Introduction

To determine the original meaning of any historical document, including the Constitution, one must determine what the authors and proponents were trying to accomplish. Every historical document has a meaning derived from its goals that gives life to the literal or logical meaning of the words. One can understand what the Founders meant by their writing of the Constitution only if one knows their programs. Words are deeds, Wittgenstein tells us.[1] The Constitution was once a weapon in a hard-fought war and its weapon-like characteristics are core to its historical meaning.

The most pressing need for the historical Constitution was to give the federal government a source of revenue to restore its ability to borrow. Under the Articles of Confederation, which preceded the Constitution, the federal government had the responsibility for the common defense, but it had no power to raise money except by requisitions upon the states. When the Revolutionary War ended, the states stopped paying their requisitions. The Requisition of 1786, the last before the Constitution, "mandated" payments by the states, mostly to make current payments to avoid default on the Revolutionary War debts. The requisition required payments of $3.8 million, but collected only $663. The federal government was destitute – "impotent" and "imbecilic" in the wording of the times.

There had been proposals in 1781 and in 1783 to give the federal government its own tax, a 5 percent "impost," or tax on imports. The impost

[1] Ludwig Wittgenstein, Philosophical Investigations, 146 (2d ed. 1958). *See also* 1 Quentin Skinner, Visions of Politics: Regarding Method 3 (2002) (saying that "we need to make it one of our principle tasks to situate the texts within such intellectual contexts as enable us to make sense of what their authors were doing in writing them"); Quentin Skinner, *Meaning and Understanding the History of Ideas* in Meaning and Understanding: Quentin Skinner and his Critics 55–65 (James Tully, ed., 1988).

proposals required an amendment to the Articles of Confederation, however, and that in turn required unanimous confirmation by the states. The 1781 impost proposals were vetoed, however, first by Rhode Island and then by Virginia, and the 1783 impost proposal was vetoed by New York.

The Founders were desperate. When war came again the federal government would need to borrow again. Without a source of revenue, the federal government could not borrow. This coastline nation was vulnerable to attack by sea by any of three rapacious empires and it could pay for neither a sloop nor a gun to defend itself.

The Constitution was first a pro-tax document, written to give the federal government revenue to pay enough of the war debts to restore the public credit so that the federal government could borrow again in the next emergency. The Constitution, as the first listed power, gave the federal government a power to tax "to pay for the debts and to provide for the common Defence and general Welfare."

Giving the federal government the power to tax proved to be sufficient to restore the public credit with surprisingly modest federal taxes. Alexander Hamilton as first Secretary of the Treasury proposed taxes, amounting per capita to only a day and a half's worth of a workingman's wages. His taxes were imposed only on imports and hard liquors, which were considered things properly suppressed. The taxes that cured the fiscal crisis and restored the public credit could have been enacted within the confederate mode. Indeed, Hamilton's tax proposals were considerably less burdensome than the 1783 impost proposal that failed, and the 1783 proposal retained state sovereignty and was fully consistent with the confederation form of government. The Constitution effected radical changes that need to be explained by more than just the pressing need for federal taxes.

The historical Constitution is a revolutionary act that went far beyond the minimally necessary fiscal reforms. Under the confederation system that preceded the Constitution, the federal government was merely a "firm league of friendship." The Congress was a mere assembly of diplomats and an agent of sovereign states. After the Constitution, the Congress was no longer an agent of sovereign states and the states were no longer supreme. The Constitution created a complete three-part national government, able to raise revenue on its own in perpetuity, able to operate independently of the states, and able to enact federal law that was supreme over the states. Under the Constitution, the national government rests for its legitimacy not on sovereign states, but directly on the sovereignty of the people.

It is the thesis of this book that the Constitution was a radically nationalizing vector compellingly explained by the righteous anger of the Founders

at the misdeeds of the states. The anger explains both key steps in the transformation and also the strength of the drive for the change.

The Founders were angry at the states for their defaults on the requisitions and for their vetoes of the federal impost. The Founders believed that the failure of requisitions was due to evil and shameful acts by the states. Rhode Island's veto of the 1781 impost was the "quintessence of villainy." Rhode Island was a detestable little corner of the Continent that injured the United States more than the worth of that whole state. Both Rhode Island and New York, it was said at the time, should rest in Hell.

