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## HOW JAMES MADISON INTERPRETED THE CONSTITUTION

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*In this Madison Lecture, Chief Judge Richard S. Arnold of the United States Court of Appeals for the Eighth Circuit explores the subject of constitutional interpretation as practiced by the eponymous James Madison. Following Madison's public arguments and private statements through crucial early American debates over federal powers, Judge Arnold finds that the "Father of the Constitution" refused to take advantage of his own formative contributions to the Constitution. On the contrary, Madison sought constitutional authority in the citizenry, as exercised through state ratifying conventions and through the precedential effect of deliberative legislative action. Arnold reminds us that Madison was a consummate politician at a time when the occupation was not yet a pejorative epithet, but public officeholders were even then subject to harsh personal criticism that rivals if not surpasses the political vitriol of our times. Madison nevertheless developed a consistent, yet flexible, view of constitutional interpretation that can still enlighten the constitutional debates of today.*

### OPENING REMARKS

There are many reasons why I was delighted to receive the invitation from Professor Norman Dorsen and equally delighted to be here before you tonight. In the first place, I feel that the Law School of New York University has adopted me and made me a part of its academic and intellectual family. Since 1981, I have, with only two exceptions, attended the Appellate Judges Seminar—a joint project of the Law School and the Institute of Judicial Administration—each summer. The first year, when I was a new Circuit Judge, I was a "student," or participant, in the Seminar. And in the succeeding years I

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\* Chief Judge, United States Court of Appeals for the Eighth Circuit. This Speech was delivered as the twenty-eighth James Madison Lecture on Constitutional Law at New York University School of Law on October 8, 1996.

have been a member of the Seminar Faculty. One of my proudest moments came when Dean Norman Redlich granted me "tenure" as a member of that Faculty. Possibly his action was *ultra vires*, but happily no one has questioned it. Other incidents in the history of the Seminar stand out, like the time I was stuck in an elevator in Vanderbilt Hall for an hour with the Chief Justice of the Supreme Court of Texas—fortunately, he was a very entertaining fellow.

You may wonder how an outlander from Arkansas like me managed to get on the Faculty of the Appellate Judges Seminar in the first place. The answer is that the Founding Director of the Seminar, Bob Leflar, was a former member of the Supreme Court of Arkansas, a former Dean of the Law School of the University of Arkansas at Fayetteville, and, not incidentally, a member of the Faculty of this Law School. It was Bob who invited me to help teach at the Seminar. So I can attribute my presence here to that same time-honoured practice that has helped so many Arkansans in the past. I refer, of course, to cronyism, one of the values that has made America great.

I also have made many good friends here over the years. I think especially of my law school classmate, Paul Chévigny, and of Tony Amsterdam, with whom I clerked at the October Term, 1960. I was in awe of Tony then, and have been ever since. Sam Estreicher, now the Director of the Appellate Judges Seminar, has been a kind taskmaster. Both he and Linda Silberman have been steadfast friends in good times and bad. And it's always a pleasure to be with John Sexton. I could go on, and in a way I would like to, but if I named all of the friends I have here, there would be no time left for James Madison.

The thing that makes me proudest about this occasion, I guess, is that it gets my name on a list that also includes Justice William J. Brennan, Jr. In fact, I believe Justice Brennan is the only person who ever delivered this Lecture twice. I have felt a special kinship for the Madison Lecture ever since I clerked for Justice Brennan in 1960 and 1961. I remember well the time and effort he lavished on his research for and preparation of the Madison Lecture in 1961. He allowed us law clerks to try our hand at drafting opinions—ones he wasn't especially interested in—but we never got near the Madison Lecture, except to proofread his finished work. Well, that's not literally true. He did let me contribute a footnote about a bill on dual-sovereignty double jeopardy that had been introduced in the Arkansas Legislature, but with that exception the Lecture was all his own work from the ground up. So it gives me a special feeling of pride to stand here in the place, so to speak, where Justice Brennan stood. I know of no judge more worthy of imitation, and I respectfully dedicate this Lecture to him.

## INTRODUCTION

The topic I have chosen is "How James Madison Interpreted the Constitution." As I sat down to write, I realized that this title is itself ambiguous. It could refer to the various substantive positions Madison took on constitutional questions throughout his life—whether the Bank of the United States was constitutional, whether Congress could build roads and canals, and the like. Or it could refer to methodology—did Madison believe in "original intent," to use that dread phrase so familiar in modern controversy, was he a textualist, and so forth. I intend the phrase to be understood primarily in the latter sense: what criteria, what sources did Madison use in arriving at his own opinion of the meaning of the Constitution? One of the things you learn very quickly when you begin trying to interpret the Constitution is that the words themselves are almost never without some ambiguity, so perhaps it is fitting that the title of a lecture on constitutional interpretation should itself be ambiguous, even though I didn't realize it when I first dreamed up the title.

You may also be wondering why anyone cares what James Madison thought about constitutional interpretation. I remember one occasion when a student asked Professor Paul Freund what Thomas Jefferson would think of a certain constitutional question if he were alive today. Professor Freund answered: "If Thomas Jefferson were alive today, he'd be too old to think." The question of the relevance of Madison's views is one you will have to answer for yourselves. My own view is that history is important because it's intrinsically interesting, or, to put it in plain language, history is fun. It may also be of some use in the work we have to do in our own time, and I will suggest why at the end of this talk.

## I

So what about Mr. Madison? Let me begin by reminding you of a few facts about his life and work, facts we all learned at one time or another, but that it helps to recall.<sup>1</sup> James Madison was born in 1751 and died in his eighty-fifth year, in 1836.<sup>2</sup> He was often in poor health. In fact, in 1772, at the age of twenty-one, having recently been graduated from the College of New Jersey, now called Princeton, he was sure he would die young. "[M]y sensations for many months past," he wrote to a friend, "have intimated to me not to expect a long

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<sup>1</sup> See generally Jack N. Rakove, *James Madison and the Creation of the American Republic* (Oscar Handlin ed., 1990).

<sup>2</sup> See *id.* at 1, 181.

or healthy life.”<sup>3</sup> Almost sixty years later, in another letter, he seems almost surprised to be still alive. “Having outlived so many of my co[n]temporaries,” he said, “I ought not to forget that I may be thought to have outlived myself.”<sup>4</sup> In 1831, when this letter was written, only Madison and Charles Carroll of Carrollton survived of the political leadership of the Revolution, and when Madison died five years later he was the last survivor.<sup>5</sup>

From 1774, when he became a member of the Committee of Safety in Orange County, Virginia, until 1817, when he completed his second term as President of the United States, Madison was almost continuously in public office.<sup>6</sup> He was a member of the Virginia General Assembly and a passionate defender there of liberty of conscience. He was a member of Congress both before and after the adoption of the Constitution, most notably in the first four Congresses of the new government, from 1789 to 1798. He drafted the Bill of Rights. He was, with Hamilton and Jay, the author of *The Federalist Papers* under the pen name “Publius.”<sup>7</sup> He was Secretary of State for eight years under President Thomas Jefferson, and in that capacity was the winning party (but what a Pyrrhic victory it was) in the most famous lawsuit in American history, an original action in the Supreme Court styled *William Marbury v. James Madison, Secretary of State of the United States*.<sup>8</sup>

And, most importantly for present purposes, Mr. Madison was the prime mover in the drafting and adoption of the Constitution. He was the quintessential Founder, known for generations by the title “Father of the Constitution.” He was a constitutional and political scholar and logician of the first rank, though not encumbered by membership in the Bar, having studied law only briefly and never practiced. He was the leading intellectual force in the Constitutional

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<sup>3</sup> Letter from James Madison to William Bradford (Nov. 9, 1772), in 1 *The Papers of James Madison* 74, 75 (William T. Hutchinson & William M.E. Rachal eds., 1962).

