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## Mary Sarah Bilder: The Mind is Like a Bat: Bernard Bailyn and the Debate on the Constitution

The Docket Team

### Mary Sarah Bilder

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After Donald Trump's election, Bernard Bailyn pondered the relevance of the debate on the Constitution to contemporary politics. As Bailyn wrote, the founders knew how the "debasement of free states" happened. In 2018, he perceived the constitutional system "tested as never before." The founders worried about "a charismatic demagogue" who would "cut through or ignore or distort the structure of law, install his corrupt minions in high office, protect them by use of the pardoning power." Repeatedly these fears had appeared in the debate on the Constitution. Bailyn ended by quoting James Madison's 1796 comment stressing the importance of the debates. As he was perfectly aware, over the last thirty years, the same words had been quoted repeatedly to attempt to justify textual and public meaning originalism as an interpretive methodology. But for Bailyn they gestured at