CHAPTER I

The Perils of Originalism

THE INFANT PERIODS of most nations are buried in silence, or veiled in fable," James Madison observed in July 1819; "and perhaps the world may have lost but little which it need regret." This was no casual observation. Years earlier, Madison had mounted a serious historical project of his own, studying the "History of the most distinguished Confederacies, particularly those of antiquity," as part of his preparations for the great Federal Convention of 1787. It was "the curiosity I had felt during my researches," he recalled near the close of his life, "and the deficiency I found in the means of satisfying it more especially in what related to the process, the principles—the reasons, & the anticipations which prevailed in the formation" of these confederations, that convinced Madison to "preserve as far as I could an exact account of what might pass in the Convention" at Philadelphia. If the Convention fulfilled "its trust," his notes would enable future generations to recover "the objects, the opinions & the reasonings" from which the "new System of Govt." had taken its form. "Nor was I unaware of the value of such a contribution to the fund of materials for the History of a Constitution on which would be staked the happiness of a young people great even in its infancy, and possibly the cause of Liberty through[ou]t the world."[1]

Madison recorded these thoughts in the preface he wrote to accompany the posthumous publication of his notes of debates at Philadelphia. “A sketch never finished or applied,” he called it—and in truth, this preface offered only a brief overview of the events leading to the calling of the Federal Convention. But its rough quality did not trouble Madison. For sound history, he believed, could never be written by the participants in great events, however momentous their deeds or intimate their knowledge. “It has been the misfortune of history,” he wrote in 1823,

> that a personal knowledge and an impartial judgment of things rarely meet in the historian. The best history of our Country, therefore, must be the fruit of contributions bequeathed by contemporary actors and witnesses to successors who will make an unbiassed use of them. And if the abundance and authenticity of the materials which still exist in the private as well as public repositories among us should descend to hands capable of doing justice to them, the American History may be expected to contain more truth, and lessons certainly not less valuable, than those of any Country or age.”[2]

So Madison urged friends and correspondents to preserve their vital papers, and he took great care to gather and safeguard his own: letters, memoranda, and, most prized of all, the notes of debates which he regarded as his great testamentary legacy to the American republic. Yet during the half century between the adoption of the Constitution and his death in 1836, Madison never thought to draft the first-person account of that momentous event that historians—with all their mistrust of memoirs—would dearly love to have.

Even so, a historian reading Madison's "Sketch" and his carefully preserved papers immediately recognizes a kindred spirit at work—so much so, in fact, that Madison may well be regarded as a patron saint of American history. Without his notes of debates, it would be nearly impossible to frame more than a bare-bones account of how the Constitution took shape. They alone make it possible to follow the *flow* of debate within the Convention, to detect the imprint of individual personalities and rhetorical styles, and, most important, to identify the shifting concerns that prevailed at different points during the deliberations.

Like so many of his colleagues and "cotemporaries," Madison was acutely and rightly aware that posterity would find his generation's experiments in self-government intensely interesting. In exchange for his own sensitivity to their needs, Madison asked only that those who later used his records should seek to write the "unbiassed" history the subject deserved. In one sense, his request sets an admirable standard to which all historians should naturally aspire: What self-respecting scholar sets out to write an avowedly "biased" history? Yet objectivity is, of course, an elusive ideal, and Madison's hopes express a faith in the possibilities of obtaining objective knowledge of the past that many modern scholars would find touchingly naïve. For two sets of reasons—one tied to the character of the Constitution itself, the other involving more general issues of historical knowledge—the task of "doing justice" to "The Founding" of the American republic is more demanding than Madison ever suspected.

Precisely because the Constitution has always played a central role in American politics, law, and political culture, as both a continuing source of dispute and a legitimating symbol of national values, the interpretation of its historical origins and meaning has rarely if ever been divorced from an awareness of contemporary ramifications. When the early-twentieth-century Progressive historians portrayed the framers as a propertied elite

intent on preserving the powers of their own class, they were mindful of the uses of public power in an industrializing America.[3] Or again, the emphasis that political scientists such as James MacGregor Burns and Robert Dahl place on the anti-democratic tendencies of the Constitution is derived from a frustration with the seeming inability of the political system to fashion effective governing coalitions.[4] No less political is the celebratory attitude toward the higher wisdom of the founders that marks the work of recent conservative political theorists who prefer the framers' ideas of natural rights and federalism to the result-oriented reasoning of contemporary legal theory and its accompanying willingness to expand the authority of federal courts at the expense of the democratic autonomy of communities and states.[5] Because any portrait of the Founding and the Founders—whether cynical or heroic—affects how we imagine these great symbols of American political life, even the most objective scholar may find it difficult to avoid an appearance of bias, however slight or inadvertent.

