Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*

CONTEMPORARY EXPOSITION

ASSUMING, as the Court usually does, that the object of constitutional interpretation is and ought to be the determination of the intent of the framers, I have shown the admissibility of materials extrinsic to the constitutional document in support of a stand as to what that intent was.[1] The character and extent of the use by the United States Supreme Court of such matters as convention debates and proceedings and the history of the times of the convention, have been examined.[2] Before turning to the question of the validity of the intent theory of constitutional construction, there remains to be considered another collateral aid which the Court frequently employs, namely, contemporary exposition. In the rhetoric of the Court, contemporary exposition is the term used to describe the opinions on questions of constitutional meaning of certain commentators, early congresses and justices of the United States Supreme Court who had been members of the Constitutional Convention. The present article is devoted to a study of the way in which the United States Supreme Court has utilized these three sources of information, together with an evaluation of the method.

I

THE OPINIONS OF THE COMMENTATORS

In matters of constitutional significance, the influence of the Supreme Court of the United States is that of moral suasion. Its views are accepted by the imaginary but undiscoverable average citizen as an act of faith. But the student of public law and the informed layman alike require something more; a requirement which the Court has met by the use of various instruments of persuasion, *i.e.*, arguments based on the language of the document, judicially developed doctrines and so-called legal principles, divers collateral materials

* This is the fourth of a series of articles upon this subject appearing in this *Review*. The earlier installments appeared in (1938) 26 CALIF. L. REV. 287, 437 and 664.

1 (1938) 26 CALIF. L. REV. 287.

2 (1938) 26 *ibid.* 437, and (1938) 26 *ibid.* 664.

including the authority of names. Among the latter, at least when we confine ourselves to the time limitations imposed by the subject matter of this article,[3] none has attained that degree of importance[4] or frequency of citation[5] accorded a series of essays commonly known as *The Federalist*.[6] Although not the only commentary on the Constitution appearing about the time of its adoption,[7] it is the most extensive and is alluded to by the Supreme Court to the almost total exclusion of all others.

First referred to by a Supreme Court justice[8] in the case of *Calder*

[3] In the course of the development of the constitutional history of the United States a number of extensive treatises have been prepared on the Constitution of the United States of which the Court has frequently taken cognizance. Most important among these are, of course, Cooley's *Constitutional Limitations*, Kent's *Commentaries on American Law*, and Story's *Commentaries on the Constitution of the United States*. In addition there have been innumerable textbooks, and books and periodical articles dealing with the meaning of particular portions of the Constitution. These materials, however, are beyond the scope of this paper, both because they were not contemporaneous expositions and because their authors are not thought to be peculiarly in a position to know the intention of the framers. When they are used, it is generally either on the theory that the views are in themselves sound or that the weight of numbers tends to add virtue to the position of the justice writing the opinion.

[4] After describing *The Federalist* papers as a part of the flood of propaganda in favor of the Constitution, Fred Rodell in his *Fifty-five Men* (1936) says, 199, "The Federalist papers, beautifully worded and most persuasively argued, put the case for the Constitution in its best light. And perhaps because they make pleasant reading, or perhaps for other reasons, they are commonly used today to discover the intent of the founding fathers. History teachers and Supreme Court members, alike, turn to the Federalist papers to explain what the Constitution means, and why." Ogg & Ray, in *Introduction to American Government* (6th ed. 1938) 44: "Better than anything else—unless possibly Madison's *Notes*—it [*The Federalist*] shows what the Constitution meant to the men who made it."

[5] In (1924) 33 YALE L. J. 728, 734, Charles W. Pierson in his article *The Federalist in the Supreme Court*, has compiled a list of the United States Supreme Court cases in which *The Federalist* had been cited to the date of writing.

[6] *The Federalist* is composed of eighty-five articles which were published individually in the New York papers between the time of the formulation and adoption of the Constitution. They were all signed "Publius" but were in fact written by Hamilton, Madison and Jay. Hamilton who originated the idea, wrote about fifty, Madison somewhat less than thirty, and Jay five or six.

[7] During the period when the articles of *The Federalist* were being published, two other series of newspaper comments on the Constitution were appearing which were also of a high standard of workmanship. One of them was signed "Cato" which has since been regarded as the pen name of George Clinton, governor of New York. The other was signed "Brutus" which was the pseudonym of Robert Yates, judge of the New York Supreme Court. Another contemporary commentary on the Constitution is the report of delegate Luther Martin to the Maryland Assembly.

[8] The first Supreme Court justice to cite *The Federalist* was Justice Chase in Calder v. Bull (1798) 3 U.S. (3 Dall.) 386, 391: "The celebrated and judicious Sir William

v. Bull,[9] *The Federalist* did not acquire its real reputation as citable authority until Chief Justice Marshall marked it with the impress of his sanction in *McCulloch v. Maryland.*[10] After that, judicial allusions to it steadily increased in number, reaching their point of greatest volume in the Civil War and Reconstruction era. With the rise of modern-day industrial and governmental problems that were both beyond the prophetic vision and the scope of the purposeful arguments of the authors of *The Federalist,* judicial invocation of their names has gradually declined in recent times. But the point of extinction undoubtedly will never be reached as long as the Court continues to discuss such matters as the nature of the federal system and the independence of the judiciary.[11]

The Federalist was originally written chiefly in support of the delegation of power to the proposed national organization. But with a concentration of authority in the central government far beyond that advocated by its authors, there developed a natural tendency to cite *The Federalist* in defense of state's rights.[12] Aside from this generalization little can be said, by way of summary description of the whole process of the use by the Supreme Court of *The Federalist.* Contrary to initial suspicions on the matter, aroused by the fact that after the adoption, Hamilton and Madison became leaders of opposing political parties, no correlation can be found between the political complexion of justices and the particular authors of the numbers of

Blackstone, in his commentaries considers an *ex post facto* law precisely in the same light as I have done. His opinion is confirmed by his successor, Mr. Wooddeson; and by the author of the *Federalist,* whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government." Pierson conjectures, *op. cit. supra* note 5, at 729, that since Justice Chase was an ardent Federalist he probably thought he was referring to an article of *The Federalist* written by Hamilton when he penned this extravagant line; but the article in *The Federalist* dealing with *ex post facto* laws has since been attributed to Madison. It should also be noted that Justice Chase does not here cite the author of *The Federalist* for his sound exposition of the Constitution or for his information about the intent of the framers, but for his "extensive and accurate knowledge of the true principles of government."

[9] *Ibid.*

[10] (1819) 17 U. S. (4 Wheat.) 316, 431. Between the time of Calder v. Bull, *supra* note 8, and McCulloch v. Maryland, the *Federalist* was only cited in one case, namely, in the concurring opinion of Justice Johnson in Fletcher v. Peck (1810) 10 U. S. (6 Cranch) 87, 144.

[11] For a more complete history of the citation of *The Federalist* by the United States Supreme Court, see Pierson, *op. cit. supra* note 5.

[12] Gilman v. Philadelphia (1865) 70 U. S. (3 Wall.) 713, 730; Lane County v. Oregon (1869) 74 U. S. (7 Wall.) 71, 76; The Justices v. Murray (1870) 76 U. S. (9 Wall.) 274, 279, 281; Legal Tender Cases (1870) 79 U. S. (12 Wall.) 457.

