

Mr. Madison's Intentions:  
Constructing the U.S. Constitution from 1787

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## Abstract

In March of this year, the United States Supreme Court began to hear arguments over the constitutionality of President Obama's signature piece of legislation, the Patient Protection and Affordable Care Act, passed in March of 2010. The central question of the case is whether the federal government can compel American citizens to purchase health insurance through an individual mandate<sup>1</sup>. Twenty-six states are currently suing the federal government over this issue. The decision of this case will have a tremendous impact on American lives, which begs further questions over the Court's role—both intended and assumed—in the federal government as it relates to the people.

There are a number of important theories about the appropriate role of the Supreme Court as well as the correct method for interpreting the Constitution. Justices such as Clarence Thomas and Antonin Scalia subscribe to a theory of interpretation known as "originalism." This theory claims that there is a knowable, original meaning of the Constitution, from which modern judges should not stray. Originalist justices purport to carry out the meaning of the Constitution when it was written in 1787 without injecting present-day value judgments into the document<sup>2</sup>.

In contrast to the originalist doctrine, living constitutionalism assumes that the Constitution is an evolving document, which changes to fit the times. Living Constitutionalist justices believe that the great value of the American Constitution is in its flexibility and ability to adapt to new conditions within the United States. It should be noted that the term, "living constitution", has become a somewhat pejorative term; it is not intended in a negative light here<sup>3</sup>. Rather, this terminology is the best way to encompass a variety of non-originalist theories.

This study investigates the advantages and disadvantages of both originalist and living constitutionalist theories of American jurisprudence, from a historical perspective. Did the "Father of the Constitution," James Madison, envision an adaptable or a more stable, unchanging, Constitution? By studying Madison's writings before, during, and after the Constitutional Convention, a clear understanding of the government that he set out to design can be discerned.

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<sup>1</sup> Adam Liptak, In Court, Sharp Questions on Health Care Law's Mandate," *The New York Times*, 27 March 2012, <[www.nytimes.com](http://www.nytimes.com)>.

<sup>2</sup> Robert H. Bork, *The Tempting of America* (New York, New York: The Free Press, Division of Macmillan, Inc.; 1990).

<sup>3</sup> Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution* (New York, New York: Alfred A. Knopf, Random House; 2005).

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## Chapter 1: Introduction and Today's Court

### I. Introduction

In March of this year, the United States Supreme Court began to hear arguments over the constitutionality of President Obama's signature piece of legislation, the Patient Protection and Affordable Care Act, passed in March of 2010. The central question of the case is whether the federal government can compel American citizens to purchase health insurance through an individual mandate<sup>4</sup>. Twenty-six states are currently suing the federal government over this issue. The decision of this case will have a tremendous impact on American lives, which begs further questions over the Court's role—both intended and assumed—within the federal government as it relates to the people of this country.

Health care is not the only major issue that the Supreme Court will rule on in this session. The Court passes judgment on all of the most controversial issues in American society today—the limitations on freedom of speech, the right to bear arms, the rights to privacy and abortion, and the conditions for a federally recognized marriage. In this year alone, the Court will be petitioned to hear approximately ten thousand different cases. From those requests, the Court will hear oral arguments and deliver decisions for seventy-five or eighty cases<sup>5</sup>. The court case over the Patient Protection and Affordable Care Act may have received intense media attention during oral argument, but this case is hardly the only important case of the 2011-2012 session. In many of these cases, the Court is asked to decide on the constitutionality of both federal and state action, but it is equally important to question the constitutionality of the *Court's* actions.

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<sup>4</sup> Adam Liptak, In Court, Sharp Questions on Health Care Law's Mandate," *The New York Times*, 27 March 2012, <[www.nytimes.com](http://www.nytimes.com)>.

<sup>5</sup> "Frequently Asked Questions," The Supreme Court of the United States, <<http://www.supremecourt.gov/faq.aspx#faqgi9>>.

In theory, Supreme Court justices are supposed to be apolitical; they are to serve their country by interpreting the American Constitution as it applies to the individual cases that come before the court. In practice, objective justices are non-existent; each justice owes his or her seat to a president who selected them on the basis of their judicial and political values. Outside of whether a justice identifies as a Republican or Democrat, justices are often ascribed a variety of descriptors—“originalist,” “textualist,” “living constitutionalist,” “strict constructivist,” “broad constructivist.”

There are a number of important theories about the appropriate role of the Supreme Court as well as the correct method for interpreting the Constitution. Justices like Clarence Thomas and Antonin Scalia subscribe to a theory of interpretation known as “originalism.” This theory claims that there is a knowable, original meaning of the Constitution, from which modern judges should not stray. Originalist justices purport to carry out the meaning of the Constitution when it was written in 1787 without injecting present-day value judgments into the document<sup>6</sup>.

In contrast to the originalist doctrine, living constitutionalism assumes that the Constitution is an evolving document, which changes to fit the times. Living Constitutionalist justices believe that the great value of the American Constitution lays in its flexibility and ability to adapt to new conditions within the United States. It should be noted that the term, “living constitution”, has become a somewhat pejorative term in some circles; it is not intended in a negative light here<sup>7</sup>. Rather, this terminology is the best way to encompass a variety of non-originalist theories.

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<sup>6</sup> Robert H. Bork, *The Tempting of America*, (New York, New York: The Free Press, Division of Macmillan, Inc.; 1990).

<sup>7</sup> Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution*, (New York, New York: Alfred A. Knopf, Random House; 2005).

For historians, any attempt to identify the specific intentions of the founders is fraught with insuperable problems. The central problem lies in identifying exactly on whose intentions modern judges should focus. Of the fifty-five delegates who attended the Constitution Convention in Philadelphia in 1787, there was little agreement among them on what exactly they had created. Moreover, the Constitution contains compromises that did not satisfy the desires of all, or even any of those delegates present. Only thirty-nine representatives actually voted in favor of the resulting document, indicating the lack of a uniform “original intent.” Additionally, a few of the most significant revolutionary characters were not actually present at the Convention itself. Thomas Jefferson and John Adams were each on ministerial missions to France and Great Britain, respectively. Patrick Henry boycotted the convention, and Samuel Adams and John Hancock were also conspicuously missing. The problem here is that it would seem counterintuitive to discuss the original intentions of the framers, when some of the best minds of the day were not even present<sup>8</sup>.

Aside from the Constitutional Convention itself, the states held their own ratifying conventions to debate and approve or reject the Constitution as written. Each state voted on the document based on its own criteria, and many states recommended amendments to the original text. Some of those amendments made their way into the Bill of Rights. Even if their suggested amendments did not make it into the first ten Amendments, the ratifying conventions left an extensive paper trail of debate notes. Originalists might wish to use these debate notes as a reservoir of original intent or understanding, but rather than suggesting that there was agreement

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<sup>8</sup> It should be noted that Thomas Jefferson was well informed of the convention. James Madison was arguably Jefferson’s closest confidante, who ensured that Jefferson was fully aware of the progress of the new nation. Jefferson certainly had an influence on Madison, and therefore indirectly on the conference in Philadelphia, but this was only an indirect influence, given the time delay in delivering letters between France and the United States in the eighteenth century.

on the Constitution, the ratifying conventions make it abundantly clear that there was no consensus. Rather than providing clarity, these debate notes further muddy the waters.

There is one figure from the Constitutional Convention, who deserves special attention when historians and political scientists alike consider the present role of the Supreme Court. James Madison had been working tirelessly for months prior to Convention on a design to improve and strengthen the federal government. Madison played an integral role in developing the content of the Virginia Plan, which would be the framework for all of the ensuing debates during the Convention. This plan was the first blueprint for the particular architecture of a new government. Madison's design took into account the practical problems facing the embryonic nation as well as advanced philosophies on the liberties of man and the role of a national government. Aside from preparing his own opinions for the ultimate convention, Madison was also one of the major actors in organizing the Convention and recruiting some of its most important players, including the future first president, George Washington. Following this immediate impact on the convention, Madison continued to influence the political system of the United States as an author of the Federalist papers, a key Federalist orator in the Virginia ratifying convention, as a leader in the House of Representatives, as a personal advisor to President Washington, a cabinet-member under President Jefferson, and finally, as the fourth President of the United States. As one historian has commented, "Had he possessed personal glamour, the next political phenomenon in America [after Federalism] would have become known as Madisonian democracy [as opposed to Jeffersonian democracy]."<sup>9</sup> Madison's influence on the post-Revolutionary era cannot be overstated.

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<sup>9</sup> Irving Brant, *James Madison: Father of the Constitution, 1787-1800*, (New York, New York: The Bobbs-Merrill Company Inc., 1950), 305.

Accordingly, in order to have any substantive discussion over the intentions of the founding generation, it is crucial to consider *Mr. Madison's* intentions and the intellectual journey he took in envisioning the new American government. Madison will remain the focus of this discussion, because of his central role in designing the Constitution and in actually bringing forth a workable government from the document that was signed in Philadelphia at the end of the summer in 1787. This study investigates the advantages and disadvantages of both originalist and living constitutionalist theories of American jurisprudence, from a historical perspective. Did the “Father of the Constitution,” envision an adaptable or a more stable, unchanging, Constitution?<sup>10</sup> By studying Madison’s writings before, during, and after the Constitutional Convention, a clearer understanding of the government that he set out to design may be discerned.

This study will begin with a more detailed explanation of the major branches of American jurisprudence; it will attempt to clarify overlapping terminology and explain the relevant Court history related to each theory. This explanation is necessary in order to explain what, exactly, historians, and both political and legal commentators are talking about when they rail against either “originalists” or “living constitutionalists.” Attention will then be turned to an in-depth study of James Madison’s preparations for the Constitutional Convention, the Convention itself, and the ratification debates following the Convention. Madison was a primary contributor to the Federalist cause, as one of three authors of the *Federalist Papers*. Madison’s role in the first few American administrations will also be addressed. Finally, with both judicial philosophy and the history of James Madison in mind, this study will turn to the problems that all of the major judicial theories face. Finally, a hybrid approach, which appreciates the inherent

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<sup>10</sup> Irving Brant, *James Madison: Father of the Constitution, 1787-1800*, (New York, New York: The Bobbs-Merrill Company Inc., 1950).



problems with the traditional philosophies, will be put forth, with the hopes of presenting a historically informed view of the Supreme Court today.

It should be pointed out, that this is a controversial subject. Today, the American people face a host of complex problems and challenging decisions. It seems that the country is once again, as it has been many times before, at a crossroads. The country is at such a crossroads over the issue of publicly funded health care, over the fundamental issues of citizenship and equality for immigrants or for homosexuals, over the proper manner of dismantling a debt bomb, and over the nation's appropriate role in a globalized world. The answers to these questions cannot be simple, and it is natural for a current population, faced with controversy and widespread uncertainty about the future, to look to history for lessons as to how to respond to the current situation. The twenty-first century did not come with instructions, but the nation's history does provide useful cues as to what had worked in the past. For historians, this history lesson is a difficult one to undertake; it is simply unknowable how James Madison or George Washington *would have* responded to the present situation. Historical figures can *only* be creatures of the time and place in which they actually lived, which is one of the reasons why there are so many objections to originalism. Historical figures' decisions and thought processes may be helpful to present day observers, but today's situation cannot be pressed upon them. It cannot be said, *for sure*, whether Thomas Jefferson would have voted for Barack Obama or not. Thus, the insight and advice that James Madison may present to twenty-first century Americans is innately and unavoidably limited.

On the other hand, from a political scientist's perspective, history can be an incredibly useful tool for modern society, depending on who is writing that history. Constructivists in

particular believe in the value of history in determining a country's future decisions<sup>11</sup>. If this society has decided that history shall be an important part of the decision-making process, then historians can hardly protest. Furthermore, the design of the Supreme Court, as well as its assumed role in the American political arena, also demands at least a moderate consideration of history.

Herein lays the dilemma of this entire discussion. There is only so much information that can be garnered from historical text and primary resources; at the end of the day, James Madison cannot tell Justice Scalia how to form a court opinion. Yet, history can be a very valid and fruitful source of political knowledge and understanding. The discussions of this paper, therefore, walk a fine line between the two disciplines of history and political science.

## II. Definitions of the Dominant Theories of Interpretation

Throughout American history, there have been a number of judicial theories that have come to the fore, and subsequently receded, only to be replaced by a new standard of judicial interpretation. Today, the terms "originalism" and "living constitutionalism" appear to dominate the debates, but there are some fine distinctions within these broad terms that must be explained before proceeding to analyze the historical merits of each position. "Originalism" will be assessed first.

### A. Originalism

The term "originalism" has as many interpretations as it has enthusiastic advocates and harsh critics. It is a loaded word, with many implications and consequential judgments attached

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<sup>11</sup> Karin Fierke, "Constructivism," in Tim Dunne, et al. *International Relations Theories: Discipline and Diversity*, (Oxford, United Kingdom: Oxford University Press, 2007).

to it. Every legal scholar who has attempted an analysis of the originalist doctrine begins by trying to define what it is, but the core meaning of “originalism” is often skewed or hidden from view because of the political valences associated with the term. The objective at this point is not to pass judgment on the doctrine, but to highlight its core components and to analyze how different individuals interpret the effects of such components.

At its most basic, originalism is a judicial philosophy that depends on the original meaning of the American Constitution to interpret current laws. Originalists rely heavily upon the text of the document and are concerned both by what the Founding Fathers wrote, as well as what their contemporaries thought the words of the Constitution meant at the time of ratification. This view freezes the Constitution at the time of its drafting and ratification, and it also freezes the wording of each Amendment at the time of their ratification.

Lawrence Solum points to four primary “commitments” of the theory. He provides a basic definition that is not exhaustive of all of the elements of originalism, but it does include the most salient and critical aspects of the doctrine:

(1) the linguistic meaning of each constitutional provision is fixed at the time it is framed and ratified; (2) the original meaning of the Constitution is the original public meaning of the words and phrases as combined by the rules of syntax and grammar; (3) the linguistic meaning of the Constitution is part of the supreme law of the land; and (4) there is a real distinction between constitutional interpretation (which discovers linguistic meaning) and constitutional construction (which translates that meaning into legal effects).<sup>12</sup>

The critical piece outlined by Solum’s definition is the stress that he places on the technical, 1780’s definitions of the language used within the body of the Constitution. This emphasis on

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<sup>12</sup> Solum includes at the end of his definition a distinction between interpretation and construction in order to clarify the difference between simply divining what the Constitution means, and how it applies to real circumstances. Consequently, this definition acknowledges that there may be some discrepancy between a pure understanding of the Constitution and how it can be applied to the actual cases that are read and decided by the Supreme Court. Robert W. Bennet and Lawrence B. Solum, *Constitutional Originalism: A Debate*, (Ithaca, New York: Cornell University Press, 2011), 77.

historic word choice demands that Supreme Court justices interpret the Constitution on the basis of the precise definitions of the words used within the document in 1789. In order to discover what the Founders intended, justices therefore need to base their interpretations on a thorough understanding of dictionaries and the public vernacular between the Constitutional Convention in 1787 and the full ratification of the document in 1790. This implies that with sufficient study, it is possible to determine one accurate and fixed definition for the language of the Constitution. It also implies that there would have been some kind of consensus about that definition.

There are a number of significant divisions within the originalist tree of thought. The primary split exists between “intentionalism” and “textualism.” With intentionalism, the burden of proof lies in identifying the true intentions or motivations of the Founders behind the clauses of the Constitution. Intentionalists claim that in order to correctly adjudicate Supreme Court cases today, the justices must divine what the Founders had in mind when they wrote in such vague and rhetorical language. As mentioned in the introduction, this is laden with problems that are at the heart of originalist interpretations. It sounds all well and good to say that a justice wishes to only use the Framers’ intent, but how can a justice go about doing so? She cannot possibly know how Edmund Randolph would feel about wire tapping, and there are many other opinions aside from Edmund Randolph’s that should be considered. Perhaps Mr. Randolph would have disagreed with say, James Wilson, both of whom were active participants at the Constitutional Convention. An even more challenging question for intentionalists to answer is whether Anti-Federalist opinions should be considered at all. Many Anti-Federalists, like Patrick Henry, boycotted the Constitutional Convention, but surely that does not mean his opinions are completely worthless. Indeed, intentionalists have an impossible burden to carry, which is why most originalists may in fact count themselves with another sub-group of originalism, textualism.

Textualism, unlike intentionalism, relies solely on the words that were actually transcribed back in 1787, and in each of the years that an Amendment to the Constitution was passed. The important feature of a Constitutional clause, for the average textualist, is what words were written down and what they meant to the average American at the time they were written. Rather than focusing on the Founders' intent, the textualists focus on everyone else in post-colonial America. Textualists treat the Constitution as a legal document. Consider, for a moment, how other legal documents' language is interpreted. When a word is used that has taken on a new meaning since the document was first written, the word is read as it was originally defined. Textualists claim that with the Constitution, an understanding of the words' meanings in 1787 must be observed when deciding Supreme Court cases today.

Justices Antonin Scalia and Clarence Thomas are perhaps the most widely known textualist-originalists today. Both maintain that the original meaning of the Constitution is supreme, and that as a result "Originalists have nothing to trade."<sup>13</sup> According to Scalia, textualists' mode of interpretation is absolutely objective. He honestly believes, or at least claims to believe, that he is only enforcing a legal document, whose meaning was secure and unchanging at the time it was signed. John Hart Ely additionally makes the argument that there are "strict" and "moderate" textualists, meaning that there are some textualists who allow for some grey area.<sup>14</sup> Justice Sandra Day O'Connor may fall into this category.<sup>15</sup> Her jurisprudence is regularly scorned by the "strict" textualist Justice Scalia in his case opinions; her own ideas about judicial interpretation will be addressed shortly.

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<sup>13</sup> A quote by Antonin Scalia, in Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court*, (New York, New York: Anchor Books, A Division of Random House, Inc., 2008), 66.

<sup>14</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge, Massachusetts: Harvard University Press, 1980).

<sup>15</sup> Sandra Day O'Connor, *The Majesty of the Law*, (New York, New York: Random House Publishing, 2003).

There are many other terms associated with the general idea of originalism, and there is not room within the confines of this study to enumerate them all. However, one last term, “interpretivist,” should be noted. “Interpretivism” is the terminology that John Hart Ely uses to identify originalist thought. At the time of his writing his seminal work, *Democracy and Distrust*, interpretivism was the dominant mode of thought for most of America, but there are very little substantive differences between interpretivism and originalism.<sup>16</sup> The shift in terminology only indicates a shift in the overall debate on judicial interpretation, but not on the content of this particular set of theories.