<sup>4</sup> Letter from James Madison to Jared Sparks (June 1, 1831), in 9 *The Writings of James Madison* 459, 460 (Gaillard Hunt ed., 1910).

<sup>5</sup> Carroll died in 1832. See Kate Mason Rowland, 2 *The Life of Charles Carroll of Carrollton, 1737-1832*, at 367-68 (New York, G.P. Putman's Sons 1898).

<sup>6</sup> See Rakove, *supra* note 1, at 10, 15, 18, 31, 42, 130, 133, 146 (noting Madison's public offices: elected in 1774 to Orange County Committee of Safety; commissioned as colonel of county militia in 1775; elected as delegate to Virginia Provincial Convention in 1776; elected to Council of State, advisory board to governor, in 1777; elected to Congress in 1779; elected as delegate to Virginia State Assembly in 1784; reelected to Congress in 1787; reelected to Virginia State Assembly in 1799; appointed as Secretary of State under President Thomas Jefferson in 1801; elected U.S. President in 1809).

<sup>7</sup> See Jacob E. Cook, Introduction to *The Federalist Papers* at vii, viii-ix (Clinton Rossiter ed., 1961).

<sup>8</sup> 5 U.S. (1 Cranch) 137 (1803).

Convention at Philadelphia in 1787, and through his notes of the proceedings, he is our main source of knowledge about what went on there.<sup>9</sup> And, at the crucial Virginia State Convention of 1788, at which the Constitution was ratified by the narrow margin of eighty-nine to seventy-nine,<sup>10</sup> Madison triumphed in debate over none other than that glorious orator of the Revolution, Patrick Henry.<sup>11</sup> Still, in spite of all these achievements and contributions, he was, in company with other leaders of his own and other times, viciously attacked in the press. Madison was, as Ingersoll put it, "[e]xposed to that licentious abuse which leading men in free countries with an unshackled press cannot escape."<sup>12</sup>

## II

So how did the Father of the Constitution go about divining the meaning of his own creation? One would expect that he would appeal, above all, to the desires and intentions of the Framers at Philadelphia, in whose number he enjoyed such pride of place. One can imagine Mr. Madison, in the heat of argument over some point of interpretation, triumphantly carrying the day by quoting from his own notes. To our surprise, perhaps, this is not at all what happened. In fact, Madison ended up almost entirely negating the subjective intention of the delegates at Philadelphia as a consideration of any importance in constitutional interpretation. He was not, however, completely consistent in that respect, and the history of his inconsistency is of some interest.

Madison's first post in the new government was as a member of the House of Representatives from Virginia.<sup>13</sup> He was, that is, a successful politician. When he and the other Representatives and Senators finally assembled in sufficient numbers to make a quorum here in New York, the temporary capital, the Constitution, grand as it was, was just a piece of paper.<sup>14</sup> It had to be brought to life by practice in order to become a living plan of government.<sup>15</sup> So everything the First Congress did was of constitutional significance, in some sense.

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<sup>9</sup> See generally James Madison, *Notes of Debates in the Federal Convention of 1787* (Adrienne Koch ed., Ohio Univ. Press 1984) (1840).

<sup>10</sup> See Rakove, *supra* note 1, at 76.

<sup>11</sup> By a vote of 88 to 80, the Convention rejected Henry's plan to adopt the Constitution conditional upon the acceptance of some 40 amendments. See *id.*

<sup>12</sup> Drew McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* 18 (1989) (quoting Charles J. Ingersoll).

<sup>13</sup> See Rakove, *supra* note 1, at 78-79.

<sup>14</sup> See *id.* at 80-85 (summarizing Madison's role in launching Congress on its course).

<sup>15</sup> For a brilliant description of this process, which no student should miss, see generally Stanley Elkins & Eric McKittrick, *The Age of Federalism* (1993).

That body was "a sort of continuing constitutional convention."<sup>16</sup> In fact, eight Representatives and eleven United States Senators had been delegates to the Philadelphia Convention.<sup>17</sup> One of the first bills introduced was one proposed by Madison to create the Departments of Foreign Affairs (now called State), the Treasury, and War (now part of the Department of Defense). The bill provided, as indeed the Constitution itself did, that the secretaries of these departments would be appointed by the President, by and with the advice and consent of the Senate, but would be removable by the President alone.<sup>18</sup> Ultimately the House agreed with Madison that the removal power was necessarily, under the Constitution, a solely executive attribute, and that has been the prevailing view, more or less, ever since.

In the course of this debate several interesting kinds of arguments were made about how to interpret the Constitution. Elbridge Gerry of Massachusetts, for example, hardly the most stable of characters, declared himself opposed to any sort of interpretation at all! Mr. Gerry was "decidedly against putting any construction whatever" on the Constitution.<sup>19</sup> He thought that "all construction" was "dangerous, or unnatural."<sup>20</sup> The words alone are authoritative. Interpretation serves only to distort. This view, admirable enough in the abstract, breaks down immediately in practice, but it was a well-entrenched part of the intellectual culture of the times. Anglo-American Protestantism, taking its cue from Martin Luther's cry, "*sola Scriptura*," took the position that "the only authoritative, and indeed the only safe, interpreter of Scripture was Scripture itself."<sup>21</sup> This view lives on today whenever anyone says that our true allegiance should be to the Constitution itself, not to anyone's interpretation of it. In this debate Madison argued from the Constitution's text and from

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<sup>16</sup> Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Year of Congress*, 26 Conn. L. Rev. 79, 80 n.3 (1993) (citing David P. Currie, *The Constitution in Congress: The First Congress, 1789-1791*, at 1-3 (June 12, 1991) (unpublished manuscript)).

<sup>17</sup> See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 349 (1996) [hereinafter *Rakove, Original Meanings*]. For a brief overview of Madison's role in the Convention, see generally Jack N. Rakove, *Mr. Meese, Meet Mr. Madison*, *The Atlantic Monthly*, Dec. 1986, at 77 (arguing that jurisprudence of "original intent" is not supported by Madison's own thought and actions).

<sup>18</sup> See 1 *Annals of Cong.* 385 (Joseph Gales ed., 1789).

<sup>19</sup> 11 *Documentary History of the First Federal Congress of the United States of America: Debates in the House of Representatives* 1021 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter *Documentary History*].

<sup>20</sup> *Id.* at 1022.

<sup>21</sup> H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 889 (1985) (quoting Robert McAfee Brown, *The Spirit of Protestantism* 67 (1965)); see also *id.* at 889-94 (describing influence of Anglo-American Protestantism's anti-interpretive tradition on early constitutional hermeneutics).

what he saw as its overall plan, "spirit," or "intention," though the reference to "intention" seems to refer to the theme of the whole document rather than to what may have been in the minds of its drafters.<sup>22</sup> Madison also argued from practicality, from what he saw as the inconvenient consequences of requiring the consent of Congress or of the Senate for removal of one of the heads of the principal departments, but, in a bow to what we would now call originalism, he explained that such arguments "were intended only to throw light upon what was meant by the compilers of the constitution."<sup>23</sup> The term "compilers" is vague, maybe deliberately so. It could mean the Framers at Philadelphia; it could mean the delegates to the state ratifying conventions; it could mean all of the above.

