignore the fact that he offers no concrete evidence to support his reconstruction of the original intent. The seriatim opinions, on the other hand, though awkward and clumsy, cite specific historical records to demonstrate that the Contract Clause was never understood as prohibiting forward looking bankruptcy legislation. In fact, the preponderance of evidence is so great that the Justices seem astounded that Marshall could disagree. One wonders whether his colleagues were willing to disagree with the Chief Justice only because they were so utterly convinced that he was in the wrong. The Justices noted that if the Contract Clause were understood to establish such broad restrictions on state power objections would have been heard in the state ratifying conventions. As Justice Johnson asked, can it "be believed for a moment that the sovereign States of this Union would have consented to" the Contract clause if they had understood it to prohibit "prospective laws, *affecting contracts.*"[113] If this had been the general understanding, "it is most wonderful that not one voice was raised against the provision, in any of the those conventions, by the jealous advocates of State rights, nor

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[112] See *Ogden* at 355 (C.J. Marshall in dissent).

[113] See *Ogden* at 258 and 268 (J. Washington seriatim opinion). The same argument is repeated by Justice Thompson at 305: "Had it been supposed that this restriction had for its object the taking from the States the right of passing insolvent laws, even when they went to discharge the contract, it is little surprising that no information of its application to that subject should be found in these commentaries upon the constitution. And it still more surprising, that if it had been thought susceptible of any such interpretation, that no objection on this ground, when the ingenuity of man was the stretch in many States to defeat its adoption; and particularly in the State of New York, where the law now in question was in full force at the very time the State Convention was deliberating upon the adoption of the constitution. But if the

even an amendment proposed, to explain the clause, and to exclude the construction which trenches so exclusively upon the sphere of State legislation."[114]

Second, after the Constitution was ratified, the states "went on carrying [bankruptcy laws] into effect and abrogating, and re-enacting them, without a doubt of their full and unimpaired power over the subject."[115] Not one single instance of a state court overturning such laws could be cited, and the sixty-first section of an 1800 federal law contained "a clear expression of the opinion of Congress in favour of the validity of this, and similar laws in the States."[116] Indeed, Congress' declaration that its law "shall not repeal or annul the laws of any State now in force, or which may be thereafter enacted for the relief of insolvent debtors, except so far as the same may affect persons within the purview of the bankrupt act," left little doubt that Congress believed that the States could enact bankruptcy laws.[117] The power of the states to enact bankruptcy laws had been recognized not just by various State legislatures, state judiciaries and Congress; even Marshall had seemingly conceded that the bankruptcy power was not exclusive in his *Sturges* opinion. As Justice Thompson noted, Marshall's argument in *Ogden* was "at variance with the decision in *Struges v Crowinshield*, where it is held, that this power is not taken from the States absolutely, but only in a limited and modified sense."[118]

Finally, the Justices also rejected Marshall's natural law argument. If the bankruptcy laws violated some natural right that man carried with him from the state of

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prohibition is confined to retrospective laws, as it naturally imports, it is not surprising that it should have been passed without objection, as it is the assertion of a principle universally approved."

[114] See *Ogden* at 268 (Washington).

[115] See *Ogden* at 278 (Johnson).

[116] See *Ogden* at 311 (Thompson).

[117] As quoted in *Ibid.*

[118] See *Ogden* at 307.

nature, why was Congress constitutionally empowered to violate this principle? "Can it be supposed," asked Justice Thompson,

> that the constitution would have reserved the right, and impliedly enjoined the duty upon Congress to pass a bankrupt law, if it had been thought that such law would violate this great principle? If the discharge of a party from the performance of his contracts, when he has, by misfortunes, become incapable of fulfilling them, is a violation of the eternal and unalterable principles of justice, growing out of what has been called at the bar the universal law, can it be, that a power, drawing after it such consequences, has been recognised and reserved in our constitution. Certainly not. And is the discharge of a contract any greater violation of those sacred principles in a State legislature, than in that of the United States?[119]

If bankruptcy laws violate a natural right, Justice Johnson asked, why is this power "asserted by every civilized nation in the world?"[120] The most remarkable aspect of Marshall's decision is not his assertion that the law was unconstitutional, but his implicit claim that there could be *no doubt* that the law was unconstitutional. In two of the three previous cases that we have examined, the Chief Justice began his decision by offering some variation of what Thayer later called the "doctrine of clear mistake."[121] And, in *Ogden*, Marshall begins his decision by obliquely referring to that principle: "This Court has so often expressed the sentiments of profound and respectful reverence with which it approaches questions of this character, as to make it unnecessary now to say more than that."[122] Thus, Marshall was claiming that he believed that there could be no doubt that the law was unconstitutional.

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[119] See *Ogden* at 312.
[120] See *Ogden* at 255.
[121] The one exception, interestingly, is *Sturges*. Perhaps Marshall did not recite a profession for judicial restraint in *Ogden* because he wanted to avoid noting how retrospective laws clearly violate the Contract Clause and instead hoped to establish a broader ruling.
[122] See *Ogden* at 332.

Even more surprising than Marshall's somewhat veiled reference to the doctrine of clear mistake is the fact that some modern commentators take this claim *prima facie*. Hobson has written that Marshall's decision in *Ogden* "did not signify any weakening of his commitment to the rule in guiding the Court's deliberations in difficult constitutional cases. Indeed, the whole thrust of his opinion was to present the case in terms that did not admit of any doubt on his part that the New York law was unconstitutional."[123] It is true that Marshall *admitted* no doubt that he was wrong. However, the Chief Justice was essentially claiming that he was right and that everyone else during the past few decades, including the majority of the Court, members of Congress, the President, state legislators and judges, were wrong. Can such a claim seriously be associated with the doctrine of judicial restraint? Of course, if one admits that Marshall was willing to ignore the doctrine of clear mistake and that he believed that natural law principles could triumph over the positive law of the Constitution, then it is impossible to argue that Marshall's approach to adjudication offers support to the arguments of today's originalists. And, if we observe that Marshall relied on natural law arguments in the two cases in which his constitutional arguments were challenged, *Fletcher* and *Ogden,* it becomes possible to contend that if the Chief Justice had confronted a more rigorous opposition in *Fletcher* as well as dissenting opinions in *Dartmouth College*,[124] he might have relied considerably more on the "general principles" of government type arguments and there would be little doubt today that he cannot accurately be characterized as a proponent of either judicial restraint or of a positive law approach to adjudication.

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[123] Hobson 1996, 101.
[124] Justice Duvall dissented in Dartmouth without recording an opinion.

Madison and Property Rights

Although Madison's arguments against the principles established in *Dartmouth College* establish that the ex-President could not possibly have agreed with Marshall's decision in *Ogden*, perhaps a word should be offered concerning Madison's understanding of property rights. Though Madison never described any rights as "natural" save religious freedom and the right to self-government, he is often accused of harboring an overwhelming concern for property rights.[125] Madison's strongest defense of property rights occurs in *Federalist* Ten. Although the subject of that essay is how to control majority faction in a democratic society, Madison does claim that the "first object" of government should be the protection of the "faculties of man," and he argues that the "different and unequal faculties" of man result in "the possession of different kinds and degrees of property."[126] However, nowhere in that essay does Madison argue that property rights should be considered inalienable. When Madison discusses what should occur if a law were to be proposed "concerning private debts" and a division arises between creditors and debtors, he does not argue against the enactment of bankruptcy laws or laws beneficial to debtors. He simply states that "[j]ustice ought to hold the balance between them,"[127] which implicitly recognizes that both debtor as well as creditor have certain rights that should be recognized.

