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# Original Intent in the First Congress

*Louis J. Sirico, Jr.*<sup>1</sup>

## I. INTRODUCTION

### *A. Arguing Original Intent in Legislative Debate*

A significant body of literature has examined how the Framers and ratifiers of the Constitution<sup>2</sup> subsequently viewed the role of original intent in construing the Constitution. The primary focus of these works is how those views should influence today's courts in deciding controversies.<sup>3</sup> A less developed question, however, is how members of the First Congress employed originalist constitutional arguments in making and debating proposed statutes.<sup>4</sup> This study seeks to contribute to that exploration, not by discussing what the Founders believed about using originalist arguments, but by examining the record of the First Federalist Congress to determine what originalist arguments its members actually made.<sup>5</sup>

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2. This article follows the convention of referring to the delegates to the Constitutional Convention as the Framers, the members of the state ratifying conventions as the ratifiers, and the leaders of that era as the Founders. At the close of the Constitutional Convention, the framers forwarded the proposed Constitution to the Articles of Confederation Congress meeting in New York City. The Congress forwarded the proposal to the states which assembled state ratification conventions pursuant to Article VII of the proposed Constitution. Once nine states ratified, the Confederation Congress took steps to elect the first Federal Congress and select a President. For a history of the ratification, see *RATIFYING THE CONSTITUTION* (Michael Allen Gillespie & Michael Lienesch eds., 1989). For a documentary history, see *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* (Merrill Jensen et al. eds., 1976–1995) [hereinafter *DHRC*].

3. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 15-28 (2d ed. 2002); RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* ch. 23, at 618-80 (2d ed. 1999); LAURENCE H. TRIBE, *1 AMERICAN CONSTITUTIONAL LAW* 47-70 (3d ed. 2000) (summarizing the debate on this issue).

4. The leading articles are Hans W. Baade, *Original Intention: Raoul Berger's Fake Antique*, 70 N.C. L. REV. 1523 (1992); Raoul Berger, *Original Intention in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

5. Analytical narratives of the First Congress include CHARLENE BANGS BICKFORD & KENNETH BOWLING, *BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS, 1789-1791* (1989) (offering a very accessible narrative); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*

An examination of the Founders' contemporary influences yields a somewhat surprising revelation: members of the First Congress discussing original intent. In the British and Commonwealth tradition, courts do not consider legislative history when construing statutes.<sup>6</sup> This principle ruled in the United States until at least the latter half of the nineteenth century.<sup>7</sup> Another contemporary influence rejecting reliance on originalist arguments may have been the anti-interpretive tradition in American Protestantism, which was designed to reject questionable interpretations of scripture by relying solely on the words of the text.<sup>8</sup> Thus, it is not surprising that at the First Congress, Elbridge Gerry of Massachusetts relied on William Blackstone's *Commentaries on the Laws of England* for rules on interpreting the Constitution:

The Judge [Blackstone] observes "[t]hat the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most probable, and these signs are either the words, the context, the subject matter, the effect and consequences, or the spirit and reason of the law." With respect to words, the Judge observes that "they are generally understood in their usual and most ordinary signification, not so much regarding the grammar as their *general* and *popular* use."<sup>9</sup>

However, reliance on legislative intent was acceptable in an earlier era. In the words of one historian:

It is only after the middle of the fourteenth century, when judges find themselves no longer able to draw either upon the actual intention of the legislator or upon the royal dispensing power, that they are forced to construct a body of rules of statutory interpretation: a

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(1997) (providing a narrative account focusing on the constitutional issues that arose in debates on the major issues); JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* (1999) (providing a narrative of deliberations over constitutional issues framed as a debate among members of first Congresses). For a narrative of elections to the First Congress and biographies of its members, see MARGARET C. S. CHRISTMAN, *THE FIRST FEDERAL CONGRESS, 1789-1791* (1989). Biographies also appear in *XIV DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS*, March 4, 1789-March 3, 1791, at 489-932 (Linda Grant DePauw et al. eds., 1972) [hereinafter DHFFC].

6. See Baade, *supra* note 4, at 1524-25; Powell, *supra* note 4, at 894-903.

7. See Baade, *supra* note 4, at 1527-28.

8. See Powell, *supra* note 4, at 889-94.

9. *XIV DHFFC*, *supra* note 5, at 453 (quoting WILLIAM BLACKSTONE, 1 *COMMENTARIES* \*59).

document, and no longer the verbal explanations of one man to another, becomes the sole basis for the judge's action . . . .<sup>10</sup>

Just as the judges of the early fourteenth century could draw on the memories of lawmakers, delegates to the First Congress could draw on the memories of several drafters of the Constitution and numerous members of the state ratifying conventions. The First Congress convened almost immediately after the Constitutional Convention and the state ratifying conventions.<sup>11</sup> At least twenty-eight members of the House and fourteen members of the Senate had been delegates to their respective state ratifying conventions.<sup>12</sup> Nine delegates to the Constitutional Convention served in the House and eleven served in the Senate.<sup>13</sup> Thus, Congress had easy access to sources of information about the intent of the Founders. Moreover, Congress was a legislature and, unlike courts, was not required to adhere to rules that prohibited looking beyond the text and rules of statutory construction when interpreting a constitution. Interestingly, in these records, I find no suggestion that the

10. Samuel E. Thorne, *The Equity of a Statute and Heydon's Case*, 31 NW. U. L. REV. 202, 207 (1936).

11. The Constitutional Convention concluded on September 17, 1787. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 659 (1966) [hereinafter MADISON'S NOTES]. The House of Representatives reached a quorum on April 1, 1789. See X DHFFC, *supra* note 5, at xvi. By that time, only North Carolina and Rhode Island had yet to ratify the Constitution. See *infra* notes 17-19 and accompanying text.

12. Members of the House who had served in their respective state ratifying conventions include Roger Sherman (Conn.), see XIV DHFFC, *supra* note 5, at 507-08; Jeremiah Wadsworth (Conn.), *id.* at 520-21; George Matthews (Ga.), *id.* at 562; George Gale (Md.), *id.* at 586; Michael Jenifer Stone (Md.), *id.* at 598; Fisher Ames (Mass.), *id.* at 615; Jonathan Grout (Mass.), *id.* at 628; George Partridge (Mass.), *id.* at 633; Theodore Sedgwick (Mass.), *id.* at 637; Samuel Livermore (N.H.), *id.* at 666; Jeremiah Van Rensselaer (N.Y.), *id.* at 726; John Baptista Ashe (N.C.), *id.* at 739; Timothy Bloodworth (N.C.), *see id.* at 742; John Sevier (N.C.), *id.* at 746; John Steele (N.C.), *id.* at 748; Hugh Williamson (N.C.) *id.* at 753; Thomas Hartley (Pa.), *id.* at 784; Frederick Augustus Muhlenburg (Pa.), *id.* at 793; Thomas Scott (Pa.), *id.* at 802; Henry Wynkoop (Pa.), *id.* at 808; Benjamin Bourn (R.I.), *id.* at 820; Aedanus Burke (S.C.), *id.* at 837; Thomas Sumter (S.C.), *id.* at 853; Theodorick Bland (Va.), *id.* at 884; Isaac Coles (Va.), *id.* at 894; Richard Bland Lee (Va.), *id.* at 901; James Madison (Va.), *see id.* at 907; and Alexander White (Va.), *id.* at 928.

Members of the Senate who served in their respective state ratifying conventions were Oliver Ellsworth (Conn.), *id.* at 493; William Samuel Johnson (Conn.), *id.* at 499; Richard Bassett (DE), *id.* at 529; William Few (Ga.), *see id.* at 542; Caleb Strong (Mass.), *id.* at 611; John Langdon (N.H.), *id.* at 650-51; Rufus King (N.Y.), *id.* at 701-02; Philip John Schuyler (N.Y.), *see id.* at 706; Benjamin Hawkins (N.C.), *id.* at 731; Samuel Johnston (N.C.), *id.* at 736; Theodore Foster (R.I.), *id.* at 814; Joseph Stanton (R.I.), *id.* at 818; William Grayson (Va.), *id.* at 867; and James Monroe, *see id.* at 877-78.

13. See BICKFORD, *supra* note 5, at 12.

rules of construction should be any different for a constitution than for a statute. Nonetheless, many years had passed since the fourteenth century, and members of Congress were unfamiliar with a tradition that would permit them to inquire into intent. However, as this study shows, the Founders were sometimes willing to make arguments that look beyond the text.

For example, in contrast to Blackstone and Gerry, James Madison posited a more innovative and expansive set of rules of construction:

An interpretation that destroys the very characteristic of the government cannot be just.

Where a meaning is clear, the consequences, whatever they may be, are to be admitted — where doubtful, it is fairly triable by its consequences.

In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.

Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.

In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority, is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability if its being left to construction.<sup>14</sup>

Nevertheless, throughout his life and with only a few deviations, Madison would consider evidence from the state ratifying conventions, but not the Constitutional Convention, because he regarded the Convention as only a drafting committee.<sup>15</sup>

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14. XIV DHFFC, *supra* note 5, at 369. Gerry's explication of Blackstone was a response to Madison's canons. Late in life, Madison wrote that the most pertinent considerations in constitutional interpretation should be:

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

Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 291 (1997) (quoting Letter from James Madison to M.L. Hurlbert (May 1830), in 9 THE WRITINGS OF JAMES MADISON 370, 372 (Gaillard Hunt ed., 1910)).

15. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 362-65 (1996); Donald O. Dewey, *James Madison Helps Clio Interpret the Constitution*, 15 AM. J. LEGAL HIST. 38, 45-47 (1971) (discussing Madison's reasons for discounting the proceedings of the Convention). Im-

Courts and legislatures overlap with regard to how they employ the Constitution. Just as a court seeks to determine whether a statute is constitutionally permissible, a legislature seeks to enact statutes that will pass constitutional muster. However, a legislature also employs the Constitution for another function: to enact statutes that help further the purposes of the Constitution or at least harmonize with those purposes. With respect to originalism, a legislature consults the Founders to define the contours of the Constitution and identify its purposes.

This study examines the arguments that members of the First Congress made with respect to original intent. It identifies and classifies these arguments in categories analogous to those that might be used in cataloguing arguments based on canons of statutory construction. Given the overlapping functions of constitutional argument for courts and legislatures, the analogy should be unsurprising.

Perhaps the study's most significant finding is that members of the First Congress invoked originalist arguments a number of times. On a given issue, however, these arguments were positioned among many other arguments and were not necessarily the dispositive ones. As this study illustrates, they usually tended to deal with general policies underlying the Constitution rather than with specific words that the Constitution contained.

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mediately before declaring his canons of construction, Madison was speaking against establishing a national bank and arguing that Congress lacked the constitutional authority to enact the legislation. When making his argument, Madison referred to the proceedings of the Constitutional Convention: “[h]is impression might perhaps be the stronger, because he well recollected that a power to grant charters of incorporation had been proposed in the general convention and rejected.” XIV DHFFC, *supra* note 5, at 368. His recollection of the Convention proceedings was accurate. *See* MADISON'S NOTES, *supra* note 11, at 638-39. At the Congress, Madison arguably relied on the intent of the Convention in debates over compensation for members of Congress, and over the national government's assumption of state debt. *See infra* text accompanying notes 82 & 90. Madison's general refusal to rely on the proceedings of the Convention is consistent with his refusal to publish his notes on the Convention's proceedings—our primary source of information on those proceedings during his lifetime. *See* DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 163-64 (1989) (discussing Madison's reasons for not permitting an earlier publication). For more information on Madison's theory of constitutional interpretation, see Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267 (1997); Dewey, *supra*.

At the same time, Madison endorsed reliance on the proceedings of the state ratifying conventions. However, Jonathan Elliot's *Debates on the Federal Constitution*, the first publication to provide widely accessible accounts of the conventions, was not published until 1936, the year of Madison's death. *See* Dewey, *supra*, at 41. And, as to be expected, the sentiments of the various conventions were often at variance with one another. *See id.* at 41-42.

### B. *The First Congress and Its Documentary Record*

The First Congress met in three sessions: from March 4 until September 29, 1789; from January 4 until August 12, 1790; and from December 6 until March 3, 1791.<sup>16</sup> The first two sessions took place in New York City and the third was in Philadelphia.<sup>17</sup> The Federalists dominated the new Congress, initially holding forty-nine of fifty-nine seats in the House and twenty of twenty-two seats in the Senate.<sup>18</sup> At the onset of the first session, North Carolina and Rhode Island had yet to ratify the Constitution and thus enjoyed no representation. On November 21, 1789, on its second attempt, North Carolina ratified the Constitution and sent two Federalist senators, three Federalist representatives, and two Antifederalist representatives to the second session of Congress.<sup>19</sup> After encountering significant economic pressure,<sup>20</sup> Rhode Island ratified the Constitution on May 29, 1790 and sent a Federalist and an Antifederalist to the Senate and a Federalist to the House who served in the third congressional session.<sup>21</sup>

Because we have only limited accounts of the First Congress, this study is necessarily limited to the floor debates in the House of Representatives. Until 1795,<sup>22</sup> the Senate followed the tradition of the Constitutional Convention,<sup>23</sup> the Articles of Confederation Congress,<sup>24</sup> and the British Parliament (until the mid 1770s)<sup>25</sup> of meeting behind closed doors. As a result, our record of its proceedings consist primarily of the Senate Legislative Journal, the

16. See BICKFORD, *supra* note 5, at v.

17. *Id.*

18. *Id.* at 4.

19. See CHRISTMAN, *supra* note 4, at 86-89 (describing North Carolina's ratification and the ensuing selection of senators and representatives: Federalist Senators Samuel Johnston and Benjamin Hawkins, Federalist representatives Hugh Williamson, John Steele, and John Sevier, and Antifederalist representatives John Baptista Ashe and Timothy Bloodworth).

20. The federal government subjected goods produced in Rhode Island to customs duties as if they were imported from a foreign country and then enacted legislation that would impose a ban on all commercial trade between Rhode Island and the United States and require Rhode Island to pay \$27,000 as its cost of discharging federal obligations incurred prior to the effective date of the Constitution. See CURRIE, *supra* note 5, at 97-98.

21. See CHRISTMAN, *supra* note 5, at 90-94 (describing Rhode Island's ratification and selection of Federalist Senator Theodore Foster, Antifederalist Senator Joseph Stanton, Jr., and Federalist representative Benjamin Bourn).

22. See X DHFFC, *supra* note 5, at xv-xvi.

23. See *id.* at xv.

24. *Id.*

25. The process of disclosure of the proceedings in the popular press was a gradual one with the House of Commons fully acquiescing in 1772 and the House of Lords fully acquiescing in 1775. *Id.* at xiv.

Senate Executive Journal,<sup>26</sup> and the extant notes and diaries of some senators,<sup>27</sup> none of which provide an account of floor debates helpful to this study.

For deliberations in the House, however, a considerable record is available. Until recently, the standard source was *Gale and Seaton's Debates and Proceedings in the Congress of the United States* (also known as the *Annals of Congress*).<sup>28</sup> Its volumes covering the First Congress were not published until 1834 and consisted of reports taken from Thomas Lloyd's *Congressional Register* and John Fenno's *Gazette of the United States*,<sup>29</sup> both contemporaneous records that were privately printed. However, in recent years, scholars have benefited from the publication of the multi-volumed series *Documentary History of the First Federal Congress, 1789-91*,<sup>30</sup> which compiles all extant records of that congress, including the *Congressional Register*, the *Gazette of the United States*, Thomas Lloyd's unpublished shorthand notes,<sup>31</sup> articles appearing in two newspapers, *The [New York] Daily Advertiser*, and *The New-York Daily Gazette*, as well as other available partial accounts of the proceedings. Although the records include the errors and inconsistencies inherent in virtually any reportage,<sup>32</sup> they offer a tremendous resource for those interested in the nation's founding.

26. See I DHFFC, *supra* note 5 (reproducing the Senate Legislative Journal); II DHFFC at 3-34 (reproducing the Senate Executive Journal). Article I, section 5, clause 3 of the Constitution provides: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same . . ." However, this provision was not construed to require publishing floor debates. See CURRIE, *supra* note 5, at 10.

27. The lengthiest and most detailed diary is that of William Maclay of Pennsylvania. See IX DHFFC, *supra* note 5, at 3-401. Maclay apparently was a difficult individual whose personality distorted his account. See *id.* at xi-xii.

28. 1 & 2 DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES (Joseph Gales, Jr. & William W. Seaton eds., 1834). With the exception of one speech from another source, these volumes include only the contents of the *Congressional Register* and the *Gazette of the United States*. See X DHFFC, *supra* note 5, at xxvii. For a history of the efforts of Gale and Seaton, see *id.* at xxiii-xxvii.

29. Fenno's *Gazette of the United States* published accounts of the debates of the First Congress beginning on April 15, 1789. See X DHFFC, *supra* note 5, at xxxv. For a history of Fenno's efforts, see *id.* at xxxiv-xxxviii.

30. The House debates of the First Congress appear in volumes X through XIV; the *Journal of the House of Representatives* appears in volume III. See DHFFC, *supra* note 5. I have enormous respect and sympathy for the generations of historians who studied the First Congress by squinting at microfiche or at crumbling pages of tiny print for hours on end.

31. Lloyd's shorthand notes contain records that never saw publication in the short-lived *Congressional Register*. See X DHFFC, *supra* note 5, at xxxiii.

32. Later in life, Madison complained that Lloyd's notes were "very defective, and abound in errors, some of them very gross, where the speeches were not revised by the author." See *id.* at xxvi-xxvii.



### C. Methodology

This study examines the debates in the House of Representatives for instances in which members based their arguments on the intent of the Founders. The study classifies the arguments in five rhetorical categories.<sup>33</sup>

1. Interpret the Constitution in Light of the Founders' Intent Expressed at the State Ratifying Conventions.
2. Interpret the Constitution in Light of the Proceedings of the Constitutional Convention.
3. Interpret the Constitution in Light of Evils that the Constitutional Convention Sought to Avoid.
4. Interpret the Constitution in Light of the Proceedings of the Congress under the Articles of Confederation.
5. Interpret the Constitution in Light of Publications Widely Circulated during the Constitution's Ratification.