The Federalist cited by them.[13] Whether *The Federalist* is used, seems to be determined solely by whether or not an appropriate passage can be found in it, without distinction of authorship, which may be construed as favoring what the writer of the opinion is saying. Consequently it becomes instructive to discover upon what theoretical foundation this use of *The Federalist* is based.

There are three diverging doctrines enunciated by the Court in support of its resort to *The Federalist*: (A) its authors spoke authoritatively as to the intention of the framers; (B) it presents an interpretation of the Constitution intrinsically of great merit; (C) having been issued and widely circulated in the form of arguments favoring the adoption of the Constitution, it presents the construction of that instrument accepted by the ratifying conventions and the people who elected them.

(A) Implicit in the doctrine of the superior persuasive power of constructions of the Constitution which were made contemporaneously with its adoption is the notion that their position in time enhances their value.[14] This increased virtue, as against later interpretations, derives in part from the belief that proximity in time and often closeness of personal association, afforded the early commentators a unique opportunity to know the actual intention of the framers, independently of the sources of information available to subsequent writers.[15] In the case of the authors of *The Federalist*, two of them

[13] In his most extended discussion of the qualities of *The Federalist*, in Cohens v. Virginia (1821) 19 U. S. (6 Wheat.) 264, 418, Chief Justice Marshall lavishes praise upon the authors of *The Federalist*. But in a later case, he seems to single out Hamilton for special attention. In Weston v. Charleston (1829) 27 U. S. (2 Pet.) 449, 467, Marshall said, " 'The Federalist' has been quoted in the argument, and an eloquent and well-merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of McCulloch v. State of Maryland, and was considered by the court." The number of *The Federalist* which was quoted extensively by Chief Justice Marshall in McCulloch v. Maryland was written by Hamilton.

[14] In Sparf & Hansen v. United States (1895) 156 U. S. 51, 169, Justice Gray said in dissent, "But, upon the question of the true meaning and effect of the Constitution of the United States in this respect, opinions expressed more than a generation after the adoption of the Constitution have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage." Again in Cohens v. Virginia, *supra* note 13, Chief Justice Marshall said, at 418, "Great weight bas always been attached, and very rightly attached, to contemporaneous exposition."

[15] Thus, Justice Johnson, in Ogden v. Saunders (1827) 25 U. S. (12 Wheat.) 213, 290, said, speaking of the Court's use of contemporaneous exposition, "It proceeds upon the presumption, that the contemporaries of the constitution have claims to our deference, on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense

were members[16] of the Convention which formulated the Constitution and one of them[17] left the most extensive record now extant of its proceedings and debates.[18] Accordingly, Chief Justice Marshall felt himself able to say concerning *The Federalist*, "The part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed."[19] Nor is this special position of the composers of *The Federalist*, as authoritative transmitters of the will of the fathers, confined to situations in which they expressly set forth the significance to be given to a particular clause for, when *The Federalist* is regarded as a complete commentary on our organic document,[20] an inference might be drawn from the absence of statement; and hence the spectacle is

put upon it by the people, when it was adopted by them..." Similarly Justice Story in Prigg v. Pennsylvania (1842) 41 U. S. (16 Pet.) 539, 620, says, "This very acquiescence, under such circumstances, of the highest state functionaries, is a most decisive proof of the universality of the opinion, that the act is founded in a just construction of the constitution, independent of the vast influence, which it ought to have as a contemporaneous exposition of the provisions, by those who were its immediate framers, or intimately connected with its adoption." Again, Cooley, in 1 *Constitutional Limitations* (8th ed. 1927) 144, says, "Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention."

[16] Alexander Hamilton and James Madison. John Jay was not a delegate to the Constitutional Convention.

[17] James Madison.

[18] See the second article in this series, (1938) 26 CALIF. L. REV. 437, note 3.

[19] Cohens v. Virginia, *supra* note 13, at 418. The same basis was asserted for the use of *The Federalist* by Chief Justice Taney in the Passenger Cases (1849) 48 U. S. (7 How.) 282, 471, where, referring to an earlier opinion he said, "...I desire now to add to it a reference to the thirty-second number of the Federalist, [by Hamilton] which shows that the construction given to this clause of the Constitution by a majority of the justices of this court is the same that was given to it at the time of its adoption by the eminent men of the day who were concerned in framing it, and active in supporting it." Again, Chief Justice Taney, *ibid.* at 474, referring to the meaning of Article I, Section 9, said, "It was discussed on that ground in the debates upon it in the Convention; and the same construction is given to it in the forty-second number of the Federalist, which was written by Mr. Madison, and certainly nobody could have understood the object and intention of this clause better than he did." Justice Daniel, *ibid.* at 504, refers to "The contemporaneous interpretation thus given by the very fabricators of the instrument itself..." See also Justice Woodbury's similar statement at *ibid.* 554.

[20] Chief Justice Marshall in Cohens v. Virginia, *supra* note 13, at 418, said, concerning *The Federalist*, "It is a complete commentary on our constitution; and is appealed to by all parties, in the questions to which that instrument has given birth." Again, Justice Daniel in the Passenger Cases, *supra* note 19, at 511, said, "Let us see how this section has been interpreted at its date by those who bore the chief part in the

sometimes witnessed of counsel[21] and court[22] urging that a given construction is not to be followed because *The Federalist* is silent on the point.[23]

When we turn to the question of the validity of the use of *The Federalist* on the ground that its authors spoke authoritatively with respect to the intention of the framers, we are confronted with a number of considerations which render the procedure unsupportable. There can be little doubt that if the writers of *The Federalist* had dedicated themselves in all sincerity to the preparation of a purely impartial account of the will of the fathers, their work would have come as near to absolute historical accuracy as human limitations would permit in the circumstances. In that case, both by reason of

formation of the Constitution; and who, to commend it when completed to their countrymen, undertook and accomplished an able and critical exposition of its *every term.*" Italics added.

[21] In Prigg v. Pennsylvania, *supra* note 15, at 593, counsel for Pennsylvania argues that in *The Federalist,* No. 42, "Every line, and every word, is noticed [of Article IV] but this very identical provision, in regard to fugitive slaves, is entirely omitted. Had it, at that day, been supposed to have conferred any power on the general government, could it thus have been passed silently by?" See also *Ex parte* Grossman (1925) 267 U. S. 87, 98, where it was argued that the president did not have the power to pardon those guilty of contempt of court because the silence of the commentators on the subject indicates that the power was not given.

[22] Thus, Justice Thompson in Ogden v. Saunders, *supra* note 15, at 305, said, referring to the impairment of obligation of contract clause, "Had it been supposed, that this restriction had for its object the taking from the states the right of passing insolvent laws, even when they went to discharge the contract, it is a little surprising, that no intimation of its application to that subject should be found in these commentaries [*The Federalist*] upon the constitution." See also the remarks of Chief Justice Chase in dissent in the Legal Tender Cases, *supra* note 12, at 585, as quoted on page 12 of this article.

