

HARVARD LAW REVIEW

THE ORIGINAL UNDERSTANDING OF ORIGINAL INTENT

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When interpreting the Constitution, judges and commentators often invoke the "original intent of the framers" in support of their positions. Many claim that such an interpretive strategy is not only currently desirable, but indeed was the expectation of the Constitution's drafters and early interpreters. In this Article, Professor Powell examines the historical validity of the claim that the framers of the Constitution expected future interpreters to seek the meaning of the document in the framers' intent. He first examines the various cultural traditions that influenced legal interpretation at the time of the Constitution's birth. Turning to the history of the Constitution's framing, ratification, and early interpretation, Professor Powell argues that although early constitutional discourse did contain references to "original intention" and the "intent of the framers," the meaning of such terms was markedly different from their current usage. He concludes that modern resort to the "intent of the framers" can gain no support from the assertion that such was the framers' expectation, for the framers themselves did not believe such an interpretive strategy to be appropriate.

I. INTRODUCTION

"The world must construe according to its wits. This Court must construe according to the law."¹

CONTEMPORARY discussion of the theory and methodology of constitutional interpretation exhibits no general agreement on the proper role either of history in general, or of the history of the Constitution's framing and ratification in particular. A few scholars argue that the latter is essentially irrelevant to the task of establishing constitutional norms;² a more common position is to recognize an obli-

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¹ R. BOLT, A MAN FOR ALL SEASONS 152 (1962) (speech of Sir Thomas More at his trial).

² See, e.g., Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981) (arguing that historical evidence of the framers' intent cannot constrain modern interpretation). Michael Perry admits the theoretical legitimacy of judicial enforcement of the framers' intentions, but argues that in practice modern constitutional decisionmaking does not, and need not, depend

gation to avoid direct contradiction of the intentions and expectations of the Constitution's framers.³ Finally, a minority of legal scholars,⁴ and a substantial and influential group of judges,⁵ maintain that the historically demonstrable intentions of the framers should be binding on contemporary interpreters of the Constitution. This last group not only invokes history ("the original understanding at Philadelphia"⁶) as a normative guide to the Constitution's meaning, but also claims historical warrant for this interpretive strategy.⁷ Raoul Berger, for example, has assured us that "current indifference to the 'original intention' . . . is a relatively recent phenomenon."⁸ The Constitution, according to Berger and others, "was written against a background of interpretive presuppositions" — chiefly, that the goal of future interpreters would be to carry out the framers' intent.⁹ As a consequence, Berger argues, the intention of the framers should control interpretation, because it is only by examining their "original intent" that the interpreter can discover the normative meaning of the Constitution. In modern discussions, this view of constitutional decision-making has acquired a number of different labels; I shall call it "intentionalism."

The purpose of this Article is to examine the historical validity of the claim that the "interpretive intention"¹⁰ informing the Constitution was an expectation that future interpreters would seek the instrument's meaning in the intentions of the delegates to the 1787 Constitutional Convention in Philadelphia. I am not concerned, then, with the historical question of what we would say early interpreters actually did in construing the Constitution, but with what they said they and others should do. I am also unconcerned in this Article with what contemporary interpreters should do, although my conclusions obviously have normative implications for strict intentionalists, who presumably regard the framers' interpretive intentions as binding for

on historical argument. See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 19, 75 (1982).

³ See, e.g., J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* at xvii-xviii (1980).

⁴ See, e.g., 3 W. CROSSKEY & W. JEFFREY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1980); B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 11-14 (1980).

⁵ See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

⁶ *Trimble v. Gordon*, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting).

⁷ See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375-76 (1981).

⁸ R. BERGER, *GOVERNMENT BY JUDICIARY* 363 (1977).

⁹ *Id.* at 365-66. Modern intentionalists, of course, do not claim that the legislators' personal motives, as distinguished from their intentions as lawmakers, are relevant. See *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); cf. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (first Supreme Court case rejecting inquiry into legislators' motives).

¹⁰ On the concept of "interpretive intention," see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 215-16 (1980).

the same reasons they believe the framers' substantive opinions should control.

The Article first explores the various cultural resources available to late eighteenth century Americans seeking to conceptualize the unprecedented task of interpreting a written constitution.¹¹ The cultural influences of Enlightenment rationalism and British Protestantism combined in an unlikely alliance to engender a suspicion of any sort of interpretation at all. The rich interpretive tradition of the English common law, in contrast, offered a plethora of hermeneutical suggestions, sometimes conflicting with one another and usually peculiar to the specific type of instrument being construed. Turning to the views on constitutional interpretation expressed during and immediately after the ratification process, I conclude that there was a tension during this period between a global rejection of any and all methods of constitutional construction and a willingness to interpret the constitutional text in accordance with the common law principles that had been used to construe statutes.¹²

A consensus on the proper approach to construing the Constitution later emerged out of the political struggle between Federalists and Republicans during the administration of John Adams. To the embattled Republicans, conceiving the Constitution as a compact of sovereign states not only had an intellectual appeal, but also seemed a politically expedient means to challenge the activities of the Federalist-controlled national government. This substantive conception of the Constitution's nature was justified by, and in turn entailed, resort to an extratextual source: the "original intent" underlying the Constitution. The Republican constitutional theory swiftly became the common property of almost all American constitutionalists after the Republicans' electoral triumph in 1800.

Contemporary intentionalists are correct, therefore, in claiming that resort to "original intent" is an interpretive strategy of great antiquity in American constitutional discourse. Despite verbal similarities, however, modern intentionalism cannot be equated with the early Republican theory. As understood by its late eighteenth and

¹¹ Pre-Revolutionary constitutional discourse frequently referred to colonial charters and parliamentary documents, such as Magna Carta and the 1688 Bill of Rights, as evidence of the meaning of the English constitution. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 259-73 (1969). The use of constitutions as written fundamental laws subject to judicial interpretation and enforcement, however, was an essentially new creation of the American Revolutionary period. See *id.* at 291. The practice, as applied to the state constitutions, was still in the embryonic stage in 1787.

¹² Eighteenth century criticism of traditional hermeneutical methods usually described what was being criticized as "construction" rather than "interpretation" of the text, perhaps because even the most literal and text-bound approach is still an interpretation. This distinction in usage, however, is not absolute. See, e.g., *infra* note 34; see also S. JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (London 1755) (entries for "construction" and "interpretation") (indicating that the two words can be used synonymously).

early nineteenth century proponents, the original intent relevant to constitutional discourse was not that of the Philadelphia framers, but rather that of the parties to the constitutional compact — the states as political entities. This original “original intent” was determined not by historical inquiry into the expectations of the individuals involved in framing and ratifying the Constitution, but by consideration of what rights and powers sovereign polities could delegate to a common agent without destroying their own essential autonomy. Thus, the original intentionalism was in fact a form of structural interpretation.¹³ To the extent that constitutional interpreters considered historical evidence to have any interpretive value, what they deemed relevant was evidence of the proceedings of the state ratifying conventions, not of the intent of the framers. Only later, during the breakdown of the Republican consensus, did the attention of constitutional interpreters gradually shift from the “intention” of the sovereign states to the personal intentions of individual historical actors.

II. HERMENEUTICAL TRADITIONS IN 1787

“There is more ado to interpret interpretations than to interpret things.”¹⁴

We cannot appreciate how the task of interpreting the Constitution was originally understood unless we first know something about the intellectual tools that were available.¹⁵ The Americans who wrote, debated, denounced, and ratified the Constitution of 1787 were thoroughly familiar with argument over the meaning and implications of “constitutions”; the “patriots” of the previous decade had understood the Revolution itself, in part, as the final, violent phase of a sustained effort to vindicate the true meaning of the ancient English constitution.¹⁶ But pre-Revolutionary constitutional discourse differed in one obvious and vitally important manner from the constitutional task that independent America set for itself: the new federal Constitution,

¹³ For a discussion of the concept of structural interpretation, see C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) (arguing that constitutional rules may be inferred from the structural relationships the Constitution ordains among governmental institutions).

¹⁴ M. Montaigne, *Of Experience* (1588), reprinted in *THE ESSAYS OF MICHEL EYQUEM DE MONTAIGNE* III.13, at 518 (W. Hazlitt ed., C. Cotton trans. 1952).

¹⁵ But see P. BOBBITT, *CONSTITUTIONAL FATE* 10 (1982) (contemporaneous British canons of construction are “largely beside the point”). To whatever extent Professor Bobbitt is making the historical assertion that late 18th century Americans regarded contemporaneous canons of construction as “beside the point,” the abundant evidence to the contrary, see *infra* pp. 902–24, suggests that he is mistaken.

¹⁶ See generally B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) (arguing that American resistance to Britain was often justified by the claim that Americans were defending English liberties and the ancient constitution); P. MAIER, *FROM RESISTANCE TO REVOLUTION* (1972) (same).

like those of the individual states, consisted not of a Burkean tradition of historical custom and political principle, but of a written document. As a result, constitutional argument in the new republics naturally and necessarily assumed the form of dispute over the proper interpretation of the constitutional texts. But Americans did not approach this novel task of constitutional interpretation free of all presuppositions about the appropriate method for construing a written instrument. They instead drew overtly on the various approaches to interpretation embedded in their cultural heritage.¹⁷ The two most obvious sources of hermeneutical wisdom were the anti-interpretive tradition of Anglo-American Protestantism and the accumulated interpretive techniques of the common law.

A. The Cultural Rejection of Interpretation

One of the central themes of the Protestant Reformation of the sixteenth century was summed up in the Reformers' slogan, "*sola Scriptura*" (Scripture only).¹⁸ In Britain, *sola Scriptura* became even more important than on the continent as a unifying principle for Protestants: the role of the English translation of the Bible in the spread of Protestantism in Britain, and Anglicanism's de-emphasis of substantive doctrine, made a professed adherence to biblical authority the main point of agreement for British Protestants.¹⁹ In the name of obedience to the Bible, Protestants rejected the rich medieval tradition of interpretation, according to which literal exposition of the text was only one (and by no means necessarily the most important) methodology; likewise, they spurned the medieval acceptance of Pope and council as authoritative interpreters.²⁰ In the eyes of the British Protestants, the only authoritative, and indeed the only safe, interpreter of Scripture was Scripture itself.²¹ Any exposition of the text that went beyond the text was, of necessity, a "human invention,"²²

¹⁷ See, e.g., F. DWARRIS, A GENERAL TREATISE ON STATUTES *646 (in United States, interpretation of a constitution "requires the exercise of the same legal discretion as the interpretation or construction of a law"); THE FEDERALIST No. 78 (A. Hamilton) (courts, in construing the Constitution, will follow the familiar rules of interpretation).

¹⁸ See R. BROWN, THE SPIRIT OF PROTESTANTISM 67 (1965).

¹⁹ See A. DICKENS, THE ENGLISH REFORMATION 189-93 (rev. ed. 1971). Instead of a detailed examination of the ordinand's Protestant orthodoxy, the Anglican Book of Common Prayer asked of men about to be made priests whether they were resolved to teach as doctrine nothing "but that you shalbe perswaded may be concluded, and proued by the scripture?" FIRST BOOK OF COMMON PRAYER OF EDWARD VI, Ordinal 309 (Everyman's Library ed. 1968) (1st ed. London 1549).

²⁰ See R. GRANT, A SHORT HISTORY OF THE INTERPRETATION OF THE BIBLE 92-109 (rev. ed. 1984).

²¹ See, e.g., Westminster Confession of Faith I.9 (1647), reprinted in UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, BOOK OF CONFESSIONS 6.009 (2d ed. 1970) [hereinafter cited as BOOK OF CONFESSIONS].

²² J. SELDEN, TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN ESQ. 25 (London

"which a discreet Man may do well; but 'tis his Scripture, not the Holy Ghost[s]." ²³

From this position it was but a short step, already taken with respect to medieval and contemporary Catholic interpretation, to the conclusion that such "human invention" is, necessarily and always, a corruption of the text's meaning.²⁴ For example, the Scots Confession of 1560, discussing the authority of general councils, granted that conciliar decrees might be accepted when confirmed "by the plain Word of God." But this did not mean that a council could develop doctrines beyond the letter of Scripture, "or even [offer] the true interpretation of it, which was not expressed previously by his holy will in his Word."²⁵ The distinction between a decree confirmable by a text and "the true interpretation" of that text is subtle, and from a modern viewpoint perhaps vacuous. The fact remains, however, that British Protestants fervently believed that such a distinction could and should be drawn, and that their own version of Christianity could be described truthfully as a presentation of the plain Word rather than as an interpretation — even a "true interpretation" — of Scripture. British Protestant writers in the post-Reformation era delighted in contrasting their own chaste literalism to the delusive and unscriptural interpretations of their theological opponents.²⁶

1699). A 17th century jurist and member of Parliament, Selden participated in the parliamentary resistance to Charles I; this role gave him a place in the pantheon of Whig defenders of liberty whom the American revolutionaries regarded as constitutional authorities. See B. BAILYN, *supra* note 16, at 315; P. MAIER, *supra* note 16, at 48.

²³ J. SELDEN, *supra* note 22, at 45.

²⁴ "If I give any Exposition but what is express'd in the Text, that is my invention: if you give another Exposition, that is your invention, and both are Human." *Id.* at 25. Protestant insistence that interpretation is corruption was linked with the rejection of the "multiple sense" approach of medieval exegesis. See Westminster Confession of Faith I.9 (1647), reprinted in BOOK OF CONFESSIONS, *supra* note 21, at 6.009.

²⁵ Scots Confession ch. XX (1560), reprinted in BOOK OF CONFESSIONS, *supra* note 21, at 3.20.

²⁶ See, e.g., Owen, Book Review (c. 1650), reprinted in INTRODUCTION TO PURITAN THEOLOGY: A READER 141 (E. Hindson ed. 1976) (criticizing Thomas More's 1643 work, *The Universality of God's Free Grace*). John Owen concludes his own elaborate interpretation of the Bible's teaching on the scope of divine grace with an attack on More for presenting "allegations and interpretations of Scripture" instead of the plainly revealed "mind and will of God." *Id.* at 170.

Critiques such as this by Protestant theologians planted the seeds of the deconstruction of Protestant orthodoxy undertaken by religious "liberals" in the late 17th and 18th centuries. Orthodox and liberal alike agreed with John Locke's claim that the sober and unprejudiced reader would find little need to interpret Scripture because such a reader would have no difficulty in understanding the plain meaning of the text. See J. Locke, Essay for the Understanding of St. Paul's Epistles, reprinted in 8 WORKS OF JOHN LOCKE at iii (11th ed. London 1812). Contemporary deistic and rationalistic critics of Protestant dogma thus could draw on the deeply ingrained literalism of British Protestantism in order to "demonstrate" the absurdities of traditional Christianity. See generally H. FREI, THE ECLIPSE OF BIBLICAL NARRATIVE 51-54, 66-85 (1974) (discussing the use of literalism by deists and others to attack Protestant orthodoxy).

Attacks on the legitimacy of scriptural interpretation spilled over easily into the political sphere.²⁷ Reform of the law emerged as a major theme of seventeenth century Puritan politics both in the American colonies and in interregnum England, and reformers saw the elimination of confusion and complexity in the law as a primary goal.²⁸ To the Puritans, the Bible could govern theological discourse because its meaning was lucid to the ordinary reader. Legal texts, in contrast, were usually obscure, and thus no explanation of their meaning could simply be "confirmed" by reference to their plain words. As a result, the Puritans argued, these supposedly authoritative texts could not in fact constrain judicial interpretation, and the elaborate interpretive techniques of the common law served only to justify judges' imposition of their personal views. Puritan lawyer William Sheppard was both prominent among and typical of the reformers. In 1656 Sheppard published a program for law reform entitled *Englands Balme*.²⁹ The centerpiece of his criticism of the existing statutory and common law was the claim that the law was so obscure that "it is not to be understood, when it is read," and was therefore "incertain," because not even judges could agree on its proper interpretation. Sheppard advocated a kind of codification that would make the law "cleer and certain" and would require judges to disavow traditional modes of interpretation and to pledge to follow the code's wording henceforth as "the settled law."³⁰

The Puritan attack on traditional legal hermeneutics was largely unsuccessful in the mother country, but in the following century its main themes were absorbed into an ideology of opposition (the "Country" ideology) that served as an important intellectual foundation for both the American revolutionaries of the 1760s and 1770s and the Jeffersonian Republicans of the 1790s.³¹ For the "Country" writers,

This type of British religious radicalism was influential in the thinking of many 18th century Americans. See D. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* 151-66 (1948).

²⁷ See generally C. HILL, *THE WORLD TURNED UPSIDE DOWN* (2d ed. 1974) (discussing relationship between religious radicalism and political and social criticism in 17th century England).

²⁸ See E. DUMBAULD, *THOMAS JEFFERSON AND THE LAW* 146-55 (1978).

²⁹ See *id.* at 146.

³⁰ See *id.* at 148.

³¹ This school of thought, which modern historians usually label the "Country" ideology, emerged in England in the early 18th century in reaction to the policies of the dominant "Court" Whigs. The Court leadership favored executive dominance in an increasingly powerful and centralized government. It supported a permanent military establishment and the encouragement of commerce through the Bank of England, and maintained a docile parliamentary majority through the use of patronage. Opposition leaders, both Tories and "Real Whigs" (who regarded the Court Whigs as apostates from the Whig heritage of 1688), developed an ideology of opposition based on suspicion of government in general and of a strong national executive in particular. The Country spokesmen identified the Court's manipulation of patronage and of the national debt as a process of "corrupting" English society that would culminate in the replacement of traditional free government by despotism on a continental model. Following 1760,

clarity and simplicity were necessary if law was to serve rather than smother liberty,³² but these advantages of a known and written law would be lost if the law's meaning could be twisted by means of judicial construction. Furthermore, just as the Pope had usurped the authority of God by claiming the power to interpret His Word, so the judiciary could undermine the legislative prerogatives of the people's representatives by engaging in the corruptive process of interpreting legislative texts.

For cosmopolitan Americans, the influence of the *philosophes*³³ — the rationalist intellectuals and social critics of the Enlightenment era — reinforced the anti-interpretive tradition of British Protestantism. The *philosophes*, sometimes borrowing from earlier intellectual movements such as sixteenth century humanism,³⁴ perceived traditional interpretation of Scripture as one of the chief props supporting the theological absurdities and religious oppression perpetrated by the established churches, and saw the niggling interpretation of complicated or obscure laws as a relic of feudal misrule and political tyranny.³⁵ In addition, they condemned judicial interpretation of statutes as a violation of the separation of governmental powers many believed

Country thought became increasingly influential among the American colonists, both as an explanation for London's apparent drift toward tyranny and as a justification for resistance. Having victoriously expelled the "Court" from America by the Revolution, American Country thinkers like Thomas Jefferson were horrified to see it reemerge in the Federalist policies of the Washington and Adams administrations. Once again, the Country themes of localism and opposition to "energetic" government seemed relevant. See Murrin, *The Great Inversion, or Court versus Country: A Comparison of the Revolution Settlements in England (1688-1721) and America (1776-1816)*, in *THREE BRITISH REVOLUTIONS: 1641, 1688, 1776*, at 368, 379-83, 397-401, 404-11 (J. Pocock ed. 1980); see also L. BANNING, *THE JEFFERSONIAN PERSUASION* (1978) (tracing the development of Jeffersonian Republicanism from Country ideology).

³² See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 79 (1973); P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 99-109, 239-49 (1965).

³³ The use of a single term such as *philosophes* for the predominantly French propagandists of the 18th century Enlightenment is misleading to the extent that it obscures the real disagreements — political, philosophical, and theological — among such figures as Voltaire, Diderot, Condorcet, and Rousseau. It suggests accurately enough the American tendency to treat the views of those sages as a collective body of "enlightened" (we would say "progressive") opinion and to select specific intellectual positions from them in an eclectic manner.

³⁴ One example of this humanist thought is Sir Thomas More's *Utopia*. More's Utopians considered the "simple and apparent sense of the law" the correct interpretation since it is "open to everyone." T. MORE, *UTOPIA* 69 (R. Adams trans. 1975) (1st ed. Louvain 1516). The *philosophes* were also influenced by the opposition to legal interpretation exhibited by English political thought. See, e.g., J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 172 (2d ed. 1921) (quoting Whig controversialist Benjamin Hoadly, who warned George I of the dangers inherent in interpretation in a sermon delivered before the King in 1717: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law giver to all intents and purposes, and not the person who first wrote or spoke them.").

³⁵ See, e.g., VOLTAIRE, *PHILOSOPHICAL DICTIONARY* 289 (T. Besterman trans. 1971) (1st ed. Geneva 1764) (entry for "Civil and ecclesiastical laws") ("to interpret" the law "is nearly always to corrupt it").

necessary to a rational and free polity.³⁶ In his enormously influential essay on criminal law, the Italian jurist Cesare Beccaria wrote that judges in criminal cases must not be allowed the authority to interpret the laws because that would make them *de facto* legislators.³⁷ Beccaria contrasted "the constant fixed voice of the law" with "the erring instability of interpretation," and his firm conclusion — "the interpretation of laws is an evil" — expressed a view widely shared by educated and "progressive" individuals in the late eighteenth century.³⁸

Either British biblicism or Enlightenment rationalism or both formed part of the mental furniture of virtually all literate Americans in the half-century from the Declaration of Independence through the presidency of John Quincy Adams.³⁹ It is therefore unsurprising that one can often discern the anti-interpretive biases of those traditions in American discussions of grand political issues,⁴⁰ as well as of private legal affairs.⁴¹ For example, the Essex County convention, in rejecting the proposed Massachusetts constitution of 1778, explained that the document provided inadequate safeguards against "artful constructions" of the laws, with potentially tragic results.⁴² The county's solution was a rigid separation of powers scheme that would enable each branch of government to check the others.⁴³ Such cultural reluctance to admit the legitimacy of significant interpretation of writ-

³⁶ See, e.g., MONTESQUIEU, *THE SPIRIT OF LAWS* VI.3, at 34-35 (T. Nugent & J. Prichard trans. 1952) (1st ed. Geneva 1748) (in a republican polity the very nature of the constitution requires judges to follow the letter of the law).

³⁷ C. BECCARIA, *ON CRIMES AND PUNISHMENTS* 14-18 (H. Paolucci trans. 1963) (1st ed. Livorno 1764).

³⁸ See *id.*; see also G. WOOD, *supra* note 11, at 301-02 (discussing American objections to judicial interpretation).

³⁹ Cf. G. WOOD, *supra* note 11, at 17 (noting influence of Puritan theology and Enlightenment rationalism on Revolutionary thought).

⁴⁰ "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), reprinted in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 144, 144 (E. Dumbauld ed. 1955) [hereinafter cited as *POLITICAL WRITINGS*]. Many Americans during this period believed that the great political desideratum was a means of protecting the Constitution from what Edmund Pendleton called "the wiles of construction," Pendleton, *The Danger Not Over*, *Richmond Examiner*, Oct. 20, 1801, quoted in L. BANNING, *supra* note 31, at 282.