#### B. Living Constitutionalism (Or, Non-Originalist Theories)

In contrast to the relatively specific definitions of each branch of originalism, “living constitutionalism” is not so well-defined. In general, living constitutionalism is used as the primary mode of thought for the opposition to originalism, but it is a very general term overall. Within most contexts, living constitutionalism, judicial activism, and non-originalism are all basically synonymous. According to former Attorney General Robert Bork:

One of the more entertaining features of the literature [about American jurisprudence] is that the revisionists regularly destroy one another’s arguments and seem to agree only on the impossibility of undesirability of adherence to the Constitution’s original meaning.<sup>17</sup>

Bork’s mocking comment is clearly not a very objective observation; Bork was one of the initial leaders of modern originalism and he is still viewed as an intellectual leader of the movement. However, his commentary sheds light on the fact that there is no unified understanding of which ideology should oppose and challenge originalism. As a result, living constitutionalism, or non-

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<sup>16</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge, Massachusetts: Harvard University Press, 1980).

<sup>17</sup> Robert H. Bork, *The Tempting of America*, (New York, New York: The Free Press, Division of Macmillan, Inc.; 1990), 141.

originalism, is the *most* appropriate term to use. Even Justice Steven Breyer, a strong living constitutionalist if there ever was one, uses the term living constitutionalism in his book, *Active Liberty*. Breyer admits that the term has taken on a pejorative tone in recent years, because of the Republican smear campaign against this brand of judicial ideology. Yet, Breyer still goes on to use the term, simply because of the lack of another more appropriate descriptor.<sup>18</sup>

The primary difference between the originalists and the living constitutionalists is that while the originalists claim that the Constitution is their only source of influence, living constitutionalists are comfortable turning towards a number of other sources and rationales in their rulings. Critics of originalism posit that such an interpretation binds judges inappropriately by stunting the growth of the Constitution, and that originalism exists only as a justification for conservative judges' political decisions. Such critics insist that originalism was designed only to oppose the liberal doctrine of the Warren Court, and especially the decision of *Roe v. Wade*. This line of reasoning further explains that the Constitution was specifically intended to be an adaptable framework for government; the framers did not intend to restrict the future of American society by imposing their views on the future public on the new country. If the doctrine of original intent is concerned with the permanent fixture of the meaning of the Constitution, living constitutionalism is concerned with allowing judges to interpret the Constitution to fit modern society.

For Breyer, the two key elements in his decision-making process are purpose and consequence. By this, he means that attention must be paid to the purpose of the law in question and the consequence of any given ruling by the high Court. Even good laws may not have been passed for good and just reasons, and even a "correct" ruling may not garner the appropriate

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<sup>18</sup> Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution*, (New York, New York: Alfred A. Knopf, Random House; 2005), 34.

consequence. While originalists may charge that this exercise is extremely subjective, Breyer replies that textualist, originalist, and literalist approaches all possess “inherently subjective elements” as well.<sup>19</sup> He asks his reader to consider this charge of subjectivity further, probing, “How does reliance on history bring about uncertainty or objectivity?”<sup>20</sup>

In general, non-originalists may be looking for particular values to be found in and defended by the Constitution. John Hart Ely calls this version of living constitutionalism, “value-protecting.”<sup>21</sup> The argument for such value-protections follows something along these lines: The Constitution, although it created one of the first, liberal democracies in the modern world, is not an inherently liberal legal text. While the Founders did their best to create a new government founded on equality and freedom, society was simply not ready, if not unwilling, to embrace racial and gender equality. As a result, Supreme Court justices today should not rely solely on the text of the Constitution, because there may be other illiberal and unfair clauses in the Constitution, lurking in the background. This line of reasoning reveals some of the most perplexing problems for political scientists studying democratization processes today. As Larry Diamond points out, democracy is not automatically accompanied by tolerance, freedom, and civil liberties. One would hope that democracies would adopt liberal values, but this is not always the case. Voting “democracies” may in fact be very illiberal in their treatment of women and minorities; there may be authoritarian states whose citizens do enjoy both human and civil rights.<sup>22</sup> The point here is that many living constitutionalists are interested in continuing to purify the American democratic experiment. Justice Breyer summarizes this process: “In sum, our

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<sup>19</sup> Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution*, (New York, New York: Alfred A. Knopf, Random House; 2005), 127.

<sup>20</sup> Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution*, (New York, New York: Alfred A. Knopf, Random House; 2005), 126.

<sup>21</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge, Massachusetts: Harvard University Press, 1980).

<sup>22</sup> Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World*, (New York, New York: Times Books 2008).



constitutional history has been a quest for workable government, workable democratic government, workable democratic government protective of individual personal liberty.”<sup>23</sup> In Justice Breyer’s estimation, the objective of the Supreme Court should be to ensure that an “active liberty” can take root in American society, even when those liberties were not actively pursued by the legislature, or by the Founders. Justice Thurgood Marshall famously commented that, “the true miracle was not the birth of the Constitution, but its life” during the bicentennial celebration of the Constitution.<sup>24</sup> For Justice Marshall, the Constitution that was drafted in 1787 was certainly imperfect, but its survival and adaptation are its greatest strengths.

In contrast to Justice Breyer’s emphasis on the purpose of various laws and the consequences of any given Court ruling, Justice Souter championed a “third way” that instead focused on *stare decisis*. *Stare decisis* is a principle that relies on the relevant history of the Court’s rulings in similar, or related, cases; it literally means to “stand by that which is decided” in Latin. This doctrine is grounded in the belief that Supreme Court rulings are supposed to be treated as settled law based on common law practice. Accordingly, most justices respect *stare decisis* to some extent and reference previous rulings throughout their decisions. While most justices may pay some attention to prior court rulings, Justice Souter placed *stare decisis* at the center of his judicial philosophy. Rather than focusing on the Constitution in 1787, Justice Souter’s position allowed for an interpretation of the document as each Court in American history had seen it at the time they were asked to rule. Despite the fact that some originalists may respect *stare decisis* in some cases, Souter’s view is still a non-originalist position, because it places more emphasis on contemporary court rulings than it does on the era of the founding. Furthermore, the “purist” originalists, such as Justice Clarence Thomas, do reject the doctrine of

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<sup>23</sup> Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution*, (New York, New York: Alfred A. Knopf, Random House; 2005), 34.

<sup>24</sup> Peter Irons, *A People’s History of the Supreme Court*, (New York, New York: The Penguin Group, 1990), 463.

*stare decisis* entirely, arguing that a poorly made decision should not be allowed to stand in future courts. It is for this reason that critics of originalism maintain that the philosophy of originalism was designed as a tool for overcoming the power of *stare decisis*, so that *Roe v. Wade* might be overturned outside of common law standards.

Hence, there are many potential classifications of living constitutionalists. The defining characteristic of this group is a belief that it is acceptable to look beyond and outside the text of the Constitution to interpret today's laws. After all, even James Madison could not have predicted the eventual dominance of the cell phone or the internet, so there is no way he could possibly have written any Constitutional clause to protect, or prohibit their use. As a result, Supreme Court justices *must* use other sources for interpreting modern cases.

Despite the wide array of other potential sources for judicial interpretation at the living constitutionalists' disposal, Chief Justice Rehnquist did make a significant distinction between what he calls a "Holmesian" theory and a biological theory of living constitutionalism. The former was named for Justice Oliver Wendell Holmes, who sat on the court from 1902 until 1932. Rehnquist says that this version of non-originalism implies that the Framers designed the Constitution, knowing full well that they could not and would not be able to predict the full potential or development of.<sup>25</sup> In an era when political campaigns of any kind were frowned upon, it would have been impossible for any of the Founders to imagine needing to regulate political contributions for example<sup>26</sup>. America's political system had grown much bigger than the Founders could have envisioned; this is a truism with which both parties can agree. The contrast,

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<sup>25</sup> Robert H. Bork, *The Tempting of America*, (New York, New York: The Free Press, Division of Random Macmillan Inc., 1990).

<sup>26</sup> In the eighteenth and nineteenth century, it was viewed as extremely egotistical to "run" for any elected office. Some politicians of this age did engage in some campaigning, but their campaigns were always discreet and involved proxies for the candidate himself. Newspaper editors and friends of the candidate could write favorably about their candidacy to ensure that their favorite candidate received votes, but the candidate himself would never have made a stump speech or pursued a campaign trail. In this sense, the candidates, although they may have desperately wanted to position, had to play hard to get with the public, in order to appear humble and fit for the job.

therefore, lies in living constitutionalists' willingness to embrace this change and accept the judicial ramifications.

In contrast to this easily digested form of living constitutionalism, Rehnquist asserts that there is a second, more damaging variant of living constitutionalism that he calls the biological version. Rehnquist calls this "living constitutionalism with a vengeance."<sup>27</sup> According to this biological interpretation, the Framers intentionally planted the Constitution as a seed, which they intended to grow, alongside the development of the country. Rehnquist views this particular version of non-originalism as a threat, because it apparently has no limits. Whereas Holmes' view is at least limited by the cases that come before the court, the biological living constitutionalism can grow to heights that are not even precipitated by a specific court case. Despite Rehnquist's hostility, this version was in fact supported by Thomas Jefferson, who surmised that "the earth belongs to the living and not to dead." Consequently, Jefferson wrote to Madison explaining that constitutions should ideally expire every nineteen years, so that each generation might have a chance to affect the changes they wished to see in their own governments.<sup>28</sup>

Originalists will counter this argument by explaining that they do agree that the Constitution is an adaptable document; the heart of the disagreement therefore lies in the *mechanism* for changing or adapting the government. The constitution can be adjusted to fit modern conditions and to incorporate modern concerns through the amendment process, which is more appropriate, according to originalists, because it is dependent on elected officials, rather than the unelected justices of the court. Nevertheless, the amendment process is unwieldy, and

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<sup>27</sup> Robert H. Bork, *The Tempting of America*, (New York, New York: The Free Press, Division of Random Macmillan Inc., 1990).

<sup>28</sup> Thomas Jefferson to James Madison, 4 February 1790, Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815*, (Oxford, United Kingdom: Oxford University Press, 2009), 149-150.

nearly impossible to initiate and then sustain through ratification. Furthermore, a court's ruling may come much more quickly than any constitutional amendment. The debate over the merits of these two positions is essentially endless.

### C. Broad vs. Strict Construction

The differences between originalists and living constitutionalists are often conflated with another related debate between strict and broad construction of the Constitution. Almost as soon as the Constitution was written, a debate emerged over whether the text should be interpreted "loosely" or "strictly." The difference between these two modes of interpretation is analogous to a literal or metaphorical interpretation of a novel or poem. Strict construction is most often associated closely with originalism, because strict construction seems to imply a closer relationship to the text; whereas loose construction of the Constitution is frequently associated with living constitutionalism. There are definitely overlaps between the strict construction and originalism, and between loose construction and living constitutionalism; however, that does not mean that they are synonymous or interchangeable.

### D. Political Affiliations

Aside from the confounding variable of strict-versus-loose construction, judicial philosophies can also be conflated with political opinions. Typically, originalism is associated with the conservative movement and the Republican Party, while living constitutionalism is seen as a liberal and Democratic philosophy. For the most part, these descriptions tend to hold some truth. Based on the current nine justices sitting on the high Court, political affiliation does dictate whether a justice will fall into a living constitutionalist or an originalist camp in most cases.

Justices Clarence Thomas and Antonin Scalia represent the most extreme originalists. Chief Justice John Roberts and Justice Samuel Alito are also firmly in the originalist camp but they are slightly less flagrant in their disregard of their fellow Justices' opinions than Thomas and Scalia. All four were nominated by Republican presidents. On the left, Justices Ruth Bader Ginsberg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan could all be considered living constitutionalists, and all four were nominated by Democratic presidents. The current swing vote, Justice Anthony Kennedy, seemed to move farther to the left as the court was packed with more hard-line conservatives. He was nominated by a Republican, President Reagan, but he has maintained a central political position.

Based on this survey of the current members of the court, it is unfortunately obvious that political leaning does often dictate judicial philosophy. However, these strict party affiliations occasionally fall apart. One recent development in the study of original intent that is of particular interest, is that in recent years, a number of liberal scholars have started to call attention to the potential for a *liberal originalism*. As outlined in the preceding paragraphs, originalism is typically only subscribed to by the most conservative justices and legal philosophers who base their analysis on the state of affairs in the new United States in 1787-1790. As Loth, Rosen, and Bravin have all pointed out in the last year, liberals can claim a piece of originalism for their own, by focusing not on the achievement of the founding revolutionary generation, but on the amendments written and ratified at the end of the Civil War. Originalism in its most pure form does require an examination of each component part of the Constitution, including its later amendments. Focusing on the Thirteenth, Fourteenth, and Fifteenth Amendments allows a very progressive-originalist doctrine to emerge that supports radical redistribution of wealth. This bodes well for modern liberals attempting to justify more progressive income taxes, and the

potential for such an ideology to take root presents the opportunity for a much more dynamic national conversation about originalism. This “liberal-originalism” proves that the originalist argument can be used for liberal ends, and the reverse is also true.<sup>29</sup>

The *Dred Scott vs. Sandford* decision of 1857 is universally reviled by both liberals and conservatives, Democrats and Republicans. Robert Bork calls it the single “worst constitutional decision of the nineteenth century.”<sup>30</sup> On the surface, most Americans despise this decision because of its validation of slavery. However, Bork points out that this ruling is a perfect example of judicial activism run amok. Bork’s primary issue with the *Scott* decision is that Chief Justice Taney transformed the due process clause in a way that added substantive meaning to the clause, where there had only been procedural instruction prior to the ruling. Taney went too far in inserting his own values into the Constitution.<sup>31</sup> While liberals may despise this ruling because of its pro-slavery implications, Bork argues that originalists should also be distressed by Taney’s value-adding opinion.<sup>32</sup> This example highlights one of the originalists’ primary objections to living constitutionalism: It may be appealing to insert one’s own values into the Constitution, but this is only appealing so long as the Justices share one’s values.

While there may be traditional associations between the political parties and judicial theories, it should now be clear that these associations are not set in concrete. There is not a

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<sup>29</sup> Jeffrey Rosen, “If Justice Scalia had His Way: What the United States Might Look Like Under an Originalist Interpretation of the Constitution,” *The New York Times*, 9 January 2011.

<sup>30</sup> Robert H. Bork, *The Tempting of America*, (New York, New York: The Free Press, Division of Random Macmillan Inc., 1990), 28-31.

<sup>31</sup> In the ruling, Taney argues that slavery cannot be outlawed, and he uses the due process clause as support. Taney claims that when Dred Scott’s owner passed into non-slave territory, he would have been deprived of his property without due process if the state did not allow him to keep his slave. There is no explicit right to hold slaves described in the original text Constitution, although the text did not grant blacks the right to vote, either. The Fugitive Slave Act of 1793 enabled slave owners to recover their lost property, if a slave were to pass into any of the other states. However, one could argue that a slaveholder entering a free state *has* in fact broken the law by maintain their slaves in a state where slavery was abolished. Bork asserts that in writing this opinion, Taney had established a right to slavery that had not previously been written to the Constitution.

<sup>32</sup> Robert H. Bork, *The Tempting of America*, (New York, New York: The Free Press, Division of Random Macmillan Inc., 1990).

definite axis between living constitutionalism, liberalism, and the Democratic Party. Similarly, there is no axis between originalism, conservatism, and the Republican Party. In fact, the most interesting cases that have been decided by the high Court are often those cases, which twist and transform these affiliations like a kaleidoscope.

The dichotomies thus far delineated between originalists and living constitutionalists, between liberals and conservatives, between strict constructionists and broad constructionists, is deceptive, because it does not reveal the spectrum-nature of judicial philosophies. Strict originalists like Justice Scalia would certainly disagree with this point, but it is important to see that judicial legal analysts and the judges they study do not simply fall into one of the two camps. At present, only two of the sitting Supreme Court justices follow a categorically originalist approach to their decisions. It is highly doubtful that the remaining seven justices would all classify themselves as living constitutionalists. Justice Sandra O'Connor, who is no longer sitting on the court, figures prominently in Jeffrey Toobin's book, *The Nine*. Toobin casts her as the all important "swing vote" on the court throughout her tenure between 1981 and 2006. Surely, Justice O'Connor did not position herself as a living constitutionalist one day, and an originalist the next. Her book, *The Majesty of the Law* underscores how her personal judicial philosophy was shaped by a number of factors, including her own definitions of how the Supreme Court should utilize its empowering text. She is an originalist to some extent, and yet Justice Scalia would hardly count her among his intellectual allies. He regularly wrote scathing critiques of her case opinions, which were oftentimes closely aligned with the values of most of America. Justice Kennedy seems to have taken over this role since Justice O'Connor's retirement. O'Connor's and Kennedy's swing vote status demonstrates that there are more than two simple camps of "living constitutionalists" and "originalists." An analysis of what

originalism *should* consider will inevitably be directed at only the most extreme group, despite the diversity of judicial opinions available.

### III. Recent History of the Theories

There are a number of ways to break down American history; some educators choose to teach the accomplishments and failures of each presidential administration, others focus on social movements, technological developments, or foreign conflicts. The best educators teach all of these aspects of the development of the American experiment. The Supreme Court's influence is also a fruitful lens, through which students can study the whole history of the country. The Supreme Court's docket and rulings may actually be the ideal mode for teaching American history, because it encompasses and is affected by all of those aspects of American life aforementioned. The cases that come before the Supreme Court's bench indicate exactly what is going on in the nation, including the most pressing, controversial issues. Although movement on those cases may be slow, the Court's litany of cases underscores what was important to Americans during each period of the nation's history.

Having defined the basic outlines of the major judicial doctrines, the question of how these doctrines have influenced the court throughout history will now be addressed. To some extent, these theories have existed, in slightly varied forms, since the signing of the Constitution. At the same time, there are aspects about these theories that are distinctly modern; these features point to particular developments in American history that precipitated a singular court case, or a movement, that fueled the development of these intellectual camps.

Robert Bork identifies a handful of very significant Chief Justices, whose leadership of the Court centralized and consolidated both the Court's and the federal government's power. The



first of these courts was led by Chief Justice Marshall. Marshall literally set the tone for the rest of the Court's history with his landmark decision in *Marbury v. Madison*. By reserving judicial review for the Supreme Court, Marshall shaped the Court's future in monumental fashion. Chief Justice Taney achieved a similar status in Bork's mind, with his unforgivable decision of *Dred Scott*. The decisions handed down during the New Deal era, and those handed down under Chief Justice Warren round out Bork's list of "centralizing" courts.<sup>33</sup> Thus, according to Bork, there has always been a gradual, if unsteady, progression towards a more centralized and powerful court. Bork sees this progression negatively, whereas other commentators may believe this development to be the beneficial growth of democracy.