The study then refines some categories into a number of subcategories, with most subcategories offering only a few examples. The variety of subcategories and the limited number of examples for each suggest that no one method of argument was singularly effective with respect to the various topics of debate.

Two issues of methodology deserve attention: the definition of "original intent" and the difficulty of determining which speaker arguments to include in the study. Depending on the context, the definition of "original intent" could range from the decisions and purposes of the Framers in selecting the words of the Constitution, to the meanings of the Constitution's words, or to the "impressions and interpretations of the Constitution formed by its original readers, citizens, polemicists, and convention delegates who participated in one way or another in ratification."<sup>34</sup> This study takes a relatively narrow view; it includes only arguments in which a House member made a reference to the Constitution's legislative history (broadly construed) when arguing that (1) a proposal was or was not constitutional or (2) the legislative history was relevant to the proposal's merits. A broader view would risk including a large

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33. In selecting these categories, I have relied heavily on CHESTER J. ANTIEU, *CONSTITUTIONAL CONSTRUCTION* (1982), which necessarily draws on the traditional canons of statutory construction. See NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* (6th ed. 2002) (the leading treatise on statutory construction).

34. RAKOVE, *supra* note 15, at 8. I borrow my description of the range of the possible definitions of "original intent" from Professor Rakove who distinguishes between "intent," "meaning," and "understanding." See *id.* at 7-9.

number of arguments whose connection with originalism is quite tenuous. Even with this narrow definition of intent, determining which arguments to classify as originalist requires making difficult choices.

The following three examples illustrate the methodology of the study and how it addresses the close cases.

*First Example:* In a debate over whether to give the President the power to remove the Secretary of Foreign Affairs from office,<sup>35</sup> Abraham Baldwin of Georgia argued that such a delegation of authority would mix the powers of the President and Senate, thus violating the principle of separation of powers. He noted that the Constitution requires the President to receive the advice and consent of the Senate in making such an appointment, but does not require such a concurrence in order to remove an officer.<sup>36</sup> Baldwin argued that “[t]he senate must concur with the president in making appointments, but with respect to the removal they are not associated; no such clause is in the constitution; and therefore I should conclude, that the convention did not chuse they should have the power.”<sup>37</sup> Although Baldwin invoked only the Framers’ implied intent, the reliance on intent is strong enough to merit including the argument in this study.

*Second Example:* One debate considered whether to amend the Constitution so that after the first census and until the size of the House reached one hundred members, there should be one representative for every thirty thousand citizens. After the House reached one hundred members, the number of representatives should be not be less than one hundred or more than one hundred seventy five, with each state having at least one representative.<sup>38</sup> The Constitution states that after the first census, “The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . . .”<sup>39</sup> Some House members were concerned that the potential size of the body would be unmanageably large or undemocratically too small, and in the course of the debate, some members proposed amendments to reduce or increase the potential size by various methods.<sup>40</sup>

35. For a summary of this debate, see CURRIE, *supra* note 5, at 36–41.

36. “[A]nd he shall nominate, and by and with the [a]dvice and [c]onsent of the Senate, shall appoint [a]mbassadors, other public [m]inisters and [c]onsuls, [j]udges of the [S]upreme [C]ourt, and all other [o]fficers of the United States, whose [a]ppointments are not herein otherwise provided for.” U.S. CONST. art. 2, § 2, cl. 2.

37. XI DHFFC, *supra* note 5, at 1005.

38. *Id.* at 1242–53 (recording the debate).

39. U.S. CONST. art. 1, § 2, cl. 3.

40. John Vining of Delaware unsuccessfully proposed “that where the number of inhabitants of any particular state amounts to 45,000, they shall be entitled to two representatives.” XI DHFFC, *supra* note 5, at 1243. Fisher Ames of Massachusetts unsuccessfully proposed that after the first census, there should be one representative for every 40,000 until the number reached 100. *Id.* Theodore Sedgwick of Massachusetts successfully moved to increase the ultimate size of the House to 200. *Id.* at 1249. Samuel Livermore of New Hampshire unsuccessfully moved to increase the mini-

Roger Sherman of Connecticut, who had been a delegate to the Constitutional Convention, explained that the proposed Constitution initially required a ratio of one representative to forty thousand citizens, but that the ratio was reduced when George Washington requested the lesser ratio "as more favorable to the public interest."<sup>41</sup>

Although Sherman's statement refers to proceedings at the Constitutional Convention, it is not part of an argument that a proposal before the Congress is or is not constitutional. Moreover, his statement is not sufficiently relevant to the merits of the proposal under consideration. Therefore, the statement is not part of this study.

*Third Example:* In a debate on a proposal to pay the senators a salary of six dollars per day and members of the House five dollars per day,<sup>42</sup> James Madison argued in favor of the proposition:

[H]e observed, that it had been evidently contemplated by the constitution, to distinguish in favor of the senate, that men of abilities and firm principles, whom the love and custom of a retired life might render averse to the fatigues of a public one, may be induced to devote the experience of years, and the acquisitions of study, to the service of their country.<sup>43</sup>

Although the study includes Madison's argument, it excludes this statement by Joshua Seney of Maryland: "[g]entlemen have brought forward the constitution upon this occasion, but I conceive it to be opposed to the very principle that they mean to advocate. This will destroy the independence of the several branches, which is to be strictly observed."<sup>44</sup>

The decision to include Madison's statement was a close one, because Madison's reference to the Framers' intent was quite indirect. However, the decision to exclude Seney's statement was not difficult, because Seney referred only to very general principles underlying the Constitution.

mum size of the House to 200. *Id.* at 1252. The initial motion, as amended by Sedgwick's motion, passed with 27 members for and 20 against. *Id.* at 1254.

41. *Id.* at 1249. Sherman's recollection was largely accurate. Washington endorsed a proposal by Nathaniel Gorham to this effect, and the Convention agreed to it unanimously. See MADISON'S NOTES, *supra* note 11, at 655. However, Madison, who unlike Sherman, supported a larger House, was critical of Sherman's reference to the Constitutional Convention: "[He] [h]oped gentlemen would not be influenced by what had been related to have passed in the convention; he expected the committee would determine upon their own sense of propriety." XI DHFFC, *supra* note 5, at 1250. Madison's criticism was consistent with his rejection of looking to the Convention proceedings in matters of construction. See *supra* note 14 and accompanying text.

42. XI DHFFC, *supra* note 5, at 1136-39 (recording the debate).

43. *Id.* at 1152.

44. *Id.* at 1154.

Because the statements of the members of the House are often unclear in explaining the extent to which they rely on the Founders' intent, if at all, some decisions on what to include in the study may generate points of disagreement. Moreover, it is true that some references to the Framers and ratifiers may refer not to their intentions but to arguments based on the Constitution's language and structure.<sup>45</sup> The lines of demarcation are often unclear. At the same time, with so many representatives having served in the Articles of Confederation Congress, the Constitutional Convention, and the state ratifying conventions, members of the House must have engaged in informal conversations that informed them about the intent of participants in the Constitution's legislative history. Thus, the recorded speeches must be read in light of what the representatives must have known.

The remainder of this article examines the First Congress's originalist arguments. As previously mentioned, there are four categories of arguments, often with subcategories in each. Since originalist arguments are attempts to give effect to the Constitution's text, the article includes the relevant constitutional provisions to give context to the arguments.

## II. ORIGINAL INTENT ARGUMENTS

### *1.00. Interpret the Constitution in Light of the Founders' Intent Expressed at the State Ratifying Conventions*

Of the arguments based on original intent, those relying on statements at the state ratifying conventions would seem the most persuasive. The conventions were an essential part of the legislating process and, in fact, the final step.

In the First Congress, delegates relied on the ratifying conventions in debating four topics: the President's power to remove the head of an executive department, the House's authority to participate in structuring treaty negotiations, the establishment of a national bank, where to place amendments in the Constitution, the Tenth Amendment, abolishing slavery, and assuming the debts of the states.

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45. See Powell, *supra* note 3, at 948 (stating that at the time, a reference to "original intent" "referred to the 'intentions' of the sovereign parties to the constitutional compact, as evidenced in the Constitution's language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or anyone else"). This study suggests that Professor Powell's conclusion invites further examination.

### 1.01. Follow Policy Sentiments Expressed at the State Ratifying Conventions

#### A. Removing the Head of an Executive Department

A major controversy in the First Congress was whether the President had the power to remove a federal officer. According to two historians, “The resolution forced Congress to confront and define basic tenets of constitutional interpretation relating to the meaning of separation of powers, advice and consent, checks and balances, and impeachment.”<sup>46</sup> A number of constitutional provisions are relevant to this debate.

Article II, section 4 of the Constitution provides: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” Article I, section 3, clause 6 gives the Senate “the sole Power to try all Impeachments.” No other provisions deal with removing federal officers. Article II, section 2, paragraph 2 states that the President shall “nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States.” Article I, section 8, clause 18, authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

In May, 1789, James Madison (Va.) proposed establishing a department of foreign affairs, to be headed by the secretary of the department of foreign affairs. This secretary would be appointed by the President with the advice and consent of the Senate, but could be removed only by the President.<sup>47</sup> The First Congress debated the constitutionality of permitting the President to remove the officer without the concurrence of the Senate.