[23] The basis of the reasoning which holds against a given construction because of the silence of *The Federalist* is highly questionable. The fact cannot be disregarded that *The Federalist* was written to induce the ratification of the Constitution. Its authors therefore, as a matter of technique in propaganda, may have deliberately disregarded particular interpretations of which they were aware and may have overlooked others suggested by later factual set-ups. Under these circumstances silence would not necessarily mean failure of agreement. The inference from silence was applied to a different source of contemporary exposition by Justice Thompson in Ogden v. Saunders, *supra* note 15. He there argued that because no objection was raised to the impairment of obligation of contract clause on the ground that its operation was prospective as well as retrospective, it was therefore not susceptible of such an interpretation. He said, "And it is still more surprising, that if it had been thought susceptible of any such interpretation, no objection should have been made, in any of the states, to the constitution, on this ground, when the ingenuity of man was on the stretch, in many states, to defeat its adoption ... But if the prohibition is confined to retrospective laws, as it naturally imports, it is not surprising, that it should have passed without objection, as it is the assertion of a principle universally approved." 25 U. S. (12 Wheat.) at 305.

ability and opportunity, their situation would have been unexcelled.[24] But the doctrine that they actually revealed the collective intent of the Constitution formulators,[25] involves the assumptions that they, in framing their articles divested themselves of their former protagonistic biases and attitudes, and that *The Federalist* was composed in an atmosphere of calm disinterestedness. The first of these is only conjecturally possible and the second is historically false. *The Federalist* was composed as an argument on one side of a bitterly controverted question. It was calculated to put the Constitution in the light which would make it most acceptable to the ratifying conventions.[26] It did not even purport to express the intention of the framers.[27]

At bottom, the Court's theory comes down to the proposition that the authors of *The Federalist,* having been members of the Constitutional Convention, had a first hand opportunity to know the intention

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[24] This statement is substantially correct but must be modified in some degree by the fact that John Jay, one of the authors of *The Federalist*, had not been a delegate to the Constitutional Convention. However, only five out of the eighty-five articles composing *The Federalist* are attributed to Jay, and these, curiously enough, are almost never cited by the Supreme Court, although this is probably due more to their subject matter than to their authorship.

[25] For some of the difficulties involved in determining this collective intent, even when a desire for absolute accuracy is hypothesized, see the discussion in the second article of this series, (1938) 26 CALIF. L. REV. 437, 451.

[26] RODELL, *op. cit. supra* note 4, 199: "It is true that there runs through *The Federalist* papers the thread of the arguments used on the floor of the Constitutional Convention. Madison, Hamilton, and Jay were appealing especially to men of affairs, to men of the type of the delegates themselves. And yet, they could not afford to go too far.

"In the Federalist papers, there was less plain talk of the horrors of democracy. The people were not so bluntly described as fools. Protection of property was to be one of the objects of the government, not its only nor its primary object.

"There was more stress laid on the public welfare of the nation as a whole, and less on the commercial interests of some of its citizens. There was more talk of helping the states to solve their separate problems, and less of keeping them well under thumb. In other words, things that were spoken out clear and bold, in the Convention, were blurred and toned down in the defense of what the Convention had done.

"For, the Federalist papers, after all, were published. The proceedings of the Convention had been secret. The Convention had met to draw up a Constitution, which the Federalist papers were later designed to sell. And so far as what the framers intended, and why, is ever concerned, the Federalist papers are the campaign speeches of the party's ablest orators. The debates are the record of the closed meeting that mapped the campaign plans."

[27] Pierson, *op. cit. supra* note 5, at 728, says, "The authors of the series of anonymous newspaper articles afterwards known to fame as 'The Federalist' had no intention of compiling a law book. They were addressing the people at large and their aim was to influence public opinion, not to formulate principles for the guidance of courts. No one foresaw the possibility that what they were writing would some day be cited in the law reports along with Blackstone and Kent."

of the men there assembled. Yet that identical experience has not been regarded as similarly endowing others who were not measurably less capable. Thus, Luther Martin's commentary on the Constitution[28] appears infrequently in the reports,[29] and then generally with disparaging comment.[30] Likewise, the able series of articles written over the name of "Brutus" by Judge Robert Yates has never, to my knowledge, been cited by the Supreme Court.[31] Furthermore, the arguments before the Supreme Court of lawyers who had been delegates to the Federal Convention, are never given additional weight by virtue of that fact, although they are only in degree less authoritative expressions of the framer's intention than the advocate's brief that passes under the title of *The Federalist*.[32] We must conclude, therefore, that the difference in the position of Madison and Hamilton, on the one hand, and Martin and Yates, on the other,[33] lies not in any difference of opportunity to know the will of the fathers, nor yet possibly in any difference of merit. It lies rather in the not altogether incidental fact that Madison and Hamilton were on the side which turned out to be victorious, and this fact, taken together with their entire careers, has made them great in the eye of posterity—a fact which has given their words a quality of persuasion which has never attached to the utterances of Martin and Yates. It is this circumstance which explains the pre-eminent popularity of *The Federalist* with the United States Supreme Court as against all other contemporary partisan commentators, and not the judicially asserted fact that they possessed peculiar opportunity to inform themselves on the issue of formulative intent.

(B) A second line of argument adduced by the Court in support of its use of *The Federalist* is based upon the quality of the work itself, disassociated from its position in time and the participation of its authors in the Constitutional Convention.[34] Thus, the statement

[28] Luther Martin had been a delegate to the Constitutional Convention from Maryland and, after its close he sent a report to the Maryland Assembly expounding his views of the instrument which he refused to sign.

[29] Legal Tender Cases, *supra* note 12, at 607, 621, 656.

[30] Juilliard v. Greenman (1884) 110 U. S. 421, 443.

[31] It is true that Yates did not attend the Convention throughout the whole course of its sessions. He attended from May 25 to July 5 when he, together with his fellow delegate from New York, John Lansing, left the Convention and returned home.

[32] Luther Martin frequently appeared before the Supreme Court as counsel in the important cases of the Marshall era.

[33] It is true that Martin's commentary is much less comprehensive in scope than *The Federalist* papers.

[34] Of course such disassociation is never actually effected in the minds of the readers, and hence when the Court alludes alone to this reason, it amounts to special emphasis rather than to exclusive mention.

is frequently found in the reports that *The Federalist* presents an interpretation of the Constitution the intrinsic merit of which entitles it to high rank.[35] Justice Story spoke of it as "a celebrated commentary."[36] Justice Daniel described it as "that able work"[37] which accomplished an "able and critical exposition"[38] of every term of the Constitution.[39] This reputation of *The Federalist* for competence and soundness on the question of constitutional meaning has induced some of the justices of the Supreme Court to claim its support, even where it is silent, by arguing that since its authors were competent they must have arrived at the view accepted by the writer of the opinion. Accordingly, Chief Justice Marshall in *McCulloch v. Maryland*,[40] conjectured, "Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative."[41]

This almost unanimous rhetorical exaltation of *The Federalist*[42] occurred mainly in the fifty year period of its most active employ-

[35] Cohens v. Virginia, *supra* note 13, at 419.

[36] United States v. Smith (1820) 18 U. S. (5 Wheat.) 153, 157. The reference here is to *The Federalist*, No. 4, which was written by Jay. It is noteworthy that this is the only reference to the number of *The Federalist* written by Jay which this author has seen.