The Founders expressed their anger at the states in immoderate, even religious terms. "United, we stand, divided we fall" had been the motto that held together the drive for independence and made victory possible. The states were betraying the sacred cause of the United States. The states had betrayed George Washington's army at Valley Forge and they were continuing their betrayal of the common cause. The action of the states in their defaults of requisitions and in veto of the impost was sin, disease, wickedness, and vice, not easily forgiven.

The anger allowed the revolution to go forward at key points in the Framers' logic. The delegates to the Philadelphia Convention had been given authority only to propose amendments to the Articles of Confederation, and amendments, under the rules of the Articles, had to be confirmed by all the states. The Framers did not think, however, that the wicked states that had vetoed the impost would ratify giving the federal government any power to tax. A federal impost was the least controversial federal tax and the Framers reasonably assumed that the states that had failed to ratify the impost – Rhode Island, New York, and Virginia – would veto again on any federal tax. The Framers were angry enough at the vetoing states that they were willing to go forward without their consent. Rhode Island was a pariah, out of the family, and it could not be allowed, once again, to do more damage to the Union than the detestable little state was worth.

Since the Framers did not think they could satisfy the Articles' requirement for unanimous confirmation by the states, they ignored the unanimous ratification requirement, ripped up the Articles of Confederation, and ended the confederation system of government. If the Articles of Confederation had not required unanimity or the Framers had not been so angry, the Framers might well have tried to find a solution to the fiscal crisis within the confederate mode in a way that preserved state sovereignty. Once they had to pass beyond the Articles, the Framers had freedom to be more radical in their changes. Starting from scratch, they abandoned the Articles and the old confederation framework.

4 ☆ Righteous Anger at the Wicked States

The Framers ended the sovereignty of the states on the authority of the sovereignty of the people. The Framers sent the Constitution for ratification by the people meeting in conventions and bypassed the states because they did not think they could get ratification from the "local demagogues" who controlled the state offices. The Framers used the people as a weapon against the states. The Constitution was legitimate although it was not ratified by unanimous consent of the state legislatures, Alexander Hamilton argued, because the consent of the people is that "pure original fountain of legitimate authority."[2] Had the Framers trusted the states to ratify a reasonable solution, they might well have drafted a Constitution more appealing to the states. The decision to bypass the states and appeal directly to the people allowed the document to be a more revolutionary, anti-state act.

The shift from a general government resting on the sovereignty of the states to a national government resting directly on the sovereignty of the people also followed logically from the states' shameful failure to pay their requisitions. A radical vice of the requisition system, Madison wrote, was its assumption that the states would respect the Republican cause and pay their requisitions, without opposition. The failure of voluntary payments meant that the federal government would have to collect requisitions by military compulsion. Collecting tax from states by compulsion was a doomed project, however, because the states would resist payment by force as they would "a foreign tribute, or the invasion of an enemy." Far better not to risk civil war and to allow the federal government to collect its own tax directly from the people, by the ordinary process by which governments enforce the law.

Once the federal government could collect its tax directly from people, rather than from the states, there was no longer a need for the federal government to be considered an agent of the states. Under the political thinking of the time, a government properly represented those who contributed to it. The source of revenue determined sovereignty. The failure of requisitions ended state supremacy. The states had forfeited their supremacy by failing to pay their dues.

The principal architect of the constitutional revolution, replacing the confederate model, was James Madison. Madison's anger at the states emerged while trying to get the states to pay their requisitions, but it had also been nurtured in the Virginia Assembly in the years immediately before the Constitution. In the Virginia Assembly, Madison had lost repeatedly to a coalition

[2] *Federalist* No. 22, at 146 (Hamilton) (Dec. 14, 1787).

led by Patrick Henry. Henry gave tax holidays that made Virginia's quota of a requisition impossible to pay, Henry had violated the treaty that ended the war by denying foreign and out-of-state creditors access to Virginia courts, and Henry had sought state subsidies to Episcopal clergy. Madison's Constitution can reasonably be viewed as his revenge against Patrick Henry for all of the issues that Madison had lost to Henry in the previous decade.

Madison in preparation for the Philadelphia Convention concluded that state sovereignty was inconsistent with the general welfare and he sought "a due supremacy of the national authority." Madison's older mentors, George Washington and Governor Edmund Randolph, told Madison that revisions of the government would have to be grafted on the confederate mode.[3] Madison was too radical for that. "It has been shown," Madison wrote, "that the existing Confederation is founded on principles which are fallacious; that we must consequently change this first foundation, and with it, the superstructure resting upon it."[4] "The general authority [must] be defended against encroachments by the subordinate authorities."[5] Madison's theory of the "extended republic," represented by *Federalist* Number 10, explained why the federal government would protect individual rights, whereas the states would abuse them. Madison first concluded privately that state sovereignty had to be replaced by a strong national government. He then carried his Virginia colleagues, then the Philadelphia Convention, and finally the nation to agree with him.