Perhaps the strongest evidence that Madison was not obsessed with the protection of property rights is that he wrote so little on the subject.[128] Besides *Federalist Ten*,

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[125] The most recent monograph advancing this claim is Matthews 1995.
[126] *Federalist Ten* 78.
[127] *Federalist Ten* 79-80.
[128] It is true that during the pre-constitutional era Madison wrote quite a few letters condemning "paper money." However, he was at least as concerned with the adverse economical effects that such policies produced as with the need to uphold property rights. And, the fact that there were so few objections raised

Madison offered only one other essay on the subject, a paper simply entitled "Property" which was written in 1792. In that essay, Madison indicated that he attached a much broader definition to the word than what it is commonly understood to mean today:

> The term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."
> In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*
> In the former sense, a man's land, or merchandize, or money is called his property.
> In the latter sense, a man has a property in his opinions and his free communication of them.[129]

Having thus offered a definition of "property" that seemingly embraced an object of desire that did not interfere with another's rights, Madison then distinguished between the right to possess property and religious freedom:

> Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.[130]

Madison's argument rests on the distinction between positive and natural rights. The only right that he is willing to place in the latter category is religious freedom. Where Marshall viewed property rights as natural and anterior to society, Madison argued that the right to the possession of property is a positive right created by the state. The principle that Madison asserted in this essay is supported by his lifelong reluctance to categorize any right besides religious freedom and the right to self-government as natural,

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against the currency restrictions found in Article I Section 10, indicates that by 1787 the general sentiment was that such laws helped no one in the long run.

[129] "Property" March 27 1792, POM 14:266.

as well as his previously discussed letter to Jefferson concerning the takeover of the College of William and Mary.

Racial Minorities

If the purpose of this inquiry were to establish that Marshall did not advance a consistent approach to constitutional interpretation, it would be necessary to examine closely his decisions concerning the rights of racial minorities. However, the fact that Marshall did adopt a historicist centered positive law approach in deciding these decisions does not detract from the argument that the Chief Justice and Madison disagreed on essential questions of constitutional law. They certainly did not disagree on every issue, and one belief that they did share was that the Constitution offered no protections for racial minorities' natural rights. It can also be noted that Marshall's mode of adjudication in these cases belies the claims that rather than expecting constitutional interpretation to be guided by history, the Framers expected its constitutional meaning to be defined much as it had been in the English common law system "through the usual judicial process of case-by-case interpretation."[131]

Perhaps no case presented the natural versus positive law divergence more clearly than did *The Antelope* (1825).[132] The dispute in *The Antelope* began when a privateer, which departed from a U.S. port but sailed under a Latin American flag, began raids on ships in the North Atlantic. This vessel, the *Columbia*, captured several ships that had been carrying African slaves but was wrecked off the coast of Brazil. After transferring its bounty back to one of its previously captured ships, the *Antelope,* this ship and her crew were seized by an American cutter and taken into an American port. The various

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[130] *Ibid.*, 267.
[131] Powell 1985, 904. See pages 101-108.

captured ships had been sailing under different flags, and both the Spanish and Portuguese governments made claims for the ship and cargo, as did the master of the revenue cutter, the captain of the privateer, and the United States governments.

Three years before *The Antelope,* Justice Story had held in a circuit court decision that the slave trade was "repugnant to the general principles of justice and humanity."[133] However, in *The Antelope*, Marshall rejected the idea that natural law principles can triumph over positive law. Marshall explicitly conceded that "every man has a natural right to the fruits of his own labour, and...no other person can rightfully deprive him of those fruits, and appropriate them against his will," as well as the idea that the slave trade was "contrary to the laws of nature."[134] However, rather than "yield to feelings which might seduce [the Court] from the path of duty," Marshall noted that the slave trade had been sanctioned by "the usages, the national acts, and the general assent of that portion of the world" involved in the dispute. Therefore, the traffic "remained lawful to those whose governments [had] not forbidden it."[135]

Not only was Marshall, at times, willing to have positive law triumph over natural law, in *Worcester v. Georgia,* (1832)[136] he employed an historicist approach to adjudication. In this opinion, which examined Georgia's clearly unconstitutional statutes aimed at harassing native Americans living within her borders, over half of Marshall's opinion consists of a detailed analysis of the historical relations between native Americans and European settlers. Although Marshall never quoted any of the arguments that he had heard in the Virginia Ratification Convention to support his contention that

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[132] 10 Wheat. 23.
[133] *United States v. La Jeune Eugenie* 1822 21 *Federal Cases* 832, 847.
[134] *The Antelope* 10 Wheaton. 66, 120.
[135] *Ibid.*, 122.

the Contract Clause was intended to establish a "great principle" of government, Marshall offered a historical tour de force in *Worcester.* The Chief Justice even examined events that occurred twenty five years before the Constitution was even ratified. Marshall referred to a 1763 speech of a superintendent of Indian affairs, one "Mr. Stuart," quoted a proclamation issued by the King of England in that same year, and discussed a proclamation issued by Governor Gage in 1772. These historical references, and many more, were used to determine the original understanding of certain constitutional provisions. Although this historicist approach to adjudication may seem surprising when compared to his Contract Clause decisions, we must remember that Marshall was not only a jurist, but also an accomplished historian; Marshall authored a four volume biography of George Washington.

Conclusion

Although the Chief Justice offered an historicist reading in cases dealing with racial minorities, Marshall rarely employed the mode of constitutional interpretation that Madison had long advocated. In most of his landmark constitutional decisions, and in the decisions for which he is best remembered, (including the Contract Clause cases, *McCulloch*, and *Gibbons v Ogden*,) Marshall offered a variant of the English common law approach. These cases demonstrate the fallacy of the claim that Madison and Jefferson invented an historicist approach to constitutional interpretation.

Although Marshall reached conclusions in the Contract Clause cases with which Madison disagreed, it could still be argued that perhaps the two men simply differed in their interpretations of this one particular clause. However, Madison clearly recognized that Marshall's approach to constitutional interpretation was fundamentally different

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[136] 6 Peters 515.

from his own, and he left no doubt of this in his critique of *McCulloch v Maryland* (1819). In fact, as the next chapter will indicate, the dispute between Marshall and Madison is directly relevant to the interpretation of the Commerce Clause today.

Chapter Seven

We Start with First Principles

Over a century and a half over their deaths, the unresolved debate between Marshall and Madison continues to divide today's Supreme Court. Consider the noted *United States v. Lopez*, (1995),[1] where Chief Justice Rehnquist, who wrote the opinion of the Court, offered an argument that paralleled Madison's critique of *McCulloch v Maryland* (1819).