Madison himself was not immune to this danger. In his own way, he sought to enhance the heroic aura that already surrounded the Convention. For if the origins of the Constitution would never be lost in the dim reaches of legend and fable, opportunity still remained to portray its adoption and its framers in mythic terms. While recognizing that the "character" of the Constitution "must be tested by the experience of the future," Madison used the final paragraph of his "Sketch" to

> express my profound and solemn conviction, derived from my intimate opportunity of observing and appreciating the views of the Convention, collectively and individually, that there never was an assembly of men, charged with a great and arduous trust, who were more pure in their motives, or more exclusively or anxiously devoted to the

> object committed to them, than were the members of the Federal Convention of 1787….[6]

An "unbiassed" view of the framers, in other words, was one that would discover their political integrity and benevolence—and one that would provide an exemplary lesson in the possibilities of republican politics to a generation that the aging statesman of the 1830s feared was learning to prefer confrontation to accommodation.

A history written in that way would necessarily tell the story of the framing of the Constitution not only from the vantage point of the framers but even, perhaps, as they would most have wanted it to be told. Understanding events as participants themselves did has always been one of the great goals and challenges of historical writing. Yet in recent years historians have become ever more insistent on the limitations of any form of storytelling—that is, of the narrative conventions traditionally used in reconstructing the epochal events of the past. Historians may think they are writing objective accounts of definable phenomena. But in practice (it is argued) there can be no single story of any event—least of all, so complex an event as the adoption of the Constitution. Moreover, the composition of any narrative history requires decisions as to perspective and dramatic structure that differ little from the imaginative contrivances of the novelist.

Even if a historian confident in his empiricism can dismiss such radical doubts as the mischievous intrusion of overly refined literary theories, the problem of perspective remains crucial for another reason. Both the framing of the Constitution in 1787 and its ratification by the states involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree. The discussions of both stages of this process consisted largely of

highly problematic predictions of the consequences of particular decisions. In this context, it is not immediately apparent how the historian goes about divining the true intentions or understandings of the roughly two thousand actors who served in the various conventions that framed and ratified the Constitution, much less the larger electorate that they claimed to represent. Economists and political scientists have developed highly sophisticated models to analyze collective voting on complex issues, but the evidence on which historians of eighteenth-century America rely cannot readily be compared with the databases of contemporary social science.

For all these reasons, then, the ideal of "unbiassed" history remains an elusive goal, while the notion that the Constitution had some fixed and well-known meaning at the moment of its adoption dissolves into a mirage. Yet in the end, what is most remarkable about our knowledge of the adoption of the Constitution is not how little we understand but how much. Historians familiar with the extant records may well feel that Associate Justice Robert Jackson rather overstated the point when he complained that the ideas of the framers had to be "divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[7] However indeterminate some of our findings may be, however much more evidence we could always use, the origins of the Constitution are not "buried in silence or veiled in fable." Not only do Madison's notes and other sources allow us to track the daily progress of the deliberations at Philadelphia, but the records of the ensuing ratification debates reveal the range of meanings that the American political nation first attached to the proposed Constitution. Nor are the relevant sources confined to what was said and written during the intense debates of the late 1780s. The larger intellectual world within which the Constitution is often located—the Enlightened world of Locke and Montesquieu, Hume and Blackstone, plain whigs and real whigs, common lawyers and Continental jurists—has been the subject of extensive analysis.

Nor is the prior political history of the Revolution a neglected episode in the study of the American past.

Questions of bias, perspective, and the intelligibility of collective action will remain vexatious, of course. But so they do in almost any kind of historical writing. Rather than fret about these problems in the abstract or bemoan the limits of the evidence, it makes more sense to ask how well particular types of sources can be brought to bear on the range of questions that arise when we ask what the Constitution originally meant, or what its framers originally intended, or what its ratifiers (and the electorate beyond them) originally understood they were being asked to endorse or reject.

MEANING, INTENTION, UNDERSTANDING—these are the three terms that the historians, political theorists, and legal scholars who engage in originalist analyses of the Constitution commonly use to title their research. The terms are often used loosely and synonymously, at some cost to the clarity that this interpretive method ostensibly seeks. But they are not fully interchangeable—or at least they need not be—and distinguishing them more carefully exposes some of the conceptual traps that ensnare the unwary.

The Constitution is the text whose meaning interpretation seeks to recover, and the term "original meaning" can accordingly be applied to the literal wording—the language—of its many provisions. For example, what does Article I mean when it talks of "commerce" (a word famously glossed in the most controversial twentieth-century exegesis of the Constitution, a cometary work which once blazed across the academic sky and has long since vanished beneath its horizon)?[8] What does Article II mean when it vests something called "the executive power" in the president (the question that underlay the most important disputes of the 1790s)? Or again, what is the "establishment of

religion" that the First Amendment prohibits Congress from making any laws respecting?