[37] Passenger Cases, *supra* note 19, at 503.

[38] *Ibid.* at 511.

[39] For similar characterizations see Fletcher v. Peck, *supra* note 10, at 144; Passenger Cases, *supra* note 19, at 479, 554; United States v. Guthrie (1854) 58 U. S. (17 How.) 284, 306; Claflin v. Houseman (1876) 93 U. S. 130, 138; Transportation Co. v. Wheeling (1878) 99 U. S. 273, 280.

[40] *Supra* note 10, at 435.

[41] Justice Holmes used the same technique in Frohwerk v. United States (1919) 249 U. S. 204, where he said at 206, "We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

[42] There have been a few instances in which the language found in the opinions of Supreme Court justices tended to disparage the use of *The Federalist*. Among these, Justice Baldwin's was most interesting. In Cherokee Nation v. Georgia (1831) 30 U. S. (5 Pet.) 1, 41, he said, "We can thus expound the constitution, without a reference to the definitions of a state or nation by any foreign writer, hypothetical reasoning, or the dissertations of *The Federalist*. This would be to substitute individual authority in place of the declared will of the sovereigu power of the Union, in a written fundamental law." Agaim in Briscoe v. Bank of Kentucky (1837) 36 U. S. (11 Pet.) 257, 328l, he said, "We have the highest assurance, in the course and range of the argument in this case, that certainty cannot be found in the almost infinite variety of laws which had

ment.[43] By the end of that time, it had become such a standard item of citation that its use was no longer regarded as calling for justifying remarks. But, during the course of this general development, there have been occasions, both in the language of the Court and in its performance, which indicate that, while *The Federalist* is an instrument of persuasion prized as an adornment to any opinion, its authority, like the authority of all of the instruments of the Court, is merely affirmatory and not of controlling obligation. Thus, Chief Justice Marshall, in *McCulloch v. Maryland*,[44] said, "In the course of the argument, the Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained. . . ." This retained "right to judge of their correctness" was exercised to reach a conclusion opposite to that maintained in *The Federalist* in the case of *Chisholm v. Georgia*.[45] In that case, adhering to the strict letter of the Constitution, it was held that under the terms of the Constitution which provided that the judicial power of the federal government should extend to all cases "between a State and citizens of another State," a state might be made party defendant in a suit brought by a citizen of another state. The possibility of just such a decision

been passed by the states in relation to the emission of paper money. Nor is there more certainty, in referring to the opinions of statesmen and jurists in debates in conventions, or legislative bodies, or political writers, or commentators on the constitution, among all of whom there is a most irreconcilable contradiction and discrepancy of views, on every debatable word and clause in the constitution. . . .

"Fully convinced that the constitution is best expounded by itself, with a reference only to those sources from which its words and terms have been adopted, I have always found certainty, and felt safety, in adhering to it as the text of standard authority to guide my reasoning to a correct judgment. In expounding it by opinion, or on the authority of names, there is, in my opinion, great danger of error; for, when it is found, that from the time of its proposition to the people, to the present, the wisest and best men in the nation, have been, and yet are, placed foot to foot on all doubtful, and many plain, propositions in relation to its construction, it is as difficult as it would be invidious, to select as a consulting oracle, any man or class of statesmen or jurists, in preference to another." Justice McLean in the Passenger Cases, *supra* note 19, at 396, after referring to a position taken by the Court in Gibbons v. Ogden and by Hamilton in *The Federalist*, No. 32, said, "I yield more to the authority of this position than to the stringency of the argument in support of it." See also remarks of counsel in Pollock v. Farmers' Loan & Trust Co. (1895) 158 U. S. 601, 615.

[43] From about 1820 to about 1870.

[44] *Supra* note 10, at 433.

[45] (1793) 2 U. S. (2 Dall.) 419.

had been urged by the opponents of the Constitution as a reason for defeating its adoption and it was specifically in answer to this objection that Hamilton, in *The Federalist*,[46] and Madison and Marshall, in the Virginia Convention,[47] asserted that the clause was not subject to the interpretation thus put upon it, and espoused the contrary view.[48] Likewise, the decisions which have held that the original jurisdiction vested by the Constitution in the Supreme Court is not necessarily exclusive[49] seem opposed to the construction accepted by *The Federalist*.[50]

The fact that the Court will disregard the views of *The Federalist* on questions of constitutional meaning when they do not accord with the judicial attitude or cannot be made to do so by construction, tends to emphasize some of the doubts which surround the theory that *The Federalist* may be utitilized because of its inherent soundness. The occasional willingness of the Court to override *The Federalist,* taken together with the frequent reference to it, must mean that some of its interpretations of the Constitution possess less excellence than others. To the impartial eye which perceives little variation in the quality of the articles of *The Federalist,* it appears that this lesser excellence in some of its parts is undoubtedly derived from the circumstance that the Court disagrees with the opinions there expressed. Contrariwise, it is difficult to escape the implication in this, as in every case where one man must pass judgment on the ideas of another, that the remaining portions of *The Federalist* are endowed with virtue because of the Court's agreement with their conclusions or development. If this be true, how logically absurd it is to seek support in *The Federalist* on the ground of its intrinsic merit. By so doing, the Court is simply saying, "*The Federalist* agrees with us. Therefore it presents a sound interpretation of the Constitution. Consequently, we shall allude to it and thereby create in our reader's mind the inference that we have

[46] No. 81.

[47] 3 ELLIOT, DEBATES (2d ed. 1881) 533.

[48] The decision in Chisholm v. Georgia, *supra* note 45, was later declared erroneous by the Supreme Court in Hans v. Louisiana (1889) 134 U. S. 1. Justice Bradley said, at 12, "Looking back from our present standpoint at the decision in *Chisholm v. Georgia,* we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people."

[49] United States v. Ravara (1793) 2 U.S. (2 Dall.) 297; Ames v. Kansas (1884) 111 U.S. 449; Börs v. Preston (1884) 111 U.S. 252.

[50] No. 81, at 381.

in some way strengthened our opinion." Thus, from this point of view, the use of *The Federalist* on the ground that it presents an interpretation of the Constitution intrinsically of great merit, has less to commend it than the doctrine that *The Federalist* is employable because its author spoke authoritatively with respect to the intention of the framers. In the latter case the Court argues that "We have discovered the will of the fathers. One reason we believe this discovery to be correct is that the authors of *The Federalist* revealed the same will; and their knowledge was first hand." At least, the reasoning in this process does not break down until the Court attempts to proceed from the fact that the authors of *The Federalist* had a unique opportunity to know the intention of the framers to the conclusions that they did actually know that intent and that they did disclose it in *The Federalist.*

There is another aspect of this process which deserves some attention. It is this: If the conclusions of the Court were actually induced by *The Federalist* then we would have a clear instance of expounding the Constitution by opinions and the authority of names. Of course, as we know it, the process is just the reverse; the aid of *The Federalist* is invoked to affirm conclusions already reached by the Court. But this fact is not widely recognized and hence the resort to the commentators proceeds upon the theory that mere numbers or the character of some names might inspire belief in correctness where the naked opinion of the Court failed to do so. But it seems scarcely reasonable that the validity of judgments in constitutional cases should be tested by whether or not a majority of commentators, most of whom lived in another age, can be counted in its support. It was with something like this in mind that Justice Bradley expostulated in the *Legal Tender Cases,*[51] "If we speak not according to the spirit of the Constitution and authorities, and the incontrovertible logic of events, elaborate extracts cannot add weight to our decision."