Nevertheless, while Bork highlights these "spikes" in power consolidation, Justice Scalia asserts that until fairly recently, there was some level of consensus on the Court and a high degree of continuity over the years. In Scalia's view, today's extreme originalism was once considered popular orthodoxy.<sup>34</sup> There was a significant shift in the second half of the twentieth century that changed this orthodoxy and revolutionized the conversations within the judiciary and about the judiciary. This process began in the first half of the twentieth century, but it was accelerated during the latter half. During this period, social issues became increasingly important to Americans, and those issues were reflected by the Court. Chief Justice Warren led a Court that tackled many of the most frustrating and unending Constitutional debates on the meaning of the protections granted by the Bill of Rights. Gordon Wood agrees, arguing that the Bill of Rights was "politically dormant" until the twentieth century.<sup>35</sup> Given that a large majority of today's

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<sup>33</sup> Robert H. Bork, *The Tempting of America*, (New York, New York: The Free Press, Division of Macmillan, Inc.; 1990), Chapter 5.

<sup>34</sup> "A Conversation on the Constitution with Supreme Court Justices Stephen Breyer and Antonin Scalia, Parts I-X," Sponsored by the Federalist Society and American Constitution Society, 5 December 2006, Accessed 26 February 2011, <[www.youtube.com](http://www.youtube.com)>.

<sup>35</sup> Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815*, (Oxford, United Kingdom: Oxford University Press, 2009), 72.

cases revolve around the Bill of Rights and subsequent Constitutional amendments, this statement is surprising, but it contributes substantially to the idea that the Warren Court broke new judicial ground, particularly in the area of individual rights with decisions like *Brown v. Board of Education*, *Miranda v. Arizona*, *Griswold v. Connecticut*, and *Roe v. Wade*. In many ways, the Court moved farther to the left than it ever had, just as the country's political pendulum made the same shift.

Scalia's brand of modern originalism was born under these conditions. With the country, the Court, and most of academia moving to the left, there were a few legal scholars and law students who decided to move to the right. Different authors ascribe slightly different roles to each of the major players in the drama, but the story evolves in basically the same way. Shortly after the ruling on *Roe*, a few law students and their conservative-leaning professors decided to start an organization to defend what they saw as the original meaning of the Constitution from the Warren Court. Steven Calabresi worked with Professor Robert Bork at Yale University, while Lee Liberman and David McIntosh worked with Professor Antonin Scalia at the University of Chicago.<sup>36</sup> Jeffrey Toobin claims that "Bork had virtually invented originalism," while Peter Irons instead assigns the leadership role to the future Chief Justice Rehnquist.<sup>37</sup> From their small society grew a much larger, well-organized effort to "take back" the judiciary from the liberal movement.

The originalists unleashed a narrative that depicted members of the Warren Court as extreme radicals, who had changed the American conception of the Constitution overnight,

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<sup>36</sup> Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court*, (New York, New York: Anchor Books, A Division of Random House, Inc., 2008), 15.

<sup>37</sup> Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court*, (New York, New York: Anchor Books, A Division of Random House, Inc., 2008), 21 and Peter Irons, *A People's History of the Supreme Court*, (New York, New York: The Penguin Group, 1990)

leading Scalia to make his claims about the “orthodoxy” of originalism.<sup>38</sup> John Hart Ely contributes to this discussion by writing:

Were a judge to announce in such a situation that he was not content with those references [purposes or prohibitions expressed by or implicit in the Constitution] and intended to additionally enforce...those fundamental values he believed America had always stood for, we would conclude that he was not doing his job and might even consider a call to the lunacy commission.<sup>39</sup>

According to Ely, originalism had been the dominant mode of thought in the American judiciary until the Warren Court changed the trajectory of the Court. This depiction of the history of the court ignores earlier landmark cases such as *McCullough v. Maryland*, *Gibbons v. Ogden*, and *Dartmouth v. Woodward*. In response, liberal living constitutionalists charged that the originalist movement was invented purely to reverse the decisions made by the Warren Court, especially *Roe v. Wade*. The genesis of originalism fuels this basic chicken and egg question over whether the theory or its opposition to *Roe* came first. Both of these positions likely contain some merit. In almost every telling of this story, *Roe v. Wade*, which established a woman’s right to privacy over her reproductive decisions, as the epicenter of the current judicial battleground. Ely further comments that:

*Roe v. Wade* was the clearest example of non-interpretivist ‘reasoning’ on the part of the Court in four decades: it forced all of us who work in the area to think about which camp we fall into, with the result that a number of persons would today label themselves as interpretivists who had not previously given the choice much thought.<sup>40</sup>

Setting political affiliations aside, it is undeniable that after the Warren Court, the Rehnquist Court swung decidedly to the right. The Federalist Society had given law students and professors an opportunity to voice, share, and consolidate their opinions. The election of Ronald Reagan,

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<sup>38</sup> “A Conversation on the Constitution with Supreme Court Justices Stephen Breyer and Antonin Scalia, Parts I-X,” Sponsored by the Federalist Society and American Constitution Society, 5 December 2006, Accessed 26 February 2011, <[www.youtube.com](http://www.youtube.com)>.

<sup>39</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge, Massachusetts: Harvard University Press, 1980), 3.

<sup>40</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge, Massachusetts: Harvard University Press, 1980), 3.

and the opening of four key seats on the Supreme Court solidified this movement. With Edwin Meese III serving as Attorney General, Rehnquist as Chief Justice, and Scalia as an associate justice, the conservative wing of the legal profession made significant strides in turning back the Warren tide, for better or for worse.

Thus, the intellectual battle lines between the current nine Justices were essentially drawn between 1973 and 1989. This does not mean that the underlying philosophies had not been present prior to this point. However, the Warren Court's breathtaking capacity for taking on and deciding landmark cases framed the old questions in such a light that new battle lines were indelibly printed on the Court and its occupants.

## Chapter 2: The Lessons of History

### I. Problems with the Articles of Confederation

The Articles of Confederation were a series of agreements between the thirteen colonies designing a rudimentary government to guide the colonies through the Revolutionary war. This agreement was intentionally written to create a very weak government. The states needed to coordinate with each other to provide supplies and men to the troops, and they also needed to be unified in order to garner a much-needed international alliance to help them actually *win* the war. Military success, was thus one of the first, perhaps the only, objective of the first federal government of the United States. However, there was no extensive planning about what the government between the several states would look like if and when the states did win. There was simply no time for further discussion over the relationships among the states. For the time being, it was sufficient that the Congress was able to fight the war and act on behalf of the states in creating a critical alliance with France. The Continental Congresses had been created to deal

with the immediate problems facing the colonists from across the Atlantic; however, as soon as those problems ceased and the war ended, many Americans realized that they would need a much more unified national governing body to survive.

Before delving into any critique of the profound weaknesses of the Articles of Confederation, the Confederations should be lauded for three remarkable achievements. The first of these feats was that somehow, the colonists were able to win the War for Independence. Aside from ultimately winning the war, the Articles of Confederation managed to achieve substantial political success in the negotiation of the peace treaty. Following the British surrender at Yorktown, peace talks commenced in Paris. John Adams, John Jay, and Benjamin Franklin represented the American interests, and David Hartley was selected to represent those of the crown. At the conclusion of the talks, Britain recognized the states as independent and sovereign and the talks established an internationally recognized border of the new confederation.

Congress under the Articles also paved the way for American power through continental domination with the Land Ordinance of 1785 and the Northwest Ordinance of 1787. These ordinances provided a framework for western expansion into the territories of the states, and they also represented one area where Congress was able to triumph over strong sectional tensions. These ordinances, in conjunction with a large land cession by Virginia, presented a very appealing method for raising revenue. The Articles of Confederation did not allow the national government to directly tax the citizens of the states, but land sales were a legal means for collecting needed cash. Peter Onuf additionally highlights that the western territories represented much more than just a potential solution to the growing war debt. Congress acted somewhat in blind faith, assuming that the “thirteen United States of America” would expand to more than just thirteen. They managed to outline a blue print for that expansion, which presumed

a prosperous and harmonious relationship between the states.<sup>41</sup> Thus, the groundwork was laid for America to span a continent, taking advantage of the vast resources that each region had to offer.

Aside from these three major achievements of the Articles of Confederation, there were also vast shortcomings. It is imperative to recognize that these shortcomings, along with the shortcomings of the British government, would inform the debates at the Constitutional Convention and would motivate James Madison to take the action he did. Articles III and IV of the Articles most clearly outlines the nature of the government: They highlighted that the states were entering into a “firm league of friendship” in which the rights of citizens would be recognized across state borders.<sup>42</sup> Most importantly, Congress was the sole power in the United States that could declare and wage war; all negotiations with foreign powers would be left to Congress. The power to raise military forces and raise taxes remained with the states. Congress could make requests to the states for the purposes of the war, but ultimate authority over the people in each state to comply ultimately resided with the state legislatures. Article II drove home this point, in stating that:

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” (Articles of Confederation, Article II).

This article had been added fairly late in the deliberations by Thomas Burke and is the most forceful claim of absolute state sovereignty contained within the document.<sup>43</sup> Aside from foreign relations, the Articles of Confederation provided Congress with none of the usual powers

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<sup>41</sup> Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance*, (Bloomington, Indiana, USA: Indiana University Press, 1987).

<sup>42</sup> *The Articles of Confederation*, U.S. National Archives & Records Administration, Washington, D.C., <<http://www.ourdocuments.gov/doc.php?doc=3&page=transcript>>. Winton U. Solberg, ed; *The Constitutional Convention and the Formation of the Union*, (Chicago, USA: University of Illinois Press; 1990, 2nd edition), 42-43

<sup>43</sup> “Thomas Burke,” *The North Carolina History Project*, Accessed 25 February 2012, <<http://www.northcarolinahistory.org/encyclopedia/495/entry/>>.

associated with a national governing body, because the Congress was not intended to be the primary governing body of the new republic. This lack of political authority was precisely the objective.

Part of the problem was that after the Declaration was passed, it was unclear who or what political body *should* hold sovereign authority in the colonies.<sup>44</sup> The colonists, and particularly Thomas Jefferson had argued as early as 1774 in *A Summary View* that the British Parliament had no right to tax or legislate in the colonies, but it was not immediately obvious what political organization *did* have that power in the case that Parliament did not. The answer for most colonists was that the power reverted to the individual states, but constitutions that were approved in states like Massachusetts seemed to indicate that sovereign authority resided in the town meetings<sup>45</sup>. Considering the number of back country rebellions that occurred before the Revolution, it is doubtful that many country farmers were ready to recognize the absolute authority of state governments after the war.<sup>46</sup> Shays's rebellion in Massachusetts illuminates this point perfectly. The rebellion in Massachusetts erupted out of the tight financial situation of the state near the end of the Revolutionary War. Because a large part of the war had been fought on Massachusetts soil, the state also carried a heavy war debt. In attempting to repay this debt, the state legislature in Boston infuriated western farmers, causing them to rebel and shut down the debtors' courts throughout the state. For these subsistence farmers, the legislature of

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<sup>44</sup> Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*, (Kansas, USA: University Press, of Kansas, 1985), 145

<sup>45</sup> The Commonwealth of Massachusetts had to draw up a new constitution after the Declaration of Independence was issued, because the former charter had invested the power of appointing governor and the governor's council in the king. Obviously, the king would no longer be making such appointments, at least as long as the colonies did not lose the war. Massachusetts quickly drew up a new constitution, allowing for elections to the governorship, however this was not enough for the Massachusites. A constitutional convention was insisted upon, but even then, the new constitution was only accepted once it had been ratified by each town committee. This move implies that ultimate authority rests with the towns, and by extension, each individual voting in the town committee. New Hampshire followed a similar path (Ibid).

<sup>46</sup> Bacon's Rebellion and the Regulator Movements in Carolinas are two additional examples of such rebellions initiated by the "back country" farmers against the tidewater elite.

Massachusetts was no different from Parliament in demanding unjustified taxes from the people. Clearly, there was little agreement about where sovereignty rested in the colonies after the war, and the delegates at Congress only sought to provide the national government with the bare minimum of power in order to reserve most authority for the state legislatures. What this means for the original understanding of the Constitution, is that most of the delegates to the Constitutional Convention and to the ratifying conventions had lived through this period of minimalist national government. The Constitution would break totally new ground for these individuals.

In hindsight, it is all too tempting to view the Confederation under the Articles as an inevitably transitory phase between the Continental Congresses and full national government. The Articles pledged each state to a “perpetuate mutual friendship;” this friendship was expected to last. Most states were perfectly content with this arrangement, believing that the weakness of the Articles was actually the new government’s greatest strength. The colonies had united with the express purpose of opposing the British impositions of taxes, legislation, and troops. The pamphlets described in the last section all attack the British Parliament and King George III for overstepping their rights, but Thomas Paine was one of the few writers to discuss the states’ value to each other. It was not yet apparent why the colonies would need to continue to be formally united after the war was over.

The most glaring, logistical problem with the Articles was that they maintained a one-state-one-vote arrangement as well as a one-state veto on amendments. This meant that if any state opposed amending the Articles, the amendment was completely off the table. This is one of the many reasons why nationalists like James Madison realized that a completely new government charter would need to be formulated; change within the Articles was just too



difficult. Whereas the federal Constitution would gain credit for being a flexible and adaptable document, the Articles showed no flexibility at all.

The second enormous weakness of the Articles of Confederation was the lack of national control over taxation. The land ordinances of 1785 and 1787 were such great successes because they created an alternative form of revenue, outside of direct taxation. Article VIII charged that:

All charges of war, and all other expences that shall be incurred for the common defence or general welfare...shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each state...The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the united States, in congress assembled.<sup>47</sup>

The fact that Congress could not directly levy taxes nor raise an army independent of states' legislatures posed enormous problems for General Washington. Washington once commented that:

It will not be believed, that such a force as Great Britain has employed for eight years in Country could be baffled in their plan of Subjugating it by numbers infinitely less, composed of Men oftentimes half-starved; always in Rags, without pay, and experiencing, at times every species of distress which human nature is capable of undergoing.<sup>48</sup>

To Washington, the Americans' ability to avoid defeat for as long as they had was truly a miracle. The appalling descriptions of the shoe-less soldiers camped at Valley Forge in 1777-1778 aptly demonstrate how difficult it was for Congress to muster the human resources and supplies necessary for waging war. This weakness did not simply disappear once peace negotiations were under way in 1781, either. Independence meant that the states would have to

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<sup>47</sup> *The Articles of Confederation*, U.S. National Archives & Records Administration, Washington, D.C., <<http://www.ourdocuments.gov/doc.php?doc=3&page=transcript>>.

<sup>48</sup> George Washington to Nathanael Green, 6 February 1783; Joseph J. Ellis, *American Creation: Triumphs and Tragedies at the Founding of the Republic*, (New York, New York: Alfred A. Knopf, 2007), 58.

defend themselves in the case of war with the Native Americans, and the mounting war debt desperately needed attention.

The basic logistical problems of the one-state veto and the lack of direct taxation were only a small part of the growing matrix of problems facing the Confederation. James Madison wrote often of his worries over the commercial interests of the United States. Much of the motivation for the revolution itself had been grounded in a desire for economic independence, but without a strong national government, commerce was difficult to conduct. Madison writes to James Monroe, lamenting that trade “can never be so regulated by the States acting in their separate capacities. They can no more exercise this power separately, than they could separately carry on war, or separately form treaties of alliance or Commerce.”<sup>49</sup> Trading laws were not standardized across the states, creating problems both internally as well as for foreigners trying to trade with any of the states. This is highlighted in a letter written by Noah Webster to James Madison in July of 1784. In this correspondence, Webster bemoaned the difficulty he was experiencing with the copyright laws of the various states, in trying to publish his *Grammatical Institute*<sup>50</sup>. In May of that same year, Madison had also complained to Thomas Jefferson of the “idea in Europe of impotency in the federal government in matters of commerce<sup>51</sup>”. The United States simply could not conduct lucrative trade when there was no central government with which foreign powers could negotiate.

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<sup>49</sup> James Madison to James Monroe, 7 August 1785; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison*;

*Volume XIII*; Sponsored by the University of Virginia; (Chicago, Illinois: The University of Chicago Press, 1973).

<sup>50</sup> Noah Webster to James Madison, July 15, 1784; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison, Volume XII*; Sponsored by the University of Virginia; (Chicago, Illinois: The University of Chicago Press; 1973).

<sup>51</sup> James Madison to Thomas Jefferson, May 8, 1784; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison, Volume XIII*; Sponsored by the University of Virginia; (Chicago, Illinois: The University of Chicago Press; 1973).

In addition to these internal conflicts, Great Britain was actively working to hurt the commercial interests of the once-belligerent colonies. The former colonial parent had no interest in helping the United States, and as a result worked to set up trade barriers and create further divisions between the states. Madison again wrote to Monroe, complaining that, “The policy of G. B. (to say nothing of other nations) has shut us the channels without which our trade with her must be a losing one.”<sup>52</sup> Because there was no central government with any enforceable authority in the United States, it was impossible for the states to respond. Great Britain’s efforts focused heavily on Northern ports such as Boston and New York, just as the Coercive Acts of 1774 concentrated on punishing Boston. This was extremely divisive, as the Northern states once again were forced to call upon the Southern states for assistance. Madison wrote to Jefferson that,

The machinations of Great Britain with regard to Commerce have produced much distress and noise in the Northern States, particularly in Boston, from whence the alarm has spread to New York & Philada...the sufferers are every where calling for such augmentation of the power of Congress as may effect relief. How far the South States & Virginia in particular will join in the proposition cannot be foreseen.<sup>53</sup>

Southern states had a long history of avoiding commitment to their northern brothers, and that attitude had experienced only a brief reprieve during the war itself. Once the war was over, the Southern states had little interest in assisting the North.