⁴¹ George Washington's final will exemplified the fear of construction. The will included an elaborate arbitration provision designed, in the event of a dispute over the will's terms, to allow a determination of Washington's (subjective) intentions "unfettered by law or legal constructions." 4 *ANNALS OF AMERICA* 115, 119 (1968). Criticizing the Virginia Court of Appeals for a decision involving the interpretation of a will, Washington's fellow Virginian George Wythe analogized the evils of testamentary construction to the confusion scriptural interpretation had wrought on the understanding of the Bible. *Aylett v. Minnis*, Wythe 219, 234 n.1 (Va. Ch. 1793), *rev'd*, 1 Va. (1 Wash.) 300 (1795); see *infra* pp. 896-97 & note 59.

⁴² Essex Result (1778), reprinted in *MASSACHUSETTS, COLONY TO COMMONWEALTH* 73, 79-80 (R. Taylor ed. 1961).

⁴³ See *id.* at 80-89.

ten documents strongly influenced Americans in their conceptualization of the task of interpreting their new Constitution. Yet despite this reluctance, the necessity of judicial construction had already engendered a second — and conflicting — source of influence: the rich common law traditions of legal interpretation.

B. Interpretation and the Common Law

Although they lacked a significant tradition of interpreting written constitutions, the newly independent Americans possessed almost an embarrassment of hermeneutical riches in the common law's centuries of dealing with wills, deeds, contracts, and statutes. By 1787, the English legal system had produced a wealth of reflection on the process of construing normative documents.⁴⁴ Moreover, the common law considered these canons of interpretation to be themselves a part of the law, and to be equally binding on the maker and the interpreter of a document.⁴⁵

The concept central to the common law's hermeneutic, and to later American discussion of constitutional interpretation, was the notion of the "intention" or "intent" underlying a text.⁴⁶ "[A]s touching construction of words," Chief Justice Fleming of the Court of King's Bench explained in 1611, "they shall be taken according to the . . . intent of parties."⁴⁷ This simple principle, however, concealed a significant ambiguity, because its salient term — intent — was by no means unequivocal in meaning.⁴⁸ The English nouns "intention" and

⁴⁴ Besides being familiar with common law traditions, some Americans were also conversant with the work done on questions of legal interpretation in the Continental international law tradition, especially that of Hugo Grotius, *see* H. GROTIUS, *DE IURE BELLI AC PACIS* (Paris 1625), Emerich de Vattel, *see* E. DE VATTEL, *LE DROIT DES GENS* (London 1758), and Jean Jacques Burlamaqui, *see* J. BURLAMAQUI, *PRINCIPES DU DROIT NATUREL ET POLITIQUE* (Geneva 1748). *Cf.* B. BAILYN, *supra* note 16, at 26–29 (noting American reliance on these authors for the laws of nations and of nature).

⁴⁵ *See* 2 T. JARMAN, *A TREATISE ON WILLS* *738 (citing 18th century cases); Porter, Book Review, 27 N. AM. REV. 167, 179 (1828), *reprinted in* THE LEGAL MIND IN AMERICA 161, 167 (P. Miller ed. 1962) (the common law supplies "the principles of interpretation" used in "every branch and department of jurisprudence").

⁴⁶ In an 1819 newspaper essay, John Marshall remarked that he could cite from the common law "the most complete evidence that the *intention* is the most sacred rule of interpretation." Marshall, *A Friend of the Constitution*, Alexandria Gazette, July 2, 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF McCULLOCH V. MARYLAND 155, 167 (G. Gunther ed. 1969) [hereinafter cited as JOHN MARSHALL'S DEFENSE]. In applying "intention" language to constitutional interpretation, Marshall explicitly drew on the traditional hermeneutic of the common law. Charles Miller's observation that "intention" properly applies only to people whereas "intent" may refer to both people and documents, *see* C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 154 n.12 (1969), correctly states current usage, but is inaccurate as applied to 18th and early 19th century authors, who used the terms interchangeably, *see, e.g.,* S. JOHNSON, *supra* note 12 (entries for "intent" and "intention" (second definition)).

⁴⁷ *Hewet v. Painter*, 1 Bulstrode 174, 175, 80 Eng. Rep. 864, 865 (1611).

⁴⁸ Indeed, Chief Justice Fleming went on to explain that "this intention and construction of words shall be taken, according to the vulgar and usual sense, phrase and manner of speech of

"intent" were derived from the Latin *intentio*, which in medieval usage could refer either to individual, subjective purpose or to what an external observer would regard as the purpose of the individual's actions.⁴⁹ The English derivatives of *intentio* inherited a similar ambiguity: the "intent" or "intention" of a document could denote either the meaning that the drafters wished to communicate or the meaning the reader was warranted in deriving from the text. The two might or might not be identical. Thus, to understand the import of the common law's focus on "intent," we must determine in what sense the word itself was used.

The use of "intent" in common law interpretive discourse is well illustrated in the *Table-Talk* of seventeenth century jurist and parliamentary hero John Selden.⁵⁰ Although Selden insisted that the "one true sense" of a document is that which "the Author meant when he [wrote] it" (the modern intentionalist's definition of "intent"), he also asserted that the court determines "the intention of the King" solely on the basis of the words of the law, and not by investigating any other source of information about the lawgiver's purposes.⁵¹ A century and a half later, John Joseph Powell's treatise on contract law displayed the same usage of "intent." According to Powell, "the law always regards the intention of the parties" to an agreement. But it does so, he immediately continued, by applying the parties' words "to that which, in common presumption, may be taken to be their intent."⁵² The law of contracts is not concerned with anyone's "internal sentiments," Powell wrote, but only with their "external expression."⁵³ At common law, then, the "intent" of the maker of a legal document and the "intent" of the document itself were one and the same; "intent" did not depend upon the subjective purposes of the author.⁵⁴ The

these words," not according to any particular meaning the parties may have intended. *Id.* at 175-76, 80 Eng. Rep. at 865.

⁴⁹ See, e.g., Langton, *Fragments on the Morality of Human Acts* (c. 1200), reprinted in *A SCHOLASTIC MISCELLANY: ANSELM TO OCKHAM 355-56* (E. Fairweather ed. 1956). The ambiguity of *intentio* is likely to have continued to affect the use of its English derivatives in legal discourse because virtually all lawyers were familiar with Latin.

⁵⁰ J. SELDEN, *supra* note 22.

⁵¹ *Id.* at 4, 44.

⁵² 1 J. POWELL, *ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS* 244 (London 1790).

⁵³ *Id.* at 372-73.

⁵⁴ "[A]lthough it is the duty of the Court to ascertain and carry into effect the intention of the party, yet there are, in many cases, fixed and settled rules by which that intention is determined; and to such rules the wisest judges have thought proper to adhere, in opposition to their own private opinions as to the probable intention of the party . . ." H. BROOM, *A SELECTION OF LEGAL MAXIMS* *427 (rev. ed. London 1848) (1st ed. London 1845).

Some modern students of hermeneutics attack non-author-based interpretation as an abstract and ultimately hopeless search for a text's meaning apart from any human context or usage. See, e.g., J. BRUNER, *IN SEARCH OF MIND* 165-66 (1983) (any message must be interpreted in terms of the intent of its originators; it is a "nice question as to whether any save linguists, logicians, lawyers and pedants ever processed a locution for its 'timeless meaning'"); E. HIRSCH,

late eighteenth century common lawyer conceived an instrument's "intent" — and therefore its meaning — not as what the drafters meant by their words but rather as what judges, employing the "artificial reason and judgment of law,"⁵⁵ understood "the reasonable and legal meaning" of those words to be.⁵⁶

Although the common law tradition identified the purpose of interpreting any document as the determination of that document's "intent," it also insisted that the proper means of carrying out this task varied according to the type of instrument to be construed. By the late eighteenth century, statutes, wills, deeds, and contracts had become the objects of what seemed at least superficially to be increasingly different interpretive methodologies. Courts treated statutes and wills similarly by purporting to pay particular attention to the subjective intentions of their drafters.⁵⁷ This concern for the drafters' purposes was, however, largely illusory. Blackstone's description of the proper approach to the construction of a will is typical: "the construction [should] be favorable, and as near the minds and apparent intents of the parties, as the rules of law will admit."⁵⁸ But Blackstone did not mean that in interpreting what lay in the testator's mind a court was free to disregard the rule of law governing the "apparent intent" of the testator's words: "the construction must also be reasonable, and

VALIDITY IN INTERPRETATION 12-14 (1967) (attacking non-author-based interpretive methodologies as incoherent). Eighteenth century common lawyers did not hold precisely the view of interpretation that Bruner and Hirsch assail. They did not deny the existence of authors' personal intentions, nor did they argue that a text can be said to have a "meaning" in itself apart from any human act of expression or understanding. Rather, they believed that the meaning *relevant to legal analysis* of an instrument is that understood by its interpreters, not that entertained by its drafters.

⁵⁵ See *Prohibitions del Roy*, 12 Co. Rep. 63, 65, 77 Eng. Rep. 1342, 1343 (1608).

⁵⁶ *Talbot qui tam v. Commanders and Owners of three Brigs*, 1 Dall. 95, 100 (Pa. 1784). The court went on to explain that on the basis of the words' "legal meaning" the judges could reach a "construction, by which positive words may be properly and justly modified." *Id.* Eighteenth century lawyers were aware, of course, that the words of a text mean something (subjectively) to the text's framers. Yet the 18th century usage of "intent(ion)" melded semantic nuances that modern usage segregates much more cleanly; it thereby blurred for 18th century English speakers differences of meaning that we regard as clear. Failure to recognize the difference between modern and circa-1800 usage undermines Raoul Berger's attempt to ground his form of intentionalism in the generally accepted "interpretive intention" of the constitutional era. See *supra* p. 886. Berger cites James Madison and Joseph Story in support of his contention, see R. BERGER, *supra* note 8, at 364-66, but this citation reflects a striking misinterpretation of the two men's views. Although Madison did refer at times to "the intention of the framers," he made it clear on numerous occasions that he was not an "intentionalist" in Berger's sense. See *infra* pp. 935-41. Story's attack on the practical possibility and theoretical propriety of intentionalism was equally thorough. See 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 388-92 (Boston 1833); *infra* pp. 942-43 & note 325; see also Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285 (1985) (discussing Story's theory of constitutional interpretation).

⁵⁷ See F. DWARRIS, *supra* note 17, at *688-90.

⁵⁸ 2 W. BLACKSTONE, *COMMENTARIES* *379 (emphasis omitted).

agreeable to common understanding."⁵⁹ Blackstone was cautioning against hypercritical readings of the words of unlearned laypersons, not endorsing an extratextual search for the purposes underlying those words.

The courts likewise looked to "rules of law" and to "common understanding" when interpreting statutes. The modern practice of interpreting a law by reference to its legislative history was almost wholly nonexistent, and English judges professed themselves bound to honor the true import of the "express words" of Parliament.⁶⁰ The

⁵⁹ *Id.* (emphasis omitted). Wills were to receive special treatment because the law assumed them to be the creations of ignorant testators at death's door. See *Throckmerton v. Tracy*, 1 Plowden 145, 162, 75 Eng. Rep. 222, 251 (C.P. 1555). The case of *Aylett v. Minnis*, Wythe 219 (Va. Ch. 1793), *rev'd*, 1 Va. (1 Wash.) 300 (1795), illustrates the limits on the common law's willingness to seek the testator's subjective purposes. In his will, the testator left his son Philip, the plaintiff, "all [his] lands in Kingwilliam [County]," *id.* at 220 (emphasis omitted), and directed the equal division of the residuary estate among the testator's widow and children. The testator, at death, owned certain lands in the named county in fee simple and was engaged in legal action to secure possession of other property to which he held a 999-year lease. After his father's executors obtained possession, Philip laid claim to the land under lease. The defendants relied on an old English case with similar facts, *Rose v. Bartlett*, Croke Car. 292, 79 Eng. Rep. 856 (K.B. 1631), in which the court had interpreted the will's language to cover only lands held in fee simple. Chancellor George Wythe refused to follow the English precedent on the grounds that the reasoning of the justices was unpersuasive and that, in light of the Aylett will as a whole, the testator clearly had meant to leave Philip all of his real property, of whatever legal character, in King William County. Wythe cautioned, however, that his interpretation was not based on extratextual considerations, but rather "exactly corresponded with the meaning of William Aylett's words . . . [because the Court was] convinced that *they* only ought to be consulted for discovering it." *Aylett*, Wythe at 233-34. Finding Wythe's opinion too daring a departure from traditional legal hermeneutics, the Virginia Court of Appeals subsequently reversed and held that, on this issue, the legal meaning of Aylett's 1780 will was fixed by the 1631 English decision. See 1 Va. (1 Wash.) 300 (1795). A few years later Wythe, admitting that he was flouting legal tradition, launched a direct and thoroughgoing attack on the use of judicial precedents in discerning the intention of wills. See *Wilkins v. Taylor*, Wythe 338, 347-54 (Va. Ch. 1799), *rev'd*, 9 Va. (5 Call) 150 (1804).

⁶⁰ "And the Judges said they ought not to make any construction against the express letter of the statute; for nothing can so express the meaning of the makers of the Act, as their own direct words, for *index animi sermo* ["the word is the sign or indicator of the soul"]." *Edrich's Case*, 5 Co. Rep. 118a, 118b, 77 Eng. Rep. 238, 239 (C.P. 1603). During the great debate in the fourth Congress over the House of Representatives' right of access to the executive branch's diplomatic files, Nathaniel Smith observed that proper statutory interpretation did not involve reference to anything other than the text of the act:

This was the universal practice of the Courts of Law, who, when called on to expound an act of the Legislature, never resorted to the debates which preceded it — to the opinions of members about its signification — but inspected the act itself, and decided by its own evidence.

5 ANNALS OF CONG. 462 (1796); *accord id.* at 441 (remarks of Rep. William Smith) (in construing a federal act, the Supreme Court does not "call for the Journals of the two Houses, or the report of the Committee of Ways and Means, in which the law originated, or the debates of the House on passing the law"). Discussing statutory construction in the 1820s, Massachusetts legal scholar Nathan Dane wrote that "such a construction ought to be put on a statute, as may best answer the intention which the makers of it had in view"; he added, somewhat ironically, that "the only difficulty is in finding this intention," and listed the means available for discovering

"intent of the act" and the "intent of the legislature" were interchangeable terms; neither term implied that the interpreter looked at any evidence concerning that "intent" other than the words of the text and the common law background of the statute.⁶¹ Political and legal scholars in both Britain and the American colonies viewed strict judicial adherence to the legislature's language as a constitutional necessity, because the "known, fixed laws" could be properly established or altered only by "the whole legislature," which spoke only through its enactments.⁶²

The common law tradition did admit the propriety of looking beyond the statute's wording where the text was defective on its face. In such situations judges were free to substitute coherence for gibberish.⁶³ A more serious interpretive problem occurred when the statute's wording was ambiguous, rather than clear but in conflict with its apparent intent. It was generally agreed that such *ambiguitas patens* could not be resolved by extrinsic evidence as to Parliament's purpose; in Francis Bacon's classic formulation, ambiguity "shall bee holpen by construction . . . but never by averrement" of the purposes of the members of Parliament.⁶⁴ This did not mean, however, that "construction" was viewed as an unstructured exercise of judicial choice. Instead, courts were bound to read acts of Parliament against the background of the common law. The Barons of the Exchequer resolved in *Heydon's Case*⁶⁵ that all statutes concerned a "mischief and defect for which the common law did not provide," and for which

the legislators' intent. "Legislative history" was not on his, or anyone else's, list at the time. 6 N. DANE, *GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW* 600 (Boston 1824).

⁶¹ "So the Judge speaks of the King's Proclamation, this is the intention of the King, not that the King had declared his intention any other way to the Judge, but the Judge examining the Contents of the Proclamation, gathers by the Purport of the words, the King's Intention, and then for shortness of expression says, this is the King's intention." J. SELDEN, *supra* note 22, at 44.

⁶² L. LEDER, *LIBERTY AND AUTHORITY* 86-87 (1968) (quoting charge to Philadelphia grand jury in 1723 case).

⁶³ See H. BROOM, *supra* note 54, at *534-36 (citing authorities); cf. 6 N. DANE, *supra* note 60, at 596 (noting that only "where the meaning of a statute is doubtful . . . can courts of law look to consequences in construing it"). In cases of defective wording, English judges followed the policy of upholding the validity of written instruments, see H. BROOM, *supra* note 54, at *413 (citing Lord Coke), by searching for the general purpose of the document as a guide to construction. See, e.g., *The Earl of Clanrickard's Case*, Hobart 273, 277, 80 Eng. Rep. 418, 423 (C.P. 1613) (expressing approval of judges "that are curious and almost subtil . . . to invent reasons and means to make Acts, according to the just intent of the parties"); see also F. DWARRIS, *supra* note 17, at *689-90 (arguing that in the construction of deeds, "such exposition should, if possible, be made, as is most agreeable to the intention of the grantor," and citing the *Earl of Clanrickard's Case* approvingly). But the curiosity and subtlety of the judges were tempered by their abhorrence of making "exposition against express words." *Id.* at *706 (quoting Lord Coke).

⁶⁴ F. BACON, *Containing a Collection of Some Principall Rules and Maximes of the Common Law*, in *THE ELEMENTS OF THE COMMON LAWES OF ENGLAND* 1, 92 (London 1630).

⁶⁵ 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584).

Parliament had ordained a remedy.⁶⁶ Therefore, "the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy."⁶⁷ In the performance of this office, the courts might consult the statute's preamble, which, although not an operative provision of the act, was the "key" to the purposes of its makers.⁶⁸ In seeking a statute's proper construction, courts would also admit the practical exposition of the statute supplied by usage under it.⁶⁹ But judicial precedent served as the most important source of information about an act's meaning beyond its actual text.⁷⁰ This followed almost by definition from the basic notion of "intent" as a product of the interpretive process rather than something locked into the text by its author. A prior construction of a statute provided certainty as to the meaning because, in Lord Coke's words, it was not the "private interpretation[]" of an individual, but rather the authoritative "resolution[] of judges in Courts of Justice."⁷¹

Whereas the common law tradition at least purported to implement the desires of the drafters in interpreting wills and statutes, the common law approach to the interpretation of contracts was blatantly unconcerned with the subjective purposes of the parties. With minor exceptions,⁷² contracting parties were conclusively presumed to have meant what their words said,⁷³ and to have been aware of the law's

⁶⁶ *Id.* at 7b, 76 Eng. Rep. at 638.

⁶⁷ *Id.* According to Professor Lon Fuller, "mischief" in this case meant something like "repugnancy" or "inconvenience." See L. FULLER, *THE MORALITY OF LAW* 83 n.38. (rev. ed. 1969). The formula in *Heydon's Case*, as reported by Coke, has been extremely influential. See 1 W. BLACKSTONE, *supra* note 58, at *87; 6 N. DANE, *supra* note 60, at 600; F. DWARRIS, *supra* note 17, at *694-95; L. FULLER, *supra*, at 82-83; J. HURST, *DEALING WITH STATUTES* 41 (1982); T. SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 235-37 (New York 1857).

⁶⁸ Sir James Dyer, a 16th century chief justice of the Court of Common Pleas, asserted, in an oft-repeated passage, that the preamble of a statute is "a key to open the minds of the makers of the act, and the mischiefs which they intended to redress." H. BROOM, *supra* note 54, at *439. A supplementary guide to the construction of a statute was provided by its classification as public and remedial rather than private or penal, a matter often noticed in the preamble. Statutes "concerning the public good," as opposed to private and penal acts, were to be construed "liberally; that is . . . in an enlarged manner." 6 N. DANE, *supra* note 60, at 599 (citing cases).

⁶⁹ See H. BROOM, *supra* note 54, at *719 (citing Lord Coke); 6 N. DANE, *supra* note 60, at 596.

⁷⁰ See Letter from Thomas Jefferson to Skelton Jones (July 28, 1809), *quoted in* D. MALONE, *JEFFERSON THE VIRGINIAN* 261-62 (1948) (meaning of statutes is "in the air" until "settled by decisions").

⁷¹ E. COKE, *Proeme to SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* (London 1642); *accord* *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 93 (Gen. Ct. 1793) (Tucker, J.) (decisions of Virginia supreme court of appeals by definition expound Virginia's constitution and laws "in their truest sense"); see also 6 N. DANE, *supra* note 60, at 597 (commonly used expressions "by being often used in statutes, and so construed, have acquired their meaning").

⁷² See 1 J. POWELL, *supra* note 52, at 387 ("ordinary import of words may be restrained" where there is "an original defect in the will of the speaker, so that it is not co-extensive with his words," or where there is "some collateral accident inconsistent with the speaker's design").

⁷³ See *id.* at 372-73. Chief Justice Popham's observations in *The Countess of Rutland's*

canons of interpretation.⁷⁴ The view of contract prevalent before the American Revolution, a view that emphasized considerations of equity and substantive justice over contractual freedom and the will of the parties,⁷⁵ went hand in hand with the courts' lack of concern with subjective intention. Judges generally construed agreements in light of the ordinary meaning of the terms and with an eye toward the nature of the contract and the identity of the parties to it.⁷⁶

During the same period in which Americans were drawing on these common law traditions to respond to the novel challenges posed by constitutional interpretation, certain changes were occurring within the traditional branches of the common law. A new self-consciousness about the process of interpretation developed toward the end of the eighteenth century, and the sixty years following 1800 saw a remarkable outpouring of scholarly discussion of hermeneutical issues in both Great Britain and America.⁷⁷ Judicial opinions also reflected ostensible shifts in emphasis. Statutory interpretation became even more frankly literalistic.⁷⁸ A judicial opinion of New York Senator John Young in 1835 captures the spirit of the age: "To understand the statute, it is only necessary to know the meaning of the words which

Case, 5 Co. Rep. 25b, 77 Eng. Rep. 89 (K.B. 1604), became proverbial, and others generalized them to include written documents of a noncontractual nature. Coke reported Chief Justice Popham to have stated that parol evidence was not admissible to vary or add to a writing, because

every contract or agreement ought to be dissolved by matter of as high a nature as the first deed. . . . Also it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory.

Id. at 26a, 77 Eng. Rep. at 90. It is clear that the exclusion of extrinsic evidence of intent, both in the contractual and in the statutory areas, rested on a substantive view of what (legally significant) "intent" is. See 1 W. BLACKSTONE, *supra* note 58, at *62; 1 J. POWELL, *supra* note 52, at 372-73.

⁷⁴ See *Throckmerton v. Tracy*, 1 Plowden 145, 162, 75 Eng. Rep. 222, 251 (C.P. 1555).

⁷⁵ See P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 169-77 (1979); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 161-73 (1977); W. NELSON, *AMERICANIZATION OF THE COMMON LAW* 54-63 (1975).

⁷⁶ See 2 J. POWELL, *supra* note 52, at 40-41; 3 N. DANE, *supra* note 60, at 574-75.