Arguing against the proposal, Elbridge Gerry (Mass.) rejected the contention that Madison’s proposal could find authorization under the “necessary and proper clause” unless the clause was construed in an extraordinarily broad manner:

By this very act the house are assuming a power to alter the constitution. . . . Such a power would render the most important clause in

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46. BICKFORD, *supra* note 5, at 38. For summaries of the debate, see *id.* at 38-41; CURRIE, *supra* note 5, at 36-41; LYNCH, *supra* note 5, at 54-63. After a lengthy debate, the house indirectly voted to give the President the power of removal. See XI DHFFC, *supra* note 5, at 1043. The Senate, however, was evenly divided, requiring Vice President Adams to cast the deciding vote approving the removal power. See I DHFFC, *supra* note 5, at 86.

47. See X DHFFC, *supra* note 5, at 725.

the constitution [presumably Article II, section 2, clause 18] nugatory, and one without which, I will be bold to say, this system of government would never have been ratified.<sup>48</sup>

Also speaking in opposition to the proposal, Alexander White (Va.) argued that the Constitution should be strictly construed and not be read liberally to give excessive power to the President. In support of this position, he relied on Virginia's statement of ratification, which contained numerous proposals for amendments, including ones that would limit federal power:

I will only remark that the state of North-Carolina has expressed nearly the same sentiments as Virginia, with this difference, that Carolina would not adopt the constitution till it was satisfied of this principle, that we could not by constructive acts enlarge our powers, in order at a future day to destroy the state governments, and with them the liberties of the people.<sup>49</sup>

Not all delegates shared the concerns of Gerry and White. Elias Boudinot (N.J.) supported the proposal on removal and referred to the sentiment expressed in the ratification conventions that the Constitution failed to provide for a sufficient separation of powers. He argued that relying on the legislative impeachment process for removal would amount to a "further blending of the executive and legislative powers" contrary to the principle of separation.<sup>50</sup>

James Jackson (Ga.), who opposed the proposal, saw no such difficulty in blending legislative and executive powers by relying on the impeachment process. In support of his position, he cited James Wilson at the Pennsylvania ratifying convention: "[t]he celebrated Mr. Wilson agrees with me in this sentiment, for he declares that the senate was constituted a check upon the president. Let gentlemen turn over his speeches, delivered in the convention of Pennsylvania, and they will find he asserts it as an incontrovertible fact."<sup>51</sup>

## B. Appointing Commissioners to Negotiate Indian Treaties

In August 1789, the House considered a proposal for negotiating treaties with Indian tribes and appointing no more than three commissioners to serve as negotiators. One issue was whether the clause limiting the number of

48. XI DHFFC, *supra* note 5, at 930. For a report of the same speech employing different wording, see *id.* at 902.

49. *Id.* at 941-42.

50. *Id.* at 966.

51. *Id.* at 1002-03.

commissioners unconstitutionally interfered with the management of treaties by the President and Senate.<sup>52</sup>

Article II, section 2, paragraph 2 of the Constitution provides: “[The President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . . .”

William Smith (Md. or S.C.) argued that the House lacked authority to play a role in the matter: “I know it has been debated in some of the state conventions, whether it is proper to let the president and senate have this power, some have thought the president ought to have it exclusively, others have judged it most eligible that the senate is associated with him, but I never heard that any one thought the legislature should have concurrent jurisdiction with them . . . .”<sup>53</sup>

### C. Establishing a National Bank

A vigorously debated issue in the First Congress was the establishment of a national bank.<sup>54</sup> However, the delegates disagreed over whether the Constitution authorized Congress to create such a powerful institution.

Article I, section 8, Paragraph 18 authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” James Madison (Va.) argued that the “necessary and proper clause” was not broad enough to authorize establishing a national bank, and that it “gave no additional powers to those enumerated.”<sup>55</sup> In support of his position, he read “sundry passages from the debates of the Pennsylvania, Virginia, and North-Carolina conventions, shewing the grounds on which the constitution had been vindicated by its principle advocates, against a dangerous latitude of its powers, charged on it by its opponents.”<sup>56</sup>

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52. *See id.* at 1192-1200 (reporting the debate on this issue, which ended with the House striking the provision on the number of permissible commissioners).

53. *Id.* at 1195-96.

54. For summaries of the debate on the successful proposal, see BICKFORD, *supra* note 5, at 73-75; CURRIE, *supra* note 5, at 78-80; LYNCH, *supra* note 5, at 77-90.

55. XIV DHFFC, *supra* note 5, at 374. *See* BICKFORD, *supra* note 5, at 73 (“His opponents considered the argument merely a smokescreen for his real interests . . . .”) Southerners like Madison feared that because the bank would be located in Philadelphia, the bill would make that city both the financial and political capital of the country. *Id.* They also believed that a national bank would become a banking monopoly that would benefit northern merchants. *See* LYNCH, *supra* note 5, at 78.

56. XIV DHFFC, *supra* note 5, at 374.

Further, Madison argued that “[t]he explanatory declarations and amendments accompanying the ratifications of the several states formed a striking evidence, wearing the same complexion.”<sup>57</sup>

### *1.02. Follow the Policy Sentiments Expressed at the State Ratifying Conventions with Great Caution*

#### A. Establishing a National Bank

In the ongoing debate over a national bank, delegates employed a number of arguments. In disagreeing with Madison’s reliance on state ratifying conventions, Elbridge Gerry (Mass.), discounted the records of the state conventions. He noted that “the debates of the state conventions, as published by the short-hand writers, were generally partial and mutilated.”<sup>58</sup> Moreover, these records were sometimes one-sided, omitting the arguments of the Antifederalists. In addition to being one sided, the speeches of a few participants may not express the sense of an entire convention. Furthermore, given the underlying struggle between the Federalists and Antifederalists, participants could be induced “to depart from candor, and to call in the aid of art, flattery, professions of friendship, promises of office, and even good cheer.” as well as make threats of political death to those who disagreed.<sup>59</sup>

### *1.03. Follow the Specific Wishes Expressed at the State Ratifying Conventions on Specific Issues*

#### A. Interweaving Amendments to the Constitution Within the Constitution or Appending them as a Supplement

In the debates over drafting amendments to the Constitution, a dispute erupted over whether the amendments should be interwoven into the body of the document or added as a supplement.<sup>60</sup>

Article V sets out procedures for amending the Constitution and provides that when the procedures are satisfied, the amendments “shall be valid for all intents and purposes, as part of this Constitution.” William L. Smith (S.C.) argued in favor of incorporating the amendments. He “[r]ead extracts from the amendments proposed by several of the state conventions at the time they ratified the constitution, from which he said it appeared that they were generally of the opinion that the phraseology of the constitution ought to be altered; nor would this mode of proceeding repeal any part of the constitution

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57. *Id.* at 375.

58. XIV DHFFC, *supra* note 5, at 460.

59. *See* XIV DHFFC, *supra* note 5, at 460.

60. *See* XI DHFFC, *supra* note 5, at 1212-16, 1221-31, 1308 (reporting this debate).



but such as it touched, the remainder will be in force during the time of considering it and ever after.”<sup>61</sup>

## B. Drafting the Tenth Amendment

The Tenth Amendment to the Constitution provides: “The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.” In the debates over its drafting, Antifederalist Thomas Tucker (Va.) unsuccessfully moved “to add the word ‘expressly’ so as to read ‘The powers not expressly delegated by this constitution.’”<sup>62</sup> The proposal was designed to narrow the authority of the national government by denying the government any powers by implication. In opposing Tucker’s motion, James Madison stated “he remembered the word ‘expressly’ had been moved in the convention of Virginia, by the opponents to the ratification, and after full and fair discussion was given up by them, and the system allowed to retain its present form.”<sup>63</sup>

## C. Abolishing Slavery

In Spring 1790, Quakers petitioned Congress to forbid vessels employed in the international slave trade from using ports in Pennsylvania.<sup>64</sup> In debating the petition, delegates to the First Congress considered whether Article I section 9 prohibited the Quaker’s proposal.

Article I, section 9, clause 1 of the Constitution forbids Congress from prohibiting “The Migration and Importation of [slaves] . . . prior to the Year one thousand eight hundred and eight . . . .” While debating this measure, William L. Smith (S.C.) argued that the southern states would never have ratified the Constitution if it did not offer protection to slavery. “On entering into this government, [the southern states] apprehended that the other states not knowing the necessity the citizens of the southern states were under to hold this species of property, would, from motives of humanity and benevolence, be led to vote for a general emancipation; and had they not seen, that

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61. *Id.* at 1230.

62. *Id.* at 1300.