While the Northern states were battling the brunt of continued animosity from the British, they also held the most war-time debt. The Revolutionary war had begun in New England and these few states overtime incurred more debt than the late-coming Southern states. Because the

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<sup>52</sup> James Madison to James Monroe, August 7, 1785; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

<sup>53</sup> James Madison to Thomas Jefferson, August 20, 1785. Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

victory of the revolution was shared by all states, New Englanders believed that the cost of the war should also be shared. Southern states believed that they should not be punished for the premature involvement of the North. Later on, in the previously referenced letter, Madison revealed his conclusions on the objectives of the British: “The danger of such a crisis makes me surmise that the policy of Great Britain results as much from the hope of effecting a breach in a our confederacy as of monopolizing our trade”<sup>54</sup>. If the goal was to break up the union, then the British were nearly successful. The idea of dissolving the union between the states was absolutely odious to Madison, who understood that the thirteen states on their own would never be able to maintain their own sovereignty. Unfortunately, the idea of a division between the states had certainly been considered; even the would-be-nationalist, Madison, considered the possibility of “a partition of the states into two or more Confederacies.”<sup>55</sup>

Consequently, the economic future of the United States in 1784 looked bleak. Great Britain was actively provoking old controversies, and other foreign nations had difficulty navigating the different trade laws of thirteen individual semi-nations. These commercial difficulties were reinforced by a complete lack of unity or loyalty to the union within the several states. In 1784, most people would refer to themselves by their allegiance to their home state. At their most patriotic, individuals might refer to themselves as “patriots” for their participation in the war, but as of yet, there was no national character. The former colonists had no concept of an “American” nation. This was partially by design; divide and conquer was one of the primary tactics employed by the British in the pre-war era. When Boston stepped out of line, Parliament and the King attempted to punish Boston alone. As a result, the mentality of separate states was

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<sup>54</sup> James Madison to Thomas Jefferson, August 20, 1785. Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

<sup>55</sup> James Madison to Edmund Randolph, 25 February 1787; Joseph J. Ellis, *American Creation: Triumphs and Tragedies at the Founding of the Republic*, (New York, New York: Alfred A. Knopf, 2007), 93.

well engrained. For example, Madison used the phrase “my Countrymen” to refer to his fellow Virginians, not his fellow Americans, when writing to Jefferson.<sup>56</sup>

The plight of Thomas Paine in 1784 was emblematic of this disconnect between the states. Less than a decade after writing his highly influential work, Paine found himself in financial trouble. Writing political pamphlets was not necessarily a lucrative profession, and he had appealed to Madison and others for support from the nation that he had helped to spur to revolution. General Washington once wrote to Madison, inquiring, “Can nothing be done in our Assembly for poor Paine?...His writings certainly have had a powerful effect on the public mind; ought they not then to meet an adequate return?”<sup>57</sup> Madison replied in distress, because Congress had refused to pass the measure granting a pension for Paine<sup>58</sup>. Madison was disgusted that the states’ representatives would abandon a national hero, to whom the states’ owed a portion of their freedom, in the man’s time of need. However, he should not have been so surprised at the inaction of Congress; their lack of support for Paine was merely another indicator of the scarcity of interstate cooperation.

Just as the United States had no concerted economic policy, it was also exceedingly difficult to forge a cohesive foreign policy for the United States. Previously, the states’ foreign policy had been made on their behalf by Great Britain, but after the war Great Britain became a foreign enemy. Although the United States had sent a number of diplomatic missions across the Atlantic, these new ministers were met with only moderate success. The problem was that no

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<sup>56</sup> James Madison to Thomas Jefferson, 3 July 1784; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

<sup>57</sup> George Washington to James Madison, 12 June 1784, Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

<sup>58</sup> James Madison to George Washington, 2 July, 1785 and August 12, 1784, Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

treaty signed in Europe would have the guarantee of ratification in the United States; even if the treaty was ratified, Europe understood that the new American Congress had no mechanism for enforcement in each of the states<sup>59</sup>. Madison queried Jefferson,

Will it not be good policy to suspend further Treaties of Commerce, til measures shall have been taken place in America which may correct the idea in Europe of impotency in the federal Govt. in matters of Commerce?<sup>60</sup>

The U.S. was still an infant nation in comparison to the societies of Europe, which had literally existed for centuries, and the Confederacy had no track record of “good credit”. Thus, American diplomatic missions abroad did not enjoy the respect afforded to other diplomatic missions from sovereign nations. Thomas Jefferson attested to this indignity when he wrote back to Madison that he had not been “able to discover the smallest token of respect towards the United States in any part of Europe”<sup>61</sup>. Jefferson further explained that the appearance of the “symptoms” of a stronger federal government had been met with favor in Europe, and he claimed that most of the continent was anxiously waiting to see what would happen to the fledgling nation. Whatever good intentions the countries of Europe may have had towards the United States, this support could not make a difference until the United States was considered a world player and not a transient republic.

As has been discussed, the lack of American legitimacy was inextricably linked to the United States’ economic position. Just as the United States did not have the political capital to negotiate with the great powers of Europe, they were also having difficulty dealing with the states of North Africa. Pirates from the shores of Africa had long haunted the Mediterranean and

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<sup>59</sup> James Madison to Thomas Jefferson, March 16, 1784. Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

<sup>60</sup> James Madison to Thomas Jefferson, 25 April, 1784, Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

<sup>61</sup> Thomas Jefferson to James Madison, September 1, 1785. Rachal. William M. E. and Rutland, Robert A, eds. *The Papers of James Madison Volume VIII*. (Chicago: The University of Chicago Press, 1973).

the eastern side of the Atlantic. European powers, including Great Britain, dealt with this menace by paying tribute to the Barbary rulers in order to protect their sea-going trade. American colonial ships had never attracted much attention from the pirates, because they were considered to be a part of the tribute-paying British Empire. Once the colonies had become the United States, the pirates quickly began targeting American shipping. It should be noted that Great Britain did not try to intercede on behalf of their former colonies. When American ships returning from peace negotiations with Great Britain were pursued by Algerian pirates, many blamed Great Britain for having a hand in the attacks<sup>62</sup>. This point reinforces the fact that Great Britain had quickly turned into a deadly and destructive enemy for her former colonies.

Once the states escaped the tyranny, and protection, of Great Britain, they were expected to join the ranks of other sovereign nations and pay tribute to the Sultan in order to avoid piracy on the high seas. Unfortunately, the young republic was not prepared fiscally or political to pay the high sums expected. Neither the political atmosphere nor the financial realities of the United States would have permitted such expenditures. The United States was still under the governance of the Articles, which could not directly levy taxes and suffered from a plethora of other incapacities already mentioned. Tragically, the colonists had just waged war against their protectors in order to gain economic and political freedom, and in the process, enabled a greater threat to jeopardize that same economic freedom. The Barbary pirates felt a certain freedom of their own in being able to expand their operations to include American shipping, which had no navy to protect it.

The problem of the Barbary pirates was a very specific illustration of the dilemma that the United States found itself in between the Revolution and the Constitutional Convention. All

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<sup>62</sup> Frank Lambert, *The Barbary Wars: American Independence in the Atlantic World*, (New York, New York: Hill and Wang, of Farrar, Straus, and Giroux, 1943).

of the states were interested in protecting their economic freedom, but they were too scarred by the abuse of the British to be able to form a government instilled with the power to make economic and political decisions for the nation. The states were dominated by their fear of any distant government that resembled Parliament or the king. Remaining true to the revolutionary legacy of 1776 meant succumbing to further political embarrassment and economic harm. As a result, men like Madison and Washington realized that creating a strong national government was not a repudiation of revolutionary principles, but rather a fulfillment of those principles. By centralizing a national government and giving that government more direct power over the citizens, it might be possible to change these unfortunate circumstances. Perhaps one state, or a group of states, would need to take the lead in trying to establish a more efficient and productive central government, for the benefit of all. It was not immediately clear to the nationalists how to begin this process. For a time, Madison and others believed that the Articles would simply have to be slowly reformed and adjusted to fit the growing needs of the American population. However, Madison did begin to realize by 1784 that the plethora of problems confronting the Articles of Confederation required radical solutions.

At this point, one might identify the “original intent” of the Framers as this desire to overcome the inherent problems of the Articles of Confederation. The goals of the Revolution, and then of the independent states, were to live in a free society, free from tyrannous tax policies, and to be able to engage in free trade. Americans wanted to live their lives as they had under Britain’s former policy of “salutary neglect,” without heavy interference from a distant seat of government.

Madison and other nationalists were also concerned with the Confederation’s inability to deal with internal problems within and between the states. Thus, an additional aspect of the



“original intent” of Madison, was to create a system of interstate cooperation, so as to protect the citizens of each state. According to Madison, the Articles’ weaknesses were indirectly chipping away at the liberties won in the Revolution. Madison worried that:

The popular governments created by the new states constitutions, including Virginia’s were trampling on the rights of minorities and ignoring the larger public good by pursuing laws such as those intended to ease the plight of debtors.<sup>63</sup>

These new popularly elected legislatures provided no recourse for minorities who became victims to the tyranny of the majority. Gordon Wood points out that part of the problem was that Americans had yet to distinguish between fundamental rights and statutory law.<sup>64</sup> As of yet, there was no Bill of Rights to declare that Congress, nor that states, could “pass no law” that would infringe upon human liberties that belonged to both the majority and the minority groups in the country.

The states further squabbled among each other over territory and trading rights. The clearest example of this bickering resulted in the Mount Vernon Conference in 1785. Maryland and Virginia had a long history of fighting over the rights to the Potomac River, and this conflict could not be resolved under the framework of the Articles of Confederation. As a result, representatives from both states decided to meet outside of Congress to find some resolution to their dispute. Although Madison was supposed to be a representative for Virginia, he was not informed of his commission in time. As a result, George Mason informed Madison of the progress of the small committee, noting that,

... We were convinced, it is their mutual Interest to cultivate [a fair & liberal Compact, as might prove a lasting Cement of Friendship between the two states]: We therefore, upon the particular Invitation of the General, adjourn’d to Mount Vernon, and finished the

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<sup>63</sup> Alan Brinkley and, Davis Deyer, eds, *The American Presidency: The Authoritative Reference*. "James Madison," (Boston, Massachusetts: Houghton Mifflin Company, 2004).

<sup>64</sup> Gordon S Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, USA: University of North Carolina Press, 1969).

Business there...I am conscious of our having been influenced by no other Motives than the Desire of promoting the public Good.<sup>65</sup>

The representatives drafted the Mount Vernon Compact, which was a series of resolutions essentially declaring that the Potomac could be used freely by both states. Both states' legislatures easily ratified the agreement. This was a watershed moment for Madison and other political players looking for ways to seriously revise the Articles. With such a positive result, Madison was encouraged that there might be some way that the Articles of Confederation could be improved, potentially by going directly to the states and bypassing the Confederation Congress. Following the success of this relatively informal meeting, it was decided that the delegates from Virginia, Maryland, and additional delegates from the remaining eleven states would meet again in the following year to tackle the issue of trade within the colonies.

Unfortunately, the Annapolis Convention of 1786 was not quite as successful as the Mount Vernon Conference. Only five states were ultimately represented in Annapolis that year. Madison's hopes were dashed, in that there simply were not enough representatives present to merit the full-scale review of the Articles that he had hoped for. Madison wrote to Monroe, explaining:

Our prospect here makes no amends for what is done with you. Delaware N.J. & Va. alone are on the ground. Two Commissrs. Attend from N.Y. & one from Pa. Unless the sudden attendance of a much more respectable number takes place it is proposed to break up the Meeting with a recommendation of another time & place, & an intimation of the expediency of extending the plan to other defects of the Confederation.<sup>66</sup>

Madison was exactly right: The convention never achieved sufficient numbers to continue the discussion of trading rights between the colonies, but the group did establish a new meeting time

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<sup>65</sup> George Mason to James Madison, 9 August 1785; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

<sup>66</sup> James Madison to James Monroe, 11 September 1786, Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume IX*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1975).

and place. The failed meeting only demonstrated to the representatives in attendance how desperately the Confederation needed to update its charter. At this time, Madison wrote to Jefferson, bemoaning these events:

I find with much regret that there are as yet little redeemed from the confusion which has so long mortified the friends to our national honor and prosperity. Congress have kept the Vessel from sinking, but it has been standing constantly at the pump, not by stopping the leaks which have endangered her. All their efforts for the latter purpose have been frustrated the selfishness of some part or other of the Constituents.<sup>67</sup>

Madison also informed Jefferson of a few of the corrections he believed needed to be made in the federal government, including the introduction of a federal veto over state laws. It was becoming very clear that something had to be done about the Articles of Confederation. Even the states' rights stalwart, Patrick Henry wrote to Madison, "Is not the federal Government on a bad Footing? If I am not mistaken you must have seen & felt this."<sup>68</sup> The prescient group that met in Annapolis decided to meet again, with all thirteen delegations present, to discuss reform of the Confederation in May, 1787 in Philadelphia. The "original intent" of this meeting and its predecessors, would be to formulate a government that could handle the problems that existed between the states, that could represent and protect the trading rights of the American merchants abroad, and that could protect the basic, civil rights of the citizens living within the Confederacy's borders.

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<sup>67</sup> James Madison to Thomas Jefferson, October 3, 1785; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

<sup>68</sup> Patrick Henry to James Madison, April 17, 1784; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

## II. Madison's Pre-Convention Efforts

The cerebral Madison arrived in Philadelphia in the spring of 1787 exceedingly well prepared for the ensuing discussions. In the eighteen months between the Annapolis Convention and the Philadelphia Convention, Madison set to work recruiting the right people to the job and setting the agenda for the grand meeting. Madison knew that in order to accomplish what he wished at the Convention, men of national stature needed to be present. General Washington, was, of course, the first name that came to mind. Recruiting Washington was significant in giving the Philadelphia Convention the legitimacy that is otherwise lacked. With the nation's hero at the helm, it would be more difficult for dissenters to oppose the Convention.

Madison had already invested copious amounts of time reading and preparing for this moment. As we have seen, he was very well aware of the specific problems facing the states and their effect on the national economy, defense, and the future prospects of the new nation. He was also extremely well read on the topic of confederation and of political theory more generally. While his close friend, Thomas Jefferson served abroad as the American ambassador to France, Madison asked him to provide a veritable library on the subject of political theory. His compiled his notes on the subject of confederacies in his work, "Of Ancient and Modern Confederacies," which examined the Lycian, Achaean, Helvetiv, Belgic, and Germanic Confederations. This was apparently a work unfinished, as Madison left off the document with the title "Gryson Confederacy."<sup>69</sup> With each of these historic amalgamations, Madison identified the structure of the federal government, the authority of that federal government, as well as the weaknesses, as

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<sup>69</sup> Madison did eventually continue to work on this document. "Of Ancient and Modern Confederacies" reappears in Madison's papers in November of 1787, when he decided to flesh out some of his ideas, and add to his list of failed confederacies.

James Madison; *The Writings of James Madison, comprising his Public Papers and his Private Correspondence, Volume II*; "Of Ancient and Modern Confederacies;" Hunt, Gaillard, ed; (New York, New York: G. P. Putnam's Sons, 1900); Accessed from <http://oll.libertyfund.org>, 20 October, 2011.

he saw them, of each particular system. In his bibliography, Madison notably cited Diderot's *Encyclopédie*, Fortunato Bartolomeo De Felice's *Code de l'Humanité*, Polybe's *General History*, and John Potter's *Acheologia Greca*, among other sources.<sup>70</sup> Throughout the document, Madison consistently highlighted how these confederacies fell apart and failed. The work showcased the sheer breadth of Madison's reading and learning, as well as his academic approach to the problems with the Confederacy. No one in 1787 had studied state craft as closely and meticulously as Madison had.<sup>71</sup>

In the month before the Convention was officially opened, Madison additionally drafted a list of all of the deficiencies of the Confederation as it stood. In "The Vices of the Political System of the United States," Madison listed eleven central problems, along with an explanation of the causes of those problems. Madison took issue with all of the following:

(1)[The] Failure of the States to Comply with the Constitutional Requisitions... (2) Encroachments by the States on the Federal Authority....(3) Violations of the Law of Nations and of Treaties....(4) Trespasses of the States on the Rights of Each Other...(5) Want of Concert in Matters Where Common Interest Requires It...(6) Want of Gauranty to the States of their Constitutions & laws against Internal Violence...(7) Want of Sanction to the Laws, and of Coercion in the Government of the Confederacy...(8) Want of Ratification by the People of the Articles of Confederation...(9) Multiplicity of Laws in the Several States.... (10) Mutability of the Laws of the States.... (11) Injustice of the Laws of States.<sup>72</sup>

Like Jefferson's Declaration of Independence, this document charged the states' governments with offenses that were detrimental to all involved. Although each of these concerns was significant, the seventh point contained Madison's most radical position. Jack Rakove claims that this is by far Madison's most important point, as it lays the groundwork for a sovereign national

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<sup>70</sup> "Memorandums on Confederacies," 30 November 1787, Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume VIII*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1973).

<sup>71</sup> Andrew Burstein and Nancy Isenberg, *Madison and Jefferson*. (New York, New York: Random House Press, 2010).

<sup>72</sup> James Madison, "Vices of the Political System of the United States," April, 1787.

government that is able to directly coerce the citizens of the several states.<sup>73</sup> Madison demanded of his audience, “Even during the war, when external danger supplied in some degree the defect of legal & coercive sanctions, how imperfectly did the States fulfill their obligations to the Union?”<sup>74</sup> The states could not be left to their own devices, nor could they be trusted to do the right thing for the good of all thirteen states. Coercion must be applied, directly to the citizens, because the informal association between that states had not worked. This shift of sovereignty from the states to the national government is enormously important to the development of Madison’s political thought in preparing for the Convention.

Both “Vices of the Political System of the United States” and “Of Ancient and Modern Confederacies” demonstrate Madison’s studious approach to solving the American confederacy’s problems. In addition to these two works, Madison put all of his thoughts together in a brief letter to George Washington, dated April 16, 1787. In this letter, Madison once again highlighted the central point of needing more authority over the states for economic, defensive, and political reasons.<sup>75</sup> The first few sentences of the letter acknowledge a letter that Madison had received from Washington, which indicated that Washington was not only attending the convention, but that he supported Madison in his efforts to put forth a radical plan for reform of the Articles. Madison mentioned that he concurred with Washington’s belief that anything less than a radical proposal would embarrass and dishonor the representatives present. Madison very likely understood that it was highly probable that Washington would be selected to serve as the president of the convention. By providing the future president with early information about the

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<sup>73</sup> Jack Rakove, *James Madison and the Creation of the American Republic*, 3rd ed., (New York, New York: Peasson Longman Publishing, 2007).

<sup>74</sup> James Madison, "Vices of the Political System of the United States," April, 1787.

<sup>75</sup> Ralph Ketcham, ed.; *The AntiFederalist Papers and the Constitutional Convention Debates*; (New York, New York: Penguin Putnam Inc., 2003); 31-34.

agenda, Madison was ensuring that his plan enjoyed the support of the man who could chair the convention.

By May, Madison had put himself through a couple of these dress rehearsals for what would become the Virginia delegations' formal proposal to the convention. In the final proposal that the Virginia delegation devised, a succinct outline for governance was provided. The plan was formally proposed by Virginia's Governor Edmund Randolph on the fourth day of the sitting convention. The resolutions called for a bicameral legislature, which could enact laws superior to those of the states, an executive, as well as a judiciary. The expressed purpose of the plan was to provide for "the common defence, security of liberty, and general welfare" of the United States.<sup>76</sup> This particular sentiment would later be echoed in the preamble to the Constitution itself.