⁷⁷ Good examples are H. BROOM, *supra* note 54; F. DWARRIS, *supra* note 17; 1-4 J. KENT, *COMMENTARIES ON AMERICAN LAW* (New York 1826-1830); F. LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (Boston 1839); T. SEDGWICK, *supra* note 67; 1 J. STORY, *supra* note 56, at 383-443; Hawkins, *On the Principles of Legal Interpretation*, 2 JURID. SOC'Y PAPERS 298 (1860).

⁷⁸ Broom summarized the trend toward literalism thus: in construing a statute "to ascertain and carry out the intention of the legislature . . . the judges will bend and conform their legal reason to the words of the act, and will rather construe them literally, than strain their meaning beyond the obvious intention of Parliament." H. BROOM, *supra* note 54, at *117; see also F. DWARRIS, *supra* note 17, at *708 (noting that "[r]ecently" English judges had manifested an intention "to adhere more closely . . . to the words of the act of Parliament"); T. SEDGWICK, *supra* note 67, at 382-83 (arguing that the "only safe rule" is to trace the legislative intent "as expressed by the words which the legislature has used").

are used."⁷⁹ Rather than take advantage of the increasing availability of legislative history in the form of committee reports and legislative journals, courts emphatically rejected any consideration of such "extrinsic evidence."⁸⁰

On the surface, the interpretation of contracts took the opposite course. The will theory of contracts gained ascendancy in the early nineteenth century, and the courts accepted as their task the simple enforcement of whatever bargain the parties had made.⁸¹ Ironically, though, the rise of the will theory was accompanied by an increasingly "objective" approach to the discovery of the parties' intent.⁸² Thus, the ideology of freedom of contract did not entail any essential modification of the law's traditional hermeneutic.

Despite the anti-interpretive influences of British Protestantism and Enlightenment rationalism, the sheer necessity of judicial construction gave rise to a substantial common law tradition of legal interpretation by the end of the eighteenth century.⁸³ Most of the Americans influential in the framing, ratification, and early interpretation of the federal Constitution were intimately familiar with the common law,⁸⁴ and they gleaned from it not only a general approach to constitutional

⁷⁹ *Coster v. Lorillard*, 14 Wend. 265, 375 (N.Y. 1835); cf. O.W. HOLMES, *The Theory of Legal Interpretation*, in COLLECTED LEGAL PAPERS 203, 207 (1920) ("We do not inquire what the legislature meant; we ask only what the statute means."). The legitimacy of resort to legislative history was only imperfectly established in Holmes's period, see, e.g., *Davis v. Pringle*, 268 U.S. 315, 318 (1925) (Holmes, J.), and he often resisted its use as contrary to the proper, "external principle of construction." See O.W. HOLMES, *supra*, at 208; see also Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947) (quoting letter from Holmes in which the latter recalls having said, while hearing oral argument, "I don't care what [the legislature's] intention was. I only want to know what the words mean.").

⁸⁰ "[T]he journals [of the legislature's proceedings] are not evidence of the meaning of a statute, because this must be ascertained from the language of the act itself, and the facts connected with the subject on which it is to operate." *Southwark Bank v. Commonwealth*, 26 Pa. 446, 450 (1856); see also T. SEDGWICK, *supra* note 67, at 243 (noting that "the intention of the legislature is to be found in the statute itself") (emphasis omitted).

⁸¹ See, e.g., M. HORWITZ, *supra* note 75, at 180-85.

⁸² See P. ATIYAH, *supra* note 75, at 459. The triumph of the will theory and the spread of an "objective" approach to contracts did not proceed at precisely the same pace, of course. See G. GILMORE, *THE DEATH OF CONTRACT* 39-40 (1974) (noting persistence of "subjective" approach into latter part of 19th century).

⁸³ An early Delaware case, *Laws v. Davis*, 1 Del. Cas. 256 (1800), illustrates the strength of the cultural distrust of interpretation even within the legal profession. One of the lawyers warned against carrying the potentially "unlimited power of construction" beyond narrow limits. The interpretations of judges, he feared, threaten "the law" on which "our rights hang and society depends." *Id.* at 258. In another Delaware case, *Brown v. Brown*, 1 Del. Cas. 188 (1798), Chief Justice Richard Bassett warned that judicial restraint in the exercise of a power to construe statutes was necessary in order to protect the constitutional separation of powers. See *id.* at 191.

⁸⁴ See, e.g., A. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank (1791), reprinted in 8 PAPERS OF ALEXANDER HAMILTON 97, 111 (H. Syrett ed. 1965) (referring to "the usual and established rules of construction").

interpretation — one centering on a search for the Constitution's "intention" — but also a variety of specific interpretive techniques. The common law, however, did not yield ready responses to a number of preliminary questions that required answers before constitutional interpretation could be assimilated to the familiar patterns of legal construction. What kind of document was the Constitution — a statute, a contract, an instrument *sui generis*? Who were its makers — the Philadelphia framers, the state conventions, the states, "We the People"? What, if any, extrinsic evidence of its meaning would be admissible in case of uncertainty — records of the federal and state conventions, statements made by its supporters, general principles of political philosophy? Without answers to these and other inquiries, the common law's hermeneutical tradition could contribute only chaos to American constitutional discourse.

III. EARLY VIEWS ON INTERPRETING THE CONSTITUTION

Friend: "You have given us a good Constitution."

Gouverneur Morris: "That depends on how it is construed."⁸⁵

A. The Framers and the Battle for Ratification

Constitutional debate was not the invention of Revolutionary America, and the invocation of written documents was a wholly traditional move in English high political controversy.⁸⁶ America's innovation was to identify "the Constitution" with a single normative document instead of a historical tradition, and thus to create the possibility of treating constitutional interpretation as an exercise in the traditional legal activity of construing a written instrument.⁸⁷ The proceedings of the Philadelphia convention reflect the delegates' awareness of this innovation and their desire to craft a document that would be understood, at least in part, through the traditional processes of legal interpretation.

⁸⁵ This exchange is quoted in A. MASON, *THE STATES RIGHTS DEBATE* 107 (2d ed. 1972).

⁸⁶ See C. BOWEN, *THE LION AND THE THRONE* 452-53, 482-84, 495-99 (1957); L. LEDER, *supra* note 62, at 95-117.

⁸⁷ See H. COMMAGER, *THE EMPIRE OF REASON* 227-35 (1977); G. WOOD, *supra* note 11, at 454-63. The Articles of Confederation were also regarded by the courts as amenable to traditional hermeneutical techniques. See *Talbot qui tam v. Commanders and Owners of three Brigs*, 1 Dall. 95, 100 (Pa. 1784). In an 1824 book review, Henry Sedgwick contrasted American constitutional discourse with its British counterpart:

[O]ur written constitutions have furnished a comparatively easy and definitive test, for the resolution of doubts and decision of controversies. In England also there have been constitutional disputes, and the disputants have appealed to theoretic reasoning, vague maxims, obsolete charters, ancient usages, half forgotten statutes, concerning which it has been [a] matter of doubtful discussion, whether they were or were not in force . . .

Sedgwick, Book Review, 19 N. AM. REV. 411, 438 (1824), reprinted in *THE LEGAL MIND IN AMERICA*, *supra* note 45, at 135, 145.

The Philadelphia framers' primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language. This expectation is evident in the framers' numerous attempts to refine the wording of the text, either to eliminate vagueness⁸⁸ or to allay fears that overprecise language would be taken literally and that the aim of a given provision would thus be defeated.⁸⁹ Debates over the language of the document were abundant,⁹⁰ yet in none of them did any delegate suggest that future interpreters could avoid misconstruing the text by consulting evidence of the intentions articulated at the convention. Although the Philadelphia framers certainly wished to embody in the text the most "distinctive form of collecting the mind" of the convention,⁹¹ there is no indication that they expected or intended future interpreters to refer to any extratextual intentions revealed in the convention's secretly conducted debates.⁹² The framers shared the traditional common law view — so foreign to much hermeneutical thought in more recent years — that the import of the document they were framing would be determined by reference to the

⁸⁸ See, e.g., J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 83 (E. Scott ed. 1893) (proceedings of May 31, 1787) (provision giving Congress powers in cases in which state legislatures are individually "incompetent" is criticized as vague); *id.* at 133 (June 8) (provision giving Congress power to negate "improper" state laws is criticized as indefinite); *id.* at 562 (Aug. 20) (necessary and proper clause is criticized as too vague in respect to Congress's power to establish federal offices); *id.* at 614 (Aug. 27) (provision concerning impeachment and removal of President in case of "disability" is criticized as too vague).

⁸⁹ Some delegates suggested that the Committee of Detail's draft provision giving each house of Congress "in all cases . . . a negative on the other" would give the House of Representatives a veto on treaties despite the later provision giving the Senate alone power to ratify treaties. *Id.* at 463 (Aug. 7). Others criticized the committee's draft of the presidential veto provision because it referred to "bills" and could thus be evaded simply by styling congressional acts as "resolutions." See *id.* at 536-37 (Aug. 15). Some delegates feared that the draft provision empowering Congress "to make war" would render the President incompetent to order defensive operations in the event of a surprise attack, while others thought the proposed substitution ("to declare war") left Congress's power too narrow. See *id.* at 548 (Aug. 17).

⁹⁰ The debate over the provision giving Congress legislative authority over maritime crimes exemplifies the convention's concern for precision. As proposed by the Committee of Detail, the provision empowered Congress "[t]o declare the law and punishment of piracies and felonies committed on the high seas." *Id.* at 454 (Aug. 6). When the provision came up for consideration by the full convention, James Madison moved to strike the words "and punishment" as superfluous. George Mason opposed the motion because he feared that the omission would leave Congress capable only of defining maritime crimes, and not of setting penalties for them. Edmund Randolph did not regard the removal of "punishment" as significant, but expressed concern over "the efficacy" of the verb "declare." Gouverneur Morris preferred "designate" to "declare," while Madison and James Wilson debated the precision of "felonies." Only after considerable discussion was the final wording settled upon. See *id.* at 544-46 (Aug. 17).

⁹¹ *Id.* at 173 (June 16).

⁹² At the convention's close, the delegates decided not to publish the journal and other papers, but rather to entrust them to convention president George Washington, subject to future action by Congress under the proposed Constitution. See *id.* at 748 (Sept. 17).

intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation.⁹³

In accepting the common law's objective approach to discerning the meaning of a document, the framers did not endorse strict literalism as the proper stance of future interpreters. The framers were aware that unforeseen situations would arise, and they accepted the inevitability and propriety of construction.⁹⁴ When a motion was made to extend the jurisdiction of the Supreme Court to cases arising under "this Constitution" as well as under "the laws of the United States," James Madison expressed concern that this would extend the Court's power to matters not properly within judicial cognizance:

Mr. MADISON doubted whether it was not going too far, to extend the jurisdiction of the Court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department.

The motion of Doctr. JOHNSON [to extend the Court's jurisdiction] was agreed to, *nem. con.* [without dissent], it being generally supposed, that the jurisdiction given was constructively limited to cases of a judiciary nature.⁹⁵

Although the Philadelphia framers did not discuss in detail how they intended their end product to be interpreted, they clearly assumed that future interpreters would adhere to then-prevalent methods of statutory construction.

The political struggle over the ratification of the Constitution elicited, both in print and on state convention floors, a considerable body of commentary on the Constitution's "intent," and on the means that future interpreters would use to determine that "intent." Americans generally agreed that the Articles of Confederation were a compact among the several states.⁹⁶ The Federalist proponents of the Constitution identified the contractual basis of the Articles as one of their chief weaknesses.⁹⁷ One of the Constitution's virtues, in the Federalists' view, lay in its rejection of a contractual model for the polity of the United States.⁹⁸ The Federalists analogized the ratification

⁹³ See, e.g., *id.* at 625-26, (Aug. 29) (meaning of "ex post facto law" not controlled by intentions of delegates to convention); *id.* at 727-28 (Sept. 14) (same).

⁹⁴ See, e.g., *id.* at 220 n.* (June 22) (Massachusetts concurs in deletion of phrase because its purpose would be achieved without express wording); *id.* at 726 (Sept. 14) (James Wilson argues that power to create monopolies is implicit in commerce power).

⁹⁵ *Id.* at 617 (Aug. 27).

⁹⁶ See, e.g., L. Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland* (1788), reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 19, 75-76 (H. Storing ed. 1981) [hereinafter cited as *STORING*]; *THE FEDERALIST* No. 15, at 70-71 (A. Hamilton) (G. Wills ed. 1982); *THE FEDERALIST* No. 22, at 111 (A. Hamilton) (G. Wills ed. 1982).

⁹⁷ See, e.g., *THE FEDERALIST* No. 18 (J. Madison) (comparing the Articles to confederations of the past).

⁹⁸ See, e.g., *THE FEDERALIST* No. 15 (A. Hamilton); *infra* pp. 929-30.

process to the passage by a legislature (the people) of a statute (the Constitution) drafted by a committee (the Philadelphia convention). Without the people's approval, the convention's work would remain a mere proposal lacking any intrinsic authority.⁹⁹ This analogy led many Federalists to assume or assert that the Constitution would be construed in accord with the same basic principles that the common law had developed for statutory interpretation.¹⁰⁰ Perhaps for their own polemical purposes, the Anti-Federalists usually agreed with the statutory analogy for the proposed Constitution, and with the corollary analogy between constitutional and statutory interpretation.¹⁰¹ Their complaint was that this methodology, applied to the sweeping language of the Constitution, would lead inexorably to the effective consolidation of the states into a single body politic with a single, omnipotent government.¹⁰²

Once the Constitution was proposed to the states, a central element of the campaign to prevent ratification was the charge that the Constitution would be the object of interpretation and that judges and legislators would read into it doctrines present only "constructively" and not textually.¹⁰³ All of the anti-hermeneutic resources of Protestant biblicism and Enlightenment rationalism were enlisted in an effort to show that the Constitution was an open invitation to political corruption and oligarchic usurpation. The Constitution was ambiguous by design, the Anti-Federalists claimed, and thereby invited con-

⁹⁹ See, e.g., THE FEDERALIST No. 40, at 199-200 (J. Madison) (G. Wills ed. 1982) (although Anti-Federalists attack convention as if it had sought the "establishment" of the Constitution, its powers were in fact "merely advisory and recommendatory").

¹⁰⁰ See, e.g., THE FEDERALIST No. 78, at 395-96 (A. Hamilton) (G. Wills ed. 1982).

¹⁰¹ See, e.g., Letters from the Federal Farmer No. 4 (Oct. 12, 1787), reprinted in 2 STORING, *supra* note 96, at 248 (assuming analogy between statutory and constitutional interpretation); Essays by Cincinnatus No. 2 (Nov. 8, 1787), reprinted in 6 STORING, *supra* note 96, at 12 (applying principles of "legal construction" to Constitution).

¹⁰² The Federalists maintained that the states' autonomy was secure because the text of the Constitution did not purport to abolish it and indeed contained only a few explicit restrictions on state power. The Anti-Federalists countered that the supremacy clause and the expansive definitions of congressional authority would reduce the states to insignificance. See 3 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 159 (J. Elliot ed. 1827, 1828 & 1830) [hereinafter cited as ELLIOT'S DEBATES] (reporting the first North Carolina convention, in which Timothy Bloodworth claimed that these provisions would "produce an abolition of the state governments"). Massachusetts Anti-Federalist Amos Singleary summarized the view of those opposed to ratification when he complained that he "wished [the Federalists] would not play round the subject with their fine stories, like a fox round a trap, but come to it," and admit that after ratification "the states will be like towns in this state. Towns . . . have a right to lay taxes to raise money, and the states possibly may have the same." 1 ELLIOT'S DEBATES, *supra*, at 111.

¹⁰³ See, e.g., *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents*, Pennsylvania Packet and Daily Advertiser, Dec. 18, 1787, reprinted in 3 STORING, *supra* note 96, at 145, 154-57 (criticizing Constitution for permitting Congress to assume effectively unlimited powers by construction, and intimating that the instrument would allow similar self-aggrandizement by the federal judiciary).

struction.¹⁰⁴ Through such construction the new federal rulers would gradually extend their power and so finally subvert American liberties.¹⁰⁵ The Supreme Court's power to interpret the Constitution would make the Court, not the people or their representatives, the true lawgiver.¹⁰⁶ Disputes over the scope of the Constitution's grants of power, the Anti-Federalists argued, showed that no one could predict how the instrument would be interpreted once adopted.¹⁰⁷ The good intentions of the Philadelphia delegates, or of the proponents of the Constitution in the state conventions, were irrelevant, because the *Constitution's* intention was expressed "[s]o loosely . . . [and] inaccurately" that misconstructions were certain to occur.¹⁰⁸ The Protestant tradition taught that God's Word is its own interpreter, and the *philosophes* had warned against the dangers of any law not plainly comprehensible on its face; the proposed Constitution, however, contained no acceptable internal criteria to guide its interpreters.¹⁰⁹ Some Anti-Federalists viewed the document in an even darker light: to them it revealed a conscious desire on the part of the Philadelphia delegates, who had clothed their proceedings in a veil of secrecy, to overthrow the free and republican constitutions of the states and substitute for them a centralized despotism.¹¹⁰

The Federalist supporters of ratification offered a variety of responses to the barrage of criticism leveled against the Constitution and its alleged susceptibility to corrupting interpretation. First, to those who questioned the good faith of the Philadelphia delegates, the Federalists responded by invoking not only the great names of Washington and Franklin, but also the common law's understanding of "intent." The Anti-Federalists' fears were misguided, they asserted, because whatever the private sentiments of the Philadelphia delegates

¹⁰⁴ See G. WOOD, *supra* note 11, at 538; 1 STORING, *supra* note 96, at 54.

¹⁰⁵ See, e.g., Letters of Centinel No. 5 (Nov. 30, 1787), reprinted in 2 STORING, *supra* note 96, at 166, 167-69.

¹⁰⁶ See 1 STORING, *supra* note 96, at 50.

¹⁰⁷ This assertion was made repeatedly by Anti-Federalists in the state conventions. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 102, at 57 (remarks of Timothy Bloodworth at the first North Carolina convention) ("no one can say what construction congress will put upon" article I); *id.* at 156 (noting remarks of Andrew Bass at the first North Carolina convention) ("[Bass] observed that gentlemen of the law and men of learning did not concur in the explanation or meaning of this constitution. . . . From the contrariety of opinions, he thought the thing was either uncommonly difficult, or absolutely unintelligible.").

¹⁰⁸ A. MASON, *supra* note 85, at 134 (quoting remarks of John Smilie at the Pennsylvania ratifying convention).

¹⁰⁹ See *id.*; Letters of Centinel No. 2 (1787), reprinted in 2 STORING, *supra* note 96, at 147 (Federalist claim that unenumerated powers are not granted to the federal government is "a speculative unascertained rule of construction" that would prove "a poor security for the liberties of the people"); 3 ELLIOT'S DEBATES, *supra* note 102, at 164 (remarks of Timothy Bloodworth at the first North Carolina convention) (Constitution is flawed because it grants "indefinite power" about which "members of Congress will differ").

¹¹⁰ See generally L. BANNING, *supra* note 31, at 105-13 (discussing Anti-Federalist arguments); 1 STORING, *supra* note 96, at 3-76 (same).

had been, those sentiments would not be the legally significant "intent" of the Constitution.¹¹¹ The members of the federal convention had been mere scribes or attorneys appointed to draw up an instrument; the instrument's true makers were the people of the United States assembled in state conventions.¹¹² It was thus the people's unquestionably republican intention, evinced in the plain, obvious meaning of the text, that would control future interpretations. The Federalists additionally denied allegations that they were already corrupting the meaning of the Constitution. It was not they but their opponents, the Federalists claimed, who were engaged in lawyers' quibbles over the language of an instrument that the common sense of the people found perfectly clear.¹¹³ As John Jay explained, Federalist statements of the document's meaning were not products of a suspect hermeneutical process; they involved "no sophistry; no construction; no false glosses, but simple inferences from the obvious operation of things."¹¹⁴ Finally, Federalists argued that the Anti-Federalist attack on the Constitution's indeterminacy ignored the limits of human communicative powers: "no compositions which men can pen, could be formed, but wh[ich] would be liable to the same charge [of ambiguity]."¹¹⁵ When interpretation was necessary, it would take place in accord with the rules of "universal jurisprudence," subject to correction by the amendment process provided for in article V.¹¹⁶

A series of essays published in the *New York Journal* from October 1787 through April 1788 under the byline "Brutus" constituted by far the most powerful and sustained attack on the Constitution from an anti-hermeneutical perspective.¹¹⁷ "Brutus" read the first sentence of the second section of article III ("The judicial power shall extend to

¹¹¹ See G. WOOD, *supra* note 11, at 524-43.

¹¹² See, e.g., 3 ELLIOT'S DEBATES, *supra* note 102, at 37 (remarks of Archibald Maclaine at the first North Carolina convention) ("The constitution is only a mere proposal. . . . If the people approve of it, it becomes their act."); THE FEDERALIST No. 40 (J. Madison). In asserting the Philadelphia convention's authority to propose a new constitution instead of mere amendments to the Articles of Confederation, in justifying the lack of a bill of rights, and in defending against the charge that the Constitution had bypassed the states (by beginning with "We the People" instead of "We the States"), the Federalists relied on the basic proposition that the Constitution would be, if adopted, the act of the people, not of the state governments or of the federal convention.

¹¹³ See 3 ELLIOT'S DEBATES, *supra* note 102, at 71 (remarks of Archibald Maclaine at the first North Carolina convention).

¹¹⁴ 1 *id.* at 255 (remarks of John Jay at the New York convention).

¹¹⁵ *Id.* at 115 (remarks of Theophilus Parsons at the Massachusetts convention); see THE FEDERALIST No. 37 (J. Madison).

¹¹⁶ See 3 ELLIOT'S DEBATES, *supra* note 102, at 74 (remarks of John Steele at the first North Carolina convention) ("universal jurisprudence" and a "plain obvious" construction will be applied to the Constitution); A. MASON, *supra* note 85, at 160 (remarks of Edmund Randolph at the Virginia convention) (improper construction of ambiguous parts of Constitution can be remedied through amendment); cf. THE FEDERALIST No. 44, at 230 (J. Madison) (G. Wills ed. 1982) (remedy for misconstructions by Congress is electoral).