Alfonso Lopez was a student at a San Antonio, Texas public school. After an anonymous tip, he was summoned to the principal's office, where he admitted possessing a .38 caliber revolver and five cartridges. He was then arrested and charged with violating Texas law. The state action was dismissed the next day after federal agents charged him with violating Congress' Gun-Free School Zones Act (GFSZA).[2] The GFSZA forbade "any individual knowingly to possess a firearm at a place that [he] knows....is a school zone."[3] While Lopez moved to dismiss his indictment on the ground that Congress lacked the power to legislate control over Texas' public schools, the government defended the GFSZA as a legitimate exercise of Congress' Commerce Clause powers. The district court ruled in favor of the government, found Lopez guilty, and sentenced him to six months in prison. The Fifth Circuit reversed, and held that the Act, "in the full reach of its terms, is invalid as beyond the power of Congress under the

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[1] 115 S.Ct. 1624.
[2] In 1992, when the police charged Lopez, the relevant statutory provision was 18 U.S.C. 922 (q)(1)(A) (1988 & Supp. V 1993). In 1994, Congress added to the Act and as a result the relevant statutory provision may now be found at 18 U.S.C. 922 (q)(2)(A).
[3] 18 U.S.C. 922 (q) (1) (A).

Commerce Clause."[4] When the case reached the Supreme Court, the government argued that Congress can regulate any activity that has a "substantial effect" upon interstate commerce. The Court, in a five to four ruling,[5] declared the GFSZA unconstitutional, and stated that the possession of a firearm in a school zone "had nothing to do with 'commerce' or any sort of economic enterprise, however broadly defined."[6]

Lopez is seen as a potential landmark decision because since *National Labor Relations Board v Jones & Laughlin Steel Corporation* (1937),[7] the Supreme Court had deferred to the judgment of Congress when reviewing Commerce Clause legislation. During this sixty year period, doctrines that had once constrained Congress' power to regulate interstate commerce, such as the "manufacturing versus commerce" distinction[8] and the "direct versus indirect affect" test[9] were overturned, and replaced with the "rational basis" test which was first offered in *Wickard v Filburn* (1942).[10] Under this doctrine the Court asks whether there is a "rational basis"[11] to believe that the legislation has a "substantial"[12] effect upon interstate commerce.[13] No statute failed to clear this very low hurdle.

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[4] United States v Lopez, 2 F.3d 1342, 1367-68 (5th cir. 1993).
[5] Chief Justice Rehnquist wrote the Court's opinion, which Justices O'Connor, Scalia, Kennedy and Thomas joined. Justice Kennedy, joined by Justice O'Connor, added one concurring opinion, and Justice Thomas added another. Justices Stevens and Souter filed separate dissents, and Justice Breyer filed a dissent joined by Justices Stevens, Souter, and Ginsberg.
[6] Lopez, 115 S. Ct. At 1625.
[7] 301 U.S. 1.
[8] *Hammer v Dagenhart,* 247 U.S. 251 (1918).
[9] *Carter v Carter Coal Co.,* 298 U.S. 238 (1936).
[10] 317 U.S. 111.
[11] See e.g., *Heart of Atlanta Motel, Inc. v. United States* 379 U.S. 241, 262 (1964); Hodell v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276 (1981); Preseault v. ICC 494 U.S. 1, 17 (1990).
[12] Wickard v. Filburn 392 U.S. 111, 197 (1942).
[13] As Justice Souter notes, the formulation of this test did not come until the 1960's because of the "complete elimination of the direct/indirect effects dichotomy and acceptance of the cumulative effects doctrine" in Wickard v. Filburn 317 U.S. 111, 125, 127-129 (1942).

In *Lopez*, however, the government's argument was weakened by its concession that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone."[14] In other words, Congress had not even asked what effects, if any, the regulated activity had on interstate commerce before passing the GFSZA. Despite the absence of congressional findings, the government still relied upon the rational basis test in its oral arguments by speculating how the possession of guns near schools might have an effect interstate commerce. The government argued:

> the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population....Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe...[And,] the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment....that, in turn, would have an adverse effect on the Nation's economic well being.[15]

Rehnquist, who delivered the opinion of the Court, responded to this rationale with an argument for abandoning the rational basis doctrine. "Under the theories that the Government presents," the Chief Justice wrote,

> it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.[16]

Rehnquist's point is that it is very easy to offer rational arguments that even the most traditional areas of state regulation, including marriage, divorce and child custody, affect interstate commerce. He therefore concluded that although Congress should have a choice of means in exercising its enumerated powers, that choice must be limited by

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[14] See Lopez 115 S.Ct. at 1631.
[15] Ibid., 1632-33.

some constraints. Because the rational basis test seems to reject any significant limitation on Congress' power, it would, in the words of the Chief Justice, "require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated....and that there never will be a distinction between what is truly national and what is truly local,"[17]

Rehnquist's critique of the rational basis doctrine has caused a certain amount of confusion.[18] The Chief Justice avoided stating whether the law would have been upheld if Congress had offered findings regarding the effects of firearm possession in and around schools upon interstate commerce.[19] Therefore, the Chief Justice retreated from clearly overturning the rational basis doctrine. And although the link between the rational basis doctrine and the Necessary and Proper Clause was explicitly made in decisions cited by the Court in *Lopez*,[20] Rehnquist's ruling failed to discuss the clause. No one argued that the GFSZA regulated interstate commerce. The question was whether it could be seen as a necessary and proper adjunct to the regulation of such commerce.

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[16] See *Lopez* at 1632.
[17] Ibid., at 1634.
[18] See Lopez, 115 S.Ct. at 1657 (Souter J., dissenting); Herbert Hovenkamp, "Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole-Tribe Decisions" Columbia Law Review 96 (1996): 2213-2247; Eric Grossman, "Were Do We Go From Here? The Aftermath and Application of United States v. Lopez" Houston Law Review 33 (1996): 798; Lawrence Lessig, "Translating Federalism: United States v. Lopez," Supreme Court Review (1995): 125-215
[19] The Court noted that in United States v Bass 404 U.S. 336 (1971), it had previously ruled a federal statute prohibiting possession of firearms by felons unconstitutional "both because the statute was ambiguous and because 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'" Lopez, 115 S.Ct. At 1631 quoting Bass, at 349.
[20] See e.g., Wickard v Filburn 317 U.S. 111, 121 (1942); Katzenbach v McClung 379 U.S. 294, 302 (1964), quoting United States v Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (Congress' power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end"); Heart of Atlanta, 379 U.S. 241, 275 (1964) (Black, J., concurring) ("Congress...has power under the Commerce Clause and the Necessary and Proper Clause to bar racial discrimination in the Heart of Atlanta Motel and Ollie's Barbecue").

Rather than directly addressing this question of how to interpret the Necessary and Proper Clause, the Chief Justice relied upon a three pronged test to justify striking down the GFSZA. He first identified the "three broad categories of activity that Congress may regulate under its commerce power" as consisting of the "channels of commerce," "the instrumentalities of commerce," and those activities which have a "substantial relation to interstate commerce."[21] Rehnquist then concluded that "the first two categories of authority may quickly be disposed of"[22] because the GFSZA "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[23] If the GFSZA were "to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce."[24] Presumably, Rehnquist would substitute his substantial relation test for the rational basis test to create a higher constitutional hurdle for interstate commerce clause legislation.[25] Instead of offering a rational argument that a regulated activity might affect interstate commerce, Congress would be required to show that the activity has an actual and substantial affect. In any event, as already noted, Congress had failed to offer any findings to support the law under Rehnquist's criteria and, therefore, the law was struck down.