### III. The Constitutional Convention

The Constitutional Convention was supposed to begin on May 14, 1787. Unfortunately, most of the appointed delegates were unable to reach Philadelphia by that date. For many of the delegates, this absence was only a reflection of the poor quality of the roads, family obligations, or professional responsibilities at home. For others, their tardiness was a reflection of their home states' disapproval of the conference. When a quorum of states was finally reached on May 24, Maryland, New Hampshire, and Rhode Island were still not represented. Rhode Island would never send delegates to the convention, because it believed that its sovereignty would be compromised by a nationalist-leaning federal government. By not attending the convention, Rhode Island's legislature hoped to question the legitimacy of the endeavor and, at the very least,

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<sup>76</sup> Ralph Ketcham, ed.; *The AntiFederalist Papers and the Constitutional Convention Debates*; (New York, New York: Penguin Putnam Inc., 2003); 37.

make it clear that their state did not support the federalizing activities of the convention. This decision proved counter-productive; by excluding themselves from the convention, Rhode Island guaranteed that the strongest voices in favor of states' rights would not be heard<sup>77</sup>. As a result, the Convention would become a debate between only those who already wanted radical or modest reform of the Articles, because those who were satisfied with the Articles of Confederation were not present.

In contrast to Rhode Island's delinquency, some delegates were very eager to take up temporary residence in Philadelphia and begin the work of the convention in earnest. Madison arrived at the beginning of the month, and George Wythe, John Blair, and Edmund Randolph joined him shortly thereafter. Throughout the month of May, the three men worked on an agenda for the convention. Madison in particular was intent on securing the ability to direct the course of the conversation, setting a comprehensive plan for change at the national meeting. His plan was perhaps more sweeping in its scope than many of the delegates were expecting. In order to win them over, Madison understood that he and his allies need to dominate the debate from the start.

It was Edmund Randolph who ultimately presented the Virginia plan to the Constitutional Convention, although the plan had Madison's political finger prints all over it. The plan set the agenda for the rest of the convention; the summer of 1787 was spent debating the merits of different aspects of the plan and of plans that were introduced as alternatives to the Virginia Plan. The plan's content included the language that would be used as the preamble to the Constitution, an outline for two houses of legislators—the upper house elected by the lower house, the lower house elected directly by the people, a power to “negative all laws passed by the

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<sup>77</sup> Solberg, Winton U, ed.; *The Constitutional Convention and the Formation of the Unio*; (Chicago,USA: University of Illinois Press; 1990), 2<sup>nd</sup> edition.



several states,” and a framework for ratification and amendment of the approved document.<sup>78</sup>

These were the most important changes that Madison would need to persuade the convention to make. The last reform, a veto over the states, was Madison’s “cherished formula for restraining the states.”<sup>79</sup> He had two primary objectives, “original intentions,” in mind—to preserve the Union, and to remedy the evils of the current situation.<sup>80</sup> At times, these objectives were at odds with each other, but, “Madison thought ‘it better to trust to further experience and even distress, for an adequate remedy,’ than to adopt ‘temporary’ expedients which might prove inadequate to the permanent needs of the Union.”<sup>81</sup>

The two most important philosophical leaps made by the small committee of Virginians were the direct voting system to the federal government and the national veto on state laws. These two logistical changes exemplify a critical step in creating the nation of the United States; these reforms fundamentally altered the relationship between the citizens of the states and the national government. This shift is paradoxical, because it brought the national government closer to the people—there would be no intermediary step between the people, the states, and the national government any longer—but it also created a government that would be geographically farther away from most citizens, aside from Pennsylvanians.

It is this paradox that Antifederalists seized upon when they launched their attack on the federal Constitution that emerged from the convention of 1787. The Antifederalists accused the federal Constitution of attempting to eliminate the state governments all together, as “Brutus” does in his Essays I and VI. Brutus worries that “all that is reserved for the individual states must

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<sup>78</sup> The Virginia Plan, Presented by Edmund Randolph to the Federal Convention, 29 May 1787, <TeachingAmericanHistory.org>.

<sup>79</sup> Irving Brant, *James Madison: Father of the Constitution, 1787-1800*, (New York, New York: The Bobbs-Merrill Company Inc., 1950), 36.

<sup>80</sup> Irving Brant, *James Madison: Father of the Constitution, 1787-1800*, (New York, New York: The Bobbs-Merrill Company Inc., 1950).

<sup>81</sup> Jack N. Rakove, *Original Meanings*, (New York, New York: Vintage Books, A Division of Random House, Inc., 1997), 39.

very soon be annihilated except so far as they are barely necessary to the organization of the general government.” He expanded this argument in his next essay:

There is no way, therefore, of avoiding the destruction of the state governments, whenever the Congress please to do it, unless the people rise up, and with a strong hand, resist, and present the execution of Constitutional laws.<sup>82</sup>

He also feared that the judicial branch created by the Constitution would “swallow up all the powers of the courts in the respective states”.<sup>83</sup> These sentiments revealed a deep seated concern of the AntiFederalists that the federal government would dominate the state governments just as the British crown had.

Had Madison been honest about his intentions for the federal government, “Brutus” and his Antifederalist compatriots would have been quite dismayed to find out that Brutus was exactly right. Perhaps it is too harsh to say that Madison wanted the state governments to be completely swallowed up by the federal government. However, Madison could not have been clearer about his dissatisfaction with the present arrangement and the meddling states. He orchestrated and attended the Constitutional Convention specifically to bring the power and unity to the federal government, which he felt was so lacking in the current arrangement. He could not express such sentiments publicly; he would never have won another election or appointment in his native Virginia. In fact, the suspected author of the “Brutus” letters, Robert Yates, published his notes from the Constitutional Convention in 1821, much to Madison’s embarrassment. His notes only covered the beginning of the Convention, because Yates left the meeting in protest of

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<sup>82</sup>“Brutus” was the pen name of one prominent Antifederalist. He wrote a series of sixteen “essays,” expounding on the importance and the dangers of the Constitution. One of his primary concerns was the elimination of the state governments. Brutus was likely the New York judge, Robert Yates. As an ally of Governor Clinton, Yates had an interest in maintaining the sovereignty of the states. Yates himself had actually attended parts of the Constitutional Convention. He and John Lansing, another representative of New York, left Philadelphia when they realized the radical nature of the Convention. His notes from the initial debates were published in 1821.

Brutus, Essay I and VI, 18 October 1787, 27 December 1787; Ralph Ketcham, ed.; *The AntiFederalist Papers and the Constitutional Convention Debates*; (New York, New York: Penguin Putnam Inc., 2003), 272 and 282.

<sup>83</sup> Brutus, Essay V, 27 December 1787; Ralph Ketcham, ed.; *The AntiFederalist Papers and the Constitutional Convention Debates*; (New York, New York: Penguin Putnam Inc., 2003), 272.

the uber-nationalist agenda that was Madison's brain child. By the time the notes were published, the retired president had no future political aspirations to worry about and the political damage was minimal. Nonetheless, this publication brought to light Madison's true nationalism, which had been obscured by the position he had taken publicly and under the cover of the pen name Publius, during the ratification era.

#### IV. Ratification and The Federalist Papers

Leaving the Convention, both James Madison and Alexander Hamilton were very disappointed with the results. The open ended nature of the resultant Constitution was not what either had hoped for, and they worried that the new government would not embrace the significant changes they had wanted to make.<sup>84</sup> At this juncture, it would appear that the "original intentions" of two very important Founders had already been pushed aside by the objectives of the other delegates to the convention. Antifederalists worried about just the opposite; many of the Antifederalist writers complained that it was not clear exactly what the federal government would or would not be allowed to do.<sup>85</sup> This was problematic for both political camps. Antifederalists were concerned that the national government would completely eliminate the state governments; Federalists worried that there would be no substantive change between the Articles of Confederation and the newly drafted Constitution. In October of 1787, Madison wrote a lengthy description of the Convention's proceedings to Thomas Jefferson, then residing in Paris. Madison spent considerable time complaining about the refusal of the

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<sup>84</sup> Joseph Ellis, *American Creation: Triumphs and Tragedies at the Founding of the Republic*, (New York, New York: Alfred A. Knopf, 2007), 117.

<sup>85</sup> Ralph Ketcham, ed.; *The AntiFederalist Papers and the Constitutional Convention Debates*; (New York, New York: Penguin Putnam Inc., 2003).

Convention to approve a national veto. He first confided in Jefferson the reasons why he thought such a veto would be a good idea in the first place:

The question with regard to the Negative underwent repeated discussions, and was finally rejected by a bare majority. As I formerly intimated to you my opinion in favor of this ingredient, I will take this occasion of explaining myself on the subject. Such a check on the States appear to me necessary 1. To prevent encroachments on the General authority. 2. To prevent instability and injustice in the legislation of the States.<sup>86</sup>

Madison proceeded in the very next paragraph to enumerate the reasons why the lack of a national veto will be so debilitating to the United States:

1. Without such a check in the whole over the parts, our system involves the evil of imperia in imperio [“an order within an order”]. If compleat supremacy some where is not necessary in every Society, a controuling power at least is so, by which the general authority may be defended against encroachments of the subordinate authorities, and by which the latter may be restrained from encroachments on each other. If the supremacy of the British parliament is not necessary as has been contended, for the harmony of that Empire; it is evident I think that without the royal negative or some equivalent control, the unity of the system would be destroyed...2. A constitutional negative on the laws of the States seems equally necessary to secure individuals agst. Encroachments on their rights.<sup>87</sup>

The anxious Madison followed this explanation with a discussion of the problems that he discovered in the confederacies he studied for his paper, “Of Ancient and Modern Confederacies.” He thus recounted to Jefferson why the negative on state actions would be absolutely necessary to avoid dissolution. Within the entirety of this important letter, Madison illustrated in exquisite detail both the successes and failures of the Convention. He believed that

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<sup>86</sup> James Madison to Thomas Jefferson, 24 October 1787; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume X*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1977).

<sup>87</sup> James Madison to Thomas Jefferson, 24 October 1787; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume X*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1977), 210.

his failure to win a national veto would lead to the undoing of the Union, but he comforted himself with the hope that the judiciary might perform this role.<sup>88</sup>

Madison's letter to Jefferson apparently demonstrated Madison's intellectual devotion to the idea of a federal negative over state laws. However, in the *Federalist Papers*, "Publius" publicly embraced this supposed failure of the Convention. In order to convince the voting public of the merits of a national government, they highlighted the strength of the states and the ultimate balance between state and national governments. Privately, Madison realized that if he had won all of the battles of the Convention, there was no way he would have been able to win the ultimate battle of the ratification. His objectives of union preservation and ridding the evils of the Articles were indeed at odds with each other, but he elected to move forward with the victories that he *had* been able to achieve. With some of the evils eliminated, he pushed to ensure that the Union would remain united, even under this new form of government. Although he had begun the process with a small list of objectives, he now turned to what became his primary motivation, maintaining the union.

As one of the three contributing authors to the *Federalist Papers*, Madison took on the role of outspoken propagandist on behalf of the Constitution along with Alexander Hamilton and John Jay. The three wrote with an impeccably similar style, so that the essays really did appear to come from one author. Nonetheless, Madison was responsible for writing a few of the most influential and ground breaking pieces of the eighty-five piece series. In *Federalist X*, Madison argued that the Union's ability to "break and control faction" would enable the United States to

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<sup>88</sup> James Madison to Thomas Jefferson, 24 October 1787; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume X*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1977), 211.

survive as an independent and sovereign nation.<sup>89</sup> The country would not erupt in civil war, he claimed, because the breadth of the country would eliminate divisions within the country. This was a sharp break from traditional theories, which argued that smaller republics would be more successful than larger ones.

In *Federalist XIV*, Madison celebrated the weaknesses of the Constitution which he had once decried to Jefferson just one month prior in his October letter. Madison wrote:

In the first place it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic... The subordinate governments which can extend their care to all those other objects, which can be separately provided for, will retain their due authority and activity. Were it proposed... to abolish the governments of the particular states... the general government would be compelled by the principle of self preservation, to reinstate them in their proper jurisdiction.<sup>90</sup>

Here, as “Publius,” Madison attempted to convince his audience that the state governments would not be destroyed. In fact, he praised the state governments, in arguing that the federal government would need to reinstate them if the state governments were ever to be eliminated. Once again, Madison has turned a negative into a positive attribute for the new Constitution. Similarly, in *Federalist XVIII*, Madison used his understanding of historic confederacies to conclude that this Constitution would be similar to that of the Grecian republic, a supposedly successful example of federal government.<sup>91</sup> Moreover, Madison wrote in *Federalist XXXIX* that the new Constitution is perfectly aligned with republican ideology and is therefore a natural next step for the revolutionary generation. In each of these essays, Madison reversed his original

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<sup>89</sup> “The Federalist X,” 22 November 1787; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume X*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1977), 263.

<sup>90</sup> “The Federalist XIV,” 30 November 1787; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume X*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1977), 286.

<sup>91</sup> “The Federalist XVIII,” 7 December 1787; Robert A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume X*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1977), 299.

position on why the Constitution should have been written in a particular way, and instead, he praised the document as it was actually written.

Aside from *Federalist X*, *Federalist LI* was perhaps Madison's most significant contribution to the *Federalists Papers*. This essay specifically addressed concerns over how the federal government could "check" itself and balance its own power throughout the three branches of the government. It is ironic to consider this essay as Madison's primary exposition on "checks," given the fact that Madison had originally only hoped to check the state governments, rather than the strong national government he had envisioned. In *Federalist LI*, Madison stated clearly, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means, and personal motives to resist encroachments of the others."<sup>92</sup> Because the branches of government would be defensive of their own power, Madison claimed that it would be impossible for any one particular branch of the government to obtain too much power. This contrasted to Madison's previous suggestions that the executive and judicial branches could be fused to form a "Council of Revision," as a check on the legislature.<sup>93</sup> In addition, the idea for a Council of Revision implies that Madison did not believe that the power of interpreting the Constitution lay solely with the judicial branch. Although each branch was assigned particular duties by the Constitution, Madison believed that all the branches of the government would play a role in the overall balancing act. In point of fact Madison further

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<sup>92</sup> "The Federalist LI," 7 December 1787; A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume X*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1977), 477.

<sup>93</sup> Andrew Burstein and Nancy Isenberg, *Madison and Jefferson*, (New York, New York: Random House Press, 2010), 140.

insisted that, “Ambition must be made to counteract ambition,”<sup>94</sup> suggesting that the branches could remain entirely separate and distinct from one another. Although Madison may have thought that the legislature was likely to become too powerful, he turned his attention in *Federalist LI* to assuring his readers that all three branches would remain independent and balanced.

The general problem for Madison during the ratification period, was that he was forced to defend the Constitution on the grounds that he believed made the Constitution a disappointment. He clearly realized however, that this was the position that the citizens of the thirteen states needed to hear in order to ratify the Constitution. However, this shift does not indicate a radical position change on Madison’s part. Although the substance of some of his arguments had changed, his basic goals of creating a stronger national government in order to preserve the union and end the tyranny by state legislatures remained unchanged. As an academic and student of history himself, Madison knew that the idealism of his original plans for the country would have to be shifted to accommodate for the reality of the challenge of ratification.

Madison’s shift in focus between the Constitutional Convention and the official enactment of the Constitution was instrumental in the ratification of the new government. Madison not only put his rhetorical brilliance to work in contributing to the *The Federalist Papers*, but he also was one of the primary advocates for the Constitution at the Virginia Ratifying Convention. Virginia’s vote was critical for a number of reasons. To begin with, if Virginia did vote yes on the Constitution, Virginia would be the ninth state to approve the plan and thus set the government in motion. Delaware had initiated the ratification period with a resounding, unanimous vote in favor of the Constitution. Pennsylvania, New Jersey, Georgia,

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<sup>94</sup> “The Federalist LI,” 7 December 1787; A. Rutland and William M. E. Rachal, et al, eds; *The Papers of James Madison Volume X*; Sponsored by the University of Virginia: (Chicago: The University of Chicago Press, 1977), 477.



Connecticut, and Massachusetts all quickly followed suite, in approving the Constitution before the end of February of 1788. Maryland and South Carolina ratified before the end of the spring, and then New Hampshire decided to forego voting—the small new England state decided to neither ratify nor reject the Constitution based on their initial round of ratifying debates.

This left Virginia, New York, North Carolina, and Rhode Island to decide the fate of the 1787 Convention's work. Rhode Island would be a relatively insignificant decision: Rhode Island had chosen to protest the Constitutional Convention, and the state's small population and territory was not vital to the Union's success if the state continued to stage its protest. However, the three other remaining states could all have had an important effect on the viability of the Union. If all three decided to reject the new plan, the Union would be reduced to an unfortunate sequence of unified states, with huge swaths of foreign territory breaking up the physical continuity of the Union.<sup>95</sup>

Aside from this territorial concern, Virginia in particular held enormous political capital among the original thirteen states. Virginia had already produced a disproportionate number of political activists, and the state's delegation to the Philadelphia Convention was directly responsible for the shape of the proposed new government. The state had provided the Union with its first hero-general, in General Washington, and the state would also go on to provide four of the first five presidents of the United States, often referred to as the, "Virginia Dynasty." If Virginia had not approved of the Constitution, the effects on the sustainability of the Union would have been enormous. James Madison was well aware of this historical moment, and he was an active leader of the Federalist charge in Richmond in 1788, in spite of a debilitating illness that weakened the Virginian federalist during the debates.

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<sup>95</sup> Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788*, (New York, New York: Simon and Schuster, 2010), 253.

In his orations, Madison again highlighted, as he had in the *Federalist Papers*, that the proposed federal government would not deny the states' their rights, nor destroy the states' existing governments. He described the would-be national government as having a "mixed nature," which would allow for the state to exercise their will in all areas, except those that were necessary to maintain a unified, continental nation. In response to the Antifederalist disapproval of the phrase "We the people," introduced by Richard Henry Lee, Madison argued that of course the federal government *should* depend on the "superior power of the people." This power, Madison argued, was the foundation of all republican government and should not be twisted to mean anything else. Madison was so convinced of the need for a centralized government, that he even defended the Constitution's lack of attention to the moral and political problem of slavery. Madison announced that even though slavery itself was "evil," the "dismemberment of the Union would be worse."<sup>96</sup> Here again, observers should note that Madison's central goal is to keep the Union together, preferably under a strong national government. Nonetheless, he was willing to do what was necessary to achieve the former goal.

Madison and his allies' arguments were compelling enough to eventually convince a majority of the representatives at the debates to vote in favor of the new Constitution. Their approval was somewhat conditional, in that they did additionally recommend a whole host of amendments, of which Madison severely disapproved. Nonetheless, this "yes" vote allowed for the political process to continue on the path that Madison had designed. Madison's personal influence over the debate and the eventual vote was appreciated by all friends of the Constitution. As Myron magnet notes, the Virginia Journal waxed poetic when writing of Madison's role in the debates:

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<sup>96</sup> Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788*, (New York, New York: Simon and Schuster, 2010), 284.