¹¹⁷ See 2 STORING, *supra* note 96, at 358.

all cases, in law and equity, arising under this Constitution") to authorize the federal courts to give the Constitution both "a legal construction" and an interpretation "according to the reasoning spirit of it, without being confined to the words or letter."¹¹⁸ Courts frequently would employ the latter "mode of construction" out of necessity, because the Constitution's grants of authority were "conceived in general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of their meaning."¹¹⁹ The courts' exercises in construction "according to the reasoning spirit," therefore, would necessarily amount to the creation of constitutional norms by judges themselves.¹²⁰

"Brutus" felt that the courts' interpretations "according to the rules laid down for construing a law"¹²¹ would be just as unfortunate. The common law tradition of statutory interpretation, he pointed out, permitted and even required the court to take the end or purpose of the statute into account.¹²² Like many statutes, the Constitution declared its purpose in a Preamble, the wording of which made it "obvious," to "Brutus," that the Constitution "has in view every object which is embraced by any government," leaving no separate sphere of responsibility for the state authorities and reducing the present confederation to a single, consolidated nation.¹²³ Most horrifying of all to "Brutus" was the realization, gathered from the Preamble, from the grants of power to Congress,¹²⁴ and from the interpretive authority entrusted to the federal judiciary, that the Constitution identified the separate existence and autonomy of the states as the mischief and defect it was to cure.¹²⁵ "Brutus" insisted that the most disinterested judge, interpreting the Constitution with strict regard for the proprieties of common law statutory construction, would agree that the document "was calculated to abolish entirely the state governments, and to melt down the states into one entire government."¹²⁶ And of course, he argued, judges would not in fact be disinterested. Elec-

¹¹⁸ Essays of Brutus No. 11, reprinted in 2 STORING, *supra* note 96, at 417, 419 (footnote omitted).

¹¹⁹ *Id.* at 420-21.

¹²⁰ See *id.* at 422 ("This power in the judicial, will enable them to mould the government, into almost any shape they please.").

¹²¹ *Id.* at 419.

¹²² See *id.*

¹²³ Essays of Brutus No. 12, reprinted in 2 STORING, *supra* note 96, at 422, 424.

¹²⁴ "Brutus" thought the "most natural and grammatical" interpretation of article I, section 8, was that it authorized Congress to do "any thing which in their judgment will tend to provide for the general welfare, and [that] this amounts to the same thing as general and unlimited powers of legislation in all cases." *Id.* at 425.

¹²⁵ See *id.* at 424-25.

¹²⁶ Essays of Brutus No. 15, reprinted in 2 STORING, *supra* note 96, at 437, 441; see Essays of Brutus No. 12, reprinted in 2 STORING, *supra* note 96, at 422, 424-25 (courts will be authorized to interpret the Constitution "according to its spirit," which is "to subvert and abolish" all state powers).

torally irresponsible, endowed with that absolute authority to interpret against which English religious and political tradition warned, the federal judges would be from the beginning the final lawgivers of the system, and in the end its absolute rulers.¹²⁷

"Brutus" therefore saw the Constitution as flawed at a deeper level than that reached by criticisms of its ambiguities or of its broad grants of power to the federal legislature. Its basic evil was its framers' misconception, deliberate or not, of the nature of fundamental law in a free society. The Philadelphia convention had devised a constitution patterned after a statute, a command issued by a legal superior and subject to technical interpretation in accord with the traditional rules of construction. But for "Brutus," a constitution should be a contract, "a compact of a people with their rulers," framed in simple and nontechnical language and enforced by the people's right to remove those rulers "at the period when the rulers are to be elected."¹²⁸ A constitution, for "Brutus," should articulate in plain terms the agreement of the community on the rightful powers of government, not establish a superior authority to determine what those powers are. Under such a political compact there could be no danger of effective usurpation by the rulers, save by force, for the compact's meaning would be clear to all and would be interpreted by the equal parties to the compact, not by a legal superior. The Philadelphia framers, unfortunately, had followed a different model. Their proposed constitution did not express consensus; it issued commands — mandates at once so complicated and so obscure that it would be impossible to give them meaning without resort by the federal political bodies to the artificial techniques of traditional legal hermeneutics. By drafting an instrument requiring such interpretation, the Philadelphia framers had ensured that future authority over the parameters of American political society would ultimately be transferred from the ordinary people to a small coterie of legal quibblers.

Commentators have suggested that Alexander Hamilton's discussion of article III in *The Federalist* Nos. 78 through 83, which appeared in late May 1788, was written as a direct response to the *Essays* of "Brutus."¹²⁹ Whether or not intended as such, those papers

¹²⁷ See *Essays of Brutus* No. 15, reprinted in 2 STORING, *supra* note 96, at 437, 437-41.

¹²⁸ *Id.* at 442. The views of "Brutus" were not unique; throughout this period American writers invoked the image of "compact" in explaining and defending the basis of the American political order. See, e.g., *Amicus Republicae, Address to the Public* (Exeter 1786), reprinted in 2 STORING, *supra* note 96, at 638, 639-40 (each state was constituted by "civil compacts"; the Articles are a further "solemn covenant" between the states); Hart, *Liberty Described and Recommended: in a Sermon Preached to the Corporation of Freemen in Farmington* (Hartford 1775), reprinted in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, at 305, 308-10 (C. Hyneman & D. Lutz eds. 1983) (human society is founded on "compact[] or mutual agreement").

¹²⁹ See, e.g., L. LEVY, *JUDICIAL REVIEW AND THE SUPREME COURT* 6 (1967) (discussing *The Federalist* No. 78). But see G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 130-50 (1981) (suggesting alternative interpretation of Hamilton's purposes).

in fact offered the most coherent Federalist rebuttal of the arguments of "Brutus." Hamilton had already observed in *The Federalist* No. 22 that one of the defects of the Articles of Confederation was their failure to establish an effective federal judiciary.¹³⁰ In addition, in *The Federalist* No. 37 James Madison had launched a devastating counterattack on the standard Anti-Federalist charge of ambiguity.¹³¹ Madison stressed the inescapable fallibility and tentativeness of all human acts of discrimination — sensory, mental, or experiential — and responded to the religious overtones in the Anti-Federalist critique with the observation that the meaning even of God's Word "is rendered dim and doubtful, by the cloudy medium through which it is communicated" when He "condescends to address mankind in their own language."¹³² Mortals' efforts at the framing of law obviously could not be hoped to better those of Omnipotence; Madison thus concluded that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."¹³³ Madison's argument, which Hamilton had anticipated in *The Federalist* No. 22,¹³⁴ was of course a restatement in somewhat abstract terms of the old common law assumption, shared by the Philadelphia framers, that the "intent" of any legal document is the product of the interpretive process and not some fixed meaning that the author locks into the document's text at the outset. In his *Essays* "Brutus" underscored this confession that the Constitution would be subject to judicial construction whose results were not completely foreseeable at present, and he labored with considerable success to demonstrate that the necessary consequence was judicial tyranny.

In *The Federalist* Nos. 78 through 83, Hamilton returned his attention to the legal character of the Constitution and its provisions for a federal judiciary. He steadfastly reiterated *The Federalist's* earlier claims that it was appropriate and necessary for the courts to "liquidate and fix [the] meaning and operation" of laws, including the Constitution.¹³⁵ Hamilton rejected the inference that the future fed-

¹³⁰ "Laws are a dead letter without courts to expound and define their true meaning and operation." *THE FEDERALIST* No. 22, at 109 (A. Hamilton) (G. Wills ed. 1982).

¹³¹ *The Federalist* No. 37 (J. Madison) appeared on January 11, 1788, well before the main body of the *Essays'* attack on article III and its implications.

¹³² *THE FEDERALIST* No. 37, at 180 (J. Madison) (G. Wills ed. 1982).

¹³³ *Id.* at 179.

¹³⁴ "The treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations." *THE FEDERALIST* No. 22, at 109 (A. Hamilton) (G. Wills ed. 1982).

¹³⁵ *THE FEDERALIST* No. 78, at 396 (A. Hamilton) (G. Wills ed. 1982).

eral courts would find in the Constitution anything shocking or surprising to the ordinary reader: "The rules of legal interpretation are rules of *common sense*, adopted by the courts in the construction of the laws. . . . In relation to such a subject [a constitution of government], the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction."¹³⁶

Faced with the argument of "Brutus" that the courts' powers of constitutional interpretation and judicial review of legislative acts would inexorably result in uncontrollable and ultimately despotic oligarchy, Hamilton countered by suggesting that "Brutus" had not taken the statutory analogy seriously enough. Both agreed, Hamilton approvingly and "Brutus" disapprovingly, that the Constitution was to be viewed as a quasi-statute, a command from a legal superior to those under its authority. According to this view, Hamilton argued, the legal superior issuing the command must be considered the ultimate repository of sovereignty in a republic: the people. But "the nature and reason of the thing," Hamilton wrote,

teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.¹³⁷

Far from exalting the judiciary over all, the doctrine of judicial review based on the courts' construction of the Constitution simply safeguarded the authority of the people who had "ordained and established" the Constitution in the first place.¹³⁸

Hamilton and "Brutus" therefore disagreed primarily over the nature of legal interpretation. "Brutus" feared that interpretation would inevitably convert the Constitution's open-textured language into a license for omnipotent federal government. Hamilton countered that legal interpretation was simply the application of common sense to text. Because the people can exercise common sense, they could tell for themselves what the Constitution meant — and no sensible reader would take it to be a charter for tyranny. Hamilton scornfully dismissed the notion that judges could exploit their interpretive authority to make themselves despots: lacking influence "over either the sword or the purse,"¹³⁹ he remarked, courts would possess "neither Force nor Will, but merely judgment."¹⁴⁰ The insulation of judges from

¹³⁶ THE FEDERALIST No. 83, at 422 (A. Hamilton) (G. Wills ed. 1982).

¹³⁷ THE FEDERALIST No. 78, at 396 (A. Hamilton) (G. Wills ed. 1982).

¹³⁸ See *id.* at 395–96 ("[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.").

¹³⁹ *Id.* at 393.

¹⁴⁰ *Id.* at 394.

electoral accountability was not a threat to liberty, but rather an essential condition to the judiciary's role as independent guardian of the Constitution's limitations on power.¹⁴¹ In reality, as Hamilton had argued earlier,¹⁴² the seeds of tyranny lurked not within the statutory analogy proposed by the Federalists, but within the contract analogy favored by "Brutus." A government with no justification other than a contractual meeting of the minds could not long endure without resorting to force to resolve the disagreements that would inevitably splinter society. The debate between Hamilton and "Brutus" was ultimately irresolvable, for they started from different premises that paralleled the conflicting hermeneutical perspectives discussed above in Part II. "Brutus" assumed the validity of the anti-interpretive tradition's equation of construction and corruption. In sharp contrast, Hamilton accepted the validity of the common law's hermeneutical techniques as means to discovering a document's "intent."

The public debate over the adoption of the Constitution thus revealed that Americans of all political opinions accepted the applicability to constitutional interpretation of hermeneutical views developed in relation to quite different documents — the Bible, parliamentary statutes, and private contracts. But there were sharp disagreements over which interpretive approach was acceptable.¹⁴³ An important element in the Anti-Federalists' critique was their implicit appeal to the distrust of interpretation cultivated by the British

¹⁴¹ See *id.*; THE FEDERALIST No. 79 (A. Hamilton).

¹⁴² See THE FEDERALIST No. 16 (A. Hamilton). At the New York convention, Hamilton argued that to "take the old confederation" and entrust it with the minimal powers virtually all Anti-Federalists conceded should be placed in federal hands "would be establishing a power which would destroy the liberties of the people," because the Confederation government, lacking the legal power to act directly on individuals, could carry out its new responsibilities only by using military force. 1 ELLIOT'S DEBATES, *supra* note 102, at 210 (remarks of Alexander Hamilton at the New York convention).

¹⁴³ The complex response evoked in many Americans by the proposed Constitution is exemplified in the behavior of Edmund Randolph of Virginia. A delegate and active participant at the Philadelphia convention, Randolph found himself unable at the end to sign the convention's finished product. After his return to Virginia, however, Randolph's fears that rejection would spell the end of the union between the states, and that disunion would lead to anarchy, overcame his misgivings about the Constitution, and he played an important role in securing Virginia's ratification. See R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS: 1777-1791, at 167-68, 174 (rev. ed. 1983). At the state ratifying convention, Randolph assailed the Anti-Federalists' dire prophecies as the product of "extravagant" misconstructions of the Constitution's text. But he agreed that at certain important points the Constitution was unhappily vague, and noted his special concern with the vagueness of the necessary and proper clause in defining the scope of congressional powers:

My objection is, that the clause is ambiguous, and that that ambiguity may injure the states. My fear is, that it will by gradual accessions gather [power to Congress] to a dangerous length. . . . I trust that the members of congress themselves will explain the ambiguous parts: and if not, the states can combine in order to insist on amending the ambiguities. I would depend on the present actual feeling of the people of America, to introduce any amendment which may be necessary.

A. MASON, *supra* note 85, at 160 (remarks of Edmund Randolph at the Virginia convention).

Protestant tradition and Enlightenment thought. The Federalists, on the other hand, treated the availability of common law hermeneutics as a positive good: precisely because there was a developed tradition of legal interpretation, they argued, the people could predict with confidence the results of future constitutional construction.

B. The Beginnings of Constitutional Interpretation

Upon convening in the spring of 1789 to inaugurate the new government created by the ratification of the Constitution, the first Congress found itself engaged almost at once in the task of explaining the Constitution's ambiguities. The Congress's most famous exercise in constitutional interpretation was the formulation and proposal to the states of a federal bill of rights, embodied in twelve proposed amendments to the 1787 text.¹⁴⁴ But almost every significant issue considered by the Congress (and some arguably not so significant¹⁴⁵) required some excursion into the fields of constitutional construction. The establishment of the executive departments, the debates over a protective tariff and a national bank, the consideration of a memorial against the slave trade and of the proper means of handling the public debt — all involved the resolution of issues of constitutional authority not plainly answered on the face of the document.¹⁴⁶ Despite their almost constant involvement with the reality of constitutional interpretation, however, many members of Congress attacked the theoretical propriety of such construction and insisted that they were merely applying the Constitution's terms. Rep. Elias Boudinot of New Jersey declared: "For my part, I shall certainly attend to the terms of the Constitution in making a decision [on whether the President's removal power could be exercised constitutionally only with the concurrence of the Senate]; indeed, I never wish to see them departed from or construed, if the Government can possibly be carried into effect in any other manner."¹⁴⁷ Rep. Elbridge Gerry of Massachusetts was dogmatic: "[A]ll construction of the meaning of the Constitution, is

¹⁴⁴ Leading members of Congress regarded the amendments not as modifying the 1787 text, but merely as making explicit the original instrument's solicitude for individual liberties. See, e.g., 1 ANNALS OF CONG. 432 (J. Gales ed. 1789) (remarks of Rep. James Madison on June 8, 1789) (Congress ought to adopt amendments that will "expressly declare the great rights of mankind secured under this Constitution"); *id.* at 715 (remarks of Rep. Roger Sherman on Aug. 13, 1789) ("The amendments reported are a declaration of rights; the people are secure in them, whether we declare them or not . . .").

¹⁴⁵ The premier example of the latter is the famous dispute over the appropriate address for the President. See L. BANNING, *supra* note 31, at 117-21.

¹⁴⁶ See 4 ELLIOT'S DEBATES, *supra* note 102, pt. II, at 139-232 (collecting opinions on constitutional questions expressed by members of the first Congress).

¹⁴⁷ 1 ANNALS OF CONG. 526 (J. Gales ed. 1789) (remarks of Rep. Elias Boudinot on June 18, 1789).

dangerous or unnatural, and therefore ought to be avoided."¹⁴⁸ Other prominent members joined in the repetition of the old anti-hermeneutical arguments.¹⁴⁹ More realistic about what Congress actually was doing, and concerned only that Congress should interpret well, were men like James Madison. Rising to address the scope of the President's removal power, Madison stressed the far-reaching consequences of Congress's decision on the question. "The decision that is at this time made," he declared, "will become the permanent exposition of the Constitution"¹⁵⁰

The passage by the first Congress of a bill to establish a national bank,¹⁵¹ drafted by Secretary of the Treasury Hamilton, provoked an elaborate debate over constitutional interpretation within the executive branch. President Washington, troubled by doubts over the constitutionality of the measure, requested formal opinions on its validity from Hamilton, Attorney General Edmund Randolph, and Secretary of State Thomas Jefferson. The opinions of Hamilton and Jefferson became classic statements of the expansive and restrictive views, respectively, of the constitutional scope of congressional power.

Both Hamilton and Jefferson purported to rely on "the usual & established rules of construction."¹⁵² Their opposing conclusions and

¹⁴⁸ *Id.* at 574 (remarks of Rep. Elbridge Gerry on June 19, 1789). Early in his remarks, Gerry asserted that he was "decidedly against putting any construction whatever on the Constitution." *Id.* at 573. Like Edmund Randolph of Virginia, Gerry had refused to sign the Constitution at the close of the Philadelphia convention. Unlike Randolph, he opposed its ratification. See 2 STORING, *supra* note 96, at 4-8.

¹⁴⁹ Roger Sherman expressed a preference "to leave the Constitution to speak for itself whenever occasion demands," rather than for Congress to "attempt to construe the Constitution." 1 ANNALS OF CONG. 538 (J. Gales ed. 1789) (remarks of Rep. Roger Sherman on June 18, 1789). Abraham Baldwin, a proponent of the view that Congress could make executive officers removable by unilateral actions of the President, responded to opponents' claims that his position violated article II, section 2 (which provides that the appointment power is exercisable "by and with the advice and consent of the Senate") with the hope that "gentlemen will change their expression, and say, we shall violate their construction of the Constitution, and not the Constitution itself." For himself, Baldwin remarked, "[W]hen gentlemen tell me that I am going to construe the Constitution, . . . I am very cautious how I proceed. I do not like to construe over much." *Id.* at 556 (remarks of Rep. Abraham Baldwin on June 19, 1789).

¹⁵⁰ *Id.* at 495 (remarks of Rep. James Madison on June 17, 1789). In defending the constitutionality of Hamilton's bank bill, Fisher Ames contrasted "the letter of the constitution" with the instrument's "meaning and intention"; the latter, he argued, was properly and necessarily to be determined by "the doctrine of implication" and the use of "a reasonable latitude of construction." 4 ELLIOT'S DEBATES, *supra* note 102, at 220-23 (remarks of Fisher Ames on Feb. 3, 1791); see also 2 ANNALS OF CONG. 1903-09 (1791) (alternative version of Ames's remarks).

¹⁵¹ Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

¹⁵² A. Hamilton, *supra* note 84, at 111. Jefferson's opinion includes a similar reference. See T. Jefferson, Opinion on the Constitutionality of a National Bank (1791), reprinted in 5 THE WRITINGS OF THOMAS JEFFERSON 284, 286 (P. Ford ed. 1892-1899) [hereinafter cited as WRITINGS]. Both papers make clear use of traditional interpretive strategies. See *infra* pp. 915-17.

radically different approaches to the problem, however, demonstrated that the two men held incompatible views about the nature of the Constitution and consequently about the proper application to it of the "usual" rules of construction. Hamilton clearly remained committed to the statutory analogy he had adopted in *The Federalist*. He insisted, in good common law fashion, that the Constitution's text was to be given its "grammatical" and "popular" meaning:

[W]hatever may have been the nature of the proposition or the reasons for rejecting it concludes nothing in respect to the real merits of the question. The Secretary of State will not deny, that whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction. Nothing is more common than for laws to *express* and *effect*, more or less than was intended. If then a power to erect a corporation, in any case, be deducible by fair inference from the whole or any part of the numerous provisions of the constitution of the United States, arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected.¹⁵³

This absolute rejection of what modern intentionalists would regard as evidence of "intent" was perfectly consistent with language prescient of modern intentionalism. A few pages earlier, Hamilton had referred to "the intent of the [Philadelphia] convention."¹⁵⁴ Such locutions were common.¹⁵⁵ They did not in any way indicate that the writer was rejecting the traditional common law understanding of "intent" as the apparent "meaning of the text" in favor of more modern, subjective notions. Indeed, in the passage last quoted from Hamilton, the context makes it plain that he derived his knowledge of "the intent of the convention" from the "obvious & popular sense" of the constitutional expression under consideration ("necessary and proper") and from the "whole turn of the clause containing it."¹⁵⁶

Just as a statute is to be construed so as to advance the remedy proposed by the legislature and revealed in the statute's preamble and provisions, so the Constitution, Hamilton wrote, must be interpreted in accord with the expansive purposes outlined in its Preamble.¹⁵⁷ The Constitution plainly intended to create a government capable of

¹⁵³ A. Hamilton, *supra* note 84, at 111. This point was made in response to Jefferson's unusual resort to "legislative history" from the Philadelphia convention's nominally secret proceedings. Jefferson referred to the well-known fact that the convention had rejected a proposal to give Congress explicit power to charter corporations. See T. Jefferson, *supra* note 152, at 287.

¹⁵⁴ A. Hamilton, *supra* note 84, at 103.

¹⁵⁵ See, e.g., *infra* note 267 (illustrating similar usage by Madison).

¹⁵⁶ A. Hamilton, *supra* note 84, at 102-03.

¹⁵⁷ See *id.* at 105.

the "advancement of the public good."¹⁵⁸ The "sound maxim of construction" required, therefore, that the Constitution's grants of power be "construed liberally."¹⁵⁹ This conclusion from the general principles of legal interpretation was confirmed, Hamilton added, by the text itself, in the necessary and proper clause:¹⁶⁰ "The whole turn of the clause containing [the phrase 'necessary and proper'], indicates, it was the intent of the convention, by that clause to give a liberal latitude to the exercise of the specified powers."¹⁶¹

Jefferson, too, treated the task of constitutional construction as analogous to common law interpretation of statutes and as requiring a determination of the document's "intent." He began, however, from a different point within the tradition — from the maxim that a statute is to be construed as changing the substance of the common law only to the extent that that conclusion is plainly required.¹⁶² Jefferson's opinion began with a list of the preexisting rules of state law that he believed the establishment of a national bank would abrogate.¹⁶³ He returned to this theme toward the end of his paper:

Can it be thought that the Constitution intended that for a shade or two of *convenience*, more or less, Congress should be authorised to break down the most ancient and fundamental laws of the several States; such as those against Mortmain, the laws of Alienage, the rules of descent, the acts of distribution, the laws of escheat and forfeiture, the laws of monopoly?¹⁶⁴

Jefferson's opening point was wholly traditional, but, as the quoted sentence indicates, his argument subtly shifted ground during the course of his opinion. The aberrant positions of Lord Coke and a few others to one side,¹⁶⁵ the common law presumption against change was only that — a commonsense assumption that legislatures do not transform whole areas of legal custom by implication.¹⁶⁶ But Jefferson

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

¹⁶¹ A. Hamilton, *supra* note 84, at 102-03.

¹⁶² See H. BROOM, *supra* note 54, at *28.

¹⁶³ See T. Jefferson, *supra* note 152, at 284-85.

¹⁶⁴ *Id.* at 289.

¹⁶⁵ Coke suggested in *Dr. Bonham's Case*, 8 Co. Rep. 107, 118, 77 Eng. Rep. 638, 652 (C.P. 1610), that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void." Whatever Coke may have meant by this remark, British legal opinion at the time of the American Revolution was overwhelmingly against any possibility of judicial review of Parliament's acts, in the name of the common law or otherwise. See, e.g., 1 W. BLACKSTONE, *supra* note 58, at *156-57 (what Parliament does, "no authority upon earth can undo").