(C) A third quality of *The Federalist* which is sometimes advanced by the Court as adding to its reference value is that it was written, published and widely circulated in the form of an argument in favor of the adoption of the Constitution and that, therefore, it presents the construction of that instrument which was accepted by the ratifying conventions and the people who elected them. Thus, Chief Justice Chase, in the *Legal Tender Cases*[52] said, "The papers

[51] *Supra* note 12, at 568.

[52] *Ibid.* at 585.

of the Federalist, widely circulated in favor of the ratification of the Constitution, discuss briefly the power to coin money, as a power to fabricate metallic money, without a hint that any power to fabricate money of any other description was given to Congress; and the views which it promulgated may be fairly regarded as the views of those who voted for adoption."[53] Most frequently, however, when the Court invokes this sanction of *The Federalist,* it generalizes about the extent of distribution[54] and leaves unstated the obviously suggested conclusion that because it was widely distributed, the interpretation of *The Federalist* must have been accepted by those who put the Constitution into force. With respect to this technique the remarks of Justice Daniel in *Veazie v. Moor,*[55] are typical. Citing *The Federalist,* he there said,[56] "These were the views pressed upon the public attention by the advocates for the adoption of the Constitution. . . ."[57] Chief Justice Marshall did not escape this weakness of underdevelopment when he sought to fix more exactly the precise point of this doctrine's greatest strength. In *Cohens v. Virginia,*[58] after extensive comment upon *The Federalist,* he said,[59] "These essays having . . . [been] published, while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration, where they frankly avow that the power objected to is given, and defend it."

Of the three doctrines enunciated by the Court in support of its use of *The Federalist,* this is the strongest, although it, too, possesses grave elements of weakness. On the side of strength, it can be said that this doctrine is based on the intent theory of constitutional construction; not the intent of the framers, but the intent of those who had the authority to innovate a new system. If any intent is to be

[53] Note the inference from the silence of *The Federalist* as drawn by Chief Justice Chase. For remarks about the invalidity of this inference, see note 23.

[54] In none of the cases in which *The Federalist* is cited has the Court done other than generalize about the extent of its distribution. As yet no study has been made to ascertain with some degree of precision the number of readers of the New York papers in which it appeared, or to discover what factual material exists, on which a conclusion might be based with respect to how widely it was circulated.

[55] (1852) 55 U.S. (14 How.) 568.

[56] *Ibid.* at 574.

[57] For similar statements see: The Passenger Cases, *supra* note 19, at 479; Legal Tender Cases, *supra* note 12, at 608; McAllister v. United States (1891) 141 U.S. 174, 197.

[58] *Supra* note 13.

[59] *Ibid.* at 418.

sought (which seems to me highly questionable), then certainly it should not be that of the proposing draftsman but that of those whose sanction gave the instrument operative force. And I suppose it can rationally be argued that these widespread articles in favor of adoption represent, at least to a degree, the opinions of many who voted for ratification. Just how many, of course, will always be a matter of conjecture, and this imponderable factor is one of the elements of weakness of the doctrine. Another element of weakness is that under this doctrine *The Federalist* would tend to replace the Constitution as the authentic source of information about the original intent. One of the incidents of this tendency is to reason by inference, sometimes drawn from the silence of *The Federalist,* that, since *The Federalist* was written in answer to objections to the Constitution "founded entirely on the extent of its powers and on its diminution of States sovereiguty," hence, where *The Federalist* said nothing about a grant to the federal government or a restriction upon the states, this silence was due to the absence of objection on this ground which, in turn, must have been due to the fact that no such grant or restriction was made.[60] The inference from silence, which necessarily implies a position of unjustifiable importance of *The Federalist* on the issue of the will of the adopters, wholly disregards the possibility of misrepresentation, deliberate ignorance, oversight, and over- or understatement on the part of both those favoring and those opposing ratification. Moreover, the doctrine that the constitutional interpretations of *The Federalist* were accepted by those who effectuated the Constitution, overlooks what seems highly probable, namely, that many who favored adoption did not share the views of *The Federalist* as to its meaning or shared them in part and disagreed with them in part. The fact that the Supreme Court occasionally overrides *The Federalist* indicates the possibility of either of these positions. This conclusion is also buttressed by the circumstance that the authors of *The Federalist* themselves, at other times, entertained different views from those set forth in *The Federalist.*[61] Finally the most astounding of the weak-

[60] Remarks on the invalidity of this inference from silence are contained in note 23.

[61] As an example of such changing expressions, Professor E. S. Corwin traces, in his *Commerce Power Versus States Rights* (1936) at 118 *et seq.,* Madison's attitude with respect to national power and curbing the authority of the states in the Federal Convention, the Virginia Convention, *The Federalist,* and the first Congress. During the Federal Convention and first Congress, Madison's remarks were in favor of completely subordinating the states, whereas in the Virginia Convention and in *The Federalist* his language tended to emphasize the continued importance of the states under the new system. See also the quotation from Rodell, *loc. cit. supra* note 26.

nesses of this use of *The Federalist* remains undisclosed. It lies in the fact that a considerable number of the conventions in the states had ratified the Constitution while a varying number of *The Federalist* papers were as yet unpublished, and, consequently, the assumption, applied equally to all the numbers of *The Federalist,* that it expressed the views adopted by those who put the Constitution into effect, is historically impossible unless we proceed upon the unlikely and judicially rejected premise that *The Federalist* papers formulated the views that were independently arrived at by the Constitution ratifiers. Of the eighty-five essays comprising *The Federalist* papers, only seventeen had been published by the date of ratification by the Delaware Convention, only twenty by the date of ratification of the Pennsylvania Convention, twenty-two by the date of ratification by the New Jersey Convention, thirty-one by the date of ratification by the Georgia Convention, thirty-six by the date of ratification by the Connecticut Convention, fifty-one by the date of ratification by the Massachusetts Convention, and seventy-seven by the date of ratification by the Maryland Convention. Hence at least seven of the state conventions had ratified the Constitution before all of the numbers of *The Federalist* had been printed, and ratifications had been procured in four of the states before half of the total number of *The Federalist* had appeared. These statistics, taken together with the failure of the Court to utilize other available methods for discovering the intention of the ratifying convention, *e.g.,* their debates and proceedings, indicate the Court's real lack of interest in what the adopters had in mind and its fundamental unconcern about the logical or historical soundness of doctrines and instruments which possess a value for purposes of persuasion.

II

THE OPINIONS OF EARLY CONGRESSES

(A) There is another kind of contemporary exposition of the Constitution which Supreme Court justices frequently invoke to supplement their opinions. It is the construction placed upon the Constitution by congresses which met early enough in the history of the United States to have had a certain interlocking membership with the Federal Convention or to have been involved in what the literary writers call "implementing the Constitution." Primarily such congressional construction is to be found in the language of the acts passed by that body or in the assumptions upon which the existence

of particular legislation is necessarily based.[62] Occasionally, however, the attitude of an early congress with respect to some question of constitutional law is sought in the debates which took place upon its floor.