63. *Id.* at 1301. In *The Federalist*, Madison had defended the “necessary and proper clause” (Art. I, § 8, cl. 18), against the charge that the Constitution should have prohibited the exercise of any power not expressly delegated to the national government. If the Constitution had included such a provision, he argued, “it is evident that the new Congress would be continually exposed . . . to the alternative of construing the term ‘expressly’ with so much rigour as to disarm the government of all real authority whatever, or so much latitude as to destroy altogether the force of the restriction.” THE FEDERALIST NO. 44, at 303 (James Madison) (Jacob E. Cooke ed., 1961).

64. See CURRIE, *supra* note 5, at 66-67 (summarizing the debate).

the constitution provided against the effect of such a disposition, I may be bold to say, they never would have adopted it . . . .”<sup>65</sup>

#### D. Assuming State Debts and the Threat of Direct Taxes

A controversial topic in the First Congress was whether the national government should assume the debts of the states and pay them as debts of the United States. Many congressmen weighed in on this issue and employed varying types of original intent arguments.<sup>66</sup>

Article I, section 8, clause 1 of the Constitution states: “Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Andrew Moore (Va.) argued that paying the state debts would require imposing a direct tax on the states.

I remember well, when the constitution was under [consideration] in the [C]onvention of Virginia. The power of imposing a direct tax was warmly opposed — The advocates for its adoption stated . . . [t]hat occasions might happen in which such a power would be necessary — That it never would be exercised but in case of necessity — But we are about to attempt it when no such necessity exists. If the convention had supposed it would have been attempted at so early a day, I think they would have not yet adopted the constitution.<sup>67</sup>

#### 2.00. *Interpret the Constitution in Light of the Proceedings of the Constitutional Convention*

The number of references to the Constitutional Convention is remarkable in that it was held behind closed doors.<sup>68</sup> Madison’s Notes, the only full record of the Convention, were published posthumously in 1840 and therefore were not available to the First Congress.<sup>69</sup> Nonetheless, references to the Convention debates arise in discussions of nine topics: presidential authority to remove the head of an executive department, imposing a duty on tonnage,

65. XII DHFFC, *supra* note 5, at 310.

66. For summaries of the debate, see BICKFORD, *supra* note 5, at 61-66; CURRIE, *supra* note 5, at 76-78; LYNCH, *supra* note 5, at 71-77. The proposal eventually passed as the result of a compromise: A reimbursement would be awarded to Virginia and other states for the part of the debt they had already paid off, and beginning in 1800, the new capital would be permanently located on the Potomac. LYNCH, *supra* note 5, at 76.

67. XII DHFFC, *supra* note 5, at 556.

68. MADISON’S NOTES, *supra* note 11, at viii.

69. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, (Max Farrand, ed., 1911) at xv.

taxing the slave trade, compensating members of Congress, paying creditors of the United States, assuming state debts, abolishing slavery, exempting members of Congress from the state militias, and establishing a national bank.

*2.01. Follow Policy Sentiments Expressed at the Constitutional Convention.*

A. Removing the Head of an Executive Department

When James Madison moved for the establishment of a department of foreign affairs with a secretary who would be removable by the President, he triggered a debate over whether the President could remove an executive officer without the advice and consent of the Senate.<sup>70</sup>

Article II, section 4 of the Constitution provides: "The President, Vice President and all civil officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Article I, section 3, clause 6 gives the Senate "the sole Power to try all Impeachments." No other provisions deal with removing federal officers. Article II, section 2, clause 2 states that the President shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States."

Speaking in opposition to Madison's proposal, John Page (Va.) argued that it would give the President far more power than the Constitutional Convention could have intended: "This was never the intention of the constitution, or [the President] would have had the sole power of appointing. The framers of the government had confidence in the senate, or they would not have combined them with the executive in the performance of his duties."<sup>71</sup>

Also speaking in opposition to the proposal, Roger Sherman (Conn.), a delegate to the Constitutional Convention, observed "[t]he convention, who formed this constitution, thought it would tend to secure the liberties of the people, if they prohibited the president from the sole appointment of all officers."<sup>72</sup>

Abraham Baldwin (Ga.) disagreed with Sherman and Page. He argued that the proposal would violate the principle of separation of powers by "mingling the powers of the president and senate."<sup>73</sup> He noted that at the Constitutional Convention, such mingling met with opposition: "[s]ome gentlemen opposed it to the last; and finally it was the principal ground on which

70. *Id.* at 725. For background information on this controversy, see *supra* notes 46-53 accompanying text.

71. XI DHFFC, *supra* note 5, at 957.

72. *Id.* at 977.

73. *Id.* at 1003-04.

they refused to give it their signature and assent. One gentleman<sup>74</sup> called it a monstrous and unnatural connection; and did not hesitate to affirm, it would bring convulsions to government.”<sup>75</sup>

### B. Imposing a Duty on Tonnage

As one means of raising revenue, Congress considered a tonnage bill that would impose a duty on each foreign ship entering a United States port proportional to the ship's carrying capacity.<sup>76</sup>

Article I, section 8, clause 1 of the Constitution states: “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises.” Article I, section 9, clause 6 provides “nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.” Relying on his construction of Article I, section 9, clause 6, Theodorick Bland (Va.) proposed an amendment that would exempt from the duty vessels bound from one port to another within the United States.<sup>77</sup> When other delegates disagreed with his reading of that provision, Bland defended it by relying on an underlying policy consideration: “[i]t was however well known that the Convention, in framing this article, designed [it] to encourage the coasting trade.”<sup>78</sup>

### C. Taxing the Slave Trade

Article I, section 9, clause 1 of the Constitution states that “a Tax or duty may be imposed on such Importation [of slaves] not exceeding ten dollars for each Person.” At the Congress, Josiah Parker (Va.) moved an amendment that would impose a ten dollar tax on every slave imported into the United States.<sup>79</sup> He argued that “it was the prevailing expectation that some measure should be entered into by the general government against the slave trade—That the constitution itself was calculated upon this idea.”<sup>80</sup>

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74. Baldwin evidently referred to Elbridge Gerry of Massachusetts, who had served with him at the Constitutional Convention. *See id.* at 1004 n.32.

75. *Id.* at 1004.

76. BICKFORD, *supra* note 5, at 31-32 (summarizing the debate on the proposal, which was defeated in the Senate).

77. *See* X DHFFC, *supra* note 5, at 410-11 (reporting the debate on Bland's amendment).

78. *Id.* at 410.

79. *See id.* at 642; *see also id.* at 642-51 (reporting the debate, with Parker eventually withdrawing his motion).

80. *Id.* at 642.

### D. Compensating Members of Congress

The members of the First Congress also debated a proposal to pay House members five dollars per day and Senators six dollars per day.<sup>81</sup>

Article I, § 6, clause 1 of the Constitution states: “The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.” Arguing in favor of the different pay scales, James Madison (Va.) claimed implicit support from the Constitution’s drafters:

[H]e observed, that it had been evidently contemplated by the constitution, to distinguish in favor of the senate, that men of abilities and firm principles, whom the love and custom of a retired life might render averse to the fatigues of a public one, may be induced to devote the experience of years, and the acquisitions of study, to the service of their country.<sup>82</sup>

### E. Paying Creditors of the United States

The First Congress had to pay the debts incurred during the American Revolution. One particularly troubling issue was how to repay the two types of creditors: original holders (individuals who loaned money to the United States and now held public securities), and nonoriginal holders (individuals who had purchased securities from the original holders at a deep discount.)

Article VI, clause 1 of the Constitution states: “All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be valid against the United States under this Constitution, as under the Confederation.” James Madison proposed paying the nonoriginal holders the highest market value and then paying the original holders the balance of what the government owed on the original securities.<sup>83</sup>

In opposing Madison’s proposal, Fisher Ames (Mass.) argued that the government should pay the full amount owed to all holders of securities:

If we pursue another kind of policy [not Madison’s proposal], such as the preamble to the constitution declares to be the objects of the government; this government and this country may expect a more than Roman fortune. . . . That gentleman [Madison] helped to

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81. XI DHFFC, *supra* note 5, at 1149-56 (reporting the debate on the failed proposal to have discriminatory salaries). Later, the Senate successfully insisted on a salary differential for 1795; however, in 1796, the salaries were equalized. See BICKFORD, *supra* note 5, at 21.

82. XI DHFFC, *supra* note 5, at 1152.

83. See XII DHFFC. *supra* note 5, at 294. After a brief debate, Madison’s proposal was rejected “by a considerable majority.” *Id.* at 474.

frame the constitution—I have no doubt it is the better for his eminent abilities—I hope that his love of his own work and his zeal for the cause which he has so ably supported, will induce him to abandon a measure, which tends so fatally to disappoint the first wishes of his own heart, and the hopes of his country.<sup>84</sup>

## *2.02. Accept a Proposal that the Constitutional Convention Did Not Enact, but Seemed to Favor.*

### A. Assuming State Debts

As previously mentioned, the First Congress debated whether the national government should assume the state's debts and pay them as debts of the United States.<sup>85</sup> Article I, section 8, clause 1 of the Constitution states: "Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

Elbridge Gerry (Mass.), a delegate to the Constitutional Convention, recalled discussions at the Convention indicating that assumption of the debts "was in contemplation from the very commencement of the new government."<sup>86</sup> According to Gerry, the delegates did not include a provision on this point for two reasons. First, the proposition they discussed did not go as far as some delegates wished, and second, other parts of the Constitution authorized the assumption:

It was opposed, on this ground, that it did not extend to the repayment of that part which the states had sunk, as well as that which remained unpaid. . . . [H]ad it not been for this objection, I believe the very provision, which gentlemen say was never expected, would have been incorporated into the constitution itself. If I recollect right, it was also contended in convention, that the proposition would be useless, as congress were authorised, under other parts of the constitution, to make full provision on this head.<sup>87</sup>

Roger Sherman (Conn.) agreed with Gerry because, "[i]t was mentioned in the general convention—but it was not thought necessary or proper to insert

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84. *Id.* at 345.