¹⁶⁶ See F. DWARRIS, *supra* note 17, at *695.

wanted to establish a more radical interpretive principle: that the presumption in constitutional construction was against *any* change, not only in particular substantive laws but also in spheres of legislative competence.¹⁶⁷ Here Jefferson's argument left behind traditional common law notions of statutory interpretation.¹⁶⁸

Jefferson implicitly accepted Hamilton's statutory analogy for constitutional interpretation yet provided no real justification for departing from the familiar patterns of statutory interpretation that Hamilton manipulated so well. Jefferson asserted that the Constitution was based on the principle embodied in the tenth amendment: that powers "not delegated" to the federal government are "reserved to the States respectively, or to the people."¹⁶⁹ He did not explain, however, how that amendment's denial to Congress of any undelegated powers necessarily carried with it an attitude of strict construction toward the powers that were delegated. Hamilton, by contrast, presented a clear picture of what the Constitution was and how it should be construed, a picture that fit easily into the traditional interpretive wisdom of the common law.

The most sustained early congressional discussion of constitutional hermeneutics arose out of the controversial treaty with Great Britain negotiated by Chief Justice John Jay. To enable the House of Representatives fully to consider the treaty's expediency and constitutionality, the powerful Republican opposition in the fourth Congress proposed a resolution calling on President Washington to transmit to the House the executive branch's files concerning Jay's negotiations. Federalist opponents of the resolution initially attacked it as unnecessary.

I will admit, that if the PRESIDENT has assumed powers not delegated to him by the people in making and proclaiming this Treaty, it is void

¹⁶⁷ Jefferson wrote that he "consider[ed] the foundation of the Constitution as laid on this ground: That 'all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people.'" T. Jefferson, *supra* note 152, at 285. Hamilton did not deny the principle on which Jefferson relied, but he viewed its significance quite differently. For Hamilton, the tenth amendment merely restated the first principle of republican government, that all governmental power is a delegation from the sovereign people. But mere acceptance of this principle did not indicate what powers the people had in fact delegated to the national government. This was the real question at issue, and Hamilton answered it with his arguments, textual and hermeneutical, for a "liberal" construction of the delegation. See A. Hamilton, *supra* note 84, at 99-100. For Jefferson, on the other hand, the tenth amendment was not a mere truism, but expressed a genuine presumption against the legitimacy of federal power, at least in the domestic sphere. See Letter from Thomas Jefferson to Justice William Johnson (June 12, 1823), *reprinted in* POLITICAL WRITINGS, *supra* note 40, at 148 ("The States supposed that by their tenth amendment they had secured themselves against constructive powers.").

¹⁶⁸ Jefferson's argument was paralleled, however, by the strict-construction approach taken by 18th century international public law in regard to cessions of power by sovereigns. See Tucker, *Appendix to 1 BLACKSTONE'S COMMENTARIES*, note D, at 143 (St.G. Tucker ed. & comm. 1803).

¹⁶⁹ U.S. CONST. amend. X.

in itself; but of what use can those papers be to us in determining that question? Are we to explain the Treaty by private and confidential papers, or by anything extraneous to the instrument itself? I conclude not. . . .

. . . . [I]f the articles of the instrument be constitutional, can the preparatory steps make them not so?¹⁷⁰

The debate soon moved, however, to a heated discussion of the House's role in considering or implementing treaties, with the Federalists arguing that the resolution would be an unconstitutional intrusion upon the exclusive treaty powers of the President and Senate. During the debate, a number of Representatives (most but not all of them opponents of the resolution) referred to or quoted from the discussions of the Constitution's meaning that had taken place during the framing and ratification period, and thus provoked a subsidiary debate on the question of constitutional hermeneutics. Asserting that the Constitution itself "must be our sole guide," William Smith of South Carolina argued that "the general sense of the whole nation at the time the Constitution was formed" could be consulted when "the words" of the text were being construed.¹⁷¹

This use of history was related but not identical to that of modern intentionalism. The "contemporaneous expositions" on which Smith and others relied were not confined to the debates at Philadelphia, or at the state conventions, but included the defenses of the Constitution published by its proponents and even the critical interpretations of its opponents.¹⁷² In addition, those who cited evidence from the ratification period almost invariably linked it with other expressions of constitutional opinion.¹⁷³ Typical of the caution with which these Representatives advanced historical materials as evidence of the Constitution's meaning was the tack taken by Uriah Tracy of Connecticut. Tracy began his attack on the resolution by observing that the House's present decision would probably fix the course of constitutional interpretation in future cases; he consequently urged caution on his colleagues.¹⁷⁴ After setting forth an elaborate analysis of the constitu-

¹⁷⁰ 5 ANNALS OF CONG. 432 (1796) (remarks of Rep. Daniel Buck); *id.* at 441 (remarks of Rep. William Smith).

¹⁷¹ *Id.* at 495 (remarks of Rep. William Smith); *see also id.* at 519-21, 523-27 (remarks of Rep. Theodore Sedgwick); *id.* at 574-75 (remarks of Rep. Benjamin Bourne).

¹⁷² *See id.* at 495-96 (remarks of Rep. William Smith) (the relevant "general opinion of the public" is that manifested uniformly by both friend and foe of ratification); *id.* at 523 (remarks of Rep. Theodore Sedgwick) (same); *id.* at 580-81 (remarks of Rep. Richard Brent) (same).

¹⁷³ *See id.* at 496 (remarks of Rep. William Smith) (subsequent "practice of Congress"); *id.* at 528 (remarks of Rep. Theodore Sedgwick) ("well understood" opinion of Supreme Court); *id.* at 574 (remarks of Rep. Benjamin Bourne) (resolutions of state legislatures on earlier treaties); *id.* at 615-16 (remarks of Rep. Uriah Tracy) (views expressed of federal powers under Articles of Confederation).

¹⁷⁴ *See id.* at 612 (remarks of Rep. Uriah Tracy).

tional text and of American practice under the Articles of Confederation, Tracy quoted from the Virginia ratification convention debates as an illustration of the "almost unanimous understanding of the members of the different [state] Conventions."¹⁷⁵ Tracy "acknowledged, that, from such debates, the real state of men's minds or opinions may not always be collected with accuracy," and explained that he relied on the state proceedings not to prove an affirmative assertion, but only to show that "no one took such extensive ground as is now contended for by some of the supporters of the resolution under consideration."¹⁷⁶

Although Tracy and others placed only modest weight on materials from the framing and ratification process, they were vigorously attacked by the resolution's supporters for "conjur[ing] up" such "extraneous sources."¹⁷⁷ Their opponents contended that the proper method of interpretation was "to attend to and compare"¹⁷⁸ the text's various provisions in accordance with the "ancient" rules for "the interpretation and construction of laws or Constitutions."¹⁷⁹ In the view of Republican spokesmen, the suggestion that the correct interpretation of the Constitution must conform to "the opinion which prevailed when the Constitution was adopted"¹⁸⁰ misconstrued both the nature of interpretation and the value of the available evidence. Edward Livingston of New York, who introduced the resolution, said that a construction based on history cannot be "conclusive . . . because . . . we [are] now as capable at least of determining the true meaning of that instrument as the Conventions were: they were called in haste, they were heated by party, and many adopted [the Constitution] from expediency."¹⁸¹ The House, it was argued, must seek "the intrinsic meaning of the Constitution. . . . from the words of it,"¹⁸² while recognizing that the text was unavoidably ambiguous on many issues and that its framers had anticipated that those questions would "be settled by practice or by amendments."¹⁸³

Resort to materials from the ratification era as one species of evidence as to the Constitution's context was in fact only mildly innovative, although proponents of the House resolution strove to make it appear a flagrant violation of the established canons of con-

¹⁷⁵ *Id.* at 616.

¹⁷⁶ *Id.* at 617.

¹⁷⁷ *Id.* at 727 (remarks of Rep. Albert Gallatin).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 603 (remarks of Rep. William Lyman).

¹⁸⁰ *Id.* at 574 (remarks of Rep. Benjamin Bourne).

¹⁸¹ *Id.* at 635 (remarks of Rep. Edward Livingston).

¹⁸² *Id.* at 505 (remarks of Rep. William Branch Giles).

¹⁸³ *Id.* at 537 (remarks of Rep. Abraham Baldwin); *see also id.* at 538-39 (it is no objection to a fair construction of the text that it was not anticipated in the ratification era).

struction. One congressman, however, seems to have come much closer to modern intentionalism. Maryland's William Vans Murray, speaking late in the three-week-long debate, expressed surprise that those privy to information about the Philadelphia convention (especially James Madison) had not shared with the House the understanding prevalent at that convention. Vans Murray regarded the Constitution as, on the whole, so "explicit[]" that the text itself left no room for arguments of "expediency or sophistry."¹⁸⁴ But the existence, so soon after the Constitution's adoption, of "doubts upon some of its plainest passages" made it the duty of a man "known to have been in the illustrious body that framed the instrument [to] clear up difficulties by [communicating] his contemporaneous knowledge."¹⁸⁵ Vans Murray himself made no attempt to locate or use such information and expressed doubt about the propriety of consulting the official journal of the Philadelphia convention.¹⁸⁶

On the following, final day of the debate, one of the leading Republicans in the House, Albert Gallatin of Pennsylvania, recapitulated the argument for the resolution. Its opponents had turned to extraneous evidence of various types, Gallatin said, only when they had recognized that "the letter and spirit of our Constitution" were against them.¹⁸⁷ Even so, Gallatin stated that he "little expected to have heard such an appeal as was made yesterday" by Vans Murray, an appeal he described as the doctrine that "the opinions and constructions of those persons who had framed and proposed the Constitution, opinions given in private, constructions unknown to the people when they adopted the instrument, should, after a lapse of eight years, be appealed to."¹⁸⁸ Even if it were proper to use the views expressed in the debates of a legislative body in interpreting that body's acts — a proposition Gallatin doubted — the opinions of the Philadelphia framers were as irrelevant as those of the legislative clerk who penned a statute. Gallatin conceded that the proceedings of the state conventions might serve as a source of corroborative evidence, but insisted that the House could and should resolve the question of its role with respect to treaties "by the letter of the instrument alone."¹⁸⁹

The *Annals of Congress* record only one voice raised in (at least partial) support of Vans Murray, that of George Washington.¹⁹⁰ The

¹⁸⁴ *Id.* at 701 (remarks of Rep. William Vans Murray). Vans Murray noted that "contemporaneous opinions [that were] still fresh" and the contents of the Philadelphia convention's official journal could serve as additional checks on misconstruction. *Id.*

¹⁸⁵ *Id.* at 701-02.

¹⁸⁶ *See id.* at 701.

¹⁸⁷ *Id.* at 733 (remarks of Rep. Albert Gallatin).

¹⁸⁸ *Id.* at 734.

¹⁸⁹ *Id.* at 738.

¹⁹⁰ President Washington's written response to the House resolution was made part of the congressional record. *See id.* at 760-61.

resolution passed by a lopsided majority (62 to 37) and was presented to President Washington; after a few days' deliberation, Washington declined to carry out the Representatives' request. He explained in a written message to the House that delivery of the administration's files on the treaty would intrude on the confidentiality necessary to the President's successful exercise of his diplomatic responsibilities. Washington went on to reject the argument that the execution of at least some treaties demanded the concurrence of the House. He based this position on his own knowledge of the Philadelphia convention's views, on the practice of the government from 1789 to 1796, on the "plain letter" of the Constitution, and on the convention's rejection of a motion to require all treaties to be confirmed by statute — a rejection recorded in the convention's official journal.¹⁹¹ The backers of the House resolution criticized Washington's conclusion and his interpretive methodology, and secured the passage of another resolution reaffirming their position.¹⁹² During the debate over this resolution, James Madison took issue with the invocation of the Philadelphia convention by Vans Murray and Washington. Vans Murray's speech had caused Madison "some surprise, which was much increased by the peculiar stress laid on the information expected," and Madison's amazement had reawakened when Washington too appealed to the Philadelphia proceedings "as a clue to the meaning of the Constitution."¹⁹³ Personal impressions of "the intention of the whole body," whether his own or Washington's, were of little value according to Madison, and were likely in any case to conflict.¹⁹⁴ Madison dismissed Washington's citation of the convention's journal as an attempt to draw an affirmative conclusion from an unexplained, negative, and "abstract vote."¹⁹⁵ Madison stated that he "did not believe a single instance could be cited in which the sense of the Convention had been required or admitted as material [to] any Constitutional question" discussed either in Congress or in the Supreme Court.¹⁹⁶

C. The Constitution and the New Supreme Court

While the members of the executive and legislative branches were busily engaged in the process of constitutional interpretation during the Constitution's first decade, the Supreme Court found relatively few opportunities to address constitutional issues. But in its first great case, *Chisholm v. Georgia*,¹⁹⁷ the Court signaled its approval of a

¹⁹¹ See *id.*

¹⁹² See *id.* at 771–72 (reprinting the text of the resolution); *id.* at 782–83 (noting affirmative vote on the resolution).

¹⁹³ *Id.* at 775 (remarks of Rep. James Madison).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 776.

¹⁹⁶ *Id.*

¹⁹⁷ 2 U.S. (2 Dall.) 419 (1793).

traditional statutory approach to construing the nation's fundamental law. *Chisholm* was an action in assumpsit against the state of Georgia, brought under the Court's original diversity jurisdiction. Georgia denied the Court's authority to hear the case and refused to enter an appearance.¹⁹⁸ Plaintiff's counsel Edmund Randolph argued that both "the letter" and the "genuine and necessary interpretation" of the Constitution sustained the Court's jurisdiction.¹⁹⁹ His argument as to the Constitution's proper "interpretation" disavowed reliance on the "history" of the instrument or on its Preamble, resting instead on two distinct pillars: the existence in the Constitution of various prohibitions on state action, and the American experience of a "government of supplication" under the "deceased" Articles of Confederation.²⁰⁰ Randolph's argument was thus wholly traditional: he sought the intent of the document by examining the text in the light of the evil it was meant to correct.

The question of state amenability to suit in federal court had been raised repeatedly during the ratification campaign, and the virtually unanimous Federalist response had been to deny that the Constitution would affect the states' sovereign immunity.²⁰¹ If the Court had regarded itself as bound by the expectations of the Constitution's framers and supporters, a decision in Georgia's favor obviously would have been warranted. A majority of the Justices, however, agreed with Randolph that a "genuine interpretation" was not to be based on such external evidence,²⁰² but rather was to be reached by use of

¹⁹⁸ See *id.* at 419.

¹⁹⁹ *Id.* at 421. Randolph was Attorney General of the United States at the time, but was representing the plaintiff in his private capacity.

²⁰⁰ See *id.* at 421-25.

²⁰¹ See, e.g., THE FEDERALIST No. 81 (A. Hamilton).

²⁰² Justice Iredell dissented on statutory grounds and indicated that he disagreed with Randolph's view of the constitutional question as well. See *Chisholm*, 2 U.S. (2 Dall.) at 429, 449-50 (Iredell, J., dissenting). Justice Iredell's constitutional disagreement with the majority was not based, however, on his acceptance of evidence about the Constitution's "history," but on the 18th century public-law presumption against the delegation of sovereign power. See *id.* at 435-36.

Justice Iredell's acceptance of the common law approach to legal interpretation is exemplified by a grand jury charge he delivered in 1799. In addressing the constitutionality of the Alien and Sedition Acts, Justice Iredell noted the Republicans' view that the Alien Act violated the "migration and importation" clause of article I, section 9. Although some Federalists rebutted the accusation by referring to the clause's well-known connection with the importation of slaves, Justice Iredell rejected this line of defense as contrary to proper legal interpretation:

I am not satisfied, as to [the Republican] objection, that it is sufficient to overrule it, to say the words do not express the real meaning, either of those who formed the constitution, or those who established it, although I do verily believe in my own mind that the article was intended only for slaves . . . But, though this probably is the real truth, yet, if in attempting to compromise, they have unguardedly used expressions that go beyond their meaning, and there is nothing but private history to elucidate it, I shall deem it absolutely necessary to confine myself to the written instrument.

G. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 551, 558 (New York 1857) (quoting charge delivered by Justice Iredell to grand jury in 1799).

the "ordinary rules for construction."²⁰³ These rules required that the intent of the Constitution's maker, "the people of the United States,"²⁰⁴ be sought in the people's own, authoritative words: the constitutional text.²⁰⁵ The majority believed that these rules of construction, when applied to the Constitution, indicated that the document was intended to allow the action against the state. The proposal and ratification of the eleventh amendment²⁰⁶ swiftly overturned the holding of *Chisholm*, but the majority's highly traditional and strikingly nationalistic approach to constitutional interpretation foreshadowed the jurisprudence of John Marshall.

* * *

Although most Americans in public life in the 1790s accepted the propriety of a statutory analogy for constitutional construction, disagreements over substantive constitutional doctrine became more glaring as opposing political parties coalesced during the later years of Washington's administration. Constitutional issues, and in particular the split between Hamilton and Jefferson over liberal versus strict construction, played an important role in the parties' efforts to define themselves.²⁰⁷ 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"²⁰⁸ could be controlled only by a narrow reading of the Constitution's expansive language.²⁰⁹ 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,²¹⁰ formulated the theory of the Constitution, and of its proper

²⁰³ *Chisholm*, 2 U.S. (2 Dall.) at 476 (Jay, C.J.).

²⁰⁴ *Id.* at 464 (Wilson, J.); *see id.* at 466-68 (Cushing, J.); *id.* at 470-72 (Jay, C.J.).

²⁰⁵ *See id.* at 450 (Blair, J.); *id.* at 466 (Wilson, J.); *id.* at 467 (Cushing, J.); *id.* at 476-77 (Jay, C.J.). Indeed, Chief Justice Jay and Justice Wilson went a step beyond Randolph by relying in part on the Preamble to illuminate the Constitution's meaning. *See id.* at 463 (Wilson, J.); *id.* at 474-75 (Jay, C.J.).

²⁰⁶ *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

²⁰⁷ *See* L. BANNING, *supra* note 31, at 201-02.

²⁰⁸ Pendleton, *The Danger Not Over*, Richmond Examiner, Oct. 20, 1801, *quoted in* L. BANNING, *supra* note 31, at 282; *see also* Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), *reprinted in* POLITICAL WRITINGS, *supra* note 40, at 144 (warning of the dangers of construction).

²⁰⁹ *See generally* L. BANNING, *supra* note 31, at 126-245 (discussing the rise of Republican opposition to the Federalist administration).

²¹⁰ Madison's emergence as a key figure in the development of the state-sovereignty theory

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.

IV. SOVEREIGN STATES AND LATER THEORIES OF CONSTITUTIONAL INTENT

*"A system like ours, of divided powers, must necessarily give great importance to a proper system of construction."*²¹¹

In 1798, the Federalist-controlled Congress, alarmed by the radical and increasingly hostile behavior of revolutionary France and fearful of subversion by a fifth column composed of foreign immigrants and Francophile Republicans,²¹² enacted the series of measures known collectively as the Alien and Sedition Acts.²¹³ Congress passed the

of the Constitution in the 1790s is, on the surface, somewhat surprising in light of his nationalist sympathies in the 1780s. See G. WOOD, *supra* note 11, at 473 (noting that by 1787, Madison was "a thorough nationalist, intent on subordinating the states as far as possible to the sovereignty of the central government"). Madison's view of federal power during his Presidency can be seen as a partial return to this pre-ratification nationalism. See Madison, Message to Congress (Dec. 5, 1815), reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 297 (M. Meyers rev. ed. 1981) [hereinafter cited as MIND OF THE FOUNDER] (suggesting an expansive view of congressional power). But see Madison, Veto Message (Mar. 3, 1817), 30 ANNALS OF CONG. 1061 (vetoing internal improvements bill on ground that it exceeded powers delegated to Congress). In the final constitutional struggle of his life, the nullification crisis of 1828 to 1832, Madison forcefully repudiated the extreme state sovereignty views of the nullifiers. See, e.g., J. Madison, Notes on Nullification (1835-1836), reprinted in MIND OF THE FOUNDER, *supra*, at 417. Madison, of course, may simply have been inconsistent; a more sympathetic interpretation is that Madison's consistency lay in his constant desire to preserve the federal republic as a just and free society. See A. KOCH, MADISON'S 'ADVICE TO MY COUNTRY' (1966) (developing such an interpretation).

²¹¹ J. Calhoun, South Carolina Exposition (original draft, Dec. 1828), reprinted in 6 THE WORKS OF JOHN C. CALHOUN 1, 40 (R. Crallé ed. 1855).

²¹² See generally J. MILLER, CRISIS IN FREEDOM 3-73 (1951) (discussing historical setting of Alien and Sedition Acts).

²¹³ Congress raised the residency requirement for naturalization from five to 14 years. Act of June 8, 1798, ch. 54, 1 Stat. 566; (repealed by Act of April 14, 1802, ch. 28, § 5, 2 Stat. 153, 155). The Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21-22 (1982)), provided for the arrest and "removal" of resident aliens in the event of hostilities between their native country and the United States. The Alien Act, ch. 58, 1 Stat. 570 (1798) (expired 1800), gave the President "virtually unlimited power over all aliens in the United States," J. MILLER, *supra* note 212, at 52, permitting him to order their surveillance, arrest, deportation, and (if they returned) imprisonment, with little judicial supervision. The Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801), settled doubts over the existence of a federal common law offense of seditious libel by making it a statutory crime to defame the government or incite resistance to the laws of the United States. The Act's defenders pointed to its requirement that malice be proved, its allowance of truth as a defense, and its provisions for jury trial as evidence that the statute in fact allayed the common law's rigor. The Republicans, who did not think there was rightfully any federal common law to change for better or worse, saw the Act as "an experiment on the American mind to see how far it will bear an

Sedition Act on July 14, 1798, and federal prosecutors swiftly pressed it into action against critics of the government; at least twenty-five arrests, in most cases of editors of Republican journals, were made under either the Act or the federal common law crime of seditious libel. The government eventually succeeded in procuring several convictions and permanently shutting down a number of opposition presses.²¹⁴

The Alien and Sedition Acts alarmed the Republican leadership on both theoretical and practical grounds. They regarded passage of the Acts as a patent transgression of both the principle of limited federal government and the liberties guaranteed by the Bill of Rights, as well as proof that the process of corruption their ideology led them to expect in any government was proceeding at an alarming rate in the United States.²¹⁵ On a practical, political level, the federal suppression of criticism was an obvious and potentially effective attempt to perpetuate Federalist control of the Presidency and Congress. The Republicans saw that a vigorous response was necessary, but the appropriate means were not obvious. Attacking the Acts through the Republican press was likely to prove self-defeating by bringing down upon the newspaper the rigor of the Sedition Act itself. Petitioning Congress for redress of grievances clearly would be futile. Public statements by prominent Republicans would put the speakers at risk — even before the Acts were passed, a Federalist-dominated grand jury had indicted a Republican congressman for communicating to his own constituents his negative evaluation of administration policies.²¹⁶ The vigor of the Federalist attempt to choke off dissent, and the Republican commitment to decentralization of power in the Union,²¹⁷ drove the Republicans to the only sphere of political power still somewhat insulated from federal retribution: the Republican-controlled legislatures of the Southern states.

avowed violation of the Constitution," to be followed if successful by an open repudiation of republicanism. Letter from Thomas Jefferson to Stephens Mason (Oct. 11, 1798), *reprinted in* POLITICAL WRITINGS, *supra* note 40, at 156.