Maddison among the rest,  
 Pouring from his narrow chest,  
 More than Greek or Roman sense,  
 Boundless tides of eloquence.<sup>97</sup>

Had Madison's role as a key figure in the Federalist movement ever been doubted, his place among the Founders was secured by his performance at the Virginia debates. The notes from the Constitution Convention had yet to be published and the essays of "Publius," were, after all written under a pen name. Although Madison's friends may have understood that his pen was behind some of the pamphlets, this knowledge was not immediately available to the general public.

#### V. Problems with Hamilton and the Emergence of the Republican Party

Although Madison may have been disappointed by the results of the Constitutional Convention, he had to live with the results that had been won through the success of the *Federalist Papers* and the Ratification period, and he wasted no time in becoming intimately involved in the administration of the new government. He was sent by his state to the embryonic House of Representatives, and he quickly emerged as the natural leader of the body. He drafted the first ten Amendments to the Constitution, primarily in order to please those political players who were on the fence about the new Constitution. The hope was that a Bill of Rights would assuage some of their fears about the potential for a tyrannous central government, and Madison worked tirelessly to this end: "There is no doubt that it was Madison's personal prestige and his dogged persistence that saw the Amendments through Congress."<sup>98</sup> By this point, Madison was

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<sup>97</sup> Myron Magnet, "The Great Little Madison," *City Journal*, Vol 21, No 2, The Manhattan Institute, <[http://www.city-journal.org/2011/21\\_2\\_urb-james-madison.html](http://www.city-journal.org/2011/21_2_urb-james-madison.html)>.

<sup>98</sup> Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815*, (Oxford, United Kingdom: Oxford University Press, 2009), 69.

in a full-on preservation mode, willing to work with potential supporters in order to assure the survival of the national government. During this period, it is undeniable that Madison's chief aim was the survival of the national government that he had helped to design.

While Madison was working as the leader of the first session of Congress in the House of Representatives, he was also one of President Washington's primary advisors. At the time, there were only four official spots on the president's cabinet: Secretaries of War, Treasury, and State, and the Attorney General. Madison was selected for none of these roles, but he still was very active in policy-making from both the executive and the legislative branches of the government he had just created. After ensuring ratification and drafting the Bill of Rights, Madison set to work opposing the proposals of his once-ally, Alexander Hamilton, the first Secretary of the Treasury.

Everyone involved in the government in 1790 was well aware of the country's pressing war debts. The problem of the debt was no secret, and President Washington asked his Treasury Secretary to draft a proposal to address this problem. Hamilton came up with a plan, "The Report on Public Credit" that bundled assumption of the national and state debts along with funding of those debts. In other words, he intended for the states to pass on their debt to the national government, and in turn, the national government would pay it all back by taxing the people directly. Hamilton was "startled" when his most vitriolic opponent turned out to be Madison, who took issue with a number of facets of Hamilton's plan.<sup>99</sup>

Madison was perturbed by the presumption that states that had already paid back their war time debts, would now be asked to subsidize the states that had not made such efforts. Madison had no problems with the basic idea of debt assumption; it was reasonable for the

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<sup>99</sup> Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815*, (Oxford, United Kingdom: Oxford University Press, 2009), 141.

national government to make one, concerted effort to pay back all of the debt in a timely manner. However, Madison wanted the assumption of debt to be made at the levels that existed in 1783, at the close of the war, rather than 1790, when some states had made efforts to repay their debts. More than four-fifths of the debt was owed north of the Mason-Dixon line. In addition, Madison strongly disapproved of the fact that Hamilton's plan disadvantaged the original holders of government bonds in favor of the speculators who had purchased those bonds. Madison believed that the soldiers and patriots of the 1776 cause should be rewarded and repaid, rather than those predatory purchasers who likely took advantage of the poor state of colonial soldiers.<sup>100</sup> Madison's objections, on behalf of his state and of the agrarian society he hoped to protect, were eventually met with a compromise. The capital of the United States would be moved to the South, and the states with only small debts would be compensated with small grants.<sup>101</sup>

Hamilton's plan for a national bank and his Report on Manufactures were both highly problematic for Madison and his political partner, Thomas Jefferson. Hamilton's ideas about progress ran in direct opposition to the ideals held by Madison and Jefferson. In many ways, this division within Washington's cabinet fell along sectional lines. Madison and Jefferson both worked for the values and the benefit of their southern constituents, while Hamilton was clearly influenced by a financially-minded New York background. In regards to the squabbles over a title for the president, Madison remained true to his upbringing, according to Wood:

Although in 1787 he had certainly wanted a stronger national government and had very much feared democracy in state legislatures, he had never wavered in his commitment to republican simplicity and to the people's ultimate sovereignty.<sup>102</sup>

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<sup>100</sup> Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815*, (Oxford, United Kingdom: Oxford University Press, 2009).

<sup>101</sup> This was *still* incredibly unpopular with Virginians.

John C. Miller, *The Federalist Era, 1789-1801*, The American Nation Series, (New York, New York: Harper & Brothers, 1960).

<sup>102</sup> Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815*, (Oxford, United Kingdom: Oxford University Press, 2009), 84.

The result of these divisions was essentially the creation of the two party political system of the United States. Jefferson and Madison were the intellectual and public leaders of the Democratic-Republicans, who would surge in their support and in their occupancy of the presidency after Adams' administration.

## VI. The Kentucky and Virginia Resolves

This cleavage within the politically active class of Americans was deepened further under the Adams administration. Adams was a Federalist of President Washington's variety, although he attracted none of the personal loyalty that Washington enjoyed. Adams had enemies on both sides of the aisle, from Hamilton, who led a growing faction of the Federalist party, and from the Republicans led by Jefferson and Madison. Adams was most reviled for his passage of the Alien and Sedition Acts, which limited free speech in the press against the administration. In hindsight, these bills were absolutely odious to the nature of the Constitution and Americans' protected rights. Unfortunately, Adams was more concerned with his political image, which was the target of a massive smear campaign, than with upholding the newly enacted First Amendment.

This lack of forethought did not go unnoticed by the other Founders. Madison wrote that the bill introduced in Congress was a "monster that must for ever disgrace its parents."<sup>103</sup> Shortly after the birth of these two young monsters, Jefferson and Madison met over two occasions at their respective homes, once at Monticello, once at Montpelier. It is likely that that the two Republicans debated their response to the Alien and Sedition Acts at these particular meetings, although conspicuously wrote very little about them. Following these meetings, both Jefferson

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<sup>103</sup>David B. Mattern and J.C.A. Stagg, et al, eds; *The Papers of James Madison Volume XVII*; Sponsored by the University of Virginia; (Charlottesville, Virginia: University Press of Virginia, 1991); 186.

and Madison produced a set of resolves to be voted on in Kentucky and Virginia respectively, lodging the states' disapproval of the Alien and Sedition Laws.

In his set of resolves, drafted for the Virginia General Assembly to vote on, Madison wrote that the bills passed under the Adams administration paved the way to monarchy and were unequivocally unconstitutional. The resolution was extremely direct in suggesting the potentially dire consequences of accepting such legislation, but Madison wrote in language that was highly complementary of the Union. The Resolution began by stating that the state of Virginia was deeply committed to the government and Constitution of the United States. It is for this reason, Madison implied, that the state must take such a negative stance on the laws at hand. Virginia held a "warm attachment to the Union of the states" and therefore needed to "oppose every infraction of those principles, which constitute the only basis of that union [the Constitution]".<sup>104</sup> Madison expressed his, and his state's, "deep regret that a spirit has in sundry instances, been manifested by the federal government to enlarge its powers by forced construction of the constitutional charter which defines them."<sup>105</sup> In Madison's mind, Adams and his administration had expanded their constitutionally assigned role to unacceptable levels. Maintenance of the union was usually one of Madison's top priorities, but he could not stand for this blatantly political power grab.

The Resolution then took aim at the President's revolutionary credentials, which were incidentally impeccable. His experience as a leading Revolutionary voice, as a delegate to the Continental Congresses, a signer of the Declaration of Independence, and as the American

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<sup>104</sup> "The Virginia Resolutions," presented 21 December 1798; David B. Mattern and J.C.A. Stagg, et al, eds; *The Papers of James Madison Volume XVII*; Sponsored by the University of Virginia; (Charlottesville, Virginia: University Press of Virginia, 1991), 189.

<sup>105</sup> "The Virginia Resolutions," presented 21 December 1798; David B. Mattern and J.C.A. Stagg, et al, eds; *The Papers of James Madison Volume XVII*; Sponsored by the University of Virginia; (Charlottesville, Virginia: University Press of Virginia, 1991); 189.

minister to Great Britain, had proven his commitment to the American cause. Thus Madison inflicted the deepest of wounds when he wrote that this “spirit” seemed destined to “destroy the meaning and effect of the particular enumeration [of the powers of the federal government]” and to “transform the present republican system of the United States, into an absolute, or at best a mixed monarchy.”<sup>106</sup> In the 1780’s, there were few other more insulting terms aside from “monarchy” to use against the president of the United States or the legislation he initiated and signed. Madison closed his Resolution by appealing to the other states to carefully referred to the Constitution as their “pledge of mutual friendship,” while insisting that “the acts aforesaid are unconstitutional.”<sup>107</sup>

This work highlighted the matured political theory of Madison. Having once argued that the “firm league of friendship” that was the Articles of Confederation, could not survive, he returned to the idea of friendship, in pleading with the other states to oppose the Alien and Sedition Acts. Ron Chernow argues that Madison’s break with Hamilton and the Federalists suggests a radical, one-hundred-eighty-degree turn in his political beliefs.<sup>108</sup> However, Madison’s shifting party affiliation is more akin to a reality check on what could be achieved. This reality check had begun while Madison was still debating the merits of the Virginia Plan at the Constitutional Convention, and it fully materialized while Madison wrote the Virginia Resolutions against the Alien and Seditions Acts. This is a relatively natural process for any leader to undergo. At the start of his career, Madison was idealistic and his thought process, though steeped in political history, did not involve the boundaries of the American reality. Later

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<sup>106</sup> “The Virginia Resolutions,” presented 21 December 1798; David B. Mattern and J.C.A. Stagg, et al, eds; *The Papers of James Madison Volume XVII*; Sponsored by the University of Virginia; (Charlottesville, Virginia: University Press of Virginia, 1991), 189.

<sup>107</sup> “The Virginia Resolutions,” presented 21 December 1798; David B. Mattern and J.C.A. Stagg, et al, eds; *The Papers of James Madison Volume XVII*; Sponsored by the University of Virginia; (Charlottesville, Virginia: University Press of Virginia, 1991), 189.

<sup>108</sup> Ron Chernow, *Alexander Hamilton*, (New York, New York: Penguin Press, 2004), 573-574.



on, Madison's adjusted vision for America included the wisdom that could come only with years of experience in statecraft itself. Throughout his life, Madison remained consistently committed to his belief in popular sovereignty and to his fierce defense of the United States as a nation. This was no easy feat, particularly as a Virginian, but Madison managed to walk this fine line well enough to be elected to two terms as president. Nonetheless, Madison's break from the Federalists does represent a significant, defining moment in what might be called "the original intent" of the father of the Constitution. At this point, his vision for a central, unified government was confronted by a nasty combination of reality and the realization that the power of the federal government could be taken too far, as was reflected by President Adams.

## VII. Courts in American before *Marbury vs. Madison*

Given that this analysis is intended to be focused on the court system, it makes sense to pause here to explain the specific history of the judiciary within the American colonies and the early history of the Union. Prior to *Marbury vs. Madison*, the role of the Supreme Court was not completely clear. Article III of the Constitution, describing the duties of the judicial branch was, according to Irons, passed "with hardly any debate."<sup>109</sup> Perhaps this was because the delegates at the Constitutional Convention were eager to return to their families in their home states, but it is also likely that the Framers did not envision a very influential role for the courts. Americans' relationship with the court system in 1787 was complicated, at best; the Founders' limited attention to this branch of the government is therefore unsurprising. In order to understand why

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<sup>109</sup> Peter Irons, *A People's History of the Supreme Court*, (New York, New York: The Penguin Group, 1999), 43.

the Founders and ratification conventions accepted this, it is critical to examine a few illustrative episodes of this thorny relationship from the colonial period.<sup>110</sup>

Prior to the American Revolution, the colonists had a very poor view of the justice system they had inherited from Great Britain.<sup>111</sup> Thomas Jefferson once commented that judicial activity was based on the “eccentric impulses of whimsical, capricious, designing men.”<sup>112</sup> This antipathy dates back far beyond even the most egregious controversies over the writs of assistance and Admiralty courts of the 1760’s and 1770’s. The Salem Witch trials from a century prior are a good example of the colonists’ view of the judiciary; the fact that a few hysterical girls were able to essentially hijack a governor-appointed court is intriguingly indicative of the lack of rationality in many colonial courts.<sup>113</sup> Although there were a whole host of potential factors that led to the witch trials, the role of the court, appointed by the governor himself, cannot be ignored. The formal court of Oyer and Terminer was in fact led by Phips’ Lieutenant Governor, William Stoughton. Bernard Rosenthal assigns central responsibility to the court, claiming that, “with Phips’ court in place, the witch trials of 1692 became almost inevitable.”<sup>114</sup> The progression of the court’s proceedings left deep scars on the Salem community and throughout the New England colonies. After such an all around traumatic series of events, it is no wonder that the residents of Salem would be at the very least, skeptical of future involvement of the courts in their town.

Less than a century later, the courts came to play a major role in the colonial conflicts that erupted into the American Revolution. It is well documented that colonists were incensed at

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<sup>110</sup> Many anti-federalists did express concerns over the vagueness of Article III. Because the judicial branch

<sup>111</sup> Gordon S. Wood; “Judicial Review in the Era of the Founding;” Robert A Licht ed.; *Is the Supreme Court the Guardian of the Constitution?* (Washington, D.C.: American Enterprise Institute Press, 1993).

<sup>112</sup> Gordon S. Wood; “Judicial Review in the Era of the Founding;” Robert A Licht ed.; *Is the Supreme Court the Guardian of the Constitution?* (Washington, D.C.: American Enterprise Institute Press, 1993), 155.

<sup>113</sup> There are many circulated theories about why the Salem Witch trials took on such epic proportions. Rosenthal’s interpretation is most applicable, considering his opinions about the court that Governor Phips formed.

<sup>114</sup> Bernard Rosenthal, *Salem Story*, (Cambridge, United Kingdom: Cambridge University Press, 1993), 31.

the enforcement of general writs of assistance. These writs could be used for property searches of any kind, and it appeared that there was no limitation on how the king's surrogates could interfere in the colonists' lives. These writs allowed royal officers to crack down on the rampant smuggling that blossomed under the legal limitations placed on the colonists by the Navigation Acts. James Otis Jr. took one of the most public stands against writs of assistance in the Paxton cases of 1761.<sup>115</sup> Although he did lose the court case for his New England clients, John Adams took note of Otis' compelling argument for liberty and judicial review. Adams took careful notes of Otis' monologue and circulated his notes at the close of the case.<sup>116</sup> The crown struck back against Otis' claims by announcing in the Townshend Acts in 1767 that the writs were completely legal, much to the chagrin of the bereaved New England traders.

Admiralty courts were also of great concern, as they were used by the British government to impose strict regulations on the colonies and to enforce punishment for some of the smuggling crimes that had been discovered through the use of writs of assistance. These grand courts could only be found in such far flung locales such as Nova Scotia, prohibiting colonial traders from staging a proper defense. Not only were colonists subject to unnecessary and potentially illegal searches and seizures, they were also physically barred from defending themselves.

Hence, the whole administration of "justice" in the colonies seems to have been tainted by the prerogative of the crown, and this fact is well reflected in both Thomas Jefferson's Preamble to the Virginia Constitution and the national Declaration of Independence. In the both documents, Jefferson accuses King George III of "transporting us beyond seas, to be tried for

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<sup>115</sup> James Otis, "Against the Writs of Assistance," 1761 Speech.

<sup>116</sup> James M. Farrell, "The Writs of Assistance and Public Memory: John Adams and the Legacy of James Otis," *New England Quarterly*, Vol. 29, No. 4.

pretended offences...”<sup>117</sup> In the Declaration of Independence, Jefferson additionally charges that King George III is guilty of the following:

He has obstructed the administration of justice...He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries...[He is guilty of] protecting them [large bodies of armed troops, quartered among the colonists], by mock trial, from punishment for any murders which they should commit on the inhabitants of these states...[and] depriving us in many cases, of the benefits of trial by jury.<sup>118</sup>

Thus, to say that the colonists had an uneasy relationship with the justice system is a gross underestimation of the frustrations the colonists felt about the judiciary. Jefferson was able to succinctly identify King George III as the perpetrator of all of these offences, but in most cases, colonial officers and magistrates were the messengers of the bad news of the crown.

Despite this rocky history, the colonists’ opinions of the court eventually changed. Gordon Wood points out that by the 1780’s, some colonists had become perturbed by the rampant republicanism of the popular assemblies.<sup>119</sup> The judiciary was one method for limiting the effects of these overwhelmingly democratic legislative bodies. Wood posits that the new nation just needed a hint of aristocracy to calm the extreme republican tidal wave that had been unleashed during the Revolution. Wood quotes Alexander de Tocqueville, explaining that “The courts of justice are the visible organs by which the legal profession is enabled to control the democracy.”<sup>120</sup>

With this political baggage in mind, the reasoning, or excuse, behind the relatively short Article III becomes clearer. There were many divided and conflicting opinions about the

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<sup>117</sup> Thomas Jefferson; Preamble to the Virginia Constitution; Adopted June 29, 1776; <[http://lexrex.com/enlightentend/laws/virg\\_pre.htm](http://lexrex.com/enlightentend/laws/virg_pre.htm)>.

<sup>118</sup> Thomas Jefferson; The Declaration of Independence; Adopted July 4, 1776; <<http://www.constitution.org/usdeclar.htm>>.

<sup>119</sup> Gordon S. Wood; “Judicial Review in the Era of the Founding;” Robert A Licht ed.; *Is the Supreme Court the Guardian of the Constitution?* (Washington, D.C.: American Enterprise Institute Press, 1993).