85. For background information on this issue, see *supra* note 66

86. XII DHFFC, *supra* note 5, at 576.

87. *Id.* See also XIII DHFFC, *supra* note 5, at 1719 (making the same argument and finding support in a similar recollection by Roger Sherman, also a delegate to the Constitutional Convention).

it in the constitution, for Congress would have sufficient power to adopt if they should judge it expedient.”<sup>88</sup>

Later, James Madison (Va.) relied on his recollection of the Convention to dispute Gerry’s argument:

If as we have been told, the assumption originated in the convention, why were not words inserted that would have incorporated and made the state debts part of the debts of the United States? Sir, if there was a majority who disapproved of the measure, certainly no argument can be drawn from this source; if there was a majority who approved of it, but thought it inexpedient to make it a part of the constitution, they must have been restrained by a fear that it might produce dissensions and render the success of their plan doubtful. I do recollect that such a measure was proposed, and, if my memory does not deceive me, the very gentleman [Gerry]<sup>89</sup> who now appeals to the constitution in support of his argument, disrelished the measure at that time, and assigned for a reason, that it would administer relief perhaps exactly in proportion as the states had been deficient in making exertions.<sup>90</sup>

### 2.03. *Reject a Proposal that a Significant Number of Delegates to the Constitutional Convention Rejected.*

#### A. Abolishing Slavery

In an effort to impede the slave trade, a group of Quakers petitioned Congress to ban from Pennsylvania ports vessels employed in the international slave trade.<sup>91</sup> Article I, section 9, clause 1 of the Constitution forbids Congress from prohibiting “[t]he [m]igration and [i]mportation of [slaves] . . . prior to the [y]ear one thousand eight hundred and eight . . .”

In opposing the committing of the petition to a committee, Abraham Baldwin (Ga.) argued that the Constitution banned the abolition of the slave trade until 1808. He emphasized that the Southern delegates to the Constitutional Convention were “so tender upon this point, that they had well nigh broken up without coming to any determination,” but conceded “from the

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88. XIII DHFFC, *supra* note 5, at 1421.

89. The original newspaper report stated “Sherman” instead of “Gerry,” but corrected the error in a later issue. *Id.* at 1176 n.55.

90. *Id.* at 1175-76. At the Constitutional Convention, Gerry had supported assumption of the state debts, but had also pointed out that “as the States had made different degrees of exertion to sink their respective debts, those who had done most would be alarmed if they were now to be saddled with a share of the debts of the states which had done least.” MADISON’S NOTES, *supra* note 11, at 495.

91. For background information on the debate, see *supra* note 64

extreme desire of preserving the union.”<sup>92</sup> Moreover, “the constitution jealously guarded what they agreed to.”<sup>93</sup> Baldwin stated that an examination of “the footsteps of that body” would show “the greatest degree of caution used to imprint them, so as not to be easily eradicated; but from the moment we go to jostle on that ground . . . I fear we shall feel it tremble under our feet.”<sup>94</sup>

#### 2.04. *Reject a Proposal that the Constitutional Convention Apparently Rejected*

##### A. Assuming State Debts<sup>95</sup>

In the debate over whether the national government should assume the debts of the states and then pay them as debts of the United States,<sup>96</sup> James Jackson (Ga.) cited Elbridge Gerry’s references to discussions at the Constitutional Convention and interpreted them as confirming that the state debts “were not respected as the debts of the Union by the convention.”<sup>97</sup> He argued: “[t]he convention met, and the constitution was formed, for the restoration of public credit, and if the state debts were a part of the debt of the Union, provision would have been made for them . . .” Thus, “if the convention had no power to insert them in the constitution, whence all our powers are derived; neither, Sir, have we the power under that constitution to provide for the payment of them.”<sup>98</sup>

Michael Jenifer Stone (Md.) also argued that the Framers did not intend that the national government should assume state debts:

Was it the intention of the framers of this government, and does their work contain the idea, that the union should assume the debts of the particular states? Will it give the general government a greater degree of power? I apprehend that it may: If, then, it be a power not contemplated in the constitution, is it not an assumed power? This deduction is clear to my mind.<sup>99</sup>

Although Andrew Moore (Va.) supported a compromise proposal, he found no constitutional barrier to having the national government assume

92. XII DHFFC, *supra* note 5, at 308.

93. *Id.*

94. *Id.*

95. Article I, section 8, clause 1 of the Constitution states: “Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”

96. For background information on this debate, see *supra* note 66.

97. See *supra* text accompanying notes 84-85.

98. XIII DHFFC, *supra* note 5, at 1697.

99. XII DHFFC, *supra* note 5, at 542.



state debt: "I think the framers of the constitution contemplated the payment of the debts of the United States only. But from our assuming the state debts, they become the debts of the United States, and we are to pay them."<sup>100</sup>

### B. Exempting Members of Congress from the State Militias

While debating a bill to regulate the state militias, the House considered a provision to exempt from service officers of the national government. Article I, section 6, clause 1 of the Constitution states:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

William Giles (Va.) objected to exempting members of Congress. He quoted Article I, section 6, clause 1 of the Constitution and declared that it set out all the privileges to which members of Congress were entitled: "if the convention took up this subject (as it is plain from the foregoing clause that they did) it is reasonable to presume, that they made a full declaration of all our privileges; and it is improper to suppose, that we are possessed of similar powers with the convention, and able to extend our own privileges."<sup>101</sup>

### C. Removing the Head of an Executive Department

As previously discussed, a major controversy in the First Congress was whether the President had the power to remove a federal officer without the advice and consent of the Senate.<sup>102</sup> Article II, section 4 of the Constitution provides: "The President, Vice President and all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Article I, section 3, clause 6 gives the Senate "the sole Power to try all Impeachments." No other provisions deal with removing federal officers. Article II, section 2, clause 2 states that the President shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States."

100. *Id.* at 536.

101. XIV DHFFC, *supra* note 5, at 133.

102. For more background information on this controversy, see *supra* notes 46-53 and accompanying text.

Arguing against the President's removal power, Alexander White (VA) denied that there was a defect or "omitted case" in the Constitution, because it failed to provide for the removal of officers. Therefore, he argued, Congress does not have the power to cure the defect:

For the constitution having directed by whom the officers shall be appointed, it does direct also by whom they shall be removed. . . . Sir, this must have been in the contemplation of the gentlemen who formed the constitution. Is it probable that they never thought about the manner in which an officer should be displaced?<sup>103</sup>

Abraham Baldwin (Ga.) disagreed with White and argued, "[i]f this had been the sense of the Convention who framed the Constitution, the clause 'to be removed in like manner' would have been added."<sup>104</sup> He continued, "no such clause is in the constitution; and therefore I should conclude, that the convention did not chuse [the Senate] should have the power."<sup>105</sup>

Roger Sherman (Conn.) also argued against White's position. Article II, section 2, clause 2 of the Constitution provides: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." If the President is the head of a department, Sherman argued, then Congress can authorize him to appoint cabinet heads and remove them.<sup>106</sup> White countered by saying he would not classify the President as the head of a department: "[t]he gentlemen who formed the constitution would not, it seems, give to the President at all events the power of appointing these inferior officers to which that of removal is attached."<sup>107</sup>

#### D. Establishing a National Bank

In the ongoing debate about establishing a national bank,<sup>108</sup> James Madison disagreed that the necessary and proper clause gave Congress the appropriate authority.<sup>109</sup> When Congress considered a proposal to establish a national bank, James Madison (Va.), who opposed the measure, questioned Congress's authority to pass it: "[h]is impression might perhaps be the

103. XI DHFFC, *supra* note 5, at 943.

104. *Id.* at 995.

105. *Id.* at 1005.

106. *Id.* at 917.

107. *Id.* at 944; *see also id.* at 956 (reporting the same speech).

108. For background information, *see supra* notes 53-54 and accompanying text.

109. Article I, section 8, clause 18 authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

stronger, because he well recollected that a power to grant charters of incorporation had been proposed in the general convention and been rejected.”<sup>110</sup>

### *3.00. Interpret the Constitution in Light of Evils that the Constitutional Convention Sought to Avoid*

In determining how to implement two provisions of the Constitution, some delegates focused on problems that the Convention sought to remedy: establishing a national judicial system and naturalizing citizens.