Meaning must be derived from usage, however, and it is at this point that the alternative formulations of original intention and understanding become pertinent. *Intention* connotes purpose and forethought, and it is accordingly best applied to those actors whose decisions produced the constitutional language whose meaning is at issue: the framers at the Federal Convention or the members of the First Federal Congress (or subsequent congresses) who drafted later amendments. Theirs were the choices of wording that produced the literal text, adding the phrase "This Constitution" at the beginning of the supremacy clause, for example, or substituting "declare" for "make" in the war-power clause. Knowing why they preferred one term to another is surely relevant to recovering the original meaning of the Constitution. Original intention is thus best applied to the purposes and decisions of its authors, the framers.

Understanding, by contrast, may be used more broadly to cover the impressions and interpretations of the Constitution formed by its original readers—the citizens, polemicists, and convention delegates who participated in one way or another in ratification. Unlike the framers, they had no authorial control over the content of the Constitution, and the only intentions they were ultimately allowed to exercise were to confirm or reject it in its entirety, sometimes hoping, but not assuredly knowing, that subsequent amendments might allay their worst fears. But this public debate was nevertheless very much concerned with how the manifold provisions of the Constitution were commonly or popularly understood—though here, of course, the range of understandings that emerged often produced rather less than a consensus.

Perhaps these distinctions seem labored or overly precise. But the value of thinking rigorously about the separate elements of originalism is compounded by the different purposes that this

theory may serve. If its purpose is merely to gain a general sense of what a term meant, or why a given provision was adopted, *without treating its original meaning as dispositive*, then it is permissible to slide promiscuously among these sources and even to regard early interpretations adopted after the Constitution took effect as reasonably authoritative because of their propinquity to the deliberations of 1787–88. The greater the remove in time from the moment of founding, the greater the inclination to collapse the distinct phases of framing, ratifying, and implementing the Constitution into one composite process of original interpretation.

But this latitudinarian attitude becomes less defensible if originalism seeks to provide something more than an informed point of departure for a contemporary decision. For the argument that the original meaning, once recovered, should be binding presents not only a strategy of interpretation but a rule of law. It insists that original meaning should prevail—regardless of intervening revisions, deviations, and the judicial doctrine of *stare decisis*—because the authority of the Constitution as supreme law rests on its ratification by the special, popularly elected conventions of 1787–88. The Constitution derives its supremacy, in other words, from a direct expression of popular sovereignty, superior in authority to all subsequent legal acts resting only on the weaker foundations of representation. If this becomes the premise of interpretation, it follows that the understanding of the ratifiers is the preeminent and arguably sole source for reconstructing original meaning. The prior editorial decisions and revisions of the Convention recede to the status of mere proposals, while actions taken by any branch of government *after* the Constitution took effect themselves become mere interpretations. Both may still offer corroboratory evidence of how the Constitution was understood, for its framers and early implementers shared a common political vocabulary with its ratifiers. But that elision should not erase the real distinction and

premise upon which a strong theory of originalism logically depends.

Whether one pursues the loose or strict versions of this method of interpretation, it would be evident that all appeals to the original meaning, intention, and understanding of the Constitution are inherently historical in nature. This does not mean, however, that these are the kinds of questions historians would ordinarily ask. A historical account of a particular clause would certainly want to address why it became part of the Constitution and how its later interpretation evolved in response to events and the concerns of political leaders, jurists, particular interests, or the public at large. It would also have room to reflect on the ironic twists and turns that have often carried interpretation away from the apparent intentions and understandings of 1787–88. But historians have little stake in ascertaining the original meaning of a clause for its own sake, or in attempting to freeze or distill its true, unadulterated meaning at some pristine moment of constitutional understanding. They can rest content with—even revel in—the ambiguities of the evidentiary record, recognizing that behind the textual brevity of any clause there once lay a spectrum of complex views and different shadings of opinion. “It may be a necessary fiction for lawyers and jurists to believe in a ‘correct’ or ‘true’ interpretation of the Constitution, in order to carry on their business,” Gordon Wood has observed, “but we historians have different obligations and aims.” The foremost of these tasks is to explain why “contrasting meanings” were attached to the Constitution from its inception.[9] And, if anything, this is a task that recent controversies over the feasibility of a “jurisprudence of original intention” have inspired historians to pursue with relish.[10]

To borrow a dictum from John Marshall, the great chief justice (and constitutional ratifier), historians can never forget that it is a debate they are interpreting. They have a further obligation not easily reconciled with the strong form of originalism. With its

pressing ambition to find determinate meanings at a fixed moment, the strict theory of originalism cannot capture everything that was dynamic and creative, and thus uncertain and problematic, in the constitutional experiments of the Revolutionary era—which is why, after all, the debates of this era were so lively and remain so engaging. Where we look for precise answers, the framers and ratifiers were still struggling with complex and novel questions whose perplexities did not disappear in 1788.