Among the statutes of the national legislature which have been treated by the Court as contemporaneous interpretation of the Constitution, none has approached the conversational significance of the Judiciary Act of September 24, 1789. But like *The Federalist*, this Act has never been deemed of sufficient weight to serve as the sole or even the primary justification of a decision rendered.[63] The case in

[62] The phase of this matter which involves the assumption that a duly enacted statute represents the view of those who passed it that it is constitutional, is probably of less significance today than in the period of the early congresses before questions of the constitutional validity of statutes were recognized as the special and almost exclusive province of the courts.

CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 92: "The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith. I do not mean to deny that there have been times when the possibility of judicial review has worked the other way. Legislatures have sometimes disregarded their own responsibility and passed it on to the courts." And this was the idea of Daniel Webster as early in the history of the country as 1829. He said: "Members of the legislature sometimes vote for a law, of the constitutionality of which they are in doubt, upon the consideration that the question may be determined by the judiciary power." Charles River Bridge v. Warren Bridge (1829) 24 Mass. (7 Pick.) 344, 422.

James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (1893) 7 HARV. L. REV. 129, 155: "No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thought of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it."

[63] In 1923 Charles Warren published an article in (1923) 37 HARV. L. REV. 49, entitled *New Light on the History of the Federal Judiciary Act of 1789*. In it he says, at 51: "It is apparent, from the manner in which the original draft of this Senate amendment constituting Section 34 was altered by its proposer before its proposal, that the word 'laws' in this Section 34 was not intended to be confined to 'statute laws' as Judge Story held in the famous case of *Swift v. Tyson*, but was intended to include the common law of a State as well as the statute law. Had Judge Story seen this original draft of the amendment, it is almost certain that his decision would have been the reverse of what it was." The holding of Swift v. Tyson has recently been reversed in Erie R.R. Co. v. Tompkins (1938) 304 U.S. 64, both on grounds of the unconstitu-

which it was most heavily relied upon was *Ames v. Kansas*,[64] and there it was clearly subordinate to the fact of a prior judicial determination.[65] In that case, the question at issue was whether the original jurisdiction of the Supreme Court was exclusive and the Court, alluding to sections 9 and 13 of the Judiciary Act in which Congress had vested parts of that original jurisdiction in inferior federal courts held that it was not.[66] At the same term of Court, when another aspect of the same question was in litigation, the Court again referred to the fact of the contemporary construction in the Judiciary Act,[67] and said, "On a question of constitutional construction, this fact is entitled to great weight."[68] Other important cases have similarly employed the Judiciary Act as affirmatory authority. This was the fact in *Stuart v. Laird*,[69] where the constitutionality of requiring Supreme Court justices to serve on circuit courts was at stake; in *Martin v. Hunter's Lessee*,[70] where the 25th section of the Judiciary Act was in controversy; in *Genesee Chief v. Fitzhugh*,[71] where Chief Justice Taney, speaking for the majority, redefined the extent of admiralty jurisdiction; in *Williams v. United States*,[72] where the Court was concerned with that provision of Article III extending the judicial power to "controversies to which the United States shall be a party."[73] Chief Justice Marshall, in *Cohens v. Virginia*,[74] after quoting from *The Federalist*, said,[75] "A contemporaneous exposition of the constitution,

tionality of the course pursued and the erroneous construction of the statute. The Court alluded to the researches of Mr. Warren, *supra* at 73, and by accepting this interpretation of the statute, escaped the necessity of overcoming an adverse contemporary legislative exposition of the Constitution.

[64] *Supra* note 49.

[65] United States v. Ravara, *supra* note 49.

[66] Ames v. Kansas, *supra* note 49, at 463-64.

[67] Börs v. Preston, *supra* note 49. In this case the Court was faced with the inquiry whether under the Constitution and laws of the United States a circuit court could under any circumstances hear and determine a suit against the consul of a foreign government. In the Ames case, the question was whether under any circumstances an inferior federal court could be vested with jurisdiction to entertain a suit in which a state was a party.

[68] *Ibid.* at 257.

[69] (1803) 5 U. S. (1 Cranch) 299, at 309.

[70] (1816) 14 U. S. (1 Wheat.) 304, 351.

[71] (1851) 53 U. S. (12 How.) 443, 457-58.

[72] (1933) 289 U. S. 553, 574.

[73] See also for a similar use of the Judiciary Act of 1789: Parsons v. Armor (1830) 28 U. S. (3 Pet.) 413, 447; Wisconsin v. Pelican Ins. Co. (1888) 127 U. S. 265, 297; Capital Traction Co. v. Hof (1899) 174 U. S. 1, 7.

[74] *Supra* note 13.

[75] *Ibid.* at 420.

certainly of not less authority than that which has been just cited, is the judiciary act itself." Twenty years earlier in *Marbury v. Madison,*[76] Chief Justice Marshall had invalidated a section of the Judiciary Act without so much as mentioning the authority of this same contemporary exposition, although six days later he concurred in an opinion in which it was again referred to with considerable deference.[77]

However, judicial resort to contemporary legislative exposition of the Constitution has not been restricted to adverting to the Judiciary Act of 1789 (although that certainly is the most frequently recurring instance), for the cases are numerous in which the high tribunal has similarly availed itself of the aid of early statutes.[78] In all of these, the assistance thus gained has been purely by way of affirmation. In practically all, the precise material used has been the subject matter and language of a duly enacted law, with seldom even a casual reference to the debate which accompanied its passage. In one set of cases, however, this technique was reversed, for in them, while the reliance was still only affirmatory, the exact material relied upon was the discussion attending an enactment rather than the nature of the enactment itself.[79] In the last of this set of cases, *Myers v. United States,*[80] the issue was whether it is constitutionally competent for Congress to deny to the president the right to remove from office, without the advice and consent of the Senate, executive officers appointed by him with that advice and consent. The majority of the Court, speaking through Chief Justice Taft, held that it was not. In so holding, the Chief Justice examined at great length the debates in the first Congress over the bill to establish the Department of Foreign Affairs in which the question of the extent to which the Constitution vests in the president the power of removal was raised and considered.[81] He scrutinized with care and deliberateness the views of the individ-

[76] (1803) 5 U.S. (1 Cranch) 137.

[77] Stuart v. Laird, *supra* note 69.

[78] See Prigg v. Pennsylvania, *supra* note 15, at 620-21; Cooley v. Board of Wardens (1851) 53 U. S. (12 How.) 299, 315-17; Dred Scott v. Sandford (1856) 60 U. S. (19 How.) 393, 419-21; Burrow-Giles Lithographic Co. v. Sarony (1884) 111 U.S. 53, 57; Hampton, Jr., & Co. v. United States (1928) 276 U.S. 394, 411-12. For the same kind of rhetoric concerning early state legislation and construction of state constitutions, see Cooper Mfg. Co. v. Ferguson (1885) 113 U. S. 727, 733.