The program that gives the original meaning to the Constitution is also the proponents' program, rather than the opposition's. The Anti-Federalists did not write the Constitution, they opposed what they saw, and they lost in the only purpose that organized them – defeating ratification of the Constitution. Their goals explain the Constitution only by silhouetting it. A normative history organized around the idea that the Constitution should not have been adopted is of no use to explain the programmatic meaning of the document. It is the Federalists' goals that give the Constitution its purposive meaning, even if the Federalists' goals had been wrong goals. The Founders had a strong political agenda that they were not shy about articulating. There is no need to posit some secret or conspiratorial motives beyond their righteous

[3] Washington to Madison (Mar. 31, 1787), *in* 9 JM 342 (saying that many considered that "the only Constitutional mode by which the defects can be remedied" was the revision of Federal system); Randolph to Madison (Mar. 27, 1787), *in* 9 JM 335 (saying that remedies would need to be "grafted on the old confederation").

[4] *Federalist* No. 37, at 233 (Madison) (Jan. 11, 1788).

[5] Madison to Jefferson (Oct. 24, 1787), *in* 10 JM at 209.

goals. They have left a great deal of evidence as to their true rationale in surviving letters and debates because they needed to persuade each other, and then the nation, of why this Constitution was so desperately needed.

Anti-Federalists in different states had little in common, except that they opposed the shift in power from their state government to the new national government. The Anti-Federalists represented the interests of continuing state power – the feudal barons and local demagogues – and they never came to grips with the desperate needs that made the Constitution so necessary. The mission of preserving the power of the state governments was not especially progressive. When they had to choose, the Anti-Federalists commonly chose state power over individual rights and the most important leaders were hostile to democracy as well. By ratification of the Constitution creating the new government, in any event, the Anti-Federalists lost. Once the new government began to operate, Anti-Federalist opposition to the Constitution shrank to an insignificant minority and then ceased to operate as a viable political force. On all the important issues, the strongly nationalist vision won the field and explains the original intent of the document.

Understanding the purposive meaning of the Constitution does require inquiry beyond the words of text to reach the historical context. Any interpretation of the Constitution certainly needs to be consistent with the words. The words are like laboratory data, the final test for any theory and never to be fudged. Still reading the words over and over again in the twenty-first century is by nature a limited tool. With each reading a modern reader tends to interject familiar modern controversies into a text written with the dreads and assumptions of a strange other age.[6] One can never understand the Constitution out of its context. One cannot reproduce the battlefields for which the Constitution was a weapon without knowing enough history to understand the battle.

Other factors often cited as causes of the Constitution do not carry nearly as much weight as the Founders' high anger at the misdeeds of the states. Giving Congress the power of "regulation of commerce" is commonly considered a substantial motive for the Constitution. All the programs seriously proposed under the cover of the words, "regulation of commerce," were mercantilist programs restricting or channeling deep-water shipping. None of the programs seriously espoused under the cover of "regulation of commerce" amounted to much, however, other than tax on commerce for

[6] *See, e.g.*, Calvin H. Johnson, *Purging out* Pollock*: The Constitutionality of Federal Wealth or Sales Taxes*, 97 Tax Notes 1723 (2002) (arguing that a Supreme Court 1896 decision misunderstood 1787 purpose of apportionment of direct tax).

revenue, even once Congress was given the authority to regulate commerce. The subsequent failure to adopt the "regulation of commerce" programs is good evidence that "regulation of commerce" was not an important cause of the Constitution.

The Constitution is sometimes portrayed as a contest between paper money and sound money, but neither Federalists nor Anti-Federalists spoke up for paper money in the ratification debates. The collapse of the Continental dollar had left too many scars. Another argument points to Shays's Rebellion, which had upset the country in the year before the Philadelphia Convention. The Massachusetts state government, however, had defeated the rebellion and scattered the rebels, and then promptly lost in the next election. Shays's Rebellion did not challenge state competency or justify national taxes or the movement to national power. The Constitution is also sometimes now thought of as tilted in favor of slaveholders, but at the time, the slaveholders themselves were not sure whether the Constitution was favorable or adverse to their interests. The Constitution supports the republican ideal that the people are the source of all legitimacy, without significantly affecting whether the nation would in fact be less or more democratic than it was.