Yet historians have other duties that complicate their relation to the recurring question of the role that originalism can play in constitutional controversy and adjudication. As critics, consultants, or citizens, they are called upon (or volunteer) to assess the historical claims that judges make while resolving a judicial case in controversy or which partisan advocates express while contesting political issues with constitutional implications. Like other experts, historians guard their professional terrain jealously, and they may rise in righteous anger when opinions they believe to be dubious and false are advanced with dogmatic certitude. But also like other experts, they possess valuable information which they can be enticed to yield up, and which may well suggest that one account of the original meaning of the Constitution appears more persuasive or better founded than another. It is one thing to say that few interpretations of the more ambiguous and disputable clauses of the Constitution can be established conclusively, another to treat all interpretations as equally plausible or representative of the prevailing ideas of the time. Historians who pursue or merely observe the ongoing quest for the Holy Grail of original meaning thus occupy an awkward position vis-à-vis other knights-errant. Their research can lay an evidentiary basis for originalist interpretation, but it can also undermine critical assumptions on which invocations of original meaning depend, and expose the flawed conclusions they reach. And as Leonard Levy, the dean of American constitutional historians, has argued, the Supreme Court’s use of originalist

evidence is best described as a mix of "law office history" and justificatory rhetoric which offers little reason to think that this method of interpretation can provide the faithful and accurate application of the original constitutional understandings its advocates promise. William E. Nelson reaches a similar conclusion in his study of the adoption and early interpretation of the Fourteenth Amendment.[11]

It is not the province of the historian to decide questions of law. But by thinking about the original meanings, intentions, and understandings of 1787–91 as a problem of historical knowledge, it may be possible to give this recurring motif of constitutional interpretation a rigor it often lacks.

FROM THE MOMENT OF ITS PUBLICATION in a special issue of the *Pennsylvania Packet* on September 19, 1787, Americans have endowed the Constitution with two complementary sets of meanings. Taken as a whole—which is how the ratifiers had to take it—the Constitution symbolizes the "more perfect union" its framers proposed to put in place of the "imbecile" Articles of Confederation. In practice, the sole choice the Federal Convention and its Federalist supporters succeeded in forcing upon the nation at large was binary: The Constitution could be either accepted or rejected, but it could be altered only after it had been ratified. Thus ratification ultimately depended on the gross comparison of the Confederation and the Constitution. Structuring the decision in this way gave the Federalists the crucial political advantage of being able to equate support for the Constitution with support for the Union. There was nothing ambiguous about the nature of this choice at the time it was made, but it certainly became so later, as southern states'-rights theorists argued that the states that had been the parties to the original compact retained a sovereign right to reverse their decision.[12]

The Constitution has thus always represented something more than the sum of its parts. But since 1789, most disputes about its meaning have necessarily centered on its individual clauses. No single clause or provision can be interpreted without considering its relation to the document as a whole. Yet in practice, the enterprise of interpretation often requires an intense analysis of key words and brief phrases that the Constitution itself does not define. No explanatory footnotes or midrashic columns encumber the text, defining what such key terms as “necessary and proper” or “the executive power” or an “establishment of religion” were meant or understood to signify.

These two conceptions of the meaning of the Constitution are complementary, not contradictory. But they do lead historians to ask different kinds of questions about its adoption. The task of explaining *why* the Constitution was adopted does not involve paying close attention to its actual drafting or the origin and evolution of particular clauses. The central issue instead is to identify the political and social alignments that favored or opposed the creation of a stronger national government. Thus long after Charles Beard offered his *Economic Interpretation of the Constitution* in 1913, many historians still view the adoption of the Constitution largely in the context of a political struggle between identifiable constituencies and interests. Though the terms used to describe these different coalitions have changed over time, the thrust of inquiry has shifted less than one might suppose. Even in Gordon Wood’s monumental study, *The Creation of the American Republic*, the substance of the Constitution matters less than the way in which the struggle over its ratification catalyzed a larger gulf between democratic and aristocratic elements in American society.[13] Within this context, it is enough to identify the most conspicuous differences between the Articles of Confederation and the Constitution; the basic story will not be altered if many of the particularities of the Constitution are ignored. Indeed, some of the concerns that most troubled the

framers at Philadelphia—such as the extended impasse between small and large states—may prove only marginally relevant.

By contrast, the task of recovering the original meaning of the Constitution in all its detail raises a series of complex questions. Where do we turn when the meaning of the text—or more accurately, the meaning of a particular passage embedded in a larger text—is open to dispute?

An avowedly historical approach to the problem of original meaning involves something more than aggregating all relevant references to a particular provision of the Constitution or an aspect of constitutional thinking. It requires us to assess the probative value of any piece of evidence as well as to think systematically about the different types of evidence with which we work. In practice, there are four sets of sources that can be brought to bear to solve problems or puzzles about the original meaning of the Constitution. Two of these sets of sources can be described as *textual* in the sense that they consist of the explicit discussion of the Constitution found in the records of debates of the federal and state conventions of 1787 and 1788, as well as the commentaries published during the campaign over its ratification. The other two sets of sources can be characterized as *contextual* in that they may enable us—when explicit commentary on particular points seems inadequate—to reconstruct a body of tacit assumptions and concerns that informed the way in which framers and ratifiers thought about the questions they were resolving. On the one hand, there were those broad notions of government that Americans had acquired through their absorption in the political theory of the Enlightenment. But the way in which the political actors of the 1780s thought about the Constitution also reflected their perceptions of what might be called the public-policy issues of their day. Lessons derived from recent experience were arguably as likely to influence their thinking as the maxims and axioms they found in Locke or Montesquieu or Blackstone.