I digress briefly to mention what seems to me the most interesting, even hilarious, aspect of the debate over the removal power, though it did not directly concern Madison himself. I can do no better than quote at length from Jack Rakove's brand new book, *Original Meanings*:<sup>24</sup>

One noteworthy effort to draw a leading inference from the records of ratification was made, however. After failing to prove that removal required impeachment, William L. Smith insisted that the consent of the Senate was constitutionally required to remove as well as appoint. This opinion was supported by "[a] publication of no inconsiderable eminence, in the class of political writings on the constitution," Smith told the House on June 16. He then read a passage from *Federalist* 77 affirming that "The consent of [the Senate] would be necessary to displace as well as appoint." But a rude shock awaited Smith. As he wrote to Edward Rutledge, the brother of the Framer, shortly thereafter:

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

The candidate was, of course, Hamilton; and Smith probably knew that Madison was the other of the "two gentlemen of great information" who had written as "Publius." Neither man felt obliged to stand by their joint work. So ended the first effort to use extrinsic

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<sup>22</sup> Greenfield, *supra* note 16, at 93-94, 94 nn.81-82 (emphasis omitted) (quoting 10 Documentary History, *supra* note 19, at 721-22, 735).

<sup>23</sup> 11 Documentary History, *supra* note 19, at 1029.

<sup>24</sup> Rakove, *Original Meanings*, *supra* note 17.

evidence taken from the period of the adoption of the Constitution to interpret its meaning.<sup>25</sup>

In my mind's eye I can see Colonel Hamilton, as he was known at the time, quietly approaching Congressman Benson on some side street a few blocks south of here, and solemnly imparting the news that on mature reflection he had changed his published opinion of the year before and now stood foursquare in support of the power of the President, the officer whose favour he now wished to attract. It is hard to think of an intention more original than this.

Let's go forward a couple of years now to 1791, the Third and last Session of the First Congress. The debate this time was over the bill to create the First Bank of the United States, one of the defining issues that split city and country, East and West, North and South, strict constructionists and latitudinarians, over the first half century or so of our history as an independent nation.<sup>26</sup> Madison, in league with that great master of party politics, Thomas Jefferson, opposed the Bank on constitutional grounds. Secretary Hamilton and, in the end, President Washington supported it, and they prevailed. Briefly recall what the constitutional debate was about, though it seems passing strange at this remove of time. The Constitution says nothing about banks, or indeed about congressional power to create any kind of corporation. The Bank's proponents had to argue in favor of implied powers, powers appropriate to give full effect to other powers granted expressly. In the case of the Bank, two express powers were relied upon, the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"<sup>27</sup> and the power "[t]o coin Money [and] regulate the value thereof."<sup>28</sup> It is not impossible to regulate commerce or coin money or to regulate its value without creating a national bank, but, advocates argued, a bank would help. The Bank would fall under another provision, the famous Necessary and Proper Clause, granting Congress the 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."<sup>29</sup>

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<sup>25</sup> *Id.* at 350.

<sup>26</sup> See *Legislative and Documentary History of the Bank of the United States Including the Original Bank of America 35-85* (M. St. Clair Clark & D.A. Hall compilers, Augustus M. Kelley 1967) (1832) (consolidating transcripts of Senate and House debates on Bank Charter of 1791).

<sup>27</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>28</sup> U.S. Const. art. I, § 8, cl. 5.

<sup>29</sup> U.S. Const. art. I, § 8, cl. 18.



Madison's main basis for constitutional opposition to the Bank was his general conviction that the federal government was, and had been intended to be, a government of limited and enumerated powers.<sup>30</sup> If the argument based on the Necessary and Proper Clause were accepted, he thought—and history has largely proved him right—there would be few limits on the national legislative power. But he also made a more specific appeal to the proceedings at Philadelphia. He himself had proposed that Congress be given a general power to issue charters of incorporation. When the committee of detail did not include such a power in the draft it reported, Madison renewed his motion. It was not successful, and the Constitution as proposed and adopted contained no such express grant of authority. Madison thought this bit of history persuasive, and justified his position as follows: "In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable inference, is a proper guide. Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties."<sup>31</sup>

Madison lost this argument and later, as we shall see, caved in entirely on the question of the constitutionality of the Bank, but the passage is interesting because it takes a rather different approach to constitutional interpretation from the one Madison adopted in later life. Here, by referring to "the meaning of the *parties*"<sup>32</sup> to the Constitution, Madison may be saying that the document is to be construed like a contract. But if the Constitution is a contract, who are the parties? Surely not the Framers. They are more like drafters. The parties are the whole "People of the United States"<sup>33</sup> or perhaps the (not yet created) federal government on the one hand and the sovereign states on the other or, perhaps better, the people of the several states as represented in the ratifying conventions.<sup>34</sup> Indeed, Madison re-

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<sup>30</sup> See, e.g., James Madison, Notes on Remarks on the Bank Bill to the House of Representatives (Feb. 2, 1791), in 13 Papers of James Madison 372, 372-81 (Charles F. Hobson & Robert A. Rutland eds., 1981) (arguing that expansive interpretation of Necessary and Proper Clause would destroy essential characteristic of federal government—its composition of limited and enumerated powers).

<sup>31</sup> Id. at 374.

<sup>32</sup> Id. (emphasis added).

<sup>33</sup> U.S. Const. preamble.

<sup>34</sup> See James Madison, Report of 1800 on the Virginia Resolutions, Delivered to the General Assembly of Virginia (Jan. 7, 1800), in 17 Papers of James Madison 303, 303-09 (David B. Mattern et al. eds., 1991) (discussing third resolution, which declared that powers of federal government resulted from compact among states); see also Wayne D. Moore, Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions, 11 Const. Comment 315, 334 (1994) (suggesting that Virginia and Kentucky Resolutions of 1798 and 1799 embraced core principle of state interpretive autonomy in examining allocation of interpretive authority among state and federal governments).

ferred to some general passages about limited powers in the ratifying-convention debates.<sup>35</sup> The difficulty is that the delegates to those conventions did not and could not know in any comprehensive way what the deliberations at Philadelphia had been like. The Convention itself was held in secret; Madison's notes, the fullest of any, were not published until 1840, and no notes at all were published until 1820.<sup>36</sup>

The next great constitutional debate in Congress that is relevant for our purposes occurred in 1796.<sup>37</sup> The Senate had ratified the Jay Treaty with Great Britain, negotiated by John Jay while serving concurrently as Minister to Great Britain and Chief Justice of the United States. The text of the Treaty was not made public until it had been ratified. (In fact, all proceedings in the Senate were secret until 1795.<sup>38</sup>) It became instantly controversial. The Republicans, who in general were more pro-French and anti-British than the Federalists, saw a way of making the issue of the Treaty concrete. They tried to assert a sort of constitutional authority of the House of Representatives in treaty making, and, indeed, if public funds need to be appropriated in order to execute a treaty, the House unquestionably has a legitimate say.

In March 1796, Washington asked the House to appropriate funds to implement the Treaty.<sup>39</sup> The Republicans then introduced a resolution asking the President to provide the House with the executive papers, reflecting the negotiating history, to enable it to place the Treaty in its proper light. Does any of this sound familiar? Federalists answered that the Treaty should be considered on the basis of its words alone. On March 10, Madison joined the fight on the side of the House. The resolution passed, sixty-two to thirty-seven.<sup>40</sup>

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<sup>35</sup> See Madison, *supra* note 30, at 372, 380 (introducing excerpts of debates from Pennsylvania, Virginia, and North Carolina conventions with statement that "[t]he explanations in the state conventions all turned on . . . the principle that the terms necessary and proper gave no additional powers to those enumerated").

<sup>36</sup> See Madison, *supra* note 9; *infra* text accompanying notes 49-51.