Rehnquist's opinion would have been easier to interpret if he had directly asked the question at the heart of the dispute: how much discretion should Congress have in choosing the "necessary and proper" means to achieve an enumerated power. His

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[21] See Lopez, 115 S. Ct at 1629-30.
[22] Ibid., at 1630.
[23] Ibid., at 1630-31.
[24] Ibid., at 1630.
[25] Although the word "substantial" was used in Wickard v Filburn 392 U.S. 111, 197 (1942), more recent decisions have seemingly abandoned the requirement and upheld legislation that had quite an insignificant effect upon commerce. See Katzenbach v McClung 379 U.S. 294 (1964).

argument for replacing the rational basis test with the substantial relation test is an indirect way of debating how the Court should interpret the Necessary and Proper Clause. Although the Government did offer a rational argument that education suffers as a result of violence and that this in turn affects interstate commerce,[26] the majority believed that the chosen means were too remote and that to allow Congress virtually unlimited discretion would in effect destroy the system of enumerated powers.

Although one would assume that Rehnquist realized that the founding generation strongly disagreed over the interpretation of the Necessary and Proper Clause, the Chief Justice's writes as if there had been a consensus among the founding generation concerning its interpretation and that the Court could return to that original understanding. "We start with first principles," Rehnquist declared at the start of his decision, and he proceeded to note that "the Constitution creates a federal government of enumerated powers."[27] He then substantiated his argument that the GFSZA violated these "first principles" of the Constitution by quoting both Madison ("[t]he powers delegated by the proposed Constitution to the federal government are few and defined")[28] and Marshall ("The [federal] government is acknowledged by all to be one of enumerated powers.")[29]

In Chapter Four I discussed the three general approaches to constitutional interpretation: intentionalism, textualism, and structuralism. Interestingly, the opinions of Chief Justice Rehnquist, and Justices Thomas and Kennedy offer excellent illustrations of an originalist application of all three methods. As indicated, Rehnquist turned to

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[26] Also see Justice Bryer's dissent. Ibid., 1659.
[27] Id., 115 S. Ct.. at 1626.
[28] Federalist #45 292-293 Rossiter 1961.
[29] *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819).

Madison and Marshall to determine the general understanding or intent of the founding generation. Justice Thomas, on the other hand, ignored evidence concerning the subjective "understanding" of particular framers, and based his decision on a textual analysis of the Constitution combined with contemporaneous evidence, such as Samuel Johnson's *English Dictionary* (1773), to establish what the word "commerce" meant in the 18th century.[30] Justice Kennedy employed a similar methodology to Rehnquist but focused more on maintaining the structural relationship between the federal and state governments. However, all three opinions shared the same premise: the original understanding of the Constitution should be upheld. If one accepts this premise, it is virtually impossible to disagree with the conclusion that the law was unconstitutional.

As for the four Justices in the minority, it is evident that they were considerably less concerned with upholding the original understanding of either the Commerce Clause or the Constitution's system of enumerated powers. They all essentially made the same argument: the Court should uphold the "rational basis precedents from the last 50 years."[31] If one accepts their premise that the Court should adhere to more recent precedent, than one must accept their conclusion that the law should have been upheld.

Thus Lopez not only demonstrates how we continue to debate whether the meaning of fundamental law should evolve, but Rehnquist's appeal to Madison also Marshall illustrates the common misperception that these two men shared a similar constitutional hermeneutic to which subsequent generations can return. Yet Madison and Marshall debated the exact question at the heart of *Lopez*: how to interpret the Necessary

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[30] *Lopez*, 115 S. CT.. at 1643 (Thomas J., concurring citing Johnson 1773).
[31] See *Lopez* at 1654.

and Proper Clause. Indeed, Madison's strongest and most extended criticism of Marshall was prompted by the Chief Justice's ruling in *McCulloch v Maryland.*

McCulloch v Maryland

In *McCulloch*, as the reader undoubtedly knows, the Court examined the constitutionality of the Second National Bank of the United States. The dispute presented two questions: does Congress have the power to incorporate a national bank and, if so, can the states tax it. It is fitting that *McCulloch*, the most important decision ever decided by the Supreme Court, contains Marshall's most famous sentence: "we must never forget that it is a *constitution* we are expounding."[32] The epigram brilliantly encapsulates the same assumptions that Rehnquist made in Lopez: constitutional disputes are resolvable by remembering what the principles and purposes of the Constitution are, and a consensus was once reached regarding these values. Indeed, Marshall's memorable synopsis of these two assumptions implies that Maryland had forgotten the context of the dispute, and thus discounts Maryland's opposing position. However, the oral arguments made before the Court show that counsel for Maryland had not forgotten that they were debating a Constitution. In fact, Maryland specifically claimed that Marshall's interpretation would "change the whole scheme and theory of the government."[33]

As Rehnquist stated, Marshall began his decision by noting that the federal "government is acknowledged by all to be one of enumerated powers." However, after asserting that the "principle is....universally admitted," Marshall raised the following caveat: "But the question respecting the extent of powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."[34] Thus,

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[32] *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 407 (1819).
[33] Ibid.,365
[34] Ibid.,365

Marshall had to address the same issue that was later raised in Lopez: how close a fit does there have to be between legislation and an enumerated power? Neither the power to incorporate a bank nor the power to ban gun possession is enumerated.

The key for Marshall was that the enumerated powers of government should be seen as "important objects,"[35] as ends and not means:

> A constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake the prolixity of a legal code, and could scarcely be embraced by the human mind...Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose these objects be deduced from the nature of the objects themselves....*that instrument [the Constitution] does not profess to enumerate the means by which the powers it confers may be executed.* [italics added][36]

Madison, as we have seen, had opposed this argument since the National Bank had been first proposed. The reader will recall that in 1791 Madison had directly challenged the idea that the Constitution does not "enumerate the means by which the powers it confers may be executed." As Representative Madison argued:

> Congress have power to regulate the value of money yet it is expressly added, not left to be implied, that counterfeiters may be punished. They have the power "to declare war," to which armies are more incident than incorporated banks to borrowing; yet the power "to raise and support armies" is expressly added; and to this again, the express power to make rules and regulations for the government of armies, a like remark is applicable to the powers as to the navy. The regulation and calling out of the militia are more appertinent to war than the proposed Bank to borrowing; yet the former is not left to construction. The very power to borrow money is a less remote implication from the power of war, than an incorporated monpoly [sic] Bank from the power of borrowing; yet, the power to borrow is not left to implication.[37]

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[35] Ibid., 407.
[36] Ibid., 407-409.
[37] *Annals of Cong.* 1791, 1899.

The First National Bank was incorporated despite these objections and it was in business for two controversial decades before it was allowed to expire. When Congress decided to recharter the expired Bank in 1815, President Madison vetoed the bill that was presented to him. Surprisingly, Madison's veto message specifically waived "the question of the constitutional authority of the Legislature to establish an incorporated bank" because he felt that he could not ignore the "repeated recognitions under varied circumstances of the validity of such an institution in the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."[38] Madison vetoed the bill purely on the grounds of expediency, but after Congress presented him with a more acceptable proposal in 1816, Madison, ironically, signed the law establishing the Second Bank of the United States. It was, this law that was the subject of the dispute in *McCulloch.* Thus, Madison did not object to Marshall's ruling in McCulloch because the ex-President thought that the law in question should have been ruled unconstitutional. Madison disagreed with *McCulloch* because he feared that the ruling would permanently alter Americans' perceptions of what a constitution *is.*

Madison's was so opposed to Marshall's ruling in *McCulloch* that he even took the highly unusual step of directly challenging a Supreme Court decision. The fact that this was the only time that Madison took such action indicates the degree of the ex-President's feelings on the matter. And because he offered his critique to Spencer Roane, a prominent Virginia judge and one Marshall's most vociferous critics, Madison undoubtedly expected that his views would be disseminated widely.[39] In this letter

[38] Veto Message, Jan. 30, 1815, WJM 8:327
[39] Madison to Spencer Roane, September 2, 1819, Meyers 1973, 458-462.