²¹⁴ See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 100 (1970) (recounting arrests under the Acts); C. HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS: 1789-1835*, at 159-60 (1944) (discussing federal common law crime of seditious libel).

²¹⁵ See L. BANNING, *supra* note 31, at 246-70; A. KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION 174-211* (1950). Jefferson referred to the Acts as "violations of the Constitution" because they attempted "to silence by force and not by reason the complaints or criticisms, just or unjust, of our citizens against the conduct of their agents." Letter from Thomas Jefferson to Elbridge Gerry (Jan. 26, 1799), *reprinted in* POLITICAL WRITINGS, *supra* note 40, at 47, 47.

²¹⁶ See A. KOCH, *supra* note 215, at 182-83.

²¹⁷ See, e.g., Madison, *Consolidation*, *Nat'l Gazette*, Dec. 5, 1791, *reprinted in* MIND OF THE FOUNDER, *supra* note 210, at 181; Letter from Thomas Jefferson to Gideon Granger (Aug. 13, 1800), *reprinted in* POLITICAL WRITINGS, *supra* note 40, at 96, 97 (arguing against "assumption of all the State powers into the hands of the General Government").

In utter secrecy, Jefferson and Madison prepared two sets of resolutions denouncing the Alien and Sedition Acts as tyrannical and unconstitutional. Jefferson's draft, originally intended for submission to the North Carolina legislature, was instead proposed to the Kentucky legislature by John Breckinridge and, with certain changes, was passed by that body in November 1798.²¹⁸ Republican legislator John Taylor²¹⁹ introduced Madison's draft in the Virginia General Assembly, which approved it in late December 1798.

The initial response to the "Virginia and Kentucky Resolutions" disappointed the Republican leadership. No other state endorsed them, and several Federalist legislatures replied with strongly nationalist resolutions denying the right of state assemblies to pass on the validity of federal statutes.²²⁰ The Kentucky legislature replied to the criticisms in 1799 by adopting a second, briefer set of resolutions reiterating the constitutional views expressed in its original resolutions.²²¹ The Virginia General Assembly followed suit in January 1800 by adopting a resolution approving a report, written by Madison, that reaffirmed the views expressed in its own 1798 resolutions.²²²

The Virginia and Kentucky Resolutions and Madison's "Report of 1800"²²³ did not achieve their immediate goal of mobilizing opposition

²¹⁸ See A. KOCH, *supra* note 215, at 186-94.

²¹⁹ Taylor became in later years one of the leaders of the "Old Republicans," the extreme wing of the Jeffersonian movement whose adherents regarded Jefferson's second term as somewhat compromised and the administrations of Madison and Monroe as continual apostasy from the true principles of 1798. Of the commentaries written before Calhoun began his series of state papers in 1828, Taylor's works — especially his *NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES* (Washington City 1823) — represent the most powerful and sustained vindication of an uncompromising states' rights interpretation of both the Virginia and Kentucky Resolutions and the Constitution.

²²⁰ See *STATE DOCUMENTS ON FEDERAL RELATIONS* 16-26 (H. Ames ed. 1906) [hereinafter cited as *STATE DOCUMENTS*] (collecting the most important of the replies). Ironically, having denied the right of states to judge the constitutionality of federal laws, several Federalist legislatures went on to review the Alien and Sedition Acts and to uphold their validity. See *id.* at 18-20 (Massachusetts); *id.* at 20-22 (Pennsylvania); *id.* at 24-25 (New Hampshire).

²²¹ The draftsman of the 1799 Resolutions is unknown, although the Resolutions strongly reflect the ideas of both Jefferson and Madison. See A. KOCH, *supra* note 215, at 201.

²²² Previously, while circulating the 1798 Resolutions to its fellow legislatures, the General Assembly had published an "Address to the People" that justified its action as an attempt to "exhibit to the people the momentous question, whether the Constitution of the United States shall yield to a construction which defies every restraint and overwhelms the best hopes of republicanism." Address of the General Assembly to the People of the Commonwealth of Virginia (1799), reprinted in 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 509, 509 (Philadelphia 1865) [hereinafter cited as *MADISON LETTERS*]. In the Report of 1800, Madison, who had left Congress in March 1798 and entered the Virginia legislature in December 1799, see A. KOCH, *supra* note 215, at 172, provided a point-by-point commentary on the 1798 Resolutions and concluded with a proposed resolution that the legislature renew its protest against the Alien and Sedition Acts. The General Assembly approved both the Report and the resolution. See Report on the Virginia Resolutions, reprinted in 4 *MADISON LETTERS*, *supra*, at 515, 555.

²²³ References in the text to "the Virginia and Kentucky Resolutions" are meant to include all three sets of resolutions as well as the Report of 1800. Debates over the proper interpretation

to the "reign of witches."²²⁴ In the longer term, however, the Resolutions proved to be among the most influential extraconstitutional, nonjudicial texts in American constitutional history. They presented a vision of the United States as a league of sovereign states, a vision that in many respects was closer to the position of the Anti-Federalists than to the view espoused by the Constitution's supporters.²²⁵ They created a vocabulary with which to express that vision.²²⁶ And they proposed, in justification of their substantive constitutional doctrines, an interpretive strategy centered on a search for the Constitution's underlying and original "intent." The detailed implications of this strategy were spelled out over the next several decades by Madison, and were criticized by the United States Supreme Court under the leadership of Federalist Chief Justice John Marshall. Even the final passage into history of the Federalist-Republican controversies did not end the Resolutions' influence. The rhetoric of "original intent" has endured, and indeed flourished, long after the universal rejection of most of its accompanying complex of ideas.

A. The "Doctrines of '98"²²⁷

The Resolutions defined the Constitution in contractual terms, as a "compact" to which "each State acceded as a State, and is an integral

of the Resolutions, including whether the Kentucky documents present a more extreme states' rights position than do Madison's products, have raged since the Old Republicans began their critique of the official — and in their view crypto-Federalist — Republicanism of Madison and Monroe. The argument put forward in this Article does not require resolution of these issues. My primary assumption has been that the interpretation placed on the Resolutions by Jefferson and Madison should be respected. Both men maintained throughout their lives that their actions in office had been consistent with the constitutional position staked out in the Resolutions and with one another's views. See J. Madison, Notes on Nullification (1835–1836), *reprinted in* MIND OF THE FOUNDER, *supra* note 210, at 418–42 (defending continuity of his views on nullification and the doctrines of the Resolutions, and denying difference between his and Jefferson's views on federalism); Letter from Thomas Jefferson to Edward Everett (Apr. 8, 1826), *reprinted in* POLITICAL WRITINGS, *supra* note 40, at 151 (federal Constitution is "a compact of independent nations subject to the rules acknowledged in similar cases"); Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), *reprinted in* 10 WRITINGS, *supra* note 152, at 375, 377 (referring to the half-century of "harmony of our political principles"); Letter from James Madison to William Eustis (May 22, 1823), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 135, 135 (G. Hunt ed. 1910) (denying charge that the Republican leaders had "abandoned their Cause, and gone over to the policy of their opponents").

²²⁴ Letter from Thomas Jefferson to John Taylor (June 1, 1798), *reprinted in* 7 WRITINGS, *supra* note 152, at 263, 265.

²²⁵ For discussions of the Anti-Federalist views of the Union, see A. MASON, *supra* note 85, at 69–100, and 1 STORING, *supra* note 96, at 24–37.

²²⁶ References to the constitutional "compact" and to the continued "sovereignty" and "independence" of the states, as well as the notions of "interposition" and "nullification," were among the Resolutions' important contributions to antebellum constitutional rhetoric.

²²⁷ In later years Republicans often referred to the constitutional theory put forward in the Resolutions as the "doctrines of '98." See, e.g., THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99, at 1 (J. Elliot ed. 1832) [hereinafter cited as RESOLUTIONS].

party; its co-States forming, as to itself, the other party.”²²⁸ This constitutional contract did not affect the “sovereign and independent” character of the parties to it.²²⁹ Before the Revolution the colonies and Great Britain had been de jure equal and “coördinate members . . . of an empire united by a common executive sovereign, but not united by any common legislative sovereign.”²³⁰ Therefore, upon rejecting the royal executive the states became discrete bodies politic, united only to the extent that they had delegated certain powers to a common agent, the federal government. The political society created by the Constitution was a purely artificial product of the states’ compact, and the federal government was a creature of the states with absolutely no powers except those “resulting from the compact.”²³¹ As in other cases of international compacts among independent nations, each state was necessarily an equal and final judge over constitutional disputes because there was no legal authority superior to the states to which such disputes could be referred. The federal instrumentalities of the compact obviously could not serve as umpire, at least with respect to disputes concerning the line between federal and state power, because to allow them to do so would be to permit the agent, rather than the principal, to determine the agent’s duties.²³²

The constitutional vision expressed in the Resolutions was by no means original, but the first application of that vision was not to the Constitution but to the Articles of Confederation. With the exception of a few ultranationalist Federalists,²³³ all the participants in the

²²⁸ Kentucky Resolutions of 1798 (T. Jefferson draft 1798), reprinted in *RESOLUTIONS*, *supra* note 227, at 61, 61.

²²⁹ Kentucky Resolutions of 1799, reprinted in *RESOLUTIONS*, *supra* note 227, at 19, 20.

²³⁰ Madison’s Report of 1800, reprinted in *MIND OF THE FOUNDER*, *supra* note 210, at 231, 245–46.

²³¹ Virginia Resolutions of 1798, reprinted in *RESOLUTIONS*, *supra* note 227, at 5, 5.

²³² See Kentucky Resolutions of 1798, reprinted in *RESOLUTIONS*, *supra* note 227, at 15, 15–16; Madison’s Report of 1800, reprinted in *MIND OF THE FOUNDER*, *supra* note 210, at 231, 237.

²³³ Ironically, in light of later history, ultranationalist sentiment at the time of the Constitution’s ratification was especially strong in the South Carolina convention. Responding to Anti-Federalist arguments that the link between the states existed solely on the basis of the Articles of Confederation and the ad hoc military alliance that had preceded their ratification, South Carolina Chancellor John Mathews asserted that the authority of the Continental Congress from the beginning was derived from the American people and that consequently Congress’s resolutions had possessed “the force of law” quite apart from and before the approval of the Articles by the state legislatures. 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 298, 298 (J. Elliot 2d ed. 1836) (remarks of John Mathews at the South Carolina convention). Charles Cotesworth Pinckney, a South Carolina delegate to the Philadelphia convention, claimed that “[t]he separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this Declaration [of Independence].” *Id.* at 300, 301 (remarks of Charles Cotesworth Pinckney at the South Carolina convention). Pinckney regarded the belief that “each state is

dispute over the Constitution's ratification in the previous decade had regarded the Articles as a compact among the states as independent sovereigns, and the Confederation Congress as the agent, not the superior, of the states. The Anti-Federalist charge that the Constitution plainly was intended to replace that existing league (based on a compact) with a "consolidated" government had been a central point of dispute in the ratification campaign.²³⁴ Although the Federalist response had taken several different tacks,²³⁵ in the end the supporters of the Constitution could not, and did not wish to, deny the noncontractual character of the instrument.²³⁶ As James Wilson observed at the Pennsylvania convention, the Constitution was not a contract, poorly drafted or otherwise:

I cannot discover the least trace of a compact in that system. . . .
 . . . This, Mr. President, is not a government founded upon compact; it is founded upon the power of the people. They express in their name and their authority, "*We the people do ordain and*

separately and individually independent, as a species of political heresy." *Id.* Most Federalists, however, conceded that the Articles made the United States no more than a league of sovereignties; the virtue of the Constitution, in their eyes, was that it would remedy this political anomaly. *See supra* pp. 904-05.

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"We the people of the United States," is a sentence that evidently shows the old foundation of the union is destroyed, the principle of confederation excluded, and a new and unwieldy system of consolidated empire is set up, upon the ruins of the present compact between the states. Can this be denied? No, sir; It is artfully indeed, but it is incontrovertibly designed to abolish the independence and sovereignty of the states individually

Remarks of Robert Whitehill at the Pennsylvania Ratifying Convention (1787), *quoted in* A. MASON, *supra* note 85, at 135, 135.

235 The most conciliatory Federalist position, and the one most familiar to modern lawyers through its incorporation in *The Federalist Papers*, held that the Constitution preserved a residuum of state sovereignty. *See* THE FEDERALIST No. 32 (A. Hamilton); THE FEDERALIST No. 39 (J. Madison). These verbally moderate Federalists pointed to equal representation in the Senate, the limitation and enumeration of federal powers, and the states' closer links with the people as significant safeguards of state autonomy. *See* 1 ELLIOT'S DEBATES, *supra* note 102, at 225, 230-31 (remarks of Alexander Hamilton at the New York convention); *id.* at 281, 282-84 (same); 2 *id.* at 95 (remarks of James Madison at the Virginia convention); 2 *id.* at 197, 203-05 (same); 3 *id.* at 122, 123 (remarks of James Iredell at the first North Carolina convention). Other Federalists were not willing to make even these concessions. *See supra* note 233. But even the most conciliatory Federalist would not and could not deny that the Constitution gave final and uncontrollable authority to the people's national organs of expression. *See* 1 ELLIOT'S DEBATES, *supra* note 102, at 319, 321 (remarks of Alexander Hamilton at the New York convention); THE FEDERALIST No. 39, at 194 (J. Madison) (G. Wills ed. 1982).

236 The common Federalist position of turning aside attacks on the federal convention's authority or on the language of the Preamble by describing the Constitution as a grant of authority from the sovereign people implicitly repudiated all contractual images of the Union's fundamental law. *See* G. WOOD, *supra* note 11, at 532-47. Not all Federalists were completely aware of this, however, and the Resolutions were to show that the document could be read from a contractual perspective.

establish," &c. from their ratification alone, it is to take its constitutional authenticity; without that, it is no more than *tabula rasa*.

. . . .
I have already shewn, that this system is not a compact or contract; the system itself tells you what it is; it is an ordinance and establishment of the people.²³⁷

The Resolutions simply ignored the recent and well-known debates over the Constitution's character, as well as the absence within its text of references to a compact or to the states as sovereign contracting parties.²³⁸ Jefferson and Madison offered instead a coherent reading of the Constitution based on the contractual imagery still familiar from the Confederation era. The force of the authors' styles, together with the infancy of the Constitution and the lingering memories of the Confederation, enabled the Resolutions to overcome these historical and textual obstacles and gain political acceptance.

The Resolutions explained that their substantive constitutional doctrines were legitimated by an inquiry into "the plain intent and meaning in which [the compact] was understood and acceded to by the several parties,"²³⁹ and "the plain sense and intention of the instrument constituting that compact."²⁴⁰ Because the Constitution is a

²³⁷ 3 ELLIOT'S DEBATES, *supra* note 102, at 286-88 (remarks of James Wilson at the Pennsylvania convention).

²³⁸ The only textual hook on which to hang the ideas of state sovereignty and constitutional compact was the tenth amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. How little support even that provision provided a theory of state sovereignty can be seen by comparing its text to that of the second of the Articles of Confederation, which declared: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." The tenth amendment lacks the earlier provision's positive declaration of state autonomy and its restriction of federal powers to those "expressly" delegated. Instead, the amendment notes that the Constitution denies certain powers to the states, and makes an ambiguous reference to powers "reserved . . . to the people." Nineteenth century advocates of state sovereignty bridled at the possibility that this last phrase could be construed as a reference in the constitutional text to the nationalist idea of a unitary American people, rather than a citizenry comprising the separate peoples of the several states. See 1 J. DAVIS, *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* 158 (1881). The ambiguity was resolved by the framers of the Confederate States Constitution, who rewrote the tenth amendment to read: "The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof." CONFEDERATE STATES CONST. art. VI, § 6 (emphasis added); see also *id.* preamble ("We, the people of the Confederate States, each State acting in its sovereign and independent character . . ."); *id.* art. VI, § 5 (rewritten version of ninth amendment) ("The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people of the several States." (emphasis added)).

²³⁹ Kentucky Resolutions of 1798, reprinted in RESOLUTIONS, *supra* note 227, at 15, 18; see also Kentucky Resolutions of 1799, reprinted in RESOLUTIONS, *supra* note 227, at 19, 20 (referring to the Constitution's "obvious and real intention").

²⁴⁰ Virginia Resolutions of 1798, reprinted in RESOLUTIONS, *supra* note 227, at 5, 5.

contract, they argued, it is to be interpreted according to the "intent" of the contracting parties. But, as discussed above, in late eighteenth century Anglo-American legal discourse, references to the "intent of a legal instrument" and to the "intent of its makers" were interchangeable, and in neither case did the term refer to the subjective purposes of the human authors. One construed a contract's "intent" not by embarking on a historical inquiry into what the parties actually wished to accomplish, but by applying legal norms to the contract's terms — that is, by construing the contract in accordance with the common understanding²⁴¹ of its terms, and in light of its nature and the character of the contracting parties.²⁴²

When the Resolutions announced that the Constitution, like an ordinary contract, should be construed according to its original and "plain intent," they were not proposing that interpreters investigate the proceedings of the Philadelphia framers. They were instead arguing for an interpretive strategy whereby the Constitution would be read against the background of eighteenth century notions about sovereignty and the behavior of sovereign entities. As explained by St. George Tucker a few years later, the justification for giving the Constitution's grants of power to federal instrumentalities "the most strict construction that the instrument will bear"²⁴³ was not that such an approach would conform to the general expectation of the individual delegates to Philadelphia or even those in the state conventions. Rather, strict construction was justified by reference to the "maxim of political law" that a sovereign can be deprived of any of its powers only by its express consent narrowly construed.²⁴⁴ The intentionalism of the Resolutions was therefore a form of structural interpretation carried out largely by inference from the nature both of compacts and of sovereignty.²⁴⁵ It was the "intent" of the states as political entities that the Resolutions deemed normative for purposes of constitutional interpretation.²⁴⁶

²⁴¹ See *supra* note 52.

²⁴² See *supra* pp. 894–96, 899–900.

²⁴³ Tucker, *supra* note 168, note D, at 154.

²⁴⁴ *Id.*

²⁴⁵ See Madison's Report of 1800, reprinted in *MIND OF THE FOUNDER*, *supra* note 210, at 231, 232–35; Letter from Thomas Jefferson to Edward Everett (Apr. 8, 1826), reprinted in *POLITICAL WRITINGS*, *supra* note 40, at 151, 151; Tucker, *supra* note 168, note A, at 3–6; *id.* note D, at 141–46, 151–56, 170–72.

²⁴⁶ Many years later, Jefferson prepared a protest for possible use by the Virginia legislature as a response to the nationalist policies of the administration of John Quincy Adams. In this protest Jefferson recapitulated the history of the Revolution and of the establishment of the Constitution, describing all these events as actions, decisions, and intentions of the states. See Jefferson, The solemn Declaration and Protest of the Commonwealth of Virginia on the principles of the Constitution of the United States of America and on the violation of them (1825), reprinted in *POLITICAL WRITINGS*, *supra* note 40, at 167, 167–69. Madison, too, remained faithful to the idea that the Constitution was the creation of the states acting as sovereign communities.

The Resolutions' reliance on the common law method of interpreting contracts was for the most part traditional, but in one respect Jefferson and Madison broke new ground. By emphasizing that the Constitution's proper meaning was that understood and acceded to by the states during a particular period of time in the past, the Resolutions suggested the possibility that some extratextual historical evidence might be relevant to constitutional interpretation. Indeed, the Resolutions explicitly recognized a form of direct "evidence" of the intent of the states: the proposed amendments and declarations of reserved rights that accompanied several of the states' ratification resolutions.²⁴⁷ For instance, the Virginia convention's recommendation of an amendment safeguarding freedom of religion and of the press was cited in the Virginia Resolutions as an express declaration, made at the time Virginia assented to the contract, that the state did not intend to delegate authority over those subjects to the federal government.²⁴⁸ Consistent with the contractual model of the Constitution, the Resolutions treated these accompanying documents as conditions attached to the state's subscription to the federal compact. By accepting Virginia's expressly conditioned ratification, the other states necessarily agreed to those conditions.²⁴⁹ This use of historical evidence in constitutional interpretation is therefore not identical to mod-

See Letter from James Madison to Daniel Webster (Mar. 15, 1833), reprinted in 4 MADISON LETTERS, *supra* note 222, at 293, 293-94.

²⁴⁷ The Virginia convention, for example, included in its ratification resolution a declaration that the Constitution's powers could be resumed by "the people of the United States," 4 B. SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 839 (1980), and that the Constitution did not grant the federal government power to infringe certain essential rights (specifically naming "the liberty of conscience and of the press"), *id.* In addition, the convention formally approved, and transmitted to Congress along with the ratification resolution, a lengthy declaration of "unalienable rights of the people" and a set of proposed amendments to the Constitution. See *id.* at 840-46.

²⁴⁸ See Virginia Resolutions of 1798, reprinted in RESOLUTIONS, *supra* note 227, at 5, 6.

²⁴⁹ The Virginia convention's ratification of the Constitution was embodied in a document that included not only the text of the Constitution, but also Virginia's declaration of reserved rights. Resort to the latter, therefore, was not consultation of a source of evidence extrinsic to the contract. Virginia, as it were, had exercised its powers as master of its offer to make that offer conditional on acceptance of Virginia's terms. Cf. Pinnel's Case, 5 Co. Rep. 117a, 117b, 77 Eng. Rep. 237, 238 (C.P. 1602) (discussing conditions on acceptances of contract offers). Madison does not discuss the consequences of other states' insisting on contradictory conditions, perhaps because the possibility of "final" but discordant interpretations by different states did not concern him, or perhaps because neither he nor Jefferson completely explored the implications of their contractual vision of the Constitution.

During the ratification campaign, a key issue had been the Anti-Federalist demand that the Constitution either be amended before adoption or ratified conditionally. The Federalists held out for unconditioned ratification, and successfully insisted that amendment propositions be recommendatory and explanatory only. See, e.g., B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 135-38, 144-47 (1977). Madison's implicit analysis of the proposed amendments in 1798 was therefore in partial conflict with the view he took of them in 1788. But, as noted on pp. 933-34, Jefferson and Madison were not purporting to engage in historical research, but rather in legal analysis of the "intent" of the parties to the constitutional compact.

ern intentionalism: it directs attention not to evidence concerning discussions preceding the framing or adoption of the text, but rather to recommendations that were themselves part of the official document constituting Virginia's ratification of the constitutional compact. Nevertheless, by focusing attention on a past historical event Jefferson and Madison raised the possibility that other historical documents might be relevant to determining the state's *original* intent.