#### A. Establishing a System of Lower Federal Courts

The structure of the federal court system, particularly the creation of inferior courts, was the subject of debate in the First Congress. Article III, section 1 of the Constitution provides: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” In opposing a proposal to have the state courts serve as the inferior federal courts,<sup>111</sup> James Madison (Va.) recalled that under the Articles of Confederation, “the judicial was so confined as to be of little consequence,” and therefore, under the Constitution, “a regular system is provided” in order to make the judiciary an effective branch of government. Madison noted that because state courts and their justices are so dependent on the state legislatures, “permitting them to make the federal laws dependent on them would throw us back into all the embarrassments which characterized our former situation.”<sup>112</sup>

Michael Jenifer Stone (Md.) argued that a system of inferior courts was not necessary. “It appears to me that the present government originated in necessity, and it ought not to be carried further than necessity will justify.”<sup>113</sup> According to Stone, “the scheme of the present government was considered by those who framed it, as dangerous to the liberties of America”<sup>114</sup> because of the tensions it created between the national government and the state governments:

[The Framers] supposed that [national government] had a natural tendency to destroy the state governments, or on the other hand, they supposed that the state governments had a tendency to abridge

110. XIV DHFFC, *supra* note 5, at 368. *See supra* note 15 (noting the deviation from Madison’s normal refusal to rely on the Constitutional Convention in matters of construction).

111. *See* BICKFORD, *supra* note 5, at 47–49 (summarizing the debate over the Judiciary Act).

112. XI DHFFC, *supra* note 5, at 1359.

113. *Id.* at 1371.

114. *Id.*

the powers of the general government, therefore it was necessary to guard against either taking place, and this was to be done properly by establishing a judiciary for the United States.<sup>115</sup>

Stone thus saw the necessity of a federal supreme court, but did not find it necessary to establish a system of inferior federal courts when the state courts could serve their function.<sup>116</sup>

## B. Naturalizing Citizens

At the time of the First Congress, there was no uniform rule for citizenship. Instead, citizenship requirements varied from state to state. The First Congress debated the parameters of a uniform citizenship rule. Article I, section 8, clause 4 authorizes Congress to “establish an uniform Rule of Naturalization.” In February 1790, the House considered a naturalization bill that read:

that all free white persons, who have, or shall migrate into the United States, and shall give satisfactory proof, before a magistrate, by oath, that they intend to reside therein, and shall take an oath of allegiance, and shall have resided within the United States, and shall have resided within the United States for one whole year, shall be entitled to all the rights of citizenship, except being capable of holding an office under the state or general government, which capacity they are to acquire after a residence of two years or more.<sup>117</sup>

Because the length of residency required to achieve citizenship varied from state to state, Thomas Hartley (Pa.) noted: “[t]he terms of citizenship were made too cheap in some parts of the union; now, to say, that a man shall be admitted to all the privileges of a citizen, without any residence at all, is what can hardly be expected.”<sup>118</sup> Roger Sherman (Conn.) argued that the interests of the states and the general government ought to be consulted:

He presumed it was intended by the convention, who framed the constitution, that the congress should have the power of naturalization, in order to prevent particular states receiving citizens, and

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115. *Id.*

116. *Id.*

117. XII DHFFC, *supra* note 5, at 146 (emphasis omitted).

118. *Id.*

forcing them upon others, who would not have received them . . . upon easier terms than those pursued by the several states.<sup>119</sup>

#### 4.00. *Interpret the Constitution in Light of the Proceedings of the Congress under the Articles of Confederation*

Delegates to the First Congress made positive references to provisions of the Articles of Confederation and legislative practices under it with respect to only two issues: defining the duties of the Secretary of the Treasury and assuming state debts. Given the dissatisfaction with the Articles, the paucity of references is not surprising.

#### 4.01. *Interpret the Constitution in Light of Successful Practices under the Articles of Confederation*

##### A. Defining the Duties of the Secretary of the Treasury

In a bill to establish the Department of the Treasury, one clause obligated the Secretary of the Treasury “to digest and report plans for the improvement and management of the revenue, and the support of the public credit.”<sup>120</sup> Article I, section 7, clause 1 of the Constitution specifies: “All Bills for raising Revenue shall originate in the House of Representatives . . . .” Some members claimed that the proposed clause empowered the Secretary to originate money bills, contrary to Article I, section 7, clause 1. Thomas Tucker (S.C.) argued:

If we authorise him to prepare and report plans, it will create an interference of the executive with the legislative powers, it will abridge the particular privilege of this house, for the constitution expressly declares, that all bills for raising revenue, *shall originate* in the house of representatives; how can the business originate in this house if we have it reported to us by the minister of finance . . . .<sup>121</sup>

In support of the bill, James Madison (Va.) cited the actions of the Congress under the Articles of Confederation to demonstrate that it created no danger: “[t]hese are precisely the words used by the former congress, on two occasions, one in 1783, the other in a subsequent ordinance, which established the revenue board, the same power was also annexed to the office of

119. *Id.* at 147.

120. XI DHFFC, *supra* note 5, at 1059. *See id.* at 1059-76 (reporting the debate on this issue).

121. *Id.* at 1059. The controversy was resolved with a successful vote on Thomas Fizsimons’s motion to delete the word “report” and replace it with the word “prepare.” *Id.* at 1072, 1076.

superintendent of finance, but I never yet heard that any inconvenience of danger was experienced from the regulation . . . .”<sup>122</sup>

## B. Assuming State Debts

When debating whether the national government should assume the debts of the states,<sup>123</sup> James Jackson (Ga.), speaking in opposition, looked to a precedent under the Articles of Confederation Congress.<sup>124</sup> Some states had voluntarily contributed impost duties — duties they imposed on imports — to the Confederation government. Jackson argued that the duties did not correspond to a state’s population, but to the economy of the state.<sup>125</sup> Elbridge Gerry (Mass.), who supported assumption, disagreed with Jackson’s assertion.

The gentleman [James Jackson (Ga.)] says, when Congress in 1783, required an impost, it was understood that every state should pay her own debts, that Georgia had done what it could, and ought not to pay an iota more.<sup>126</sup> This is a new doctrine, and is contrary to the express stipulations of all the requisitions of Congress [requests for financing from the states], of which I think are between twenty and thirty.<sup>127</sup>

### 4.02. *In Interpreting the Constitution in Light of Practices under the Articles of Confederation, Consider all the Factors that had been Present*

#### A. Defining the Duties of the Secretary of the Treasury

Article I, section 7, clause 1 of the Constitution specifies: “All Bills for raising Revenue shall originate in the House of Representatives . . . .” In a bill to establish the Department of the Treasury, one clause obligated the Secre-

122. *Id.* at 1072.

123. For background information on this issue, see *supra* note 65.

124. Article I, section 8, clause 1 of the Constitution states: “Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”

125. See XIII DHFFC, *supra* note 5, at 1701. Jackson was responding to an argument by Roger Sherman that, according to a 1781 committee report, states had contributed in proportion to the number of their inhabitants. *Id.* at 1421. Jackson was arguing that states that import more pay proportionately more, and that their reliance on imports is not proportionate to their respective populations. *Id.* at 1701.

126. Jackson had stated only that Georgia had contributed heavily to the public treasury, because “Georgia manufactures nothing, and imports everything.” *Id.* at 1701.

127. *Id.* at 1720.

tary of the Treasury “to digest and report plans for the improvement and management of the revenue, and the support of the public credit.” Some members argued that this clause empowered the Secretary to originate money bills, contrary to Article I, section 7, clause 1.<sup>128</sup>

James Madison (Va.) argued that, under the Articles of Confederation, a revenue board had enjoyed these powers and had worked successfully.<sup>129</sup> John Page (Va.) noted, however, that the prior Congress had a check upon revenue board misconduct: “the late congress were obliged to submit their plans to the state legislatures; consequently there was less danger of undue influence.”<sup>130</sup>

### *5.00. Interpret the Constitution in Light of Publications Widely Circulated during the Constitution's Ratification*

#### A. Removing the Head of an Executive Department<sup>131</sup>

As previously discussed, a major controversy in the First Congress was whether the President had the power to remove a federal officer.<sup>132</sup> Opposing the proposition to give removal power to the President, William L. Smith (S.C.) noted that he had “examined the subject maturely” and had consulted “sensible writers on the subject of the constitution, who had laid it down, that the senate ought to be consulted in the removal as well as in the appointment of officers.”<sup>133</sup> Smith claimed to find support for his position in *The Federalist*: “[o]ne, in particular, under the signature of PUBLIUS, who had commented with extensive learning, and with the most profound sagacity, had expressed fully that opinion.”<sup>134</sup>

128. For background on this debate, see *supra* notes 120-22 and accompanying text.

129. XI DHFFC, *supra* note 5, at 1072.

130. *Id.* at 1073.

131. Article II, section 4 of the Constitution provides: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” Article I, section 3, clause 6 gives the Senate “the sole Power to try all Impeachments.” No other provisions deal with removing federal officers. Article II, section 2, clause 2 states that the President shall “nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States.”