Each of these sources has its virtues and its potential defects. A historical approach to the problem of original meaning has to ask what each contributes to the overall inquiry.

The obvious point of departure must be the records of the Federal Convention itself: the inadequate journal kept by its secretary, William Jackson; Madison's daily notes of debates; and the other notes, memoranda, and speeches preserved by other delegates at Philadelphia. Given the circumstances under which the delegates deliberated, theirs were the only intentions that in any literal sense affected the composition and substance of the Constitution. This was not only because the Convention met in secret but, equally important, because its results ran far beyond what even the most astute observers anticipated or even imagined it would propose. The absence of any accepted agenda prior to the opening of debate in late May 1787 and the fact that the delegates came to Philadelphia essentially uninstructed by their legislative constituents make the internal deliberations of the Convention the first and most salient set of sources for the original meaning of the Constitution.

Tried techniques of historical narration should, in theory, be easy to apply to the task of writing the interior "story" of the Convention. What kind of event could be more susceptible to standard narrative treatment than one involving a limited number of actors (including certifiable "great men") meeting for a brief period and making critical decisions that define the dramatic structure of the entire story? Yet in practice the numerous narrative histories of the Convention have added little of interpretive value to our understanding of the framing of the Constitution. Certain stock themes are so essential to all accounts of the Convention as to defy authors to show a spark of originality. No author can stray far from a heavy reliance on Madison's notes of debates. The central actors must also be cast true to character: Madison, bookish yet politically astute; George Washington, reserved yet charismatic; James Wilson, brilliant but

arrogant; Benjamin Franklin, witty and wise; Luther Martin, inebriated and stultifying yet good for comic relief; Roger Sherman, a crabbed speaker but a dogged parliamentarian; Alexander Hamilton, the candid iconoclast; and Gouverneur Morris, rashly (if apocryphally) draping his arm around Washington's shoulder. And the dramatic structure of the story turns out to be misshapen, since the climactic "great compromise" of July 16 occurred a full two months before Franklin could finally conclude that it was a rising and not a setting sun he had long pondered on the back of Washington's chair.[14]

Even when the literary problems inherent in retelling a familiar, highly stylized story are put aside, the most that any merely narrative approach to the Convention can offer is a dramatic backdrop to the more important analytical questions we want to ask about the making of the Constitution. The dramatic structure of the Convention thus matters far less than the intellectual and political structure of the issues the delegates sought to resolve. For the completed Constitution was not the sum of a series of decisions taken on discrete issues. It is better imagined (to pursue the mathematical metaphor) as the solution to a complex equation with a large number of dependent variables: change the value of one, and the values shift throughout. The central problem thus involves tracing the relation between (or among) individual decisions that often seem to concern discrete issues but were in fact closely connected. Breathless accounts of the changing moods of the delegates or evocations of the heat and humidity of a Philadelphia summer that was, in any case, reasonably mild[15] will not explain why the decision to allow the state legislatures to elect the Senate undermined Madison's proposal to give Congress an absolute veto over all state laws; or how the final tinkering over the mechanics of presidential election was designed to enlarge executive authority in foreign affairs.

The construction of the matrix of these decisions is complicated by the fact that the Convention addressed two distinct types of issues. At the most abstract level, the debates were indeed concerned with such fundamental questions as the nature of representation and executive power, federalism, the separation of powers, and the protection of individual and minority rights. It is evident, too, that the delegates believed that what they did would have lasting implications not only for their constituents but for a larger world. No one dissented when Madison and Hamilton both observed that the decisions of the Convention were destined to "decide for ever the fate of Republican Government."[16]

Yet the debates at Philadelphia also had an intensely pragmatic cast. Much of the Convention was spent on issues that the delegates approached as spokesmen for the particular interests of their constituents. Here their real challenge did not involve solving theoretical dilemmas posed by Hobbes or Locke or Montesquieu; it instead required efforts to accommodate the conflicting interests of different states and regions on such matters as the apportionment of representation and taxes, the regulation of commerce, and the extension of the slave trade. Rather than view the Convention as an advanced seminar in constitutional theory, historians and many political scientists have preferred to describe it as a cumulative process of bargaining and compromise in which a rigid adherence to principle yielded to the pragmatic tests of reaching agreement and building coalitions.[17] From this perspective, the politics of the Convention resemble that of any legislative body, and its votes become grist for the fine-milling techniques of roll-call analysis that are commonly used to explain decision-making in Congress, state legislatures, or, for that matter, any city council outside Cook County, Illinois. The key to understanding the "great compromise" may thus be found, one political scientist has suggested, through two-or five-factor solutions with the varimax rotation (ortho).[18]

Ideas or *interests*—these are the classic if hackneyed antinomies upon which much of the debate over the political and intellectual history of the entire Revolutionary era has long been conducted. It is not difficult to see how both affected the deliberations at Philadelphia in 1787. What is elusive is the interplay between them. Some of the arguments the framers advanced were doubtless designed to legitimate positions rooted in calculations of state or regional or class interest. Others carried deeper conviction on their merits, as attempts to resolve issues that were avowedly related to problems of constitutional theory, broadly considered. The true task is thus to find "the middle ground"—a Madisonian metaphor—between the clouded heights of principle and the familiar terrain of specific interests.