<sup>37</sup> See generally 4 *Annals of Cong.* 426-783, 970-1291 (1796) (reporting congressional debates over Jay Treaty).

<sup>38</sup> See 1 *Annals of Cong.* 16 (Joseph Gales ed., 1789) ("[T]he Legislative as well as Executive sittings of the Senate were held *with closed doors* until the second session of the third Congress . . .").

<sup>39</sup> See George Washington, Message and Proclamation Enclosing the Treaty of Amity, Commerce and Navigation Between the United States and His Britannic Majesty (Mar. 1, 1796), reprinted in 29 *National State Papers of the United States, 1789-1817*, at 106 (Eileen D. Carzo ed., 1985). The House of Representatives appropriated \$80,808 for implementing the Treaty on May 3, 1796. See 4 *Annals of Cong.* 1295-98 (1796).

<sup>40</sup> See 4 *Annals of Cong.* 759 (1796).

Washington replied in a memorandum on March 30.<sup>41</sup> Hamilton had reminded him that the Convention had defeated a motion to involve the House in treaty making. Washington had deposited the Journal of the Convention with the Department of State. The Journal reflected that a motion to require that treaties be ratified by law had been explicitly rejected. The President refused to deliver the papers, claiming what we would now call executive privilege. Notice that Washington's appeal was not to the debates or anyone's notes of them, but to the Journal, the formal record of proceedings that the Convention had officially approved.

The House continued to pursue the issue. On April 6, 1796, Madison made another speech.<sup>42</sup> He affected to believe that Washington's appeal to the Journal of the Convention was improper, even though he had in 1791 reasoned in much the same way.<sup>43</sup> He had been stung by criticism from Representative William Vans Murray of Maryland. During a speech on March 23, Murray urged Madison, as a principal Framer, to give the House the benefit of his recollection of the drafting history.

If the Convention spoke mysterious phrases, and the gentleman helped to utter them, will not the gentleman aid the expounding of the mystery? If the gentleman was the Pythia in the temple, ought he not to explain the ambiguous language of the oracle? To no man's expositions would he listen with more deference.<sup>44</sup>

In his response, Madison disclaimed the ability to speak for the intention of the whole body of the Convention. The Framers had disagreed in their opinions. He also had a personal reason to avoid this kind of argument, because he had been criticized for using it during the Bank debate of 1791. He then said:

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. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention,

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<sup>41</sup> See generally George Washington, Message to the House, Assigning the Reasons Which Forbid His Compliance with the March 24 Resolution (Mar. 30, 1796), reprinted in 29 National State Papers of the United States, *supra* note 39, at 318.

<sup>42</sup> See 4 Annals of Cong. 772-81 (1796).

<sup>43</sup> See *supra* text accompanying notes 26-35.

<sup>44</sup> Rakove, Original Meanings, *supra* note 17, at 361.

which proposed, but in the State Conventions, which accepted and ratified the Constitution.<sup>45</sup>

Turning to the evidence, Madison was not able to find in the published records of the state conventions much that was useful. Even the Virginia debates, as published, "contained internal evidences in abundance of chasms, and misconceptions of what was said."<sup>46</sup> A better authority, he thought, was amendments proposed by the state conventions.<sup>47</sup> He speculated that the Framers of those amendments would have favored the construction now advanced by the Republican majority. It was not explained how proposals designed to remedy perceived defects in the Constitution could prevail over the explicit language of the Treaty Clause. It is hard to shake the suspicion—and I hope you will not think me disrespectful for voicing it—that Madison was simply using the arguments he thought best suited to his position of the moment.

### III

The position taken by Madison during the debates over the Jay Treaty in 1796, so far as I can tell, remained his firm opinion for the rest of his life.<sup>48</sup> He never again relied mainly on the subjective intentions of the delegates in Philadelphia and, in fact, he took care that his notes of the Convention's deliberations not even be published until after his death. But other people's notes began to leak out, and Madison's reaction to this development was interesting. In 1808, when Madison was running for President as, of course, a Jeffersonian Republican, a campaign pamphlet was published in support of his rival, George Clinton, Governor of New York and a strong Anti-Federalist.<sup>49</sup> The pamphlet was edited by Clinton's son-in-law, none other than Edmond Genêt, known to history as Citizen Genêt, the trouble-making Minister of France to the United States who had kicked up so much dust in the 1790s and then settled permanently in America. The

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<sup>45</sup> 4 *Annals of Cong.* 776 (1796).

<sup>46</sup> James Madison, Notes on Remarks on Jay's Treaty Before the House of Representatives (Apr. 6, 1796), in 16 *The Papers of James Madison* 290, 296 (J.C.A. Stagg et al. eds., 1989).

<sup>47</sup> See generally Donald O. Dewey, James Madison Helps Clio Interpret the Constitution, 15 *Am. J. Legal Hist.* 38 (1971) (discussing Madison's various approaches to constitutional interpretation).

<sup>48</sup> See, e.g., Irving Brant, 3 *James Madison: Father of the Constitution, 1787-1800*, at 436 (1950) (describing Madison's speech to House of Representatives on April 6, 1796, as "lay[ing] down the rule which for the rest of his life enabled him to escape from his 1787 nationalism"). See generally *id.* at 431-71.

<sup>49</sup> See 3 William W. Crosskey & William Jeffrey, Jr., *Politics and the Constitution in the History of the United States* 403 (1980) (recounting instances where Madison attempted to moderate his formerly pro-Federalist views).

pamphlet consisted of quotations from notes of the Convention taken by Robert Yates, a delegate from New York. Yates had been at the Convention for only seven weeks and had not signed the Constitution, but his notes were, at the time, the only first-hand source of the Convention's deliberations available to the public. (The official Journal of the Convention was not printed and published, by order of Congress, until 1820.<sup>50</sup>) The notes portrayed Madison as a strong nationalist. There was, of course, a great deal of truth in this portrayal; Madison had proposed to the Convention, unsuccessfully, to give the federal government a veto over state laws. One can imagine that this publication caused Madison a degree of political embarrassment, but he did not counter the pamphlet by publishing his own notes or even, so far as I have discovered, quoting from them in his own defense. Perhaps he thought such a tactic would be self-serving and unpersuasive.

In any case, the problem recurred in 1821, when Yates's notes were published in full.<sup>51</sup> Yates had died twenty years before. As I have noted, he was a fierce Anti-Federalist and had been at the Convention for only seven of the sixteen weeks it was in session. He had, however, become Chief Justice of the highest court of New York, and his account was something to be reckoned with. Madison's friends began urging him to publish his own notes, and, indeed, the fact that he had taken such pains to make them in the first place—he later said the labor involved had endangered his health—and then preserved them for so many years must mean that he considered them of great value. Madison had in fact begun as early as 1780, at the age of twenty-nine, to keep and compile various letters, notes, essays, and other papers containing the record of his public life. Still, and even in the face of what he thought to be the distortions of the record made by Yates, he kept his own notes private. Critics, including, Professor Crosskey, might say that Madison needed time to alter his notes to make them fit the states' rights, proslavery needs of the Southern politics of the time.<sup>52</sup> I leave that controversy to one side. I will say only that I start, in Madison's case as in that of others, with a presumption of rectitude and I am not convinced that it has been overcome in this instance.

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<sup>50</sup> See 16 *Annals of Cong.* 2628 (1820) (recording "Resolution to authorize the publication of part of the Secret Journal of Congress, Under the Articles of Confederation" of April 21, 1820).

<sup>51</sup> See generally Robert Yates, *Secret Proceedings and Debates of the Convention* (Washington, Gov't Printing Off. 1909) (1838).