In Republican hands, the intentionalist hermeneutic of the Resolutions became a powerful tool in the fight against the expansive, "liberal" construction of the Constitution favored by the Federalists. As a form of the traditional approach to contract interpretation, that intentionalism was even more familiar than Hamilton's use of common law techniques of statutory interpretation: for Hamilton, the Constitution could at most be regarded as analogous to a statute; but for Jefferson and Madison, it actually was a contract.²⁵⁰ Furthermore, the interpretive strategy suggested by the Resolutions enabled the Republicans to wield the anti-hermeneutic tradition against Federalist "construction" of the Constitution even as they insisted that their own equally extratextual interpretation involved mere adherence to the "obvious and real intention" of the compact.²⁵¹ As Madison wrote in the Report of 1800, it did "not seem possible that any just objection [could] lie against" the Virginia Resolutions' invocation of intent, because that invocation "amounts merely to a declaration that the compact ought to have the interpretation plainly intended by the parties to it."²⁵²

The Republicans insisted that the Resolutions' version of intentionalism called simply for the application of the "acknowledged rule[s] of construction"²⁵³ to the Constitution in order to expound that contract "according to the true sense in which it was adopted by the States, that in which it was advocated by its friends, and not that which its enemies apprehended."²⁵⁴ The "friends" of the Constitution during the ratification era, however, had denied that the instrument was contractual and that the new federal government would be subordinate to the states.²⁵⁵ The striking dissimilarity between this view and the one advanced by Jefferson and Madison in 1798 — that the

²⁵⁰ The states created the federal government, according to the Kentucky Resolutions of 1798, "by compact under the style and title of a Constitution for the United States . . . each State acced[ing] as a State." Kentucky Resolutions of 1798, *reprinted in* RESOLUTIONS, *supra* note 227, at 15, 15.

²⁵¹ See Kentucky Resolutions of 1799, *reprinted in* RESOLUTIONS, *supra* note 227, at 19, 20.

²⁵² Madison's Report of 1800, *reprinted in* MIND OF THE FOUNDER, *supra* note 210, at 231, 234.

²⁵³ *Id.* at 253.

²⁵⁴ Letter from Thomas Jefferson to Elbridge Gerry (Jan. 26, 1799), *reprinted in* POLITICAL WRITINGS, *supra* note 40, at 47, 47.

²⁵⁵ See *supra* pp. 929–30 (Constitution not contractual); *supra* note 235 (final authority under Constitution lies in federal, not state, hands).

Constitution was a compact among the states and that the states possessed final authority under it — demonstrates that the Resolutions' brand of intentionalism did not in fact lead to a historically valid reconstruction of the views of the original proponents of ratification. Moreover, the interpretive strategy employed in the Resolutions was an integral part of the substantive constitutional doctrine it was designed to justify. To agree that proper constitutional interpretation involves an examination of the intent of sovereign states forming a compact, we must first agree that this is what the Constitution truly is — a contract among sovereigns. The Resolutions rested on a circularity, justifying substance by a mode of interpretation justified only by that same substance.

Circular or not, the Resolutions were triumphantly vindicated, at least in Republican eyes, by the results of the election of 1800, in which the Republicans seized control of both Congress and the Presidency from the Federalists. The victors viewed the "revolution of 1800"²⁵⁶ as the people's endorsement of the approach to constitutional interpretation embodied in the "doctrines of '98." The champions of "the Republican Ascendancy" were quick to paint themselves as the heirs to a line of apostolic succession extending back to the heroes of the colonial struggles against British tyranny.²⁵⁷

With remarkable speed, the constitutional theory of the Virginia and Kentucky Resolutions established itself as American political orthodoxy. Even the state legislatures that had denounced the Resolutions in the strongest terms and decried the Virginia and Kentucky assemblies as improper arbiters of federal constitutional questions were, within a decade, preaching the pure Republican doctrines. The General Assembly of Rhode Island, for example, had replied to the Virginia Resolutions in 1799 by describing them as an "infraction of the Constitution of the United States, expressed in plain terms."²⁵⁸ By 1809, however, the Rhode Island legislature was of a different mind, resolving

[t]hat the people of this State, as one of the parties to the Federal compact, have a right to express their sense of any violation of its provisions and that it is the duty of this General Assembly as the organ of their sentiments and the depository of their authority, to

²⁵⁶ Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *reprinted in* POLITICAL WRITINGS, *supra* note 40, at 151, 152.

²⁵⁷ Letter from James Madison to William Eustis (May 22, 1823), *reprinted in* 9 THE WRITINGS OF JAMES MADISON, *supra* note 223, at 135, 136; *see* Elliot, *Preface to RESOLUTIONS*, *supra* note 227, at 2, 2 (the Resolutions "embody the principles of the old Republicans of the Jeffersonian school, the genuine disciples of the Whigs of '76"). This invocation of "Whiggism" by Elliot evoked even more distant but equally hallowed memories of the struggle of free Englishmen against Stuart despotism.

²⁵⁸ State of Rhode Island and Providence Plantations to Virginia (1799), *reprinted in* STATE DOCUMENTS, *supra* note 220, at 17, 17.

interpose for the purpose of protecting them from the ruinous inflictions of usurped and unconstitutional power.²⁵⁹

Acceptance of the compact theory (and of its accompanying intention-ism) spread throughout the country and, beyond the confines of John Marshall's Supreme Court, stood virtually unquestioned until the nullification crisis of 1828 through 1832.²⁶⁰ Even if it were not actually coeval with the Constitution, the rhetoric of that document's original "intent" acquired an aura of age and self-evident truth all its own.

B. James Madison's Theory of Constitutional Interpretation

Although the Virginia and Kentucky Resolutions expressed an approach to constitutional construction that soon achieved canonical status in American politics, they did not themselves set forth a detailed interpretive methodology. That task remained for James Madison. As one of the prime movers in the Philadelphia convention of 1787 and in the Virginia ratifying convention the following year, as one of the authors of *The Federalist*, and as the draftsman of both the Virginia Resolutions of 1798 and the Report of 1800, Madison played a critical role both in the process of framing and ratifying the Constitution and in the formulation of a consensus about its meaning. Although he would have been quick to distinguish his personal opinions from the public meaning of the Constitution, the coherent interpretive theory Madison expressed in speeches and letters over many years has special value for anyone seeking to discern the "interpretive intent" underlying the Constitution.

Madison's interpretive theory rested primarily on the distinction he drew between the public meaning or intent of a state paper, a law, or a constitution, and the personal opinions of the individuals who had written or adopted it. The distinction was implicit in the common law's treatment of the concept of "intent," but Madison made it explicit and thereby illuminated its implications and underlying rationale. Madison's reliance on this basic hermeneutical premise is evident in his correspondence with Secretary of State Martin Van Buren in 1830. Responding to President Andrew Jackson's citation of a veto message Madison had sent Congress in 1817, Madison wrote

²⁵⁹ Report and Resolutions of Rhode Island on the Embargo (1809), *reprinted in* STATE DOCUMENTS, *supra* note 220, at 42, 43-44.

²⁶⁰ States' rights constitutionalists of a later era looked back on the first three decades of the 19th century as a halcyon period of consensus on basic constitutional issues, although they recognized, of course, that there had been disagreements on particulars. See, e.g., 1 J. DAVIS, *supra* note 238, at 128-29 (the heresies of the Federalists were first revived around 1830 by Webster and Story); 1 A. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 503-05 (1868) (Tucker's state-sovereignty reading of the Constitution "was not gainsayed or controverted by any writer of distinction, that I am aware of, until Chancellor Kent's Commentaries appeared in 1826, and Story's, in 1833").

that Jackson's use of his message had misconceived his personal views. But Madison conceded that Jackson might have correctly interpreted the public meaning of the message:

On the subject of the discrepancy between the construction put by the Message of the President [Jackson] on the veto of 1817 and the intention of its author, the President will of course consult his own view of the case. For myself, I am aware that the document must speak for itself, and that that intention cannot be substituted for [the intention derived through] the established rules of interpretation.²⁶¹

Madison applied the same distinction between public meaning and private intent to statutes,²⁶² to the Report of 1800,²⁶³ and to the Constitution. With respect to the Constitution, Madison described his knowledge of the views actually held by the delegates to the Philadelphia and Virginia conventions as a possible source of "bias" in his constitutional interpretations,²⁶⁴ and cautioned a correspondent against an uncritical use of *The Federalist*, because "it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates."²⁶⁵ He explained that he had decided to delay publication of his notes of the Philadelphia convention until after his death

or, at least, . . . till the Constitution should be well settled by practice, and till a knowledge of the controversial part of the proceedings of its framers could be turned to no improper account. . . . As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character.²⁶⁶

²⁶¹ Letter from James Madison to Martin Van Buren (July 5, 1830), reprinted in 4 MADISON LETTERS, *supra* note 222, at 89, 89. In an earlier letter to Van Buren, on June 3, 1830, Madison had written that he believed his own present understanding of the 1817 veto message "was the general understanding" in 1817, but conceded that "[w]hether the language employed duly conveyed the meaning of which J.M. retains the consciousness, is a question on which he does not presume to judge for others." Letter from James Madison to Martin Van Buren (June 3, 1830), reprinted in 4 MADISON LETTERS, *supra* note 222, at 88, 88; see also Letter from James Madison to N.P. Trist (June 3, 1830), reprinted in 4 MADISON LETTERS, *supra* note 222, at 87, 87 (Madison again speaks of the meaning of the 1817 veto "[t]o my consciousness," while admitting that "the entire text" of the message may have conveyed that meaning faultily).

²⁶² See Letter from James Madison to Edward Livingston (July 10, 1822), reprinted in MIND OF THE FOUNDER, *supra* note 210, at 338, 338-39.

²⁶³ See Letter from James Madison to N.P. Trist (Feb. 15, 1830), reprinted in 4 MADISON LETTERS, *supra* note 222, at 61, 61 (acknowledging distinction between "the object of the member who prepared the documents in question" and their "fair import," while asserting in that particular case the identity of the two).

²⁶⁴ Letter from James Madison to Henry St. George Tucker (Dec. 23, 1817), reprinted in 3 MADISON LETTERS, *supra* note 222, at 53, 54.

²⁶⁵ Letter from James Madison to Edward Livingston (Apr. 17, 1824), reprinted in 3 MADISON LETTERS, *supra* note 222, at 435, 436.

²⁶⁶ Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), reprinted in 3 MADISON LETTERS, *supra* note 222, at 228, 228.

Madison employed the distinction between public meaning and private intent to differentiate the relative value of the various sources of information to which constitutional interpreters might turn for evidence on "the intention of the States."²⁶⁷ The text itself, of course, was the primary source from which that intention was to be gathered, but Madison's awareness of the imperfect nature of human communication²⁶⁸ led him to concede that the text's import would frequently be unclear.²⁶⁹ Madison thought it proper to engage in structural inference in the classic contractual mode of the Virginia and Kentucky Resolutions, and to consult the direct expressions of state intention available in the resolutions of the ratifying conventions.²⁷⁰ He regarded the debates in those conventions to be of real yet limited value for the interpreter: evidentiary problems with the surviving records²⁷¹ and Madison's insistence on distinguishing the binding public intention of the state from the private opinions of any individual or group of individuals, including those gathered at a state convention,

²⁶⁷ Letter (not posted) from James Madison to John Davis (c. 1832), *reprinted in* 4 MADISON LETTERS, *supra* note 222, at 232, 243–44. This letter illustrates well the variety of uses Madison could make of the rhetoric of "intention" without indicating any change or uncertainty in his basic interpretive stance: within a few paragraphs, Madison refers to "the intention of those who framed, or, rather, who adopted the Constitution"; he immediately states that the interpreter "must decide that intention by the meaning attached to the terms by the 'usus' [governmental and judicial precedent]"; he remarks that it "need scarcely to be observed that" the intention so determined "could not be overruled by any latter meaning put on the phrase, however warranted by the grammatical rules of construction"; and he finally mentions the "intention of the parties to the Constitution" and the "intention of the States." *Id.* at 242–43 (emphasis omitted). The apparent inconsistency of Madison's use of the term to the modern reader is due to the fact that for Madison the word still retained its traditional common law meaning. *See supra* pp. 895–96.

²⁶⁸ *See* THE FEDERALIST No. 37 (J. Madison); Letter from James Madison to N.P. Trist (Mar. 2, 1827), *reprinted in* 3 MADISON LETTERS, *supra* note 222, at 565, 565; *supra* p. 910.

²⁶⁹ *See* Letter from James Madison to N.P. Trist (Mar. 2, 1827), *reprinted in* 3 MADISON LETTERS, *supra* note 222, at 565, 565; Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), *reprinted in* 3 MADISON LETTERS, *supra* note 222, at 143, 145; *cf.* Letter from James Madison to Thomas Grinné (Jan. 15, 1828), *reprinted in* 3 MADISON LETTERS, *supra* note 222, at 611, 611 (laws are "always liable, more or less, till made technical by practice, to discordant interpretations").

²⁷⁰ *See* Letter from James Madison to Judge Spencer Roane (May 6, 1821), *reprinted in* 3 MADISON LETTERS, *supra* note 222, at 217, 220 (advocating structural inference about the intentions of the states); Letter from James Madison to Joseph Cabell (Mar. 22, 1827), *reprinted in* 3 MADISON LETTERS, *supra* note 222, at 571, 571–72 (same); Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *reprinted in* 4 MADISON LETTERS, *supra* note 222, at 121, 129–30 (amendments proposed by state ratifying conventions are evidence of states' intentions); *supra* p. 932. Madison also made reference at times to the weaknesses in the previous federal system that the Constitution was intended by the states to correct — a combination of the intentionalism of the Resolutions and the traditional common law approach to statutory interpretation. *See* Letter from James Madison to Joseph Cabell (Oct. 30, 1828), *reprinted in* 3 MADISON LETTERS, *supra* note 222, at 648, 655.

²⁷¹ *See* Letter from James Madison to Jonathan Elliot (Feb. 14, 1827), *reprinted in* 3 MADISON LETTERS, *supra* note 222, at 552, 552.

led him to conclude that the state debates could bear no more than indirect and corroborative witness to the meaning of the Constitution.²⁷² Madison allowed that contemporaneous expositions of the document by its supporters were of some value, but he cautioned that such statements were to be regarded strictly as private opinions, useful chiefly in shedding light upon the meaning of words and phrases that the fluidity of language might gradually change over time.²⁷³ Last and least in value were the records of the Philadelphia convention. Once again, there were significant evidentiary problems,²⁷⁴ but Madison's objection to treating the framers' views as authoritative was based chiefly on theoretical grounds.

Mr. [Madison] said, he did not believe a single instance could be cited in which the sense of the Convention had been required or admitted as material in any Constitutional question. . . .

But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them, it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.²⁷⁵

Madison was quite insistent that a distinction must be drawn between the "true meaning" of the Constitution and "whatever might have been the opinions entertained in forming the Constitution."²⁷⁶ The distinction did not imply a refusal to recognize the purposive character

²⁷² See *id.*; Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), reprinted in 4 MADISON LETTERS, *supra* note 222, at 121, 128 (interpreter must look for the meaning given the text "by the Conventions, or, rather, by the people, who, through their Conventions, accepted and ratified" the text).

²⁷³ See Letter from James Madison to H. Lee (June 25, 1824), reprinted in 3 MADISON LETTERS, *supra* note 222, at 441, 442-43 (arguing that literal meaning of text varies as language changes); Letter from James Madison to Andrew Stevenson (Mar. 25, 1826), reprinted in 3 MADISON LETTERS, *supra* note 222, at 520, 521-22 (noting value of "contemporary expositions"); Letter from James Madison to N.P. Trist (Mar. 2, 1827), reprinted in 3 MADISON LETTERS, *supra* note 222, at 565, 565 (Constitution affected by the imprecision and mutability of language).

²⁷⁴ See Letter from James Madison to Robert Garnett (Feb. 11, 1824), reprinted in 3 MADISON LETTERS, *supra* note 222, at 367, 367; Letter (not posted) from James Madison to John Davis (c. 1832), reprinted in 4 MADISON LETTERS, *supra* note 222, at 232, 253-54 (noting difficulties in interpreting convention's proceedings); Letter (not posted) from James Madison to John Tyler (1833), reprinted in 4 MADISON LETTERS, *supra* note 222, at 280, 288-89 (criticizing as biased and inaccurate Robert Yates's and Luther Martin's accounts of the convention). The problem of accuracy could of course have been cured, at least to Madison's satisfaction, by publication of his journal, which he regarded as "a pretty ample view of what passed in that Assembly." Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), reprinted in 3 MADISON LETTERS, *supra* note 222, at 228, 228.

²⁷⁵ 5 ANNALS OF CONG. 776 (1796) (remarks of Rep. James Madison).

²⁷⁶ Letter from James Madison to John Jackson (Dec. 27, 1821), reprinted in 3 MADISON LETTERS, *supra* note 222, at 243, 245.

of the instrument;²⁷⁷ it simply denied that the framers' subjective intent was the purpose that mattered.²⁷⁸

The dichotomy between public meaning and private intent also informed Madison's view of constitutional precedent. He consistently thought that "*usus*,"²⁷⁹ the exposition of the Constitution provided by actual governmental practice and judicial precedents,²⁸⁰ could "settle its meaning and the intention of its authors."²⁸¹ Here, too, he was building on a traditional foundation: the common law had regarded usage as valid evidence of the meaning of ancient instruments, and had regarded judicial determinations of that meaning even more highly.²⁸² Applying this view of interpretation to the Constitution, Madison felt himself compelled to change his position on the controversial issue of Congress's constitutional power to incorporate a national bank.²⁸³ In the first Congress, Representative Madison opposed

²⁷⁷ See *THE FEDERALIST* No. 37, at 179 (J. Madison) (G. Wills ed. 1982) ("The use of words is to express ideas.").

²⁷⁸

But whatever respect may be thought due to the intention of the Convention which prepared and proposed the Constitution, as presumptive evidence of the general understanding at the time of the language used, it must be kept in mind that the only authoritative intentions were those of the people of the States, as expressed through the Conventions which ratified the Constitution.

Letter from James Madison to M.L. Hurlbert (May, 1830), *reprinted in* 4 *MADISON LETTERS*, *supra* note 222, at 73, 74.

In 1791, in the heat of the congressional debate over Hamilton's bank bill, Madison, like other opponents of the bill, occasionally referred to the Philadelphia convention's failure to adopt a proposal giving Congress the power to charter corporations. See 2 *ANNALS OF CONG.* 1937-60 (1791) (remarks of Rep. James Madison). Thereafter, Madison's understanding of the task of constitutional interpretation remained remarkably consistent over a period stretching from 1796 (when he was a leader of the embattled Republican opposition that was resting its hopes on the states as a counterweight to the federal government) until the early 1830s (when, as an elder statesman, he was contributing his prestige to the support of federal authority against a states' rights challenge by self-proclaimed followers of the "doctrines of '98").

²⁷⁹ Letter (not posted) from James Madison to John Davis (c. 1832), *reprinted in* 4 *MADISON LETTERS*, *supra* note 222, at 232, 242.

²⁸⁰ See Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), *reprinted in* 3 *MADISON LETTERS*, *supra* note 222, at 143, 143 (a constitution's meaning, "so far as it depends on judicial interpretation," is established by "a course of particular decisions"); Letter from James Madison to Joseph Cabell (Sept. 7, 1829), *reprinted in* 4 *MADISON LETTERS*, *supra* note 222, at 45, 47 ("definitive power" to settle constitutional questions on the allocation of power between federal and state governments is lodged in federal Supreme Court).

²⁸¹ Letter (not posted) from James Madison to John Davis (c. 1832), *reprinted in* 4 *MADISON LETTERS*, *supra* note 222, at 232, 249.

²⁸² See *supra* p. 899. Madison also referred to this legal background in *The Federalist Papers*. See *THE FEDERALIST* No. 37, at 179 (J. Madison) (G. Wills ed. 1982); *supra* p. 910.

²⁸³ In later life Madison was accused by state's rights advocates of inconsistency in his constitutional opinions — a charge that he denied. See Letter from James Madison to W.C. Rives (Oct. 21, 1833), *reprinted in* 4 *MADISON LETTERS*, *supra* note 222, at 309, 309-10. He would admit to even the *appearance* of inconsistency only in the national bank case. See Letter from James Madison to N.P. Trist (Dec. 1831), *reprinted in* 4 *MADISON LETTERS*, *supra* note 222, at 204, 211.

on constitutional grounds the bill establishing the First Bank of the United States;²⁸⁴ as President, Madison twenty years later signed into law the act creating the Second Bank.²⁸⁵ "But even here the inconsistency," Madison assured a correspondent, "is apparent only, not real." His own "abstract opinion of the text" remained unchanged: the words of the Constitution did not authorize Congress to establish the bank.²⁸⁶ Nevertheless, he recognized that Congress, the President, the Supreme Court, and (most important, by failing to use their amending power) the American people had for two decades accepted the existence and made use of the services of the First Bank, and he viewed this widespread acceptance as "a construction put on the Constitution by the nation, which, having made it, had the supreme right to declare its meaning."²⁸⁷ He had signed the Second Bank bill, Madison declared, in accordance with his "early and unchanged opinion" that such a construction by usage and precedent should override the intellectual scruples of the individual,²⁸⁸ and he explained to his friend the Marquis de LaFayette that "I did not feel myself, as a public man, at liberty to sacrifice all these public considerations to my private opinion."²⁸⁹ In Madison's eyes, precedents — at least those derived from "authoritative, deliberate, and continued decisions" — served to "fix the interpretation of a law."²⁹⁰ Furthermore, Mad-

²⁸⁴ See A. KOCH, *supra* note 215, at 108–10.

²⁸⁵ See *id.* at 254.

²⁸⁶ Letter from James Madison to C.E. Haynes (Feb. 25, 1831), reprinted in 4 MADISON LETTERS, *supra* note 222, at 164, 165.

²⁸⁷ Letter from James Madison to Marquis de LaFayette (Nov. 1826), reprinted in 3 MADISON LETTERS, *supra* note 222, at 538, 542; see also Letter from James Madison to Thomas Jefferson (Feb. 17, 1825), reprinted in 3 MADISON LETTERS, *supra* note 222, at 483, 483 (stating that Congress, in legislating in accordance with the Constitution, will inevitably reflect the will of the people).

For Madison, the most unequivocal exercise by the people of their power "to declare [the Constitution's] meaning" was the formal procedure of amendment or constitutional convention. See, e.g., Madison, Veto Message (Mar. 3, 1817), 30 ANNALS OF CONG. 1061 (1817) (in vetoing on constitutional grounds an internal improvements bill, Madison expressed his approval of the bill's object, "cherishing the hope" that an amendment rendering the bill constitutional would be secured). But Madison feared the unsettling effects of resorting too frequently to formal constitutional revision. See Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), reprinted in 1 MADISON LETTERS, *supra* note 222, at 503, 504. In Madison's view, the ordinary and indeed preferable mode for popular declaration of the Constitution's meaning was the deliberate construction put on it by the people's organs of government and confirmed by the acquiescence of officials and voters. See Letter from James Madison to C. J. Ingersoll (June 25, 1831), reprinted in 4 MADISON LETTERS, *supra* note 222, at 183, 183–87.