<sup>120</sup> Gordon S. Wood; “Judicial Review in the Era of the Founding;” Robert A Licht ed.; *Is the Supreme Court the Guardian of the Constitution?* (Washington, D.C.: American Enterprise Institute Press, 1993), 166.

judiciary, and as a result, the Court was left somewhat to its own devices to invent its own role in the nascent country. The first major case that the Supreme Court heard was *Chisholm vs. Georgia*, in February of 1793. In this case, the plaintiff argued that he was owed money by the state of Georgia for goods that had been provided to the state during the Revolutionary War. Georgia refused to acknowledge the lawsuit, claiming that it could not be sued by an individual of another state, in this case, South Carolina. The court ruled with Chisholm four-to-one, with Justice Iredell as the lone dissenting voice. In spite of this resounding victory for Chisholm, the decision was quickly overruled by the Eleventh Amendment states very clearly:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.<sup>121</sup>

This amendment not only shut down Chisholm's case, but it also virtually shut down the Supreme Court for nearly a decade, until the *Marbury vs. Madison* ruling. There were no other significant cases in the interim. This particular case brings to light a number of enthralling conclusions. On first glance, the case is fairly simple. The court acted one way, Congress did not like the Court's ruling, and then the Eleventh Amendment worked. Originalists love this case for two reasons. First, the amendment process worked; there was relatively swift action taken against a purportedly improper ruling. Second, the amendment that was passed shut down a potentially "activist" court.<sup>122</sup> On the other hand, this case brings support to the living constitutionalist claim that there was no agreed upon definition of the Constitution at its founding. If there had been such a consensus, it would not have been possible for a Supreme Court filled with Framers to disagree with the sitting legislature.

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<sup>121</sup> *The United States Constitution*. < <http://www.archives.gov/exhibits/charters/constitution.html>>.

<sup>122</sup> Peter Irons, *A People's History of the Supreme Court*, (New York, New York: The Penguin Group, 1990), 93.

The most intriguing aspect of this case is the fact that all of the sitting Supreme Court Justices were present at the founding. This does not bode so well for originalists. Even if intentionalism is put to the side, it is very difficult to defend the fact that four of the “founders” were able to make a critical mistake on the interpretation of the Constitution; they made a mistake egregious enough that Congress even felt that it was necessary to pass an amendment to guarantee that no similar mistake could be committed again.<sup>123</sup> Nevertheless, the Constitution represented the first effort to define and record a governing system for a federal republic that would be enforced via the judiciary. In this light, *Chisholm* becomes a case in which the various branches of government were testing the waters of their newly appointed powers.

Once the Court recovered from the boomerang effect of the *Chisholm* case, *Marbury v. Madison* carved out a more distinct role for the high Court, in the form of judicial review. In this famous case, Chief Justice Marshall declined to require Secretary of State Madison to deliver Marbury’s commission to the judiciary that had been signed by the outgoing president, John Adams. Marshall argued that he would not issue a writ of mandamus, because section thirteen of the Judiciary Act of 1789, which granted the judiciary the authority to issue the writ, was itself unconstitutional. Marshall states that Marbury does deserve his commission:

It is, then, the opinion of the Court [that Marbury has a] right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

But Marshall also explains that the Supreme Court is not in the position to enforce this, because of the Judiciary Act’s unconstitutionality:

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution. . . . The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part

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<sup>123</sup> Ibid, 93.

of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable...The rule must be discharged.<sup>124</sup>

Although Marshall gave up the relatively insignificant power of enforcing writs of mandamus, he was able to secure a more permanent, broad reaching power for the Court through this opinion.

## Chapter 3: Conclusions

### I. Problems for Originalism

At its most basic, originalism implies a frozen Constitution. This idea is incompatible with the historical fact that Madison was both a leading Federalist, and then he was also a founding Republican. Although party memberships were not formally recognized or acknowledged, party affiliation in eighteenth-century America was typically based on one's opinion of the new Constitution, with few exceptions. One's vision of the Constitution dictated one's party, even more so than it would today. As a result, Madison's change of party indicates that either he had a change in opinion or that the party (the Federalists) with which he originally was associated, changed in some way that was unpalatable to Madison's general plans for the country. Both of these conclusions contain negative consequences for originalism.

If Madison did in fact have a change of heart, then it would seem preposterous to insist that an originalist view of the Constitution is correct, given that the "father" of the Constitution himself had changed his opinion between the drafting of the Constitution in the summer of 1787, the *Federalist* winter of 1787-1788, and the battle over Hamilton's proposed plans in 1790.

On the other hand, if it is the case that Madison did not change his mind, but simply rejected the direction that the Federalists were taking the country, then modern day observers

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<sup>124</sup> Gerald Gunther and Kathleen M. Sullivan, *Constitutional Law, 13<sup>th</sup> Edition*, (Westbury, New York: Foundation Press, Inc., 1997), 2-11.

must understand that the country was “off-track” even as early as 1790. It has been borne out in the history books that Madison’s first major break with the Washington administration was over Alexander Hamilton’s plans for assuming the public debt. Although Madison was considered to be the first president’s “right hand man,”<sup>125</sup> the President chose to adopt Hamilton’s plan. The conflict between Hamilton and Madison was irreparably deepened by Hamilton’s second major policy plan, which was to create a national bank. Both of Hamilton’s plans were accepted, at the disgust and dismay of Madison. Although the Federalist Party eventually died out shortly after John Adams’ presidency in 1816, the Federalists did leave a lasting impression. First, they were able to ratify and institute their plan for national governance. Second, they left the country with Hamilton’s plan for debt assumption, as well as the national bank. By Madison’s standards, the original intent *and* the original text of the Constitution had been abandoned when these policies were instituted.

The second major problem with originalism is that it implies that there was some agreement on the issues before the Constitutional Convention and the ratification conventions. In truth, the discussion above highlights that this was simply not the case. There was huge disagreement over what the Constitution really meant, and the Constitutional Convention itself was a partisan event. Only those committed to some reform of the Articles even bothered to attend the Convention, so the resultant Constitution is hardly a cumulative body of the opinions of all of the political thinkers of 1787. There is a reason why the Constitution had acquired the epithet, “a bundle of compromises” and it is certainly *not* because the Constitution stood for a unified vision for the future of the country. Even if there had been agreement among the delegates to the Convention and among the voters of the ratifying conventions, these voters

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<sup>125</sup> Irving Brant, *James Madison: Father of the Constitution, 1787-1800*, (New York, New York: The Bobbs-Merrill Company Inc., 1950).



represented less than half of the population of the several states in 1787. With women and blacks excluded from the votes and from the debate, it is hard to justify the claim that there was any kind of consensus among the citizens of the Confederacy. Finally, Justice Breyer and other living constitutionalists reject, at face value, the claim that originalism or textualism can somehow be objective. Breyer claims that each judicial theory has some “inherently subjective elements” and that any effort to “divine” the original intent of the document is really just a political ploy to excuse the very political and very subjective opinions of originalist judges.<sup>126</sup>

Third, the great value of the Constitution is that it has been able to survive and endure for over two hundred years; the “Great Experiment” lived to see the twenty-first century. By freezing the Constitution, it may lose its fundamental value. Thomas Jefferson himself did not think that a lasting Constitution was a good idea; given his personal financial troubles, he was well inclined to liberate each generation from the prior generation’s (in)decisions. As has been mentioned, Jefferson even wrote to Madison, entertaining the idea of a constitution that would expire every nineteen years. Madison politely dissuaded Jefferson of this idea as quickly as he could.<sup>127</sup> In this spirit, Breyer writes, “In sum, our constitutional history has been a quest for workable government, workable democratic government, workable democratic government protective of individual personal liberty.” The value of the Constitution is not in its frozen, 1787 form, it is in its adaptability according to this view.<sup>128</sup>

Finally, it is important to recall that the “Framers” were not even necessarily the political figures that one might expect. John Adams and Thomas Jefferson were conspicuously absent, as

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<sup>126</sup> Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, (New York, New York: Alfred A. Knopf, Random House, 2005), 127.

<sup>127</sup> Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815*, (Oxford, United Kingdom: Oxford University Press, 2009), 149.

<sup>128</sup> Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, (New York, New York: Alfred A. Knopf, Random House, 2005), 34.

they were living overseas on diplomatic missions for the U.S. during the Convention. George Washington, the Zeus, of the American pantheon of Revolutionary gods did not speak at the Convention until the absolute last day of debate.<sup>129</sup>

## II. Problems for Non-Originalists

By assessing James Madison as the central figure in this discussion, an originalist attitude is assumed. However, this is appropriate even when analyzing anti-originalist points of view, because even the most liberal judicial activists claim to be only upholding the Constitution and its principles as they understand those principles. Therefore, it still makes sense to use the same rubric of historical understanding to assess living constitutionalist theories.

To begin with, although there may have been heated debates in 1787 over *who* could be trusted to elect good representatives to the national government, there was no disagreement about the fact that these officials should be elected. For this reason, Robert Bork finds the current state of the Supreme Court completely unacceptable: “we are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers.”<sup>130</sup> Madison wanted the national government to be elected directly by the people, in fact, rather than through the already elected state legislatures. The same was true of the ratifying conventions. Furthermore, this commitment to elections can be traced to pamphlets written in support of a Revolution against Great Britain. The primary assault made by these pamphlets was that Parliament and the king were unfit to rule the colonies, because they were not representative bodies and they did not value the interests of the colonists. Thus, the idea that a group of

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<sup>129</sup> Carol Berkin, *A Brilliant Solution: Reinventing the American Constitution*, (New York, New York: Harcourt Press, 2002), 51.

<sup>130</sup> Robert H. Bork, *The Tempting of America*, (New York, New York: The Free Press, Division of Macmillan, Inc., 1990), 131.

unelected officials might wield so much power is absolutely odious to the democratic ideals of both 1776 and 1787. Chief Justice Rehnquist wrote that the idea of a living constitution is thus “genuinely corrosive of the fundamental values of our democratic society.”<sup>131</sup> Public opinion on the direction of the country is supposed to be funneled, via democratic election, into the legislature, not into the judiciary.

The idea that justices might use their own value systems to make their decisions in Supreme Court cases might be appealing, if it were not for the fact that the justices are not guaranteed to share the public’s views. In 1873, the Court ruled specifically to bar women from practicing law at the national level, and in 1943 approved the internment of civilian Japanese-American citizens. One would hope that the opinions of those Justices did not actually represent the best legal thinking in the country at that time, but that does not mean that all justices will always make morally “right” or “good” decisions.<sup>132</sup> In support of this argument, Antonin Scalia repeatedly announces that the Supreme Court has no right or authority to make value judgments. He is a lawyer, fit to interpret legal documents, but he is no ethicist. Scalia adds that he has no idea what the average American thinks about moral questions, and that is not his job.<sup>133</sup> Even revisionist John Hart Ely claims that,

Controlling today’s generation by the values of its grandchildren is no more acceptable than controlling it by the values of its grandparents: a liberal “accelerator” is neither less nor more consistent with democratic theory than is a “conservative brake.”<sup>134</sup>

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<sup>131</sup> William H. Rehnquist, “The Notion of a Living Constitution,” *The Harvard Journal of Law and Public Policy*, Vol. 29, No. 2, <[www.law.harvard.edu/students/orgs/jlpp/vol29\\_No2](http://www.law.harvard.edu/students/orgs/jlpp/vol29_No2)>.

<sup>132</sup> Louis Fisher, “One of the Guardians, Sometimes,” Licht, Robert A, ed., *Is the Supreme Court the Guardian of the Constitution?* (Washington, D.C.: American Enterprise Institute Press, 1993).

<sup>133</sup> “A Conversation on the Constitution with Supreme Court Justices Stephen Breyer and Antonin Scalia, Parts I-X,” Sponsored by the Federalist Society and American Constitution Society, 5 December 2006. Accessed 26 February 2011, <[www.youtube.com](http://www.youtube.com)>.

<sup>134</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge, Massachusetts: Harvard University Press, 1980), 70.

It seems that even the most well intentioned justices should not be entrusted with the decisions that really belong with a democratically elected legislative body.

Second, there is no precedent for judicial activism in England. This is significant, because, as has been discussed, the arguments of the Revolution were based in classical and enlightened theory, modified only slightly to fit the colonists' experiences with colonial rule. Otis, Dickinson, Paine, and Jefferson all based their arguments on European theories of government; the Revolution erupted because the colonists claimed that the King George had abandoned the established rules of the English empire. Yet, activist judges of the American breed can be found nowhere in England, because their system does not allow for it. In the U.K. if the courts find that a law is unfair, too harsh, or "unconstitutional", then the law is simply thrown back to the legislature for reassessment.<sup>135</sup> This convention of the English system is a large contributing factor to the supremacy and sovereignty of Parliament. There is simply no room for "legislating from the bench". Based on this contrast, it makes little sense why the founders would have condoned any kind of rule-making by the justices. Every other part of the Constitution was written explicitly to imitate and correct, if necessary, the government of the United Kingdom. The concept of active judicial review however, is a purely American invention that does not fit within the grand movement of the Revolution nor the Constitutional Convention.

Third, Madison was extremely concerned with the separation of powers, in order to avoid legislative supremacy. He did not want any one branch of the federal government to enjoy too much power, and accordingly recommended creating a "Council of Revision," bringing together the Executive and Judicial branches in order to block encroachments by the legislature.<sup>136</sup>

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<sup>135</sup> Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism*, (Hants, England: Dartmouth Publishing Company Ltd., 1999).

<sup>136</sup> Andrew Burstein and Nancy Isenberg, *Madison and Jefferson*, (New York, New York: Random House Press, 2010), 140.

Federalist LI was deeply concerned with pitting ambition against ambition within the government to ensure that no branch was superior. In the United Kingdom, the legislature is decidedly sovereign and supreme in the government. The United States has no such official supremacy of one branch over the others, although originalism is sometimes construed to mean deference to the legislature. Only the Constitution itself is claimed to be “supreme” via the Supremacy Clause along with the Supreme Court’s decisions in cases brought before them. Chief Justice John Marshall explained this very clearly: “The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts.”<sup>137</sup> This authority stems from the fact that the United States has a written, codified constitution, as opposed to the decentralized constitution of the United Kingdom.

Fourth, the irony of this debate is that it was the Anti-constitution party, the Antifederalists, who insisted that the judiciary created by the Constitution would become too powerful. In contrast, the Federalists insisted that the judiciary had neither force nor will; judges’ only tool would be their judgment.<sup>138</sup> Meanwhile, “Brutus” wrote that “[the judiciary] will be exalted above all other power in the government and subject to no control.”<sup>139</sup> To some extent, the Antifederalists were correct. The Supreme Court does now enjoy breathtaking power over the most intimate details of American lives. Yet, the Federalists insisted that this was not in their plans. In the Virginia plan for instance, there is no mention or hint of judicial review of its modern proportions. Instead, the Virginia design called for a national judiciary only to settle disputes that could not be settled in state courts because of conflicts of interest. This leaves one

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<sup>137</sup> Gerald Gunther and Kathleen M. Sullivan, *Constitutional Law, 13th Edition*, (Westbury, New York: Foundation Press, Inc., 1997), 9.

<sup>138</sup> Walter Berns, “Preserving a Living Constitution,” Licht, Robert A, ed., *Is the Supreme Court the Guardian of the Constitution?* (Washington, D.C.: American Enterprise Institute Press, 1993).

<sup>139</sup> Brutus, Essay XII, 15 March 1788; Ralph Ketcham, ed.; *The AntiFederalist Papers and the Constitutional Convention Debates*; (New York, New York: Penguin Putnam Inc., 2003).

to wonder whether Marshall's decision to invoke judicial review was justified at all. If it was not, then this entire debate is moot, as the Supreme Court has been functioning on false premises all along.

### III. Final Conclusions

In examining the relevant history leading up to and following the drafting of the Constitution, it becomes clear that both living constitutionalism and originalism are inherently flawed. Both camps focus on select pieces of the Constitution that serve their purposes, while ignoring other aspects of the document and the motivations that orchestrated its drafting. In this regard, they are both deeply political theories, which rely on history only as a tool for achieving their political goals. The central problem with living constitutionalism is that it promotes a larger, value-adding quality to the role of the judiciary than was envisioned by James Madison. The court was supposed to be the "check" on the rest of the government; the court was not supposed to need its own "check" as it does today. Living constitutionalism fundamentally disavows the foundational principles of this democracy, by placing so much power in the hands of a few unelected officials. The judicial appointment process completely sidesteps Madison's vision, described in *Federalist X*, of a large republic that could stamp out factions. With such a small body of members, the Supreme Court would appear to be bound to create factions rather than avoid them.

On the other hand, originalism has its faults as well. Although Madison is claimed as the champion Founder by organization such as the Federalist Society, a close study of Madison's intellectual trajectory disproves the notion of a frozen or consensual Constitution. With Madison's gradual evolution from ultra-nationalist, to moderate, to states-rights advocate, it is

hard to identify exactly what he may have intended. Although this evolution may appear to be an enormous flip-flop, it may also be characterized as the natural progression of a leader, from idealist to pragmatist. Perhaps, his intentions lay precisely at the moment where he abandoned the Federalist mantle, and embraced the Democratic Republican ideology. If this is the case, this country disregarded Madison long ago. Perhaps the strictest originalists would agree with this point. However, most Americans would agree that it would be unnecessary and harmful to the country to attempt to unravel and forget over two hundred years of precedent and governance.

John Hart Ely presents an intriguing alternative view; he insists that the Constitution was primarily a procedural document rather than a value-ridden document. He writes,

...The selection and accommodation of substantive values is left almost entirely to the political process and instead the document [the Constitution] is overwhelmingly concerned, on the one hand, with procedural fairness...and...with ensuring broad participation in the process and distributions of government.<sup>140</sup>

While this division between procedural and substantive values does not solve every problem, it does pay service to a desirable balance of power between the branches of government. Chief Justice Rehnquist's explanation is also compelling:

These limitations [on the power of the federal government] were not themselves designed to solve the problems of the future, but were instead designed to make certain that the constituent branches when *they* attempted to solve those problems, should not transgress these fundamental limitations.<sup>141</sup>

Taken together, these opinions limit the potential role of the federal government, and especially the judicial branch. These limitations, in my opinion, are an accurate representation of what James Madison was trying to accomplish. Although he supported a strong, centralized government, Madison's conflicts with Alexander Hamilton demonstrate that he did intend for

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<sup>140</sup>John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge, Massachusetts: Harvard University Press, 1980), 87.

<sup>141</sup>William H. Rehnquist, "The Notion of a Living Constitution," *The Harvard Journal of Law and Public Policy*, Vol. 29, No. 2, <[www.law.harvard.edu/students/orgs/jlpp/vol29\\_No2](http://www.law.harvard.edu/students/orgs/jlpp/vol29_No2)>.

limitations on the government. While it may be impractical to “undo” all of the constitutional developments that have occurred since the 1790’s, it does make sense to keep the idea of a balanced and limited government at the forefront of such judicial debates. This is particularly true considering Madison’s concept of a “Council of Revision,” which revealed Madison’s preference for balance between the branches of government.