Yet precisely because these higher principles often prove difficult to distill from the political maneuvers or elliptical discussions of the Convention, many students of the original meaning of the Constitution prefer to give equal or even greater weight to the commentaries and debates of the ratification campaign. Foremost among these sources are the essays of *The Federalist*, whose sway over modern scholarship begs explanation in its own right. But for all its virtues, *The Federalist* presents only one facet of the wide-ranging debate that erupted with the publication of the Constitution. Nothing like the extraordinary mobilization of public interest the Constitution evoked had been seen since the crisis of independence a full decade earlier. Ratification, it might be argued, created more than a new framework of national governance. It also demonstrated the possibility of national politics, anticipating the equally noteworthy innovations that enabled Americans, against their expectations, to create effective political parties within a few years.

The records of the ratification campaign are more diverse than those of the Federal Convention. They consist of pamphlets and newspaper essays written to influence public opinion; private

letters assessing both the Constitution and the changing state of politics; and the records of debates in the state conventions, whose assent alone gave the Constitution its ultimate legal force. This corpus of material can be put to two general uses.

First, the ratification records occasionally provide useful evidence bearing on the prior deliberations at Philadelphia. Individual framers were often asked to explain why the Convention had acted in one way or declined to act in another; sometimes their responses add significantly to our knowledge of the original debates at Philadelphia. Moreover, the arguments that these framers advanced in support of the Constitution might reflect reliable impressions or summaries of the considerations they felt had prevailed at Philadelphia—and thus attest to the original intentions underlying the text. Certainly some of the respect *The Federalist* commands is due not only to its lucid, comprehensive treatment of the Constitution but also to the privileged position its two principal authors, Madison and Hamilton, held as leading framers.

Far more important, however, is the second use to which the ratification records can be put. Taken as a whole, they provide our best evidence of how the Constitution and its provisions were understood at the moment of adoption. Again, this understanding (or these understandings) cannot be equated with the authorial intentions that gave the Constitution its actual content. It is entirely possible—even probable, indeed almost certain—that the intentions of the framers and the understandings of the ratifiers and their electors diverged in numerous ways, on points both major and minor. Given the highly charged and intensely political character of the ratification campaign, no other outcome was possible. True, the Federalist supporters of the Constitution had a natural incentive to rally around the most effective explanations for particular clauses, and thus to foster a measure of consensus as to their meaning. But their Anti-Federalist opponents could freely credit any objection their imaginations

could conjure, no matter how wild. Some of their predictions echoed the hyperbole of eighteenth-century political rhetoric, and Federalists cited this extravagance and the inconsistencies in the Anti-Federalist brief against the Constitution to prove that their opponents were unreasoning and overwrought. Many historians have shared that view.[19] Yet whether extravagant or plausible, Anti-Federalist fears were part of the original understanding of the Constitution, not only in their own right but also because they influenced the arguments that were made in its support.

Our reconstruction of the original understanding(s) of the Constitution, then, cannot be divorced from the political context of the ratification struggle. This does not mean that we should dismiss all statements on either side of the question as so much propaganda, but it does require an evaluation of the expedient needs that particular arguments were made to serve. For both parties, the overriding imperative was to determine whether the Constitution would be adopted, not to formulate definitive interpretations of its individual clauses. Thus while arguments about particular provisions mattered a great deal, in the end, the sole decision the ratifiers took was that of approving the Constitution as proposed or rejecting it. The only understanding we can be entirely confident the majority of ratifiers shared was that they were indeed deciding whether the Constitution would "form a more perfect union" than the Articles of Confederation (even if it no longer claimed, as had the Articles, that this union would be "perpetual").[20]

Our knowledge of what the ratifiers understood they were adopting is further limited by the spotty character of the reporting of the debates at the state conventions and the obscurity of their members. Though a few speeches were reported in more detail than Madison provided in his corresponding efforts at Philadelphia, none of the records of the state conventions, with the possible exception of Virginia, match his notes in quality and breadth.[21] Yet notwithstanding their deficiencies, these records

deserve careful scrutiny for one crucial reason that is, however, related more to questions of law than to those of history. Madison stated the key point in 1796, when he argued that questions about the meaning of the Constitution could be answered in the light of the debates over ratification, but *not* by consulting the intentions of the framers at Philadelphia. "Whatever veneration might be entertained for the body of men who formed our Constitution," he told the House of Representatives,

> the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.[22]

Although Madison had serious problems explaining how the views of the latter were to be ascertained, his position has at least this in its favor: It is fully consistent with the theory of popular sovereignty that was itself one of the great rallying points of Federalist argument in 1787 and 1788. The Constitution became supreme law not because it was proposed by the Federal Convention of 1787 but because it was ratified by the state conventions of 1787–88. By this criterion, the intentions of the framers were legally irrelevant to its interpretation, but the understandings of the ratifiers could provide a legitimate basis for attempting to fix the original meaning of the Constitution.