<sup>52</sup> See 3 Crosskey & Jeffrey, *supra* note 49, at 400-09 (suggesting that Madison deliberately altered his notes on Federal Convention of 1787 to moderate his inconsistent positions regarding states' rights).

Let's look at what Madison himself said about the notes at the time. For one thing, he continued to downplay their value as indicators of the meaning of the Constitution. "[W]hatever might have been the opinions entertained in forming the Constitution," he wrote to his brother-in-law, John G. Jackson, in 1821, "it was the duty of all to support it in its true meaning as understood *by the nation* at the time of its ratification."<sup>53</sup> It is in this same letter that Madison showed his strong conservative, even antiquarian, feelings by inveighing against "constructive innovations"<sup>54</sup> or, as we would phrase it today, novel constructions. The sentiment expressed here can be called "originalist" in the sense that it seemed to regard the Constitution's "true meaning" as having been fixed at the time of ratification. But this view is not a wholly accurate picture of Madison's approach, as we shall see when we examine Madison's concept of "precedent." The important point for now is that Madison consistently downplayed the significance of his own notes. I quote from one more letter:

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. However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political institutions, . . . the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be, not in the opinions or intentions of the body which planned and proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions, where it received all the authority which it possesses.<sup>55</sup>

Notice that in this formulation it is not "the nation" in general that is appealed to, surely a concept so amorphous as to be of little practical use, but the more particular group of "the people in their respective State Conventions."<sup>56</sup> But what about those points on which state conventions might disagree? What about the fact that the debates at those conventions were not published in any systematic form until 1836, the year of Madison's death, when Jonathan Elliot's five volumes of *Debates on the Federal Constitution* came out? It is small wonder, perhaps, that Madison himself consulted only his own

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<sup>53</sup> Letter from James Madison to John G. Jackson (Dec. 27, 1821), in 3 *Letters and Other Writings of James Madison* 243, 245 (New York, R. Worthington 1884).

<sup>54</sup> *Id.*

<sup>55</sup> Letter from James Madison to Thomas Ritchie (Sept. 25, 1821), in 3 *Letters and Other Writings of James Madison*, *supra* note 53, at 228, 228.

<sup>56</sup> *Id.*

recollections of the Virginia Convention of 1788, and then never cited any of the actual debates, not even his own speeches.<sup>57</sup>

So one of the reasons Madison did not publish his notes during his lifetime was that the notes would, or at any rate, *should* be given no authoritative character in resolving issues of constitutional interpretation. It is interesting to speculate about what some of the other reasons might have been. Madison may have had scruples about violating the Convention's rule of secrecy. This would be a reason, perhaps, for withholding publication, if not altogether, at least until all of the delegates had died. On the other hand, all of the delegates except Madison were dead by 1831, and yet he still did not publish the notes. He could have done so at that point and been safe from contradiction by anyone living. He feared the notes might be misused. But every public document is misused by somebody—the privilege of doing so is secured by the First Amendment—and misuse could more readily have been corrected had the author still been living when the notes were published. Madison did think that constitutional debates would become less partisan with the passage of time—he was wrong about that—and that the proceedings of the founding period would, over time, become more revered.

Another possible reason has to do with money. Madison may have thought the notes would be worth more after his death. One authority has rejected such a suggestion indignantly. "Anyone who has read Madison's writings and followed his political career . . . would find it impossible to believe that mercenary motives could influence him in such a case."<sup>58</sup> But one does not have to be exactly "mercenary" to be concerned about one's family's material well-being, and the record is clear that Madison was worried about how his wife, born Dolly Payne, would be able to support herself after his death. (Recall Dr. Johnson's famous dictum that "[n]o man but a blockhead ever wrote except for money."<sup>59</sup>) Mrs. Madison was quite a bit younger than he, and in fact lived for about another fifteen years.<sup>60</sup> Madison's will instructed his wife to have the manuscript published.<sup>61</sup> He left detailed instructions about the legacies to be paid out of the revenues anticipated, including \$2000 to the American Colonization Society.

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<sup>57</sup> See Dewey, *supra* note 47, at 41.

<sup>58</sup> *Id.* at 46 n.26.

<sup>59</sup> Leonard Louis Levinson, *Bartlett's Unfamiliar Quotations* 333 (1971).

<sup>60</sup> Dolly Todd, a widow, was twenty-six and James Madison was forty-three when they married. See Allen C. Clark, *Life and Letters of Dolly Madison* 25 (1914). Dolly Madison died in 1849. See *id.* at 449-50.

<sup>61</sup> See Extract from Mr. Madison's Will (Apr. 15, 1835), in 4 *Letters and Other Writings of James Madison*, *supra* note 53, at 569, 569.

(Madison's solution to the issue of slavery, that peculiar and peculiarly evil institution, was to resettle the slaves in Africa—a wholly unworkable idea, not least because most of the slaves did not want to go.)

Unhappily, no commercial publisher willing to undertake the task without a substantial advance from the family could be found.<sup>62</sup> So recourse was had to the buyer of last resort, the government. (The United States had bought Washington's papers.) The family approached Congress with a suggested price of \$100,000. This proved impossibly high. So Mrs. Madison came down, first to \$50,000 and then to \$30,000. The leaders of Congress agreed, but a major hurdle remained, getting Congress to pass a bill. I quote now from Professor McCoy's excellent book, *The Last of the Fathers*:<sup>63</sup>

Senator Calhoun took the lead in opposing the bill, which he promptly branded unconstitutional. The *Register of Debates* recorded some of his sentiments:

The question now before the Senate, Mr. C. said, was whether Congress had the power to purchase the copy-right to Mr. Madison's papers, which, in the present state of political feelings, were regarded of little or no value in the money market. Mr. C. regarded it as truly deplorable, that these invaluable papers, which threw a light upon the constitution which had never been shed upon it before, should be deemed of no value by the public, absorbed with party politics and the low love of gain, so that such a work could not be published. But where, Mr. C. asked, was the special power in the constitution for Congress to publish such a work?

Certainly not in the "general welfare" clause, Calhoun maintained, and to make the point he read from Madison's famed Report of 1800, which denied the false interpretation of that notorious clause that supporters of the present bill would need to rely on. Indeed, Calhoun touted the Virginia Report as Madison's greatest constitutional testament and said that Congress would dishonor his name by assenting to an appropriation of money for which the Constitution gave no sanction. "Mr. C. felt that his position in opposition to this resolution was a painful one; but the opinions of Mr. Madison, which were the text book of Mr. C., and of those with whom he acted, demanded that he should not abandon it."<sup>64</sup>

Could Senator Calhoun have been recalling and repeating the very constitutional theories that Madison once used in opposing the

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<sup>62</sup> See Elizabeth Lippincott Dean, *Dolly Madison: The Nation's Hostess* 210 (1928) (noting Dolly's difficulties in selling manuscript and eventual purchase by Congress in 1837).

<sup>63</sup> McCoy, *supra* note 12.

<sup>64</sup> *Id.* at 168.



Bank and, at the very end of his term as President, in vetoing the cherished internal improvements bill sponsored by none other than Congressman John C. Calhoun? However that may be, Calhoun lost the vote, the bill passed, and Madison's estate got the money.