Madison repeated his argument against viewing the enumerated powers of Congress as "objects:"

> Much of the error in expounding the Constitution has its origin in the use made of the species of sovereignty implied in the nature of Government. The specified powers vested in Congress, it is said, are sovereign powers, and that as such they carry with them an unlimited discretion as to the means of executing them. It may surely be remarked that a limited Government may be limited in its sovereignty as well with respect to the means as to the objects of his powers.[40]

Madison also disagreed with Marshall's analysis of the word "necessary." Marshall writes that it "frequently imports no more than that one thing is convenient, or useful." According to Marshall, Maryland had argued that "necessary" should be read "as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory."[41] To apply the latter definition, the Chief Justice noted, "would have been to change, entirely, the character of the instrument, and give it the properties of a legal code." Furthermore, to "have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason and to accommodate its legislation to circumstances."[42] Madison, on the other hand, argued that the Chief Justice had created a false dichotomy in his definition of "necessary." As the ex-President noted, there is "certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding

[40] Myers, 1973, 461.
[41] McCulloch 413-414.
[42] Ibid., 415-416.

it with a laxity which may vary its essential character, and encroach on the local sovereignties with which it was meant to be reconcilable."[43]

The Not Necessarily Necessary - Necessary and Proper Clause

Marshall's dichotomous definition of "necessary," combined with his argument that the enumerated powers of Congress should be seen as "great objects," led to the conclusion that Madison most strongly opposed: "A sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution."[44] Congress, not the Court, should decide whether legislation passes the constitutional test of necessity. Perhaps Marshall's famous explication of "necessary" masks his apparent conclusion that the courts should ask not whether a law is necessary, but whether it is appropriate or proper. After noting that history had clearly proven "the importance" of the Bank, Marshall wrote that even if "its necessity [were] less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place [Congress]."[45]

There are but three ways to define the powers of government in a written constitution: by authorization, by prohibition, or by a combination of both. If a constitution only lists powers, the constitutional test of a measure will be to ask whether the act is related to a power that has been enumerated. If a constitution only lists prohibitions on power, the question becomes whether the power is prohibited. Presumably, under a constitution that both enumerates and prohibits powers, acts of government must pass both tests. In *McCulloch,* Marshall offers a two part test to

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[43] Myers 1973, 461.
[44] McCulloch 421.

determine the constitutionality of laws that ostensibly follows this last rule: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government...this tribunal...[would] say that such an act was not the law of the land."[46] Any means that are not prohibited and are genuinely related to an enumerated power are thus constitutional or, as Marshall famously put it, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[47]

However, there is a tension, if not a contradiction, in Marshall's opinion. On the one hand, Marshall argues that acts of Congress must be legitimately tied to an enumerated power. However, he also claims that the Constitution was "intended to endure for ages to come," and, therefore, that acts Congress finds merely "convenient, or useful" are constitutional.[48] Madison feared that the latter argument would supersede the former because it invited Congress to justify virtually any act. "Is there a Legislative power" Madison wrote, "not expressly prohibited by the Constitution, which might not, according to the doctrine of the Court, be exercised by a means of carrying into effect some specified Power."[49] Madison even warned that legislation would be judged constitutional by referring solely to the prohibitions of power. *Lopez* provides ample evidence of the accuracy of Madison's prediction that the system of enumerated powers would eventually be rendered obsolete. Not only is it one of the very few cases in which

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[45] Ibid., 423.
[46] Ibid. 423.
[47] Ibid., 421.
[48] Ibid., 415, 413.

the Court has been willing to strike down a law based on the argument that it is not related to an enumerated power, it is also a decision in which four members of the Court agreed that banning gun possession near schools is reasonably related to the regulation of interstate commerce, even though Congress had not bothered to offer any findings to support that dubious conclusion.

Chief Justice Rehnquist's argument in Lopez parallels Madison's criticism of McCulloch in four ways. First, both men feared that the constitutional system of enumerated powers was under attack. Madison argued that "no practical limit can be assigned" to Marshall's reading of the Necessary and Proper Clause, and Rehnquist asserted that under the rational basis doctrine "it is difficult to perceive any limitation on federal power."[50]

Second, both Madison and Rehnquist argued that the Court is responsible for maintaining limitations on the powers of Congress and maintaining the balance of federalism. "It is true," Madison wrote, that "the Court are disposed to retain a guardianship of the Constitution against legislative encroachments." He then asked, paraphrasing, Marshall's reading of "necessary," "suppose Congress should, as would doubtless happen, pass unconstitutional laws not to accomplish objects not specified in the Constitution, but the same laws as means expedient, convenient, or conducive, to the accomplishment of objects entrusted to the Government; by what handle could the Court take hold of the case?" "[I]t seems clear," Madison concluded, "that the Court, adhering to its doctrine, could not interfere without stepping on Legislative ground, to do which

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[49] Myers 1973, 459.
[50] See Lopez 115 S. Ct. at 1632.

they justly disclaim all pretension."[51] Rehnquist made the argument that though his commercial/noncommercial distinction would lead to legal uncertainty; "Congress had operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty "to say what the law is."[52] Third, like Rehnquist, Madison argued that the system of federalism or "the very existence of these local sovereignties" is an argument against "the pleas for a constructive amplification of the powers of the General Government."[53]

A fourth parallel is that Madison even offered his own "first principles" or original intent argument to support his contentions:

> [I]t was anticipated I believe by few if any of the friends of the Constitution, that a rule of construction would be introduced as broad and 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 a rule would not have prevented its ramification.[54]

The debate between Madison and Marshall, as well as the divide over the *Lopez* decision, is best understood in reference to Marshall's epigram that "we must never forget it is a constitution we are expounding." Marshall believed that the Constitution entailed a flexible interpretation; how else could it survive? Madison, on the other hand, believed that the meaning of constitutional provisions must remain fixed; why else should it survive? Marshall's assertion that the Constitution was "intended to endure for the ages to come and consequently, to be adapted to the various crises of human affairs"[55]

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[51] Meyers 1973, 459-60.
[52] Quoting Marbury v. Madison, 1 Cranch. 137, 177 (1803).
[53] Myers 1973, 461.
[54] Myers 1973, 460.
[55] McCulloch, 17 U.S. at 415.

was at odds with Madison's belief that the purpose of the Constitution was to define and limit the powers of government.