It is common to see the Constitution described as written to limit the federal government and to protect states rights.[7] Indeed, the Supreme Court in recent years has been creating new doctrines to restrict the federal government and to protect the states[8] and the justification for the new anti-federal

[7] *See, e.g.*, EDLING 219 (2003) (saying that "[t]he mainstream interpretation of the Federalist argument presents it as a call for limited government and protection of minority rights").

[8] The Supreme Court has found, for example, that the federal government may not prohibit guns on school property (Lopez v. New York, 514 U.S. 549 (1995) (holding that Congress could not make carrying firearms on school property a federal crime)), may not create federal civil damages remedy for rape (United States v. Morrison, 120 S.Ct. 1740 (2000) (holding that Congress could not create a federal civil remedy for rape)), and may not demand that local sheriffs check arrest records for federal gun control laws. Printz v. United States, 521 U.S. 898 (1997) (Congress could not require local police to check arrest records of prospective gun purchasers). *See also* New York v. United States, 505 U.S. 144 (1992) (federal government may not force states to take responsibility for nuclear waste). The states are newly immune from federal labor standards (Alden v. Maine, 119 S.Ct. 2240 (1999)) and federal trademark and patent remedies (College Savings Bank v. Florida Prepaid Postsecondary Educ. Peens Bd., 119 S.Ct. 2219 (1999)). *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996), which is the seminal (as well as Seminole) case holding that the Eleventh Amendment gives the states substantive immunity that Congress can not abrogate. State agencies are immune from federal administrative process of an adjudicative nature. Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002)(state sovereign immunity extends to federal administrative adjudication brought by private party because administrative adjudications were "walked and squawked" like litigation in federal

restrictions is based heavily on a "jurisprudence of original intention."[9] The Supreme Court is also going beyond the words of the document to find that the unstated overall structure or design of the Constitution favors the states and hobbles the national level.[10] The Court is relying on an abstract "plan of the convention,"[11] or "the system of federalism established by the Constitution"[12] to restrain the federal government, even in the absence of any explicit restriction in the constitutional text.

Limitation of the federal government, however, does not describe the crisis for which the Constitution was written. As James Wilson said to the Convention, "[i]t has never been a complaint agst. Congs. that they governed overmuch. The complaint has been that they have governed too little."[13] Or as Madison had to explain to Jefferson, when Jefferson returned to America, "[t]he evils suffered and feared from weakness in Government . . . have turned the attention more toward the means of strengthening the [government] than of narrowing [it]."[14] The 1787 Constitution was written to take sovereignty or supremacy away from the states because of their wickedness, and to create and empower a complete national government. The historical Constitution was written to end the impotence or imbecility of the federal level. Restoration of the historical Constitution with a purified understanding of its original meaning or its deep structure would not be friendly to Anti-Federalist principles, even the new ones.

Sometimes it is argued that the original purpose of the Constitution was to limit the federal government to protect individual rights. The core of the Constitution is thus said to rest in the ten amendments of the Bill of Rights. Madison's theory of the extended republic, however, considered the federal government the best protector of individual rights. Madison's presumption that states would inevitably abuse individual rights was consistent, Madison

court barred by the Eleventh Amendment) (over dissent of Breyer, J, arguing that federal administrative agency can use adjudications to decide whether to bring constitutionally allowed enforcement proceedings).

9 Edward Meese, Speech to American Bar Association, July 9, 1985, *reprinted in* 2 BENCHMARK 1 (1986) (calling for a "jurisprudence of original intention").

10 *See*, *e.g.*, Alden v. Maine, 527 U.S. 706, 729 (1999) (Kennedy, J.) (arguing that states have immunity from federal fair labor standards because of the "fundamental postulates implicit in the constitutional design"); Printz v. United States, 521 U.S. 898, 936 (1997) (O'Connor, J. concurring) (concluding that federal plans "utterly fail to adhere to the design and structure of our constitutional scheme"). Note also the subtitle of RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987).

11 Alden v. Maine, 527 U.S. 706, 730 (1999).

12 *Id.*

13 Wilson, Federal Convention (July 14, 1787), *in* 2 FARRAND 10.

14 Madison to Jefferson (Feb. 4, 1790), *in* 16 PTJ 150.

believed, with his experience in opposition to Patrick Henry in the Virginia Assembly in the prior decade. The Constitution, before any amendment, protected the right to trial by jury in criminal cases and judicial review by writ of habeas corpus of the legality of any imprisonment. Madison viewed Anti-Federalists' calls for a further Bill of Rights as just an excuse offered to defeat the structural shift from state to federal power. There is nothing friendly to the evil states in Madison's motives in creating the 1787 Constitution.