So we see that most of the time at least, Madison deprecated not only his own notes, but also anyone else's recollections of the subjective intentions expressed by the Framers at the Convention in Philadelphia. The question why he nevertheless took such care to compile and publish his notes remains, in my mind anyway, without a definite answer. If the notes were of such little value in constitutional interpretation, why make them available to a public that, Madison surely must have known, would use them for that very purpose? If, as we learned in the first year of law school, it is reasonable to infer that one intends the natural and probable consequences of one's acts, we might even say that Madison *intended* that his notes be used for a purpose he himself disavowed. However that may be, it is clear that he was willing to cite public comments made at the time, either in speeches, as at the state ratifying conventions, or in the newspapers. And the leading instance of such a public comment was, of course, *The Federalist*. Of this series of anonymous publications, today we would say columns, Madison warned that "it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates."<sup>65</sup> He seems nevertheless to have thought highly of *The Federalist* as a legitimate means of constitutional interpretation. In a sketch prepared for Thomas Jefferson on the proposed curriculum for the University of Virginia, Madison described *The Federalist* as "an Authority to which appeal is habitually made by all & rarely declined or denied by any, as evidence of the general opinion of those who framed & those who accepted the Constitution of the U. States on questions as to its genuine meaning."<sup>66</sup> Perhaps it is a mistake to parse a one-time statement, drafted presumably for the eyes of Thomas Jefferson only, but I cannot resist pointing out that at least in this passage, the opinion of those who framed the Constitution (the delegates at Philadelphia) seems to be placed on an equal footing with that of "those who accepted" it. It is, however, only the "general" opinion that Madison mentions, so perhaps it would be wrong to cite this passage as evidence that Madison would countenance citing the views of the delegates on any particular issue of constitutional interpretation.

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<sup>65</sup> Letter from James Madison to Edward Livingston (Apr. 17, 1824), in 3 Letters and Other Writings of James Madison, *supra* note 53, at 435, 436.

<sup>66</sup> Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), in 9 The Writings of James Madison, *supra* note 4, at 218, 221.

Another important aspect of Madison's approach is his emphasis on the document as a thing in itself, a creation, so to speak, with existence independent of its creators. If I remember my college course in English correctly, this is roughly what modern critics think about poetry. T.S. Eliot can try to help us by writing a commentary explaining what he meant in *The Waste Land*, but what he meant is not necessarily what the poem means.<sup>67</sup> The poem means what its readers, from time to time, find in it. If we transpose this maxim into the field of construction of legal documents, we might say that a legal document, other, perhaps, than a private contract, means whatever its readers from time to time reasonably think it means. Madison, I suspect, would eliminate the phrase "from time to time" from this formulation. He was tremendously cautious about language. He knew that the meaning of words changed over time.<sup>68</sup> It was the original meaning, not some "constructive innovation," to which he would look.

We see this approach in some comments Madison made when President Andrew Jackson vetoed the renewal of the Second Bank of the United States in 1830. Jackson had cited in his support a veto message that Madison had sent to Congress in 1817.<sup>69</sup> Madison wrote the Secretary of State, Martin Van Buren, that Jackson had misunderstood what he, Madison, had meant. Madison conceded, however, that Jackson might have correctly interpreted the public meaning of the earlier veto 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.<sup>70</sup>

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<sup>67</sup> See generally Eliot in *His Time: Essays on the Occasion of the Fiftieth Anniversary of The Waste Land* (A. Walton Litz ed., 1973).

<sup>68</sup> See Letter from James Madison to Major Henry Lee (June 25, 1824), in 3 Letters and Other Writings of James Madison, *supra* note 53, at 441, 442 ("[T]he language of our Constitution is already undergoing interpretations unknown to its founders . . . . If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject.").

<sup>69</sup> See Robert Allen Rutland, *James Madison: The Founding Father* 238 (1987) (noting that Madison vetoed bill allocating Bank bonus and dividends to canal and road building because he found such allocation beyond both "necessary and proper" and "general welfare" powers granted by Constitution).

<sup>70</sup> Letter from James Madison to Martin Van Buren (July 5, 1830), in 4 Letters and Other Writings of James Madison, *supra* note 53, at 89, 89.

In this regard, it was important to Madison to take into account the kind of document that was being construed. The Constitution, he warned, should not be interpreted as if it were "an ordinary statute, and with the strictness almost of a penal one."<sup>71</sup> He had taken much the same position in an earlier letter to Judge Spencer Roane of Virginia, a correspondent who probably would have wanted to interpret the Constitution as if it were a penal statute.<sup>72</sup> At that time, Madison pointed out that there was "certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it with a laxity which would vary its essential character."<sup>73</sup> One thinks immediately of Chief Justice Marshall's famous statement that "we must never forget that it is a *constitution* we are expounding,"<sup>74</sup> though Madison agreed with Marshall on little else.

#### IV

The most distinctive aspect of Madison's approach to constitutional interpretation may be his concept of "precedent." When we use the word, we think instantly of judicial decisions. For many years, and perhaps this is still true, the law schools behaved as if the only law in existence were that contained in the opinions of appellate courts. We knew there were such things as statutes, of course, like the Statute of Uses, for example, but they were to be strictly construed if in derogation of the common law; that is, they were regarded with distrust and were to prevail over judicial opinions only in a clear case. I believe this attitude still obtains when we think of constitutional law. "Law is what judges do," Holmes said, and he was echoed by Chief Justice Hughes: "The Constitution . . . is finally what the Supreme Court determines it to mean."<sup>75</sup> There is a sense, no doubt, in which this is true, but when Madison spoke of "precedent" he was not primarily thinking of courts. He knew that courts are not the only organs of government that make constitutional law. Congress and the President make constitutional law whenever they enact a statute, in the sense that they necessarily decide that what they are about to do is within

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<sup>71</sup> Letter from James Madison to Reynolds Chapman (Jan. 6, 1831), in 4 *Letters and Other Writings of James Madison*, supra note 53, at 143, 147.

<sup>72</sup> See James Madison and the American Nation 1751-1836, at 362 (Robert A. Rutland et al. eds., 1994) (noting that Roane opposed federal courts overturning state court decisions indicating more statute-oriented conception of constitutional authority).

<sup>73</sup> Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), in 3 *Letters and Other Writings of James Madison*, supra note 53, at 143, 146.

<sup>74</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

<sup>75</sup> Dexter Perkins, Charles Evans Hughes and American Democratic Statesmanship 32-33 (Oscar Hundlin ed., 1956) (quoting speech by Hughes).

the powers granted by the Constitution. Their action, to be sure, can be tested in court at some point down the road, but even courts are often impressed by a settled course of legislation, especially one begun early in the history of the Republic. So Madison did agree, unlike his mentor Jefferson, that the Supreme Court of the United States had "definitive power" to settle constitutional questions.<sup>76</sup>

The Madisonian concept of precedent that I'm discussing here is legislative precedent. The acts of the first few Congresses, it seemed to him, were important in this regard. "[E]arly, deliberate & continued practice under the Constitution"<sup>77</sup> was of importance, though some statutes, apparently, were more equal than others. He complained that Congress would alternate between procrastination and precipitation, often producing a careless rush of legislation at the end of a session. Not much has changed in 180 years, has it? These "mid-night precedents . . . ought to have little weight in any case," Madison said.<sup>78</sup> So it was not merely any statute that would establish a practice, but a statute that was enacted only after careful deliberation. This is hardly a bright-line standard, and judges would probably complain that it would be difficult to apply if it were a rule of judicial interpretation, but still it's hard to purge our minds entirely of the fact that some congressional enactments, even ones with far-reaching effect, appear to have received relatively little thought. Madison, in any case, thought that was important.