Gibbons v Ogden

"Constitutionally," it has been said, "the nineteenth century was the century of the contract clause."[56] In the twentieth century, from the New Deal to the landmark Civil Rights Acts of 1964 and 1965, the Commerce Clause has played the leading role in the unprecedented expansion of the power of the federal government. Ironically, like the Contract Clause, little was said of this clause during the ratification debates. *Gibbons v Ogden (1824)*,[57] marked the Court's first ruling on the Commerce Clause and is best understood in conjunction with *McCulloch* because, as White has noted, "Gibbons can be seen as the next logical step from McCulloch's claims about federal supremacy."[58]

The question presented to the Court in *Gibbons* was whether Congress' power "To Regulate Commerce...among the States,"[59] is an exclusive or a concurrent power. Aaron Ogden, held a New York state issued exclusive franchise to navigate the waters between Manhattan and New Jersey. Thomas Gibbons challenged Ogden's exclusive and claimed that his federal license allowed him to "navigate the waters of any particular state by steamboats."[60]

Although Marshall's decision did not explicitly rule that the power to regulate interstate commerce is exclusive to the federal government, he did state that this power,

> like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution...If, as has always been understood, the

[56] Magrath 1966, 101.
[57] 9 Wheat 1.
[58] White 1991 568.
[59] Article I Section 8 of the U.S. Constitution
[60] As quoted in White 1991, 570.

> sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.[61]

Although Madison never publicly commented on Marshall's decision in *Gibbons*, there was no need to. In his last official act as President, Madison had vetoed the Bonus Bill which provided funds for constructing roads and canals. Even though he had publicly endorsed the its goal of improving America's transportation and communication systems, Madison had repeatedly warned that a constitutional amendment would be required before Congress could undertake such a task.[62] Ignoring such statements, Congress simply enacted the legislation which Madison proceeded to overturn. "The power to regulate commerce among the several States," Madison explained in his veto message, "cannot include a power to construct roads and canals, and to improve the navigation of water-courses in order to facilitate, improve, and secure such a commerce, without a latitude of construction departing from the ordinary import of the terms."[63]

Madison reiterated this argument that the economic regulatory powers of Congress must be construed narrowly in his *McCulloch* critique. Indeed, Madison's argument against Marshall's ruling in McCulloch is perfectly applicable to today's rational basis test, and could have been quoted by Rehnquist in *Lopez*,

> what is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion

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[61] See *Gibbons* at 196-97.
[62] See ie., Madison's Eighth Annual Message, Dec. 3, 1816 in WJM 8:379 where the President invited Congress to resort "to the prescribed mode of enlarging" their powers in order to "effectuate a comprehensive system of roads and canals."
[63] "Veto Message," March 3, 1817, WJM 8:386-87.

> as to the former to which no practical limit can be assigned. In the great system of Political Economy having for its general object the national welfare, everything is related immediately or remotely to every other thing; and consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a Power over every other. Ends & means may shift their character at the will & according to the ingenuity of the Legislative Body.[64]

Madison's argument that a regulated activity must have "some obvious and precise affinity," to an enumerated power stands in opposition to Marshall's argument that the power can "be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[65] Although there can be no doubt that Madison would have agreed with the majority's decision in *Lopez*, it is not hard to imagine that even Marshall would have thought that the law in *Lopez* was unconstitutional. For Marshall had stated in *Gibbons* that Congress' power is "restricted to that commerce which concerns more states than one," which implies that only commercial activities are subject to congressional regulation.[66]

However, it can also be argued that by stating that Congress' interstate commerce powers do not "comprehend that commerce which is completely internal....and which does not extend to or affect other states," Marshall was claiming that any commerce that *affects* other states falls under the category of interstate commerce. This argument, considered in combination with his statements in *McCulloch* that the Constitution "does not profess to enumerate the means by which the powers it confers may be executed," and that questions regarding "the degree of [a power's] necessity...is to be discussed in [Congress,]"[67] strongly supports the contention that the law in *Lopez* should have been

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[64] Myers 1973, 458-59.
[65] See *Gibbons* at 196-97.
[66] See *Gibbons* at 46.
[67] See *McCulloch* at 423.

upheld. In either event, it is likely that the Court will soon revisit the question of the necessary connection between the enumerated powers of Congress and the means which are allowed to be chosen because a case quite similar to *Lopez* is at present working its way up the federal courts.

In 1994, Congress used its interstate commerce power to enact the Violence Against Women Act[68] which entitles rape victims to sue their attackers on grounds that their civil rights were violated. At least twelve cases have been filed in federal courts under this law and in one of them, *Brzonkala v Virginia Polytechnic Institute and State University* (1999)[69] the United States Court of Appeals for the Fourth Circuit declared the law unconstitutional. Congress, perhaps because its prohibition against gun possession had been overturned in *Lopez*, had made sure to offer findings that rape "affects" interstate commerce and it offered estimates that "we spend $5 to $10 million a year on health care, criminal justice, and other social costs" because of violence against women.[70]

However, the Court ruled that the statute, in the words of Judge J. Michael Lutttig, "cannot be reconciled with the principles of limited Federal Government upon which this nation is founded."[71] In fact, Judge Luttig's opinion not only relied heavily upon Rehnquist's reasoning in *Lopez*, Luttig argued that one of the "first principles" of our Constitution is that the Federal Government is one of enumerated powers. Judge Lutttig even began his decision by referring to Marshall's opinion in *Marbury v Madison* to substantiate this claim. Of course, *McCulloch* not *Marbury* is the case that Luttig

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[68] 42 U.S.C. § 13981 (1994) ("VAWA")
[69] *Brzonkala v VPI State University*, No. 96-1814, 4th Cir. 1999 U.S. App. LEXIS 3457, Mar. 5 1999.
[70] Ibid., 16.
[71] New York Times March 6 1999 "Court Voids Civil Rights Law on Rape Victims" A9 (The name of the case is not given, but the victim's name is Christy Brzonkala.

should have considered, and perhaps the question at the heart of Luttig once again goes back to the debate between Madison and Marshall.

Cohens v Virginia

It is interesting to note that although Madison rarely commented upon the Court, he directed his few criticisms at two of the most prominent Marshall Court decisions: *Dartmouth College* and *McCulloch.* And although he failed to criticize directly such decisions as *Fletcher* or *Gibbons*, there can be little doubt Madison also disagreed with those rulings. Thus, Madison and Marshall differed over the interpretation of the Contract Clause, the Commerce Clause, and the Necessary and Proper Clause.

Two centuries have passed since the founding era, and many of the more subtle nuances of that political era have been largely forgotten. Of all the figures from that period, no one offered a more complex political theory than Madison. Madison truly belonged to neither the Federalist nor the Republican party. As the great historian, Henry Adams, once noted:

> Distrust of Madison was natural, for neither Virginian nor New Englander understood how Madison framed the Constitution and wrote the "Federalist" with the same hand which drafted the Virginia Resolutions of 1798.[72]

I have already noted how critics today are considerably less troubled by such contradictions. A lack of principle and political ambition are offered as ready explanations. However, if Madison did formulate a new constitutional theory in the 1790s in order to placate the states rights advocates in Virginia, one must ask why he did not join the Republican effort to prohibit the Supreme Court from overturning decisions

[72] Adams 1986, Vol. I 178.

offered by the highest state tribunals. No person was more closely associated with this argument than Spencer Roane who sat on the Virginia Court of Appeals.