²⁸⁸ Letter from James Madison to C.E. Haynes (Feb. 25, 1831), reprinted in 4 MADISON LETTERS, *supra* note 222, at 164, 165; Letter from James Madison to N.P. Trist (Dec. 1831), reprinted in 4 MADISON LETTERS, *supra* note 222, at 204, 211.

²⁸⁹ Letter from James Madison to Marquis de LaFayette (Nov. 1826), reprinted in 3 MADISON LETTERS, *supra* note 222, at 538, 542.

²⁹⁰ Letter from James Madison to N.P. Trist (Dec. 1831), reprinted in 4 MADISON LETTERS, *supra* note 222, at 204, 211. The obligation of legislator or judge henceforth was to follow the meaning as construed, and not his "solitary opinions." Letter from James Madison to C.J. Ingersoll (June 25, 1831), reprinted in 4 MADISON LETTERS, *supra* note 222, at 183, 184–86.

ison claimed, this view represented not just his opinion, but the general expectation — the “interpretive intention”²⁹¹ — that prevailed at the time of the Constitution’s framing and ratification:

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them.²⁹²

The public character of long-settled precedent was for Madison the key to reconciling his acceptance of views inconsistent with his “abstract opinion” of the bare text and his commitment to the Republican version of the old anti-interpretive tradition. To the end of his life, Madison warned his fellow citizens against expansive innovations in constitutional interpretation, “new principles and new constructions, that may remove the landmarks of power.”²⁹³ But however strongly he might have fought constitutional error when it first appeared, for Madison there could be no return to the unadorned text from interpretations that had received the approbation of the people.²⁹⁴ The Constitution is a public document, and its interpretation, for Madison, was in the end a public process.

²⁹¹ See *supra* note 10.

²⁹² Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), *reprinted in* 3 MADISON LETTERS, *supra* note 222, at 143, 145.

²⁹³ Letters of Helvidius No. 4 (1793), *reprinted in* MIND OF THE FOUNDER, *supra* note 210, at 209, 210; see also Letter from James Madison to James Monroe (Dec. 27, 1817), *reprinted in* 3 MADISON LETTERS, *supra* note 222, at 54, 56 (“Serious danger seems to be threatened to the genuine sense of the Constitution . . . by an unwarrantable latitude of construction.”); Letter from James Madison to Joseph Cabell (Sept. 18, 1828) (published with Madison’s approval in the *Washington National Intelligencer* in December 1828), *reprinted in* MIND OF THE FOUNDER, *supra* note 210, at 370, 375 (contrasting congressional power to enact a protective tariff, sanctioned by 40 years’ exercise, with a “novel construction however ingeniously devised”). Madison’s reluctance to categorize a constitutional development as sufficiently erroneous to warrant resistance was based in part on his belief that interpretation is only partially “objective.” See, e.g., 5 ANNALS OF CONG. 494 (1796) (remarks of Rep. James Madison) (acknowledging that “[n]o construction” can be “perfectly free from difficulties,” but recommending his own as “subject to the least”).

²⁹⁴ Madison’s view of interpretation is exemplified in his warning to one correspondent that “some care in discussing the question of a distinction between literal and constructive meanings may be necessary in order to avoid the danger of a verbal character to the discussion.” Letter from James Madison to N.P. Trist (Mar. 1, 1829), *reprinted in* 4 MADISON LETTERS, *supra* note 222, at 16, 17. For Madison, the (legitimate) “constructive” meaning of the Constitution is no less that instrument’s “intention” than is the “literal”; and indeed the former may be the legally appropriate “intention” in the event of a conflict. Madison did not deny that some constructions of the Constitution would so transform the nature of the federal compact that nothing less than a formal exercise of the amending power could justify them, but in his view such a case would be “of a character [so] exorbitant and ruinous” as to justify revolution. See Letter from James Madison to Joseph Cabell (Oct. 30, 1828), *reprinted in* MIND OF THE FOUNDER, *supra* note 210, at 380, 387; J. Madison, Notes on Nullification (1835–1836), *reprinted in* MIND OF THE FOUNDER, *supra* note 210, at 417, 418. Madison himself was confident that “the barrier” against any such usurpation was now “happily too strong in the text of the

C. *The Marshall Court and Constitutional Construction*

The "revolution of 1800" that swept away Federalist nationalism and vindicated the "doctrines of '98" left one pocket of resistance to Jeffersonian Republicanism intact: the Supreme Court and its newly appointed Federalist Chief Justice, John Marshall. Over the three and a half decades of Marshall's tenure, his rhetorically moderate²⁹⁵ yet staunchly nationalistic views prevailed on a Court increasingly populated by Republican Justices.²⁹⁶ Marshall and his learned Republican friend, Justice Joseph Story, regarded the state-sovereignty and constitutional-compact themes of Republican constitutional thought as strands of wild-eyed political theory, "the cobwebs of sophistry and metaphysics."²⁹⁷ Instead of searching for the intent of sovereign contracting parties, the Marshall Court followed the path, staked out in the Constitution's first years, of applying traditional methods of statutory construction to that instrument.

Marshall's conventional view of statutory construction is illustrated by his opinion in *United States v. Fisher*,²⁹⁸ a case involving the interpretation of a federal act giving the United States priority over general creditors in bankruptcy proceedings.²⁹⁹ Marshall noted the difficulties attendant upon construing an ambiguous statutory provision, and he stressed the need to cast a wide net in seeking evidence as to "the intention of the legislature": "Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived."³⁰⁰ Although in this case Marshall perceived clarity where the defendants had seen confusion, he agreed that in interpreting ambiguous terms the Court might properly use "all the means recommended by the counsel for the defendants."³⁰¹ Cranch's report of the arguments shows that the suggested means included consultation of the act's title, preamble, and "general scope and design,"³⁰² and consideration of the methodology prescribed in *Heydon's*

Instrument, in the uniformity of official construction, and in the maturity of public opinion, to be successfully assailed." Letter from James Madison to C.J. Ingersoll (Nov. 27, 1827), reprinted in 3 MADISON LETTERS, *supra* note 222, at 601, 601.

²⁹⁵ See, e.g., Marshall, *A Friend to the Union*, Philadelphia Union, Apr. 24, 1819, reprinted in JOHN MARSHALL'S DEFENSE, *supra* note 46, at 78, 87-91 (denying difference between his views in *McCulloch v. Maryland* and Madison's in the Report of 1800).

²⁹⁶ After 1811 only two Justices (Marshall and Bushrod Washington) were Federalists.

²⁹⁷ Letter from Joseph Story to Stephen White (Mar. 3, 1819), reprinted in 1 W. STORY, LIFE AND LETTERS OF JOSEPH STORY 325 (1851); cf. Letter from John Marshall to Joseph Story (July 31, 1833), reprinted in 2 W. STORY, *supra*, at 135 (describing states' rights views as "political metaphysics").

²⁹⁸ 6 U.S. (2 Cranch) 358 (1805).

²⁹⁹ Act of April 4, 1800, ch. 19, § 62, 2 Stat. 19, 36.

³⁰⁰ *Fisher*, 6 U.S. (2 Cranch) at 386.

³⁰¹ *Id.* at 389.

³⁰² *Id.* at 368, 372.

Case,³⁰³ of other federal statutes,³⁰⁴ and of the consequences of taking the act literally.³⁰⁵ Although Marshall considered all of these means legitimate, he placed the most weight on a close analysis of the wording and structure of the statute's text.³⁰⁶ Neither the attorneys nor the Chief Justice suggested an investigation of the congressional debates. In light of Marshall's traditional view of statutory construction and his acceptance of a statutory analogy for the Constitution, there appears to have been no inconsistency between his insistence that "the great duty of a judge who construes an instrument, is to find the intention of its makers,"³⁰⁷ and his belief that a construction "within the words" of a constitutional provision is legitimate regardless of whether the framers foresaw or intended it.³⁰⁸

The Marshall Court's response to constitutional arguments based on invocations of the extratextual "intent" of the states was a renewed emphasis on the supremacy of the text, read in light of the Constitution's purposes as set forth in its Preamble:

[T]he enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. . . . [We] know of no rule for construing [the Constitution] other than is given by the language of the instrument . . . taken in connection with the purposes for which [federal powers] were conferred.³⁰⁹

The Marshall Court's approach to constitutional interpretation was strikingly similar to Madison's, despite their different starting points. Both Marshall and Madison accepted the common law understanding that the intent of a document is, at least in part, the product of the

³⁰³ See *id.* at 368, 372-73.

³⁰⁴ See *id.* at 374-75.

³⁰⁵ See *id.* at 368-69.

³⁰⁶ See *id.* at 387-89.

³⁰⁷ Marshall, *A Friend of the Constitution*, Alexandria Gazette, July 2, 1819, reprinted in JOHN MARSHALL'S DEFENSE, *supra* note 46, at 155, 168-69. Like earlier common lawyers, and like Madison, see *supra* note 267, Marshall could refer to the intention of "the framers" or of "those who gave these powers," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819), without thereby implying that he was relying on any extratextual evidence of that intention. Marshall shared Madison's view that the Philadelphia framers were merely drafters whose views were not binding. See *id.* at 403; see also 1 J. STORY, *supra* note 56, at 383 (assessing "intention," in the words of Blackstone, from "the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law").

³⁰⁸ *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644-45 (1819); cf. Marshall, *A Friend to the Union*, Philadelphia Union, Apr. 28, 1819, reprinted in JOHN MARSHALL'S DEFENSE, *supra* note 46, at 78, 102-03 (necessary and proper means may be unforeseeable by framers).

³⁰⁹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188-89 (1824) (Marshall, C.J.); cf. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (Story, J.) (Constitution should receive a "reasonable construction, according to the import of its terms"); *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 414-16 (1829) (Johnson, J., concurring) (insisting that a literal reading of the ex post facto clause correctly construes what "the Constitution most clearly intended").

interpretive process; both accepted the authority of practice and precedent;³¹⁰ and neither regarded historical evidence of the framers' personal intentions as a definitive or even particularly valuable guide to constitutional construction.

D. Aftermath

The constitutional consensus created by the "doctrines of '98" and the "revolution of 1800" endured at least until the nullification crisis of Andrew Jackson's first term,³¹¹ but cracks in its facade began to appear in the 1820s. New England Federalists' resistance to the foreign policies of Presidents Jefferson and Madison culminated in the Hartford convention of 1815, which was widely seen as a first step toward secession.³¹² However politically divisive, the convention signaled that the heirs of Hamilton had accepted a key constitutional dogma of his enemies: it served notice that if the grievances voiced were not redressed, New England Federalists were prepared to invoke state sovereignty against the assertion of federal power.³¹³ Despite this general acceptance of the Republican account of the Constitution's nature and origin, constitutional argument continued: the political debates in the 1810s and '20s over federal tariff policy and over congressional power to further internal improvements prompted proponents of federal power to search for means of altering the anti-nationalist legacy of the Virginia and Kentucky Resolutions. From the other end of the political spectrum, the devotees of an extreme states' rights constitutionalism criticized the more moderate policies of

³¹⁰ See 1 J. KENT, COMMENTARIES ON AMERICAN LAW 242 n.a (3d ed. New York 1836) (1st ed. New York 1826) (commending Marshall and Story for their allegiance to text and precedent); 1 J. STORY, *supra* note 56, at 392.

³¹¹ See *supra* note 260.

³¹² Federalist delegates from the New England states convened in Hartford in December 1814 and January 1815 to discuss means of opposing the unpopular war measures of the Republican administration. Among the convention's resolutions, which were approved only by the legislatures of Massachusetts and Connecticut and were rejected by nine other states, were a series of amendments to the Constitution designed to enhance New England influence on national affairs and check the power of the federal government. An additional resolution — that the New England states should meet again in June if their reforms were not achieved — was widely interpreted as a threat of secession, but was mooted by the news of peace. See Resolutions Adopted by the Hartford Convention (1815), *reprinted in* STATE DOCUMENTS, *supra* note 220, at 83, 85; Reply of the Legislature of New Jersey (1815), *reprinted in* STATE DOCUMENTS, *supra* note 220, at 86 (condemning the resolutions); Extract from the Reply of the Legislature of New York (1815), *reprinted in* STATE DOCUMENTS, *supra* note 220, at 87 (same).

³¹³ During the nullification crisis, New England nationalist Nathan Dane wrote: "[S]tates rights and state sovereignty, are expressions coined for party purposes, often by minorities, who happen to be dissatisfied with the measures of the General Government, and as they are afterwards used, they produce only state delusion. In this business each large minority has had its turn." 9 N. DANE, GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW app. 32-33 (Boston 1829).

Madison and his successor, James Monroe, as apostasy from the Republican faith.³¹⁴

Faced with a political need to develop new modes of constitutional interpretation to supplement or supplant the eroding Republican consensus, interpreters of the Constitution redefined the central hermeneutical concept of that consensus, the Constitution's "intent." As employed in the Virginia and Kentucky Resolutions, that term was an invitation to structural, not historical,³¹⁵ interpretation: witness how thoroughly Madison, one of the greatest of the Republican thinkers, excluded from his understanding of normative constitutional intent any trace of the historically ascertainable purposes and expectations of the Philadelphia framers. But this traditional, Republican understanding of "intent" was gradually replaced by the modern, subjective use of the word. In other areas of law, "intent" increasingly meant the historical intentions of *someone*, however much evidentiary rules might be used to frustrate a genuine search for those intentions.³¹⁶ A similar change became evident in constitutional discourse. With the growing availability of original materials revealing the actions and opinions of the individual actors who played roles in the Constitution's framing and adoption, popular and legal interest in that episode of history markedly increased.³¹⁷

The watershed in the history of constitutional interpretation was the crisis provoked by South Carolina's strident response to the passage of a protective tariff by Congress in May 1828. Although the so-called "tariff of abominations" was extremely unpopular throughout most of the South, the reaction to it was exceptionally vigorous in South Carolina. A state convention assembled in November 1832 and passed an ordinance "nullifying" the federal act.³¹⁸ President Jackson responded with a vigorous assertion of federal supremacy and his resolve to uphold the tariff — and a potentially violent collision between federal authority and states' rights was averted only narrowly.³¹⁹ Two conflicting approaches to constitutional interpretation

³¹⁴ See A. SCHLESINGER, *THE AGE OF JACKSON* 18–29 (1946).

³¹⁵ The Resolutions, to be sure, did presuppose a simple and stylized model of American history in which separate, semi-sovereign colonies threw off the British yoke to become fully sovereign republics that subsequently linked themselves in a confederation through a compact. The final stage in American constitutional development was the renegotiation of the contract in 1787 through 1790. This static picture of "history," however, did not depend on any particular historical research and was not subject to revision. It was taken as a first principle.

³¹⁶ See, e.g., P. ATIYAH, *supra* note 75, at 459.

³¹⁷ See J. HIGHAM, *HISTORY* 69 (1965).

³¹⁸ See Ordinance of Nullification of South Carolina (1832), *reprinted in* STATE DOCUMENTS, *supra* note 220, at 169.

³¹⁹ In early 1833 Congress passed both an act empowering the President to use federal power to collect the tariff, Act of Mar. 2, 1833, ch. 57, 4 Stat. 632, and a compromise tariff act, Act of Mar. 2, 1833, ch. 55, 4 Stat. 629, which alleviated the South Carolinians' economic objections to the "tariff of abominations." South Carolina, in convention, then repealed its repudiation of

emerged as the intellectual product of the crisis. The nationalist school of constitutional thought, with Daniel Webster leading the way in the Senate and Justice Joseph Story serving as scholar and consultant,³²⁰ explicitly rejected the definition of the Constitution as a compact among sovereign states. The nationalists identified the text, as construed by precedent, as the authoritative source of constitutional meaning and regarded the Supreme Court as the final and authoritative interpreter of the Constitution.³²¹ The states' rights school, with John C. Calhoun playing the roles of both Webster and Story, subscribed to an extreme version of the compact theory and insisted that final interpretive authority rested with the states.³²² Adherents of both camps increasingly expressed their views as explications of the "original intent" of the framers,³²³ and earlier scruples against the use of "extrinsic evidence" in constitutional interpretation gradually lost their force.

The new use of the rhetoric of constitutional intention is illustrated by Judge Abel Parker Upshur's *A Brief Enquiry into the True Nature and Character of our Federal Government*,³²⁴ published in 1840. Upshur, a distinguished Virginia jurist and states' rights politician, wrote the *Brief Enquiry* as a "review" of Story's treatise on constitutional law; the result was a closely argued critique of Story's nationalism and a reformulation of states' rights constitutionalism in light of Story's argument.³²⁵ Although Upshur accepted and employed the interpre-

federal tariff laws and nullified the Force Act. See South Carolina's Final Action (1833), reprinted in STATE DOCUMENTS, *supra* note 220, at 188. Both sides having saved face, the crisis subsided. See A. SCHLESINGER, *supra* note 314, at 94-97.

³²⁰ Webster and Story were friends as well as political allies, and some believe that the latter's hand can be seen in Webster's famous speeches against the compact theory on the Senate floor. See 2 V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT: THE ROMANTIC REVOLUTION IN AMERICA 300 (1927).

³²¹ See 1 J. STORY, *supra* note 56, at 344-75.

³²² Calhoun, although originally a nationalist, secretly authored some of the early justifications of nullification adopted by South Carolina during the crisis. An open advocate of South Carolina's position by 1830, Calhoun was quickly recognized as the most powerful thinker on the states' rights side of the dispute, and Jonathan Elliot included extracts from two of his addresses in his 1832 collection of the canon of "documents in support of the Jeffersonian Doctrines of '98." See RESOLUTIONS, *supra* note 227, at 41.

³²³ Interestingly, both Story and Calhoun avoided the "original intention" terminology for the most part — the former because of his textualism and regard for precedent, see *infra* note 325, the latter because of his almost pure "intentionalism" in the original sense, see Calhoun, Fort Hill Address (1831), reprinted in 6 THE WORKS OF JOHN C. CALHOUN, *supra* note 211, at 59, 60-61.

³²⁴ A. UPSHUR, A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT (Petersburg 1840).

³²⁵ In his treatise, Justice Story criticized states' rights constitutionalists on substantive and hermeneutical grounds. Responding to the emergence of modern intentionalism, Story roundly attacked the notion that historical evidence from the framing and ratification process could determine the Constitution's meaning. Such evidence, he thought, can reveal only "the private interpretation of any particular man, or body of men" — an interpretation that others have no

tive tools made familiar by the Resolutions, he did not characterize his inferences from structure and from the political theory of sovereignty as evidence of the "intent" of the Constitution.³²⁶ Upshur, instead, was an intentionalist in the modern sense: "The strict construction for which I contend applies to the *intention* of the framers of the Constitution; and this may or may not require a strict construction of their words."³²⁷ Upshur thought that the determination of that intention was an essay in historical reconstruction, to be carried out by investigating the proceedings and opinions of the Philadelphia framers.³²⁸

By the outbreak of the Civil War, intentionalism in the modern sense reigned supreme in the rhetoric of constitutional interpretation. In his inaugural address, Jefferson Davis described the Confederate constitution as "the Constitution formed by our fathers," a document that differed from the older instrument's text only "insofar as it is explanatory of their well-known intent."³²⁹ Sen. Charles Sumner of Massachusetts, one of the most radically nationalist members of the Union Congress, stated: "Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt . . . we cannot err if we turn to the framers . . ."³³⁰ The implicit repudiation of the original understanding of "original intent" was complete.

reason to accept. 1 J. STORY, *supra* note 56, at 388. The people sanctioned not the debates of the various conventions, but the text only. *See id.* at 389 ("Nothing but the text itself was adopted by the people."); *see also id.* at 388-90 (attacking use of "legislative history" in constitutional interpretation). Story contended that constitutional interpretation, like statutory construction, is a matter of construing the text "according to its fair intent and objects, as disclosed in its language," and not of arguing over the "probable meaning" of the personal intentions of historical actors. *Id.* at 390 n.1.

Story's brilliant polemic against the modern form of intentionalism (which he ascribes to Jefferson) attacks it not only on evidentiary, but also on theoretical grounds (it elevates private views over the expressed will of the public). The one striking deviation from this strongly textualist approach during the Marshall years was Chief Justice Marshall's opinion in *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). *Barron* sued the city of Baltimore for violating his fifth amendment right to receive just compensation for a public taking of his property. Despite the open-ended character of the amendment's text, which had led some commentators to suggest that it applied to state as well as federal action, *see, e.g.,* W. RAWLE, *A VIEW OF THE CONSTITUTION* 120-21, 129-30 (1825), a unanimous Court limited the amendment's scope to federal takings, at least partly because the "universally understood . . . history of the day" showed that the amendments were not intended to apply to the states. 32 U.S. (7 Pet.) at 250.

³²⁶ *See, e.g.,* A. UPSHUR, *supra* note 324, at 58, 71 (describing his constitutionalism as based on political theory, without referring to "intent").

³²⁷ *Id.* at 94. Upshur never discusses the possibility that the framers' intentions might conflict with his political theory.

³²⁸ *See, e.g., id.* at 51-53 (using history of the proceedings of the Philadelphia convention to establish the meaning of the Preamble).

³²⁹ Address of Jefferson Davis at Montgomery, Alabama (Feb. 18, 1861), *reprinted in* 9 *ANNALS OF AMERICA* 238, 240-41 (1968).

³³⁰ CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).

V. CONCLUSION

It is commonly assumed that the "interpretive intention" of the Constitution's framers was that the Constitution would be construed in accordance with what future interpreters could gather of the framers' own purposes, expectations, and intentions. Inquiry shows that assumption to be incorrect. Of the numerous hermeneutical options that were available in the framers' day — among them, the renunciation of construction altogether — none corresponds to the modern notion of intentionalism. Early interpreters usually applied standard techniques of statutory construction to the Constitution. When a consensus eventually emerged on a proper theory of constitutional interpretation, it indeed centered on "original intent." But at the time, that term referred to the "intentions" of the sovereign parties to the constitutional compact, as evidenced in the Constitution's language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or of anyone else. The relationship of modern intentionalism to this early interpretive theory is purely rhetorical.³³¹

In defending their claim that the "original understanding at Philadelphia" should control constitutional interpretation, modern intentionalists usually argue that other interpretive strategies undermine or even deny the possibility of objectivity and consistency in constitutional law. Critics of this position typically respond with a battery of practical and theoretical objections to the attempt to construe the nation's fundamental law in accord with historical reconstructions of the purposes of the framers. There may well be grounds to support either of these positions. This debate cannot be resolved, however, and should not be affected, by the claim or assumption that modern intentionalism was the original presupposition of American constitutional discourse. Such a claim is historically mistaken.

³³¹ To be faithful to the interpretive intentions of the generation of the framers, the modern intentionalist would have to abandon his or her intentionalism and adopt the common law view of the "intention" of a statute, or disavow the legitimacy of any extratextual interpretation in the manner of the anti-hermeneutical traditions of British Protestantism and European rationalism, or accept the substantive constitutional doctrines of compact and state sovereignty that grew out of the original intentionalism of the Virginia and Kentucky Resolutions.