The most famous instance of Madison's use of the concept of precedent came when he changed his mind with respect to the Bank of the United States. You recall that in 1791, towards the end of the First Congress, Madison had unsuccessfully opposed the bill to create the First Bank.<sup>79</sup> He did so mainly on constitutional grounds.<sup>80</sup> The Bank—whether to renew it and, if so, on what terms and conditions—remained a defining issue in American politics for about the next fifty years. It divided the country. On the one hand, the commercial and financial interests of the North and East thought banks, and specifically a national bank, merely a natural tool of economic progress. On the other hand, the agricultural and frontier interests of the South and

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<sup>76</sup> Letter from James Madison to Joseph C. Cabell (Sept. 7, 1829), in 4 *Letters and Other Writings of James Madison*, supra note 53, at 45, 47.

<sup>77</sup> Letter from James Madison to M.L. Hurlbert (May 1830), in 9 *The Writings of James Madison*, supra note 4, at 370, 372.

<sup>78</sup> Letter from James Madison to Judge Spencer Roane (May 6, 1821), in 9 *The Writings of James Madison*, supra note 4, at 55, 61.

<sup>79</sup> See 2 *Annals of Cong.* 1960 (1791) (recording House vote in favor of Bank over Madison's objections); id. at 1769 (recording Senate vote in favor of Bank).

<sup>80</sup> See generally Gaillard Hunt, *The Life of James Madison* 201 (1902) (describing Madison's opposition to Bank).

West thought of banks, and probably intangible property in general, as something sinister. The existence of wealth that cannot be touched, plowed, looked at, and lived on was an idea especially uncongenial to Jefferson and his followers. So, when the First Bank of the United States expired of its own terms in 1811, having been authorized for only twenty years, the country was sharply divided on whether to renew it. A bill to create the Second Bank of the United States failed in the Senate in 1811 by the casting vote of Madison's Vice President, Elbridge Gerry.<sup>81</sup> In 1815, a similar bill passed both houses and was presented to the President.<sup>82</sup> He vetoed the bill, but only on policy grounds.<sup>83</sup> (Later, in 1816, Madison signed a better bill, he said, creating the Second Bank of the United States.<sup>84</sup>) The veto message, and Madison's subsequent comments about it, are most interesting. The President expressly disclaimed the view, so tenaciously advocated by himself twenty-three years earlier, that the Bank was unconstitutional.<sup>85</sup> How to explain this seeming about-face?

The answer lay in the concept of precedent. Madison felt that the country had, so to speak, ratified the validity of the Bank. He insisted that his private opinion remained unchanged. If he had not been in public life, if he had been a law teacher, for example, I suppose he would have felt unconstrained by history. But he was a public man, and believed himself obligated to relinquish his private view. The Bank had been thoroughly discussed in Congress before it was established (who would know this better than Madison?), and it had operated for twenty years, with annual appropriations confirming its existence and validity each year. Madison thought that:

[T]he question of the constitutional authority of the Legislature to establish an incorporated bank [had been] precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indica-

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<sup>81</sup> See 4 *Annals of Cong.* 346-47 (1811) (recording Gerry's deciding vote in opposition to Bank's charter renewal).

<sup>82</sup> See 5 *Annals of Cong.* 174-75 (1815) (recording Senate vote to renew Bank's charter); *id.* at 1043-45 (recording House vote to renew Bank's charter).

<sup>83</sup> See *id.* at 189-91 (recording Senate consideration of Senate veto and Presidential message to Senate).

<sup>84</sup> See 5 *Annals of Cong.* 280-81 (1816) (recording Senate vote in favor of new bill); *id.* at 1343-44 (recording House vote in favor of new bill).

<sup>85</sup> See 5 *Annals of Cong.* 189 (1815) (recording veto message from President Madison to Senate, stating that question of constitutionality of Bank was "precluded . . . by repeated recognitions, under varied circumstances, of the validity of [the Bank], in acts of the Legislative, Executive, and Judicial branches of the Government").

tions, in different modes, of a concurrence of the general will of the nation.<sup>86</sup>

The Bank had received "the entire acquiescence of all the local authorities, as well as of the nation at large to all of which may be added, a decreasing prospect of any change in the public opinion adverse to the constitutionality of such an institution."<sup>87</sup> To veto the bill under these circumstances would be "a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment & intention."<sup>88</sup> For the same reasons, when Andrew Jackson later vetoed a bill to extend the Bank's existence, Madison disagreed.

Some of Madison's contemporaries suspected that his constitutional conversion was disingenuous. It seems clear that Madison had become convinced of the necessity of the Bank as a policy matter.<sup>89</sup> In addition, we must remember that Madison was a politician. Names like Washington, Jefferson, and Madison come down to us with an almost godlike aura, but they were not gods, they were people, and what's more, they were people who had to run for office. Well, maybe Washington didn't really have to run for it, but he did have to manage the country after he got in office, and that is certainly a political job. The fact that the country had accepted an institution, that most of the country seemed to want to keep it, and that it appeared to be working well could not fail to weigh with any elected official, especially one who, like Madison, had changed his mind during his first congressional campaign on a subject as important as the necessity of a Bill of Rights. We can sympathize with a remark, referring to the issue of the Bank, that was made to Madison late in his life: "It may be proper . . . to remark that your opinion is very strongly relied on on both sides of the question."<sup>90</sup>

Still, I think we have to accept Madison's genuine feeling that his own "abstract opinion of the text"<sup>91</sup> could not prevail against "a construction put on the Constitution by the nation, which, having made it,

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<sup>86</sup> James Madison's Veto Message to the Senate of the United States (Jan. 30, 1815), in 8 *The Writings of James Madison*, supra note 4, at 327, 327.

<sup>87</sup> Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 *Letters and Other Writings of James Madison*, supra note 53, at 183, 186.

<sup>88</sup> *Id.*

<sup>89</sup> See Dewey, supra note 47, at 53 (noting that Madison characterized establishment of national bank as "expedient").

<sup>90</sup> *Id.* at 54 (quoting Letter from H.G. Reynolds to James Madison (May 15, 1834)).

<sup>91</sup> Letter from James Madison to C.E. Haynes (Feb. 25, 1831), in 4 *Letters and Other Writings of James Madison*, supra note 53, at 164, 165.

had the supreme right to declare its meaning.”<sup>92</sup> “I did not feel myself, as a public man, at liberty to sacrifice all these public considerations to my private opinion.”<sup>93</sup>

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.<sup>94</sup>

Professor Powell has aptly summed the matter up:

[H]owever 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. The Constitution is a public document, and its interpretation, for Madison, was in the end a public process.<sup>95</sup>

One may be pardoned, I hope, for objecting that concepts like “the approbation of the people” and “the will of the nation” are rather formless. They are what we call today “public opinion.” But I am sure Madison did not have in mind daily tracking polls, and there is a distinction between what he was talking about and what now goes by the name of public opinion. Madison was talking about public opinion, all right, but about opinion manifested and solidified over decades of time. A shift by the general public from one opinion of the Constitution to another would, I believe, have had no influence whatever on Madison, unless the shift had proved itself permanent by remaining unchanged for years and years. This concept is, in a way at least, the opposite of original intent or original meaning of any kind: it appears to contemplate that the meaning of the document can change because of what people think about it years after its drafting and enactment. The idea, if taken literally and pushed to its logical conclusion, is dangerous in the extreme. It could justify almost any sort of excess, any sort of encroachment on the rights of minorities, for example, if enough of the public desired it for a long enough time. That is not the sort of thing, I think, that Madison had in mind.

Let’s be clear, too, that Madison’s idea of precedent, in the sense of consistent governmental practice, was not simply invented in 1816 for political purposes. Madison had consistently taken this same position. Indeed, in *Federalist No. 37*, he had this to say: “All new laws,

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<sup>92</sup> Letter from James Madison to Marquis de LaFayette (Nov. 1826), in 3 Letters and Other Writings of James Madison, *supra* note 53, at 538, 542.