[79] United States v. Guthrie, *supra* note 39, Justice McLean's dissent at 307; Parsons v. United States (1897) 167 U.S. 324, 328; Myers v. United States (1926) 272 U.S. 52.

[80] *Ibid.*

[81] *Ibid.* at 111, 119, 128, 131.

ual members participating in the argument and in the vote, concluding that their general tenor and outcome supported the position taken by him.[82] In separate dissenting opinions both Justice McReynolds and Justice Brandeis denied that the Congressional Debates of 1789 could be reasonably construed as favoring the stand of the majority,[83] and Justice McReynolds asserted that there was a rule against the admissibility of congressional debates in determining the meaning of a statute.[84] Thus, for the first time, the validity of employing contemporary legislative exposition as an aid in the determination of questions of constitutional construction was controverted, although it must be noted that only a small part of the entire procedure was here in issue.

(B) In explaining his use of this source of information about constitutional meaning, Chief Justice Taft assigned three reasons in justification of the technique. He said,[85] "We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress, not because a Congressional conclusion on a constitutional issue is conclusive, but, first, because of our agreement with the reasons upon which it was avowedly based; second, because this was the decision of the First Con-

[82] Chief Justice Taft used the debates of the members of Congress whether or not they had been delegates to the Constitutional Convention. But he gave greater weight to the views of the members who had attended the Philadelphia meeting. *Ibid.* at 114.

[83] *Ibid.* at 193, 242, 284.

[84] *Ibid.* at 199. It is to be noted that Justice McReynolds here sought to apply a doctrine frequently enunciated by the Court with respect to congressional debates and statutory construction to the debates of an early congress and constitutional construction. That Justice McReynolds was not even accurate on the question of statutory construction, see Note (1937) 25 CALIF. L. REV. 326. In Downs v. Bidwell (1901) 182 U.S. 244, Justice Brown, after referring to the congressional debate of 1803 over Jefferson's proposed purchase of Louisiana said, at 254, "It is unnecessary to enter into the details of this debate. The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts." It is to be noticed that in applying this formal rule of statutory construction to congressional debates and constitutional construction the debate in question took place in a congress which met fourteen years after the founding of the government. Furthermore, for this proposition, Justice Brown cited United States v. Union Pacific (1875) 91 U.S. 72, a case involving statutory, not constitutional construction. Thus, these two statements by Justice McReynolds and Justice Brown, which are the only two instances this author has seen in which a Supreme Court justice objected to the admissibility of debates in early congresses on questions of constitutional construction, are essentially without foundation.

[85] Myers v. United States, *supra* note 79, at 136.

gress, on a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification; and, third, because that Congress numbered among its leaders those who had been members of the Convention. It must necessarily constitute a precedent upon which many future laws supplying the machinery of the new Government would be based, and, if erroneous, it would be likely to evoke dissent and departure in future Congresses. It would come at once before the executive branch of the Government for compliance, and might well be brought before the judicial branch for a test of its validity."[86] Without lingering over the instructive implications of the fact that Chief Justice Taft included reasons two and three even though the first alone was undoubtedly ample warrant for the resort,[87] and without pausing to reproduce the highly similar rhetoric occurring in all cases in which the matter is discussed,[88] we may note that the actions of early congresses on constitutional ques-

[86] Again, *ibid.* at 174, Chief Justice Taft, said, "What, then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accordance with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument."

[87] Later in the same opinion, *ibid.* at 176, Chief Justice Taft, with bluntness and honesty, again indicated the weight really allowed the Court's various instruments of persuasion when he said, "When, on the merits, we find our conclusions strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct..."

[88] Generally similar language to that above quoted from Chief Justice Taft is to be found in the following citations, which, however, differ in one notable particular, namely, they lay primary emphasis on the relationship of the early congresses to the Constitutional Convention, while Chief Justice Taft, the former President and long time administrator, seems chiefly to stress the fact that the early congresses were the founders of the government: Martin v. Hunter's Lessee, *supra* note 70, at 352; Cohens v. Virginia, *supra* note 13, at 420; Prigg v. Pennsylvania, *supra* note 15, at 621; Dred Scott v. Sandford, *supra* note 78, at 419; Ames v. Kansas, *supra* note 49, at 464; Börs v. Preston, *supra* note 49, at 257; Burrow-Giles Lithographic Co. v. Sarony, *supra* note 78, at 57; Wisconsin v. Pelican Ins. Co., *supra* note 73, at 297; Capital Traction Co. v. Hof, *supra* note 73, at 7; Hampton, Jr., & Co. v. United States, *supra* note 78, at 412.

tions are given added sanction by the two circumstances, *i.e.*, that some of their members had been delegates to the Federal Convention,[89] and that they were obliged to supply and set in motion the machinery of government.

The first of these additional sanctions is based upon the intent theory of constitutional construction. Its fundamental hypothesis is that the members of the early congresses who had been delegates to the Constitutional Convention must have known what the latter body intended.[90] As in the case of the use of *The Federalist*, this hypothesis involves the assumption that each of the delegates to the Federal Convention was a qualified expert as to the intention of the fathers on every constitutional issue that was presented to Congress during the entire term of his service there, and that on such issue his speeches were made and his vote cast free of politics, free of personal inclination, free of ulterior aim, and with a single-minded devotion to estab-

[89] When the first Congress met, only ten states were represented in the Senate, which was composed of twenty members, of whom precisely one-half had been members of the Constitutional Convention: Ellsworth, Johnson, R. Morris, Paterson, Read, Langden, Strong, Few, Bassett, Butler. Of the members of the House of Representatives, eight had been delegates to the Federal Convention: Baldwin, Carroll, Clymer, Fitzsimmons, Gerry, Gilman, Madison, and Sherman.

[90] In Knowlton v. Moore (1900) 178 U.S. 41, Justice White added a third additional sanction for contemporary legislative exposition. He said, at 56, "It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government. The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention, which framed the Constitution, must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds." It is to be noticed that this additional reason given by Justice White for allowing weight to contemporary legislative exposition is not based on the intent theory of constitutional construction. The authority of congressmen who had not been delegates to the Federal Convention is derived, in Justice White's opinion, from the "keen appreciation" which they "must have had" of the "influences which shaped the constitution"—in other words, from their knowledge of the history of the events and statements which led up to the formation and adoption of the Constitution. The doctrine is based on the assumption that, having been witness thereto, their knowledge of these things was better than that gained by retrospective investigation.

Still a fourth additional sanction sometimes urged in behalf of a legislative exposition of the Constitution made by the first Congress is based on the fact it rounded out the Constitution by proposing the first ten Amendments, which fact, to a degree, made the first Congress a framing convention. See Capital Traction Co. v. Hof, *supra* note 73, at 7; Myers v. United States, *supra* note 79, at 174.

lish the original intent. Of course, such assumptions are obviously contrary to the facts of political life and purposeful existence. Moreover, under this theory there is no rational possibility of explaining the differences in the opinions of the former participants in the Philadelphia Convention on questions of constitutional interpretation, especially such as were developing at this period between Madison and Hamilton. Furthermore, confining ourselves to the inferences to be drawn from an enactment duly passed, it cannot be said legitimately that the existence of a given statute necessarily indicates the constitutional attitudes of a substantial number of the persons who voted for it; this would be to deny the complex factors and relationships that go into personal motivation. As to the deductions that are to be drawn on constitutional questions from the debates on the floor of early congresses, they are as misleading, unreliable, and uncertain as the debates of the Constitutional Convention itself,[91] and here the intent sought is one step further removed.