The Bill of Rights, consisting of the first ten amendments to the Constitution, is best understood in historical context as a symbol or sop, with little substantive meaning. The Anti-Federalists tried to make ratification of the Constitution contingent on prior approval of a Bill of Rights, adding rights beyond what was in the Constitution already, but they failed. Instead, the Bill of Rights was drafted and debated in the first Congress, in which Anti-Federalists held only 15% of the voting power. Madison filtered the rights proposals to remove anything he considered unsafe or anti-federal. Anything the Anti-Federalists wanted that the proponents of the Constitution did not was defeated, without serious contest. The Virginia Anti-Federalists voted against the Bill of Rights because they considered it a sop. Indeed, in context, the Bill of Rights looks like a sop. It was written to give something to the two states, North Carolina and Rhode Island, which had not yet ratified. Not much would be given, however, especially not to wicked Rhode Island.

The Tenth Amendment, which provides that Congress shall have only the powers delegated to it, is especially to be understood as a sop. Article II of the Articles of Confederation provided that Congress would have only the powers expressly delegated to it. The Framers took out the "expressly delegated" limitation. When challenged by the Anti-Federalists, the Founders said that the "expressly delegated" limitation had proved to be "destructive" to the Union and that they wanted the federal passport system, although it had not been expressly authorized.[15] The absence of the word "expressly" under that history should be understood to mean that the federal government has implied or unexpressed powers, particularly the passport power.

The Constitution is sometimes described as if it were a timeless document written to establish eternal verities. That is probably not a helpful way to understand the original intent. The most intensely felt needs in 1787–1788 were desperate but short-term needs. The most pressing need, to restore the federal credit, was accomplished with the new federal taxes, adopted by 1791.

[15] Randolph, Virginia Convention (June 24, 1788), *in* 3 ELLIOT 600–601. *See* Madison, U.S. House of Representatives (Aug. 18, 1789), *in* 1 ANNALS 790 (successfully resisting the insertion of the word "expressly" into what became the Tenth Amendment).

Any serious program beyond tax in the "regulation of commerce" power was finally abandoned by the time of the negotiation of the Jay Treaty in 1794, which prevented retaliatory imposts against the British. The Constitution had effect beyond the concrete programs, but like the ripples in a lake, all of the energy of the Founders was in the rock and first ripple, and the ripples beyond that had rapidly decreasing energy. The Founders were willing to claim grand principles to persuade and support their programs, but the grand principles should be understood as servants to the immediate programs, used to persuade the fence sitters. Madison, for instance, quickly abandoned his grand theory of the superiority of the extended republic within a decade when the politics of the principle changed. A politician must first settle the political problems of his or her own time. Six months is a long time in politics. It is, in any event, very hard to write eternal verities when that is not an especially important part of what one is trying to do.

The strict end of the Constitutional movement is best marked by the adoption of the Eleventh Amendment to the Constitution in 1796. The Eleventh Amendment granted immunity to the states from suits by creditors from the Revolutionary War and allowed the states to refuse to pay their just war debts, not long after the Supreme Court had explicitly held that the Constitution made the war debts enforceable against the states. Payment of the war debts and anger at the states for dereliction of their duties was core to the Constitution. Enforcement of state debts, however, was not a necessary part of the purpose because it was the destitution of the federal government, and not of the states, that was the mortal danger to Republic. It was the federal government that would borrow again to defend the nation in the coming war. Payment of state debt was primarily just a moral issue that seems not to have been settled by the constitutional debates. By 1796, moreover, the Constitutional movement had achieved its purposes, an energetic three-part government on the national level, supreme over the states and able to borrow again. The programs under "regulation of commerce" had either been adopted or abandoned. By 1796, the Founders had split into two partisan camps – one Hamiltonian and one Jeffersonian – which were never able to cooperate again. The movement for the Constitution had splintered and diffused and the polity had moved on to other issues.

The anger at the states also dissipated and the pendulum swung back in their favor. Jefferson was elected in what he called the Revolution of 1800,[16] and the policy of his Administration was to favor the states and restrict the

[16] Jefferson to Spencer Roane (Sept. 16, 1819), *in* 10 WTJ 140.