<sup>93</sup> *Id.*

<sup>94</sup> Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), in 3 Letters and Other Writings of James Madison, *supra* note 53, at 143, 145.

<sup>95</sup> Powell, *supra* note 21, at 941.

though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."<sup>96</sup> This passage contains at least the germ of the Madisonian concept of precedent, and it was written long before any particular concrete issues of constitutional interpretation had arisen.

I could go on in some length, but you will be relieved to know that I won't. I shall content myself with just a few other references to Madison's position on constitutional questions of the day. One such question, hotly debated, was that of the protective tariff.<sup>97</sup> Madison thought that forty years of history had settled this question, if indeed it amounted to much in the first place. The First Congress had affirmed the power to enact tariff legislation for the purpose of protecting domestic manufactures, and a continuous course of legislation since that time had confirmed this decision. Madison therefore felt himself compelled to disagree strongly with Calhoun and others who insisted that the power to impose taxes on imports had to be exercised for the purpose of raising revenues only. In articulating his position, Madison again appealed to precedent, in the sense in which I have used that word. "No novel construction however ingeniously devised, or however respectable and patriotic its Patrons, can withstand the weight of such authorities, or the unbroken current of so prolonged & universal a practice."<sup>98</sup>

Madison also vigorously opposed Calhoun on the issue of nullification.<sup>99</sup> Such an idea, Madison thought, was a dangerous innovation and completely inconsistent with the history of the 1780s. He warned that we must go "back to times & scenes in which I was often an actor, always an observer; & which are too much overlooked in discussing the objects & meaning of our Constitution."<sup>100</sup> Nullification, Madison thought, would repeal the achievement of 1787. The Constitution should be understood in light of the evils it was designed to cure: commerce and navigation were in disarray, the states were passing retaliatory legislation against each other, and the nation, if it was a nation, was being given no respect abroad. To countenance the

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<sup>96</sup> The Federalist No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

<sup>97</sup> See generally Edward McNall Burns, *James Madison: Philosopher of the Constitution* 114-15 (1938) (discussing Madison's position on protective tariffs).

<sup>98</sup> Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), in 9 *The Writings of James Madison*, supra note 4, at 316, 333.

<sup>99</sup> See generally Burns, supra note 97, at 117-19 (discussing Madison's views on nullification and secession).

<sup>100</sup> McCoy, supra note 12, at 133 (quoting Letter from James Madison to Edward Everett (Nov. 14, 1831)).



possibility of nullification, Madison said, would turn the country into "a mere league of independent sovereigns,"<sup>101</sup> a concept completely at war with what the nation had decided to do when it ratified the Constitution in the first place.

Less than six years before his death, Madison himself summed up his approach to constitutional interpretation in a letter. The most pertinent considerations, he said, were the following three:

1. The evils & defects for curing which the Constitution was called for & introduced.
2. The comments prevailing at the time it was adopted.
3. The early, deliberate & continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies.<sup>102</sup>

This formulation is deeply rooted in history. It does not, to be sure, mention the subjective intentions of the Framers at Philadelphia, or, for that matter, anybody else's subjective intentions. It focuses rather on the objective meaning that the nation must reasonably be understood to have given the words of the Constitution at the time of their adoption. Nor is there much comfort here for those who thought that the Constitution ought to be reinvented for each succeeding generation. Thomas Jefferson had a great deal of sympathy for this view, but Madison was markedly more cautious about new interpretations. He does lay stress on actual governmental practice under the Constitution, but, in his view, the practice must be "early, deliberate & continued."<sup>103</sup>

### CONCLUSION

What can we learn from Madison that is of any use in present-day constitutional decisionmaking? Maybe the answer is nothing. Perhaps the kinds of issues with which Madison dealt are so different that his interpretive criteria cannot easily be transposed into the present generation. Most of the great constitutional questions with which the courts grapple nowadays seem to be related to limitations on the power of government, limitations contained either in the original Bill of Rights or in the great Civil War Amendments. This was not what constitutional argument was mainly about in the first decades of our history. The argument then was about distribution of power between the federal government and the states, specifically whether certain

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<sup>101</sup> Id. at 135 (quoting Letter from James Madison to Andrew Stevenson (May 2, 1827)).

<sup>102</sup> Letter from James Madison to M.L. Hurlbert (May 1830), in 9 *The Writings of James Madison*, supra note 4, at 370, 372.

<sup>103</sup> Id.

powers asserted by Congress fell within the delegation made by Article I, Section 8. This kind of constitutional question has been largely unmentioned in this country for many years now, with the exception of the celebrated case of *United States v. Lopez*,<sup>104</sup> indicating that there are *some* limits on the commerce power. Nor did Madison have a great deal of confidence in the courts. The federal judges, after all, had been enthusiastic about enforcing the odious Alien and Sedition Laws of 1798 and 1799, and Madison complained of the Marshall Court that it was not activist enough. By interpreting the Necessary and Proper Clause so broadly, the Marshall Court, he thought, had unleashed upon the public the most dangerous branch, the Legislature, and freed it of meaningful restraint. Congressional approval of the Bank of the United States, for example, seems to have weighed much more heavily in Madison's mind than the fact that the Supreme Court had upheld the Bank. Indeed, when Madison finally announced in 1814 that he believed, because of the weight of precedent, that the Bank was constitutional, *McCulloch v. Maryland*<sup>105</sup> had not even been decided.

What would Madison think about the modern debate over "original intent"? He certainly was an advocate for originalism, but in the sense of the original meaning of the document, when viewed against the times in which it was adopted. The kinds of arguments that this approach makes relevant are quite general. They involve broad inferences from the essential structure of the Constitution, from the evils of the 1780s and from the nature of a federal government in general. Through it all, in my view, Madison maintained a generally consistent position. Even when, in his 1791 argument against the Bank, he referred to the failure of a certain proposition at the Convention in Philadelphia, it was not what was said in debate that he cited, but simply the action of the Convention in rejecting a proposal to grant Congress a general power to charter corporations.<sup>106</sup> To those who would still charge Madison with inconsistency—during his own lifetime he was said to have been on every side of every issue—I would reply that anyone who has seen public service, especially in more than one branch of government, state and federal, and who has lived as long as Madison did can be made to seem inconsistent in at least some respects. Maybe this is not a bad thing. A person who is completely consistent can justly be accused of having no new thoughts, and, if one

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<sup>104</sup> 115 S. Ct. 1624 (1995).

<sup>105</sup> 17 U.S. (4 Wheat.) 316 (1819) (upholding Congress's power to incorporate a national bank).

<sup>106</sup> See 2 Annals of Cong. 1896-97 (1791) (recording Madison's argument that Constitution granted no federal power to incorporate Bank).

is wrong, consistency is hardly a good thing. If Madison did change his view from time to time, we can cite in his favor no less an authority than Cardinal Newman, who remarked that "to improve is to change, and to be perfect is to have changed often."

I can't claim that Madison changed often enough to be perfect, but it does seem to me that he exhibited a healthy sense of practicality in approaching the great constitutional questions that confronted him. Practicality, after all, is not a bad thing in government. If the government doesn't work, if the Constitution is interpreted in such a way as to make it so rigid as to be completely unable to adapt, government will fail of its essential purpose. Maybe those who construe the Constitution could use a little more practicality and a little less theory. However that may be, and even if you think Mr. Madison may have bent a little from time to time and fallen into some degree of inconsistency, I would urge that you judge him with some degree of charity and tolerance. You might even go farther, and use some charity and tolerance in judging those who hold office in our own time.