The second additional sanction urged in behalf of the constitutional opinions of early congresses is much more plausible than the first. It proceeds upon a theory different from the first. It represents a departure from the doctrine that the proper office of constitutional construction is the determination of the intent of the framers. Its primary basis is the proposition that with respect to the steps taken by them in the implementing of the Constitution and formation of the government, the actions of the early congresses should be given weight as expressing the meaning of the relevant constitutional clauses.[92] It assumes that some leeway had to be allowed the prac-

[91] See *supra* note 25.

[92] This doctrine has been principally, but not altogether, confined in application to the actions of early congresses. Certain of the reports of Alexander Hamilton made to Congress while he was the Secretary of the Treasury have been given a similar importance by counsel and the Court. Thus, see the effort that counsel against the bank made in McCulloch v. Maryland, *supra* note 10, at 332-33, to show that the arguments in Hamilton's famous report on the United States Bank were no longer applicable. See also the attention which the Court lavishes on Hamilton's report on manufactures, in United States v. Butler (1936) 297 U. S. 1. In an article in (1937) 25 CALIF. L. REV. 389, *Reorganization of the Supreme Court,* Professor D. O. McGovney says with respect to this case, at 405, "Justice Roberts ignored comparison of the A. A. A. with the very plan which led Hamilton to announce the interpretation which Justice Roberts professed to accept." Likewise, Professor E. S. Corwin, *op. cit. supra* note 61, at 242 said, referring to United States v. Butler, "Here indeed, the test is, to all appearance, applied in a form that would totally repeal the supremacy clause so far as the spending power is concerned, and this in face of the fact that Justice Roberts, who spoke for the Court, took occasion to announce its acceptance of the Hamiltonian broad view of that power!" While I agree that this case cannot be too strongly disparaged, I sub-

tical judgment of men confronted with a practical situation; that, in supplying the machinery of government, and putting the Constition into operation, the founders would be limited by conditions and guided by considerations which must to a degree modify the theory of the document, that out of this joinder of the instrument with reality would rise the real Constitution.[93]

III

THE OPINIONS OF THE FRAMER-JUSTICES[94]

There is a tendency among Supreme Court justices, which at times becomes instructively pronounced, to rely on prior decisions of the Court in justification of a judgment being given. Without attempting to investigate the doctrinal sanctions of the authority of precedent, it can be said that, essentially, the foundation of this reliance is the priority in time of the determination relied upon. Generally, any previous adjudication made by the Court which is in fact, or can be made to appear to be in point is regarded as citable without distinction as to the period in the country's history when it occurred. This is true of those early decisions in which former delegates to the Federal Convention participated as judges.[95]

Sometimes, however, added weight is claimed for an antecedent determination on the ground that it was a leading case or because of

mit that the two professors have misread the language employed by Justice Roberts. He did not profess to accept the Hamiltonian view, but Justice Story's interpretation of that view. He said, "We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one." 297 U.S. at 66.

[93] Justice Bradley, in his opinion in the Legal Tender Cases, *supra* note 12, at 567, employed some interesting language: "I deem it unnecessary to enter into a minute criticism of all the sayings, wise or foolish, that have, from time to time, been uttered on this subject by statesmen, philosophers, or theorists. The writers on political economy are generally opposed to the exercise of the power. The considerations which they adduce are very proper to be urged upon the depositary of the power. The question whether the power exists in the national government, is a great practical question relating to the national safety and independence, and statesmen are better judges of this question than economists can be."

[94] Every justice of the United States Supreme Court is, to a degree, a constitution maker. By the use of the term "framer justices," this heading is intended to refer only to the justices of the Supreme Court who had been delegates to the Constitutional Convention.

[95] Of the delegates to the Constitutional Convention, five later became members of the Supreme Court bench. They were: John Rutledge, 1789-1791; James Wilson, 1789-1798; John Blair, 1789-1796; William Paterson, 1793-1806; Oliver Ellsworth, 1796-1800.

the merits of the discussion which attended it or because it was one of the abler efforts of "the great Chief Justice." Similarly, unusual authority is occasionally sought for an early decision by virtue of the fact that one or more of the justices joining in its rendition had been members of the Constitutional Convention.[96] Thus, in arguing that the federal courts possessed "the power and jurisdiction . . . to indict and prosecute common law crimes within the scope of the federal judicial power . . .,"[97] Chief Justice Taft directed attention to the fact that this had been the view of Justices Wilson and Paterson and that they had been delegates to the Philadelphia Convention.[98] Likewise, in *Pacific Insurance Co. v. Soule,*[99] *Springer v. United States,*[100] and *Veazie Bank v. Fenno,*[101] mention was made of the fact that certain of the justices[102] participating in *Hylton v. United States,*[103] upon which the Court placed reliance, had been among the Constitution makers.[104]

In none of these cases does the Court state the theory upon which special mention of this particular past experience of certain justices is based. The obvious inference, however, since the Constitutional Convention has not acquired a reputation as a training school for judges, is that the members of the Court who had assisted in the formulation of the Constitution were, like the authors of *The Federalist* and some of the members of the early congresses, in a unique position to know the intention of the framers.[105] Consequently, the

[96] It is to be noted that many of the cases employing the Judiciary Act of September 24, 1789 as a contemporary legislative exposition of the Constitution, refer to the fact that its principal author was later chief justice of the United States Supreme Court. See Capital Traction Co. v. Hof, *supra* note 73, at 7; Ames v. Kansas, *supra* note 49, at 463. In these cases, Ellsworth is generally spoken of as "the author" of the Judiciary Act. Recent researches by Mr. Warren, *op. cit. supra* note 63, have shown that William Paterson had a greater share in its preparation than had previously been known.

[97] *Ex parte* Grossman, *supra* note 21, at 114.

[98] *Ibid.*

[99] (1868) 74 U.S. (7 Wall.) 433, 444.

[100] (1880) 102 U.S. 586, 599.

[101] (1869) 75 U.S. (8 Wall.) 533, 545.

[102] Wilson and Paterson. Ellsworth was erroneously described by Justice Swayne as participating. *Ibid.*

[103] (1796) 3 U.S. (3 Dall.) 171.

[104] See also Ames v. Kansas, *supra* note 49, at 465, and Myers v. United States, *supra* note 79, Justice McReynolds' dissent at 215.

[105] Reference is sometimes made to the fact that certain justices participating in early decisions who were not delegates to the Constitutional Convention, had been active in the adoption of the Constitution. See Springer v. United States, *supra* note 100, at 600.

use of this fact is here just as insupportable as in the case of *The Federalist* and some of the members of early congresses, and is subject to the same challenge. The circumstance that it has only been resorted to in a handful of instances would tend to suggest that the Court realizes its fundamental inapplicability. But the failure of the Court to fully exploit its potentialities as an instrument of persuasion is inexplicable.

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