Ideally, this debate between living constitutionalists and originalists depicts the classic “Madisonian dilemma.” For Madison, there were unavoidable tensions within a democracy or a republic. The primary tension was between the will of the majority and the protection of the minorities. In order to be a democracy or a representative republic, it would be important to value and act on the will of the majority of the people. However, the will of the majority had the potential to become tyrannous. If and when that happened, minority rights should be protected by unelected judges in cases properly brought before them. In their most ideal forms, originalism protects the will of the majority both in 1787 and the will of the majority expressed today through the legislature’s passage of amendments, while living constitutionalism protects the minorities from the tyranny of the majority. Either way, the system can be corrupted.

Unfortunately, rather than representing this grand democratic debate, the conflicts between originalism and living constitutionalism typically fall along the same lines as the political debates in this country. These “constitutional doctrines” have been invented, twisted, and manipulated to fit the political needs of the party in power; this indictment applies to both sides of the aisle. However impartial they may claim to be, Supreme Court justices inevitably bring their political ideologies to the bench, where they must then decide how to constitutionally justify their decisions.



Nonetheless, there may still be some hope in the judicial system, as it has generally managed to avoid deep or lasting corruption. The Court has maintained a level of respect and admiration that is unique among the three branches of government. Although various presidents and political parties did periodically attempt to “pack” the court or overtly influence the direction of the court, the American Supreme Court has remained remarkably resilient and resolute. While there have been periods of liberal or conservative dominance, the Court has sustained a relatively straight path in contrast to the other branches of government, which seem to swing so violently to the left or to the right that the entire country is battered by the whiplash effect. Perhaps it is precisely this balancing act that was Madison’s original intention. Just as Madison changed his political affiliation when he realized one party was following an improper path, the same may be said about the judicial system today.

As both originalists and living constitutionalists discuss, the Constitution was a great “bundle of compromises.” From Madison’s perspective, this bundle of compromises certainly may have fallen short of his initial hopes for the new federal government. However, Madison’s disappointment should not discount the overall success of the Constitutional Convention. The delegates sitting in Philadelphia in the summer of 1787 may have come together with wildly different expectations for what the Convention would or could accomplish. Nonetheless, under the most severe time constraints and political pressures, the delegates managed to produce an incredible document. Modern observers should consider the possibility that the original intent was precisely the grand compromises and bargains that were struck both in 1787 and throughout the ratification period. The founders, collectively and intentionally, acted to preserve the tensions between state and federal government and between executive, legislative and judicial branches of government under the new Constitution.

Sources

Allison, Robert J. *The Crescent Obscured: The United States and the Muslim World, 1776-1815*.

New York, New York: Oxford University Press, 1995.

Arkes, Hadley. *Constitutional Illusions & Anchoring Truths: The Touchstone of Natural Law*.

New York, New York: Cambridge University Press, 2010.

*The Articles of Confederation*. U.S. National Archives & Records Administration. Washington,

D.C. <<http://www.ourdocuments.gov/doc.php?doc=3&page=transcript>>.

Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Cambridge,

Massachusetts: The Belknap Press of Harvard University Press, 1967.

Baumann, Fred. "Historicism and the Constitution." Bloom, Alan, ed. *Confronting the*

*Constitution*. Washington, D.C.: American Enterprise Institute, 1990.

Bennet, Robert W. and Solum, Lawrence B. *Constitutional Originalism: A Debate*. Ithaca, New

York: Cornell University Press, 2011.

Berkin, Carol. *A Brilliant Solution: Reinventing the American Constitution*. New York, New

York: Harcourt Press, 2002.

Berns, Walter. "Preserving a Living Constitution." Licht, Robert A, ed. *Is the Supreme Court the*

*Guardian of the Constitution?* Washington, D.C.: American Enterprise Institute Press,

1993.

Bessette, Joseph. "Guarding the Constitution from Legislative Tyranny." Licht, Robert A, ed. *Is*

*the Supreme Court the Guardian of the Constitution?* Washington, D.C.: American

Enterprise Institute Press, 1993.

Bork, Robert H. "The Right of Privacy: The Construction of a Constitutional Time Bomb."

- Feinberg, Joel and Coleman, Jules; eds. *Philosophy of Law, 6<sup>th</sup> Edition*. Belmont, California: Wadsworth and Thompson Learning, 1999; 356-359.
- Bork, Robert H. *The Tempting of America*. New York, New York: The Free Press, Division of Macmillan, Inc., 1990.
- Boyer, Paul and Nissenbaum, Stephen. *Salem Possessed*. Cambridge, Massachusetts: Harvard University Press, 1974.
- Brant, Irving. *James Madison: Father of the Constitution, 1787-1800*. New York, New York: The Bobbs-Merrill Company Inc., 1950.
- Bravin, Jess. "Rethinking Original Intent." *The Wall Street Journal*. 14 March 2009.
- Breyer, Stephen. *Active Liberty: Interpreting Our Democratic Constitution*. New York, New York: Alfred A. Knopf, Random House, 2005.
- Brinkley, Alan and Dyer, Davis, eds. *The American Presidency: The Authoritative Reference*. "James Madison." Boston, Massachusetts: Houghton Mifflin Company, 2004.
- Burstein, Andrew and Isenberg, Nancy. *Madison and Jefferson*. New York, New York: Random House Press, 2010.
- Chernow, Ron. *Alexander Hamilton*. New York, New York: Penguin Press, 2004.
- "A Conversation on the Constitution with Supreme Court Justices Stephen Breyer and Antonin Scalia, Parts I-X." Sponsored by the Federalist Society and American Constitution Society. 5 December 2006. Accessed 26 February 2011. <[www.youtube.com](http://www.youtube.com)>.
- Crackel, Theodore J. "George Washington and the Constitution." *History Now: American History Online. Issue XIII*, September 2007.  
<[www.gilderlehrman.org/historynow/09\\_2007/historian2.php](http://www.gilderlehrman.org/historynow/09_2007/historian2.php)>.
- Diamond, Larry. *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the*

- World*. New York, New York: Times Books, 2008.
- Dickinson, John. *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies*. New York, New York: Outlook Company, 1903.
- Dickinson, John and Jefferson, Thomas. *Declaration of the Causes and Necessity of Taking Up Arms*. 1775.
- Ellis, Joseph J. *American Sphinx: The Character of Thomas Jefferson*. New York, New York: Alfred A. Knopf, 1997.
- Ellis, Joseph J. *American Creation: Triumphs and Tragedies at the Founding of the Republic*. New York, New York: Alfred A. Knopf, 2007.
- Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Massachusetts: Harvard University Press, 1980.
- Farrell, James M. "The Writs of Assistance and Public Memory: John Adams and the Legacy of James Otis." *New England Quarterly*, Vol. 29, No. 4.
- Feinberg, Joel and Coleman, Jules; eds. *Philosophy of Law, 6<sup>th</sup> Edition*. Belmont, California: Wadsworth and Thompson Learning, 1999.
- Fierke, Karen. "Constructivism." Dunne, Tim; et al. *International Relations Theories: Discipline and Diversity*. Oxford, United Kingdom: Oxford University Press, 2007.
- Fisher, Louis. "One of the Guardians, Sometimes." Licht, Robert A, ed. *Is the Supreme Court the Guardian of the Constitution?* Washington, D.C.: American Enterprise Institute Press, 1993.
- Foner, Eric. *Tom Paine and Revolutionary America*. Oxford, UK: Oxford University Press, 1976, 2005.
- Fowler, William M. Jr. *Jack Tars and the Commodores*. Boston, Massachusetts: Houghton

Mifflin Company, 1984.

“Frequently Asked Questions.” The Supreme Court of the United States. Accessed 25 March 2012. <<http://www.supremecourt.gov/faq.aspx#faqgi9>>.

Gunther, Gerald and Sullivan, Kathleen M. *Constitutional Law, 13th Edition*. Westbury, New York: Foundation Press, Inc., 1997.

Hobson, Charles F. and Rutland, Robert A., et al, eds. *The Papers of James Madison, Volume XIII*. Sponsored by the University of Virginia. Charlottesville, Virginia: University Press of Virginia, 1981.

Irons, Peter. *A People's History of the Supreme Court*. New York, New York: The Penguin Group, 1999.

Jefferson, Thomas. *Declaration of Independence*. Adopted July 4, 1776.

<<http://www.constitution.org/usdeclar.htm>>.

Jefferson, Thomas. *Preamble to the Virginia Constitution*. Adopted June 29, 1776.

<[http://lexrex.com/enlightentend/laws/virg\\_pre.htm](http://lexrex.com/enlightentend/laws/virg_pre.htm)>.

Jefferson, Thomas. *A Summary View of the Rights of British America*. Williamsburg, Virginia; 1774.

Jensen, Merrill. *The Articles of Confederation, An Interpretation of the Social-Constitutional History of the American Revolution 1774-1781*. Madison, Wisconsin: The University of Wisconsin Press, 1966.

Ketcham, Ralph. *The Madisons at Montpelier: Reflections on the Founding Couple*.

Charlottesville, Virginia: University of Virginia Press, 2009.

Ketcham, Ralph; ed. *The AntiFederalist Papers and the Constitutional Convention Debates*.

New York, New York: Penguin Putnam Inc., 2003.

- Lambert, Frank. *The Barbary Wars: American Independence in the Atlantic World*. New York, New York: Hill and Wang, of Farrar, Straus, and Giroux , 1943.
- Leiner, Frederick C. *The End of Barbary Terror: America's 1815 War Against the Pirates of North Africa*. New York, New York: Oxford University Press, 2006.
- Licht, Robert A, ed. *Is the Supreme Court the Guardian of the Constitution?* Washington, D.C.: American Enterprise Institute Press, 1993.
- Linder, Doug. "Exploring Constitutional Conflicts: Theories of Constitutional Interpretation." University of Missouri-Kansas Law School Constitutional Law Course. Created 2012. Accessed 26 February 2012. <[www.law2.umkc.edu/faculty/projects/ftrials/conlaw/home/html](http://www.law2.umkc.edu/faculty/projects/ftrials/conlaw/home/html)>.
- Liptak, Adam. "In Court, Sharp Questions on Health Care Law's Mandate." *The New York Times*. 27 March 2012. <[www.nytimes.com](http://www.nytimes.com)>.
- London, Joshua E. *Victory in Tripoli: How America's War with the Barbary Pirates Established the U.S. Navy and Built a Nation*. Hoboken, New Jersey: John Wiley and Sons, Inc. , 2005.
- Loth, Renee. "We All 'Own' the Constitution." *The Boston Globe*. 8 January 2011.
- Lyons, David. "Constitutional Interpretation and Original Meaning." Feinberg, Joel and Coleman, Jules; eds. *Philosophy of Law, 6<sup>th</sup> Edition*. Belmont, California: Wadsworth and Thompson Learning, 1999; 374-388.
- Madison, James. "Of Ancient and Modern Confederacies." April-June 1786.
- Madison, James. "Vices of the Political System of the United States." April, 1787.
- Madison, James. *The Writings of James Madison, comprising his Public Papers and his Private Correspondence*. Hunt, Gaillard, ed. New York, New York: G. P. Putnam's Sons, 1900.

- Volume II, Chapter: "Of Ancient and Modern Confederacies." Accessed from <http://oll.libertyfund.org>, 20 October, 2011.
- Maier, Pauline. *American Scripture: How America Declared Its Independence from Britain*. London: Pimlico, 1999.
- Maier, Pauline. *Ratification: The People Debate the Constitution, 1787-1788*. New York, New York: Simon and Schuster, 2010.
- Mattern, David B., Stagg, J.C. A., et al, eds. *The Papers of James Madison Volume XVII*. Sponsored by the University of Virginia. Charlottesville, Virginia: University Press of Virginia, 1991.
- Magnet, Myron. "The Great Little Madison," *City Journal*, Vol 21, No 2. The Manhattan Institute. < [http://www.city-journal.org/2011/21\\_2\\_urb-james-madison.html](http://www.city-journal.org/2011/21_2_urb-james-madison.html)>.
- Magnet, Myron. "James Madison and the Dilemmas of Democracy: What kind of government did the Father of the Constitution envision?" *City Journal*. Winter 2011. The Manhattan Institute. Accessed from <http://www.city-journal.org>.
- Malleson, Kate. *The New Judiciary: The Effects of Expansion and Activism*. Hants, England: Dartmouth Publishing Company Ltd., 1999.
- Marambaud, Pierre. "'Letters from a Farmer in Pennsylvania' as Political Discourse: Ideology, Imagery, and Rhetoric," in *Early American Literature*, vol. 12, no. 1. Chapel Hill, North Carolina: University of North Carolina Press, 1977.
- McDonald, Forrest. *E Pluribus Unum: The Formation of the American Republic, 1776-1790*. Indianapolis, Indiana, USA: Liberty Press; 1979, 2<sup>nd</sup> edition.
- McDonald, Forrest. *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*. Kansas, USA: University Press, of Kansas, 1985.

- Miller, John C. *The Federalist Era, 1789-1801*. The American Nation Series. New York, New York: Haper & Brothers, 1960.
- Norton, Mary Beth. *In the Devil's Snare: The Salem Witchcraft Crisis of 1692*. New York, New York: Alfred A. Knopf, 2002.
- O'Connor, Sandra Day. *The Majesty of the Law*. New York, New York: Random House Publishing, 2003.
- Onuf, Peter S. *Statehood and Union: A History of the Northwest Ordinance*. Bloomington, Indiana, USA: Indiana University Press, 1987.
- Otis, James, Jr. *A Vindication of the Conduct of the House of Representatives*. Boston, Massachusetts: Edes & Gill, 1762.
- Otis, James, Jr. "In Opposition to the Writs of Assistance," as recorded by John Adams, 1761.  
<<http://www.nationalcenter.org/OppositiontoWrits.html>>.
- Otis, James Jr. *The Rights of the British Colonists Asserted and Proved*. Boston, Massachusetts: Edes & Gill, 1764.
- Paine, Thomas. *Common Sense*. London, England: Penguin Group Ltd., 2004.
- Peele, Gillian. *Governing the United Kingdom, Third Edition*. Oxford, England: Blackwell Publishing, 1995.
- Rakove, Jack. "James Madison and the Constitution." *History Now: American History Online*. Issue XIII, September 2007.  
<[www.gilderlehrman.org/historynow/09\\_2007/historian2.php](http://www.gilderlehrman.org/historynow/09_2007/historian2.php)>.
- Rakove, Jack. *James Madison and the Creation of the American Republic*, 3rd ed. New York, New York: Peasson Longman Publishing, 2007.
- Rakove, Jack N. *Original Meanings*. New York, New York: Vintage Books, A Division of



- Random House, Inc., 1997.
- Randolph, A. Raymond. "Originalism and History: The Case of *Boumediene vs. Bush*." *Harvard Journal of Law and Public Policy*, Vol. 34, No. 1. <[www.harvard-jlpp.com](http://www.harvard-jlpp.com)>.
- Rehnquist, William H. "The Notion of a Living Constitution." *The Harvard Journal of Law and Public Policy*, Vol. 29, No. 2.  
<[www.law.harvard.edu/students/orgs/jlpp/vol29\\_No2](http://www.law.harvard.edu/students/orgs/jlpp/vol29_No2)>.
- Rosen, Jeffrey. "If Justice Scalia had His Way: What the United States Might Look Like Under an Originalist Interpretation of the Constitution." *The New York Times*. 9 January 2011.
- Rosenthal, Bernard. *Salem Story*. Cambridge, United Kingdom: Cambridge University Press, 1993.
- Rutland, Robert A. and Rachal, William M. E., et al, eds. *The Papers of James Madison, Volumes XIII, IX, X*. Sponsored by the University of Virginia. Chicago, Illinois: The University of Chicago Press; 1973, 1975, 1977.
- Scalia, Antonin. "Constitutional Interpretation the Old Fashioned Way." Sponsored by the Woodrow Wilson International Center for Scholars, Washington. D.C. 14 March 2005.
- Scalia, Antonin. Lecture at the Oxford University Union; Oxford, UK. 9 March 2011.
- Scalia, Antonin. *A Matter of Interpretation*. Princeton, New Jersey: Princeton University Press, 1997.
- Sloan, Cliff and McKean, David. *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court*. New York, New York, Public Affairs; 2009.
- Solberg, Winton U, ed. *The Constitutional Convention and the Formation of the Union*. Chicago, USA: University of Illinois Press; 1990, 2<sup>nd</sup> edition.
- Stagg, J.C. A., editor in chief, the James Madison Papers. "An Introduction to the Life and

Papers of James Madison." Library of Congress.

<[www.memory.loc.gov/ammem/collections/madison\\_papers](http://www.memory.loc.gov/ammem/collections/madison_papers)>.

Strauss, David A. "The Living Constitution (An Excerpt)," *The Record*. A University of Chicago Law School Publication, Fall 2010.

"Thomas Burke." *North Carolina History Project*. Accessed 25 February 2012.

<<http://www.northcarolinahistory.org/encyclopedia/495/entry/>>.

Toobin, Jeffrey. *The Nine: Inside the Secret World of the Supreme Court*. New York, New York: Anchor Books, A Division of Random House, Inc., 2008.

Toobin, Jeffrey. "Partners: Will Clarence and Virginia Thomas Succeed in Killing Obama's Health-Care Plan?" *The New Yorker*. 29 August, 2011.

*The Virginia Plan*. Presented by Edmund Randolph to the Federal Convention, 29 May 1787.

<[TeachingAmericanHistory.org](http://TeachingAmericanHistory.org)>.

*The United States Constitution*. <<http://www.archives.gov/exhibits/charters/constitution.html>>.

Weisman, Richard. *Witchcraft, Magic, and Religion in 17<sup>th</sup> Century Massachusetts*. Amherst, Massachusetts: University of Massachusetts Press, 1984.

Wheelan, Joseph. *Jefferson's War: America's First War on Terror, 1801-1805*. New York, New York: Carroll & Graf Publishers, 2003.

Wills, Garry. *James Madison*. The American Presidents Series. New York, New York: Times Books, Henry Holt and Company Publishing, 2002.

Wood, Gordon S. *The Creation of the American Republic, 1776-1787*. Chapel Hill, USA: University of North Carolina Press, 1969.

Wood, Gordon S. *Empire of Liberty: A History of the Early Republic, 1789-1815*. Oxford, United Kingdom: Oxford University Press, 2009.

Wood, Gordon S. "Judicial Review in the Era of the Founding." Licht, Robert A, ed. *Is the Supreme Court the Guardian of the Constitution?* Washington, D.C.: American Enterprise Institute Press, 1993.

Wood, Gordon S. *The Radicalism of the American Revolution*. New York, New York: Alfred A Knopf, 1991.

Young, Ernest A. "The Constitution Outside the Constitution," *Yale Law Journal*, Vol. 117, No. 3. December 2007; 408-473.