132. For background on this controversy, see *supra* note 46-53, 72.

133. XI DHFFC, *supra* note 5, at 843.

134. XI DHFFC, *supra* note 5, at 843; see also *id.* at 853, 861 (reporting the same statement in *The Gazette of the United States* and *The Congressional Register*, respectively); *id.* at 935 (reiterating his reliance on *The Federalist*). Smith was referring to THE FEDERALIST NO. 77. See *id.* at 843 n.7. “The consent of ‘the Senate’ would be necessary to displace as well as appoint. . . . Those who can best estimate the value of

Abraham Baldwin (Ga.) argued that the proposal would violate the principle of separation of powers by “mingling the powers of the president and senate.”<sup>135</sup> He referred to one delegate to the Convention, presumably Elbridge Gerry (Mass.)<sup>136</sup> who “called it a monstrous and unnatural connection; and did not hesitate to affirm, it would bring convulsions to government.”<sup>137</sup> Gerry continued to raise concerns about the lack of separation of powers during the ratification debates, particularly in his letter to the Massachusetts legislature in October 1787.<sup>138</sup> Moreover, Baldwin noted: “[t]his objection was not confined to the walls of the convention; it has been the subject of newspaper declamation, and perhaps justly so.”<sup>139</sup>

James Jackson (Ga.) also spoke against the proposal. As for the relationship between the executive and the legislative, he found them intertwined and considered the senate as part of the executive, and the President as part of the legislative. He appealed to the work called the FEDERALIST, as confirmation of this.<sup>140</sup> He also encouraged his colleagues to read the speeches that James Wilson delivered at Pennsylvania’s ratifying convention declaring that “the senate was constituted a check upon the president.”<sup>141</sup> According to Jackson: “[t]his sentiment is confirmed by other writers of reputation.”<sup>142</sup>

## B. Establishing a National Bank

Article I, section 8, clause 18 authorizes congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” When Congress considered a proposal to establish a national bank,<sup>143</sup> James Jackson (Ga.) argued that the proposal contravened the spirit of the Constitution by creating “a monopoly of a very extraordinary nature . . . . He then read sev-

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a steady administration will be most disposed to prize a provision, which connects the official existence of public men with the approbation or disapprobation of that body [the Senate] . . . .” THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 62, at 515-16. Smith probably knew the identities of PUBLIUS. See RAKOVE, *supra* note 15, at 350. However, he may not have known which author wrote which paper. See XIV DHFFC at 421 n.20.

135. XI DHFFC, *supra* note 5, at 1003-04.

136. *See id.* at 1004 n.32.

137. *Id.* at 1004.

138. *See id.* at 1004 n.32.

139. *Id.* at 1004.

140. *Id.* at 948.; *see also id.* at 970 (reporting the same speech in *The Congressional Register*).

141. *Id.* at 1002-03. For more information on Jackson’s speech on this point, see *supra* text accompanying note 50.

142. XI DHFFC, *supra* note 5, at 1003.

143. For background information on this issue, see *supra* notes 53-54.



eral passages from *The Federalist*, which he said were directly contrary to the assumption of power proposed by the bill."<sup>144</sup> However, those passages argued that the necessary and proper clause should be read expansively.<sup>145</sup> Shortly thereafter, he again read from *The Federalist* "to shew that the assumption of this power, agreeable to the sentiments of the author of those pieces, would be contrary to the constitution, the powers of Congress being particularly defined."<sup>146</sup> Elias Boudinot (N.J.) quoted from the same issue of *The Federalist* as well as from *The Federalist No. 23* to argue that the clause in question was sufficiently broad enough to authorize Congress to establish a national bank.<sup>147</sup>

### III. CONCLUSION

It has been argued that for the Founders, "original intent" referred only to what could be gleaned from the Constitution's language and the use of structural means of interpretation but not from the personal intentions of the Founders. The present study opens this argument to reevaluation. In the Founding Era, the debates over the Constitution's scope permitted a broader array of evidence, including the purposes, expectations and intentions of the individuals and gatherings that created the document. At the same time, this study shows that the compromises and decisions of the First Congress resulted from both interest politics and a variety of arguments, including originalist arguments, which were sometimes raised on opposite sides of the same issue. This process has always been typical of legislatures.<sup>148</sup>

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144. XIV DHFFC, *supra* note 5, at 364. *See id.* at 376 (reading from *The Federalist* "to shew that the assumption of this power, agreeable to the sentiments of the author of those pieces [presumably Hamilton, who advocated a national bank], would be contrary to the constitution, the powers of Congress being particularly defined.").

145. Elias Boudinot (N.J.) disclosed that Jackson had read from *The Federalist No. 44* and then read from it to document the argument that the necessary and proper clause had to be read broadly, because it was impractical to include in the Constitution a positive enumeration of all national governmental powers. *See id.* at 439 (quoting THE FEDERALIST NO. 44 (ALEXANDER HAMILTON), *supra* note 62, at 304). Based on his remarks, Boudinot thought the author of the paper was Madison, who opposed a national bank, while the author was Hamilton who advocated it. *See* XIV DHFFC, *supra* note 5, at 439. At this time, authorship of the individual papers was not generally known. *See id.* at 421 n.20.

146. *Id.* at 376. I would surmise that Jackson realized the error in his first interpretation of *Federalist No. 44* and was now correcting himself. Apparently, Jackson correctly believed that the author of the paper was Hamilton.

147. *Id.* at 439. *The Federalist No. 23* (Alexander Hamilton) argues that the national government should have unlimited power in matters of common defense.

148. "While rational argument remains an important currency [in legislative decision making], the ability to negotiate and moderate views in the context of such negotiation is equally important." ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 67 (1997). During his

For example, in a speech opposing the establishment of a national bank, Madison allowed the use of “contemporary expositions given to the constitution.”<sup>149</sup> Under this canon of construction, he introduced evidence on the sentiments expressed in various state ratifying conventions that the necessary and proper clause should be narrowly construed.<sup>150</sup> Thus, he relied on legislative history – not contemporary expositions of meaning – to argue that Congress lacked the authority to establish the bank. In doing so, Madison deviated from the purely textual British tradition that did not employ legislative history to construe statutory text.<sup>151</sup> Despite this deviation, Madison apparently expected his argument to be persuasive to his colleagues. His choice of argument suggests that when it came to rules of construction, the Founders were not purely textualists, but were often pragmatic politicians.

The originalist arguments, moreover, have an air of practicality to them. Minimal reflection on the categories of argument and the arguments themselves confirms that they are not highly rarified. Putting aside the burden of dealing with the eighteenth-century rhetorical style of public debate, the modern reader can easily understand the concerns of the debaters. Perhaps the most theoretical issue that arises is separation of powers. Yet, in discussing proposals dealing with the allocation of power and the potential blending of powers between the executive and the legislative branches, the reader understands that the issue is not about a blind aspiration to a rigid separation of powers. Rather it is about deciding how best to make decisions without allocating too much power to one branch and thus inviting despotic rule and corruption.

The originalist arguments were one type of persuasive argument among many. They arose in debates on serious topics and seemed to play the greatest role in debates on the most controversial issues. Primarily, these were the debates over the President’s removal power and assumption of the states’ debts, some of which divided the country according to the particular interests of the various states.

Debates with regional implications included those over abolishing slavery, taxing the slave trade, assuming the states’ debts, which would disfavor states that had worked to pay off much of their financial obligations, and establishing a uniform naturalization law, which would disfavor states with liberal naturalization laws.

An examination of the arguments, the presenters, and the context suggests that the debates were generated by both matters of constitutional policy and political pragmatism. For example, although Madison had argued in *The*

long career in public service, Judge Mikva served as a member of the Illinois House of Representatives and the United States House of Representatives. Professor Lane also has a long history of public service. *Id.* at xxiii.

149. XIV DHFFC, *supra* note 5, at 374.

150. *See supra* text accompanying notes 58-59 (arguing that the Constitution did not authorize establishing a national bank).

151. *See supra* text accompanying notes 6-9.

*Federalist* for a broad reading of the necessary and proper clause, he opposed reading the clause broadly enough to authorize a national bank. Madison's position may have rested merely on political theory and the legislative history of the state ratifying conventions. However, his position and arguments may also have found roots in the belief that such a bank would favor the Northern states over the Southern states, and could have stemmed from his desire to win reelection when he had barely won his seat the first time.

A negotiated settlement of an issue can overcome constitutional scruples. For example, despite the many constitutional and originalist arguments on the authority of Congress to assume the debts of the states, the Congressional parties acquiesced to assumption when offered a compromise in which states like Virginia which, for example, would receive some reimbursement for the debt it had already paid off and gain the location of the permanent capital of the country along the Potomac.<sup>152</sup>

In academic discussions about originalism, scholars sometimes make an effort to identify consistent theories of constitutional construction employed by the Founders. According to one theory, they relied solely on the text of the document and ignored its legislative history.<sup>153</sup> In contrast, others would argue that consulting original intent was always a permissible tool of construction.<sup>154</sup> And puzzlement is inevitable when the Founders occasionally fail to conform with the chosen theory. It is quite likely that the Founders were both intellectuals and pragmatic politicians who were not concerned with hewing a perfectly consistent line. And, as one scholar has noted, "history is indeterminate."<sup>155</sup>

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152. See *supra* note 66.

153. See *supra* text accompanying notes 5-8.

154. See, e.g., Berger, *supra* note 4.

155. Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 441 (1996).