Even the most intensive examination of the surviving records for the debates of 1787 and 1788 will leave substantial gaps in our knowledge, however. Similarly, the spare language of the Constitution does not make explicit the broader assumptions about government on which it is clearly based. The preamble to the Constitution cannot sustain the close theoretical analysis that has been lavished on the opening paragraphs of the Declaration of Independence.

To fill these gaps in the record and the silences of the Constitution, many scholars have sought to reconstruct the larger intellectual context that shaped the contours of American thought in the late eighteenth century. That thought and the Constitution it produced were expressions of the Enlightenment. There can be no question that the framers and many of their contemporaries were familiar not only with the great works of such luminaries as Locke, Hobbes, Montesquieu, Hume, and Blackstone, but also with the richly polemical literature of seventeenth-and eighteenth-century English politics, the moral philosophy and social science of the Scottish Enlightenment, and the disquisitions on public law of such respected European authorities as Grotius, Pufendorf, and Delolme. Moreover, it is clear that general historical reading informed the way in which eighteenth-century Americans thought about politics. When they spoke of learning from experience, they did not mean their own so much as that of previous generations, running all the way back to classical antiquity.[23]

All of these writings were somehow part of the intellectual universe the framers inhabited. Yet again, their application to the interpretation of the Constitution poses difficult problems.[24]

Perhaps the most vexatious involves tracing the lines of influence between these authorities and their American audience. At certain points, it is clear, quite specific connections can be made. The way in which Hamilton and Madison both invoke “the celebrated Montesquieu” to introduce their respective discussions

of the extended republic and the separation of powers in *The Federalist* (essays 9 and 47) demonstrates the authoritative status that the French baron's treatise *De I' esprit des lois* commanded.[24] Much has been made, too, of the inspiration that Madison found in David Hume's essay "Idea of a Perfect Commonwealth" as he sought to counter the familiar view that the republican form of government was suitable only for small and homogeneous societies, like the city-states of antiquity.[25] Or again, the Federal Convention's first discussion of executive power on June I, 1787, presupposes a knowledge of William Blackstone's treatment of royal prerogative in his *Commentaries on the Laws of England*.[26]

Yet it is no easy matter to link specific provisions of the Constitution with the writings of prior authorities. The problem lies in a distinction that Americans at every level of politics understood: that between fundamental *principles* of government, on the one hand, and the actual *forms* that any individual government could take. On the principles of government, a broad consensus reigned. Government existed for the good of the many, and to protect the liberty, property, and equal rights of the citizen. The idea that representation would help the government to determine the common good was commonplace, and so was the belief that separation of powers was essential to the protection of rights. These and other principles were reiterated in all the political writings in which Americans were steeped. Their authority was axiomatic.[27]

Axioms alone, however, do not solve problems; specific calculations are always needed to derive the desired results. In practice, the entire enterprise of constitution making in revolutionary America centered on determining which forms of republican government were best suited to securing the general principles all accepted.[28] Decisions about forms touched such prosaic questions as the respective powers and privileges of the different branches of government or the two houses of a legislature, the basis of representation, terms of office, modes of

election, and so on. Though statements by Hume or Montesquieu or Blackstone or Harrington occasionally seemed pertinent to a particular problem, more often a wide number of solutions could be made compatible with the first principles of republicanism. From their reading the framers of the Constitution could extract no simple formulas to determine the exact form the new government should take.

The intellectual world of the Enlightenment, then, provides only a general context within which the Constitution can be located. Though clearly important in its own right, it cannot readily be brought to bear to solve particular puzzles of constitutional meaning.

There is, however, a far broader context within which these writings can be located, and which in turn provides the true framework for recovering what was both original and derivative in the intentions and understandings of 1787–88. For the adoption of the federal Constitution culminated a century and a half of constitutional controversy, contestation, and innovation that gave the American revolutionaries a richly complicated legacy of ideas and practices from which to construct their new republican polity. With a modest risk of oversimplification, this prior history can be divided into four substantial phases.

It is evident, first, that the vocabulary of American constitutional thinking was profoundly shaped by the great disputes between the Stuart monarchs and their opponents (in Parliament and out) which reached a momentous climax in the Glorious Revolution of 1688–89. On a host of issues—ranging from the great paradigms of mixed government and separation of powers to the “inestimable” right to trial by jury—the contending positions of the Stuart era were still vividly recalled a full century later.