In 1821 a criminal case from Virginia, *Cohens v. Virginia*[73] reached the Supreme Court. The Cohen brothers had been convicted of selling lottery tickets in Virginia but appealed the ruling on the grounds that they held a federal license. Virginia argued that the Eleventh Amendment precluded the Court from hearing the case, but Marshall ruled that that amendment did not prevent federal courts from deciding federal questions even if the state were an appellee Because the Court had essentially overruled Virginia's highest court on a criminal matter the decision caused a considerable uproar.

Roane, undoubtedly encouraged by Madison's recent letter criticizing Marshall's ruling in *McCulloch*, unsuccessfully tried to enlist Madison in the cause. "On the abstract question of whether the federal or the State decisions ought to prevail," the ex-President responded, "the sounder policy yield to the claims of the former." As he warned Roane, if the states were to be allowed to have the final say on constitutional questions, the Constitution "might become different in every State, and would be pretty sure to do so in some; the State Govt's would not stand all in the same relation to the General Govt, some retaining more, others less sovereignty; and the vital principle of equality, which cements their Union thus gradually be deprived of its virtues."[74]

Roane was not the only prominent Republican who attempted to enlist Madison's support for the cause. Two decades after he had warned that if the Republicans did not seize control of the Federalists dominated courts the "Revolution of 1800" would fail because "from that battery all the works of republicanism are to be beaten down and

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[73] 6 Wheat 264.
[74] JM to SR June 29, 1823, WJM 9:66.

erased,"[75] Jefferson found himself still battling his old nemesis, Chief Justice Marshall. In a series of letters to his appointee, Justice Johnson, the Jefferson joined in the protest against the Supreme Court's power to serve as the ultimate arbiter of constitutional disputes between the federal and state governments.[76] One would imagine that Jefferson should have known better than to turn to Madison. Indeed, Madison's response was surprisingly stern. After some preliminary remarks, Madison wrote that "the agitated question" to consider was "whether the Judiciary Authority of the U.S. be the constitutional resort for determining the line between the federal & State jurisdictions."[77]

As Madison informed his friend, such a power "is expressed by the articles declaring that the federal Constitution & laws shall be the supreme law of the land, and that the Judicial Power of the U.S. shall extend to all cases arising under them," it was regarded as "essential" by the Framers, and "was the prevailing view of the subject when the Constitution was adopted & put into execution." In fact, as Madison reminded Jefferson, in *Federalist* 39 he had written that "in controversies relating to the boundary between [the federal and state governments] the tribunal which is ultimately to decide is [the Supreme Court.]"[78] Not only had the proposition been originally agreed to, it remained the "prevailing view" thro' the long period which has elapsed; and that even at this time an appeal to a national decision would prove that no general change has taken place."[79]

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[75] TJ to John Dickinson, Dec. 19, 1801, in Jefferson 1904, 4:424.
[76] TJ to William Johnson, June 12, 1823, in Jefferson 1904, 10:232. For a discussion of the correspondence between these two men see chapter nine in Morgan 1954.
[77] JM to TJ June 27, 1823, WJM 9:141-42.
[78] *Federalist* 39 245.
[79] *Ibid.*, 142.

In his characteristically understated fashion, Madison noted that he was "not unaware that the Judiciary career has not corresponded with what was anticipated." The Court "by some of its decisions, still more by extrajudicial reasonings & dicta, has manifested a propensity to enlarge the general authority in derogation of the local, and to amplify its own jurisdiction." However, in the next very telling sentence, Madison wrote, "the abuse of a trust does not disprove its existence."[80]

Although it is often claimed that Madison's position in the 1780s contradicted what he had stood for in the 1780s, we must remember Adams's observation that neither Virginian nor New Englander completely understood Madison. During the 1780s Madison viewed the weakness of the Continental Congress as detrimental to the public good, and helped lead the struggle to centralize power through the enactment of a Constitution. A decade later, after the federal government exceeded its legitimate powers and passed the Alien and Sedition Acts, Madison became a friend to the states rights cause. But, when nullificationists began threatening the cause of Union, Madison once again defended the powers of the national government. Madison's uncompromising stance against the "preposterous & anarchical pretension" that congressionally approved protective duties were somehow unconstitutional and individual states could nullify the acts did not go unnoticed by Marshall. Indeed, the Chief Justice noted his "peculiar pleasure...[that Madison] is himself again, [avowing] the principles of his best days."[81]

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[80] Ibid.,
[81] Marshall to Story, Oct. 15, 1830, Quoted in Ketcham 1995 643.

Conclusion

The purpose of this dissertation was to challenge the assumption that the founding generation achieved a consensus as to how to approach constitutional interpretation. Once we recognize that Madison and Marshall disagreed over many of the same issues that divide originalists from non-originalists, we must conclude that it is impossible to return to the Founders' interpretive intent. However, we are still left with one unavoidable question: how should the Constitution be interpreted today?

It would be supremely arrogant to expect to resolve a debate that has continued, in one form or another, for over four centuries. Indeed, it may not even be possible to formulate a new argument in support of either originalism or non-originalism. The questions involved in this dispute -- whether the law should evolve or remain fixed, and whether or not fundamental law incorporate rules of logic, justice and fairness -- have been examined by the greatest legal minds in both England and America. Therefore, I have focused less on the theoretical debate than on the historical assumptions that underpin it.

I argue that it is misguided to challenge the legitimacy of either the natural or positive law legal traditions in America. However, it would be unsatisfying to conclude that because Madison and Marshall's conflicting constitutional theories reflected values, ideals and assumptions that were widely shared by their contemporaries, today's debate over constitutional interpretation is simply unresolvable. Perhaps the most constructive way to decide how the Constitution should be interpreted is not to argue over who was right, but to note which legal theory ultimately prevailed and why.

There can be no doubt that although Madison is considered to be the "Father of the Constitution," it is Marshall who defined the popular understanding of the document. Marshall's success is truly remarkable when one considers the tactical advantages that Madison and Jefferson enjoyed. Marshall's Federalists were dominant in the 1790s, but his party became little more than an historical artifact after his elevation to the Court. When the Republican party in 1801 assumed control of, to paraphrase Hamilton, the two most dangerous branches of government, the Court was an exceedingly weak institution. The Republican Congress quickly initiated impeachment hearings against Justice Chase, threatened Chief Justice Marshall with the same, canceled the Court's 1802 term, and repealed the circuit court legislation that the Federalists had just passed. Furthermore, over the next 24 years, Jefferson, Madison, and Monroe nominated Justices to the Court who they hoped would counterbalance Marshall's influence. In fact, by 1811 a majority of the Justices were Republicans.[1]

Marshall was a respected figure in 1800, but there was little indication that he would one day be recognized as America's greatest judge. As the reader will recall, he was offered the nomination only at the last minute after Jay's letter of refusal had arrived. Finally, Marshall had to confront the two men who were most closely identified with the writing of the nation's defining political documents: the Declaration of Independence and the Constitution.

If the originalist approach to constitutional interpretation ever had a chance to become dominant, it was during the early nineteenth century. Yet, in just a single term, the Chief Justice wrote one decision that explicitly acknowledged its departure from the

[1] In 1811the Court consisted of five Republicans – Justices Johnson, Livingston, Todd, Duvall and Story *and just two Federalists Washington and Marshall.

original understanding of the Constitution,[2] and another that directly contradicted arguments that the most important Framer had advocated for decades.[3] Not only were these two decisions accepted; they have become widely revered landmark rulings that are rarely challenged, even by today's originalists.