These positions remained vital, in the second place, because the structure of colonial politics gave seventeenth-century arguments a continuing vitality in eighteenth-century America.

Colonists naturally regarded their own legislative assemblies as miniatures of the mother Parliament, and the provincial elites who ruled there sought to acquire for these bodies the same rights and privileges that the House of Commons had struggled so long to acquire (or regain, if one clung to the belief that the Norman conquest of 1066 had deprived England of its "ancient constitution" of Gothic liberty). The recurrence in the colonies of these classic quarrels between executive prerogative and legislative privilege made Americans receptive not only to the general principles that Locke had enshrined in his *Second Treatise* but also to the works of more obscure but equally impassioned writers who preserved the radical edge of seventeenth-century polemics amid the complacency of Georgian Britain.

Third, the imperial controversy that began with the Stamp Act of 1765 and ended with the Declaration of Independence sharpened the colonists' understanding of the striking differences between their own political practices and attitudes and those prevailing "at home" in Britain. These differences seemed most conspicuous in the practice of representation, but they were evident as well in the colonists' rejection of monarchy, aristocracy, and much (if not quite all) of the theory of mixed government.

Fourth, and arguably most important, independence necessitated the reconstitution of legal government within all the states (save the corporate colonies of Rhode Island and Connecticut), and it thus gave rise to the "experiment in republicanism" that the past generation of scholars has explored in such detail. The adoption of written constitutions of government in the mid-1770s was in one sense a wonderful accident made possible by the literal-minded way in which the colonists believed the collapse of royal government and the eruption of civil war had reduced them to something like a state of nature. But it also gave them the opportunity to establish new and superior forms of government, more in tune with the

conditions of American society and republican principles. And once established, the operations of these state governments in turn provided the most visible examples of what republicanism meant in practice. Their failings not only drove the movement for constitutional reform that brought the framers to Philadelphia in May 1787, they also provided the experimental evidence upon which the Convention drew as it sought to fashion an improved model of republican government.[29] For the convention delegates of 1787–88 came to their task fresh not from research in their studies but from the business of managing a revolution and conducting public affairs at every level of government. Conscious as they were of the fate of other republics and confederacies, ancient and modern, the lessons of the past that they weighed most heavily were drawn from their own experience.

Yet if this decade of constitutional experimentation was the greatest influence on the debates of 1787–88, principles and lessons inculcated over the previous century and a half were not simply sloughed off as the detritus of an irrelevant, pre-Revolutionary ancien régime. Americans were as eclectic in their use of history as they were in their often selective reading of texts and authorities. Reconstructing how they reasoned about the great questions of the late 1780s may therefore require a review —in highly synthesized form—of aspects of Anglo-American politics and political theory that long predate the immediate debates over the Constitution. No simple formula or code can map how these strands of thought came together in 1787–88. Like any other historical effort to explain how texts emerge from contexts, the recovery of original meanings, intentions, and understandings is itself an act of interpretation—but one that can at least be bounded, though not perfected, by canons of scholarship.

Some may object that too great an emphasis on establishing the multiple contexts within which the framers and ratifiers acted risks historicizing the great moment of the Founding, reducing its

profound expressions of principle to the prosaic level of mere interest and ideology, and subordinating its transcendent meaning in favor of a time-bound portrait of an eighteenth-century society that remains irretrievably lost and alien.[30] Against these charges, historians can respond in at least two ways. They can plead necessity: The evidence allows no other choice; our knowledge of the complexity of political controversy and debate during this period can sustain no other conclusion. Or they can plead innocence. Far from treating the political thought of the Revolutionary era as the mere product of a fevered ideology, the most important recent historical writing goes to great lengths to describe its originality and creativity. But it does so not by abstracting these creative acts and ideas from the circumstances of their origination but by exploring and explaining the relation between them.

ULTIMATELY, OF COURSE, HISTORIANS, political theorists, and legal scholars diverge in their approaches because they pose different questions and seek different answers. Working historians should have no illusions about their capacity to correct, much less prevent, the errors to which their colleagues seem prone. Nor should historians be surprised when their findings are put to uses they never intended or even contemplated. Surely J. G. A. Pocock, Bernard Bailyn, and Gordon Wood never imagined that their reconstruction of the early modern ideology of republicanism would provide the conceptual foundation upon which an entire school of legal scholars soon launched a "republican revival" of their own, in the process fashioning an originalism of the communitarian left to challenge the originalism of the new (and Republican) right. 21[31] The forms of historical argumentation employed on both the right and left margins of contemporary scholarship (and politics) are not driven, of course, by the historians old-fashioned and perhaps naïve desire to get

the story right for its own sake. They represent, instead, only another chapter in the saga of the American search for a usable past. Historians certainly help this search to go forward, but they may also suggest why its goal is (and should remain) elusive. By taking the problem of "originalism" seriously, by considering the uses and potential misuses of different forms of evidence, it may be possible to advance a debate that is very much about a specific moment in history but is not about history alone.