Although Marshall's eloquence was essential to his success, the Chief Justice was dependent on more than just the power of his pen. Many Americans, especially lawyers, were predisposed to accept his mode of interpretation because they too had read Blackstone's *Commentaries.* Another key to Marshall's success was the appeal of his elegentia juris portrayal of the Constitution. Consider how hard it must have been for Madison to argue against Marshall's assumption that principles of justice, fairness, and logic are incorporated into the Constitution. Madison's sole claim was that his approach to constitutional interpretation was more democratic or, as he would put it, more compatible with the republican theory of government.

Marshall's approach to constitutional interpretation prevailed because it was more accommodating to the needs of a rapidly evolving society. The Constitution was written when America was an agrarian nation comprised of small farmers. If its meaning had remained rigidly fixed save for the formal amendment process, the document would not have survived the changes wrought by the industrial revolution, the civil war, emancipation, numerous depressions and two world wars. We justly celebrate Marshall for the far-sighted nature of his decisions, not for the integrity of his methodological approach to constitutional interpretation.

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[2] See discussion of *Dartmouth College in* Chapter Six.
[3] See discussion of *McCulloch* in Chapter Seven.

Indeed, it is likely that Marshall would be revered less if he had followed a more consistent approach to constitutional interpretation. If Marshall had declared that slavery violated the "general principles" of government, what effect would such a ruling have had? Would the slaves have been liberated, or would the decision have been attacked and the power of the Supreme Court mortally wounded? Or, if Marshall had ruled that the Constitution does not prevent a state from seizing the property of a private corporation even though such actions violate the "general principles" of government, would the economic development of the country have been crippled? Marshall was like a great card player who knew how to play the hand that he was dealt. The Chief Justice stretched the meaning of the Contract Clause as far as he possibly could in *Dartmouth College*, but when confronted with a bald instance of a state destruction of property, Marshall declined to argue that the Fifth Amendment was intended to apply against state governments. In this originalist decision, *Barron v Baltimore* (1833),[4] Marshall acknowledged that no one had anticipated that the Bill of Rights would apply against the state governments.

It is ironic, yet understandable, that it is Madison who is more often accused of inconsistency. Although his 1790s constitutional arguments were neither bogus nor formulated, they did go against the tide of history. As I have demonstrated, Americans had shown a willingness to allow political necessity to determine their understanding of fundamental law. When they resisted English taxation the colonists cited Coke and Blackstone. When the rebellious Americans became Revolutionaries and declared their independence, they suddenly espoused the arguments of Locke. The Framers based the Constitution upon the principle of popular sovereignty, but in order to secure ratification

[4] 7 Pet. 242 (1833).

the Federalists never acknowledged that the doctrine of consent precludes the existence of other substantive natural rights.

Americans are often willing to sacrifice the integrity of their constitutional beliefs to advance their interets. Even Presidents Jefferson and Madison, it was said, out-federalized the Federalists. Perhaps Madison's sudden silence on constitutional questions during the first decade and a half of the nineteenth century arose from his inability to defend such actions as the Louisiana Purchase.

Nonetheless, Madison's belief in originalism was sincere. When he vetoed the Bonus Bill in 1816, he undoubtedly hoped that this last official act of his Presidency would help re-establish the originalist approach to constitutional interpretation. Yet, when Senator John Calhoun learned of Madison's 1816 veto he asked a question that Madison never answered: "upon what principle can the purchase of Louisiana be justified?" As Henry Adams has observed, if in 1816 the Constitution were "an instrument...employed for the first time," all would have "admitted that Madison was right." However, Madison should have considered not just the original understanding of the document, but "the interpretation which for sixteen years the Republican party, through Congress and Executive, had imposed upon the text."[5]

The problem with the originalist position is not that it was an artificial theory constructed by Madison and Jefferson in the 1790s. The difficulty is that even the strongest proponents of the theory thought that the public good must, at times, override constitutional restraint. And, as Madison once noted "precedents of usurpation" tend to have "a poisonous tendency."[6]

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[5] Adams II 1285.
[6] JM to Edmund Pendleton Jan. 8, 1782, POM IV 22.

Even though its strongest advocates helped undermine the theory, it would still be a mistake to think that the originalist doctrine ever became obsolete. As indicated, Chief Justice Marshall went to great lengths to make his decisions appear grounded in the original understanding of the Constitution. Indeed, his contention that the Framers' words answer questions that they never personally considered has become absolutely essential to the functioning of our constitutional system of government. Americans usually deny what Justice Jackson once admitted: "what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah."[7] The Chief Justice would never have made such an acknowledgement, nor would he have ever agreed with Holmes' statement that if "my fellow citizens want to go to Hell I will help them. It's my job."[8] Marshall, of course, also disagreed with what Madison had argued during the debate over the removal power: "If the Constitution means this by its declarations to be the case, we must submit; but I should lament it as a fatal error interwoven in the system, and one that would ultimately prove its destruction."[9]

However, it is considerably easier to imitate Marshall's confident rhetoric than it is to match his reasoning ability. With the exception of *Ogden v Saunders,* Marshall always knew just how far the document could bend before it broke. The authority of the Constitution is threatened whenever the general public believes that its meaning is being violated or ignored, as well as when it is admitted that the document demands action that

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[7] Youngstown Sheet & Tube Co. v Sawyer, 343 U.S. 579, 634 (1952) (Jackson J., concurring).
[8] Letter written to Harold Laski (need to get full cite, quoted from the New Yorker Jan. 11, 1999 Jeffrey Rosen, "Rehnquist's Choice" 29)
[9] *Annals* 1 Cong. 1 sess., 372

is inappropriate or immoral. The strength of non-originalism is in avoiding the latter. But, if originalism has experienced a revival in recent years, it is because laws and judicial decisions have been issued that seem to have the only the most tenuous relation to the Constitution.

No one would argue against the goal of protecting children from violent crime. However, is the possession of guns near school yards truly connected to interstate commerce? And, if it is, what act would not be included under this category? Indeed, Congress has now decided that even sexual assault falls under the purview of its interstate commerce powers. The problem with these laws is not that they are ill-intentioned. The difficulty is that it is impossible to argue that these laws are constitutional, and, at the same time, maintain that the powers of Congress are "defined and limited." Of course, it is not just Congress that has offered implausible interpretations of the Constitution. Even many who believe that privacy should be protected and that a women should have a right to secure an abortion admit that such rights were established not by the Framers of the Constitution but by the Justices of the Supreme Court.

Political considerations undoubtedly influenced Marshall's decisions. However, except for *Ogden v Saunders*, the Chief Justice always managed to establish a plausible connection between his decision and a specific constitutional provision. And, Marshall also conceded that the laws of justice and practical necessity cannot always triumph over the words enacted into the Constitution. We cannot expect, nor should we desire, to return to the original understanding of the Founders. If Madison's understanding of the Commerce Clause and the Necessary and Proper Clause was incompatible 1800 America, it is only more so today. However, the constitutional separation of powers, federalism,

and popular sovereignty are all principles that should still be upheld. They are subverted when Congress declares that the Commerce Clause reaches into every possible aspect of human existence, and when the Supreme Court practices non-interpretivist judicial review. What the Founders deemed to be their greatest innovation and most significant legacy -- a written constitution -- is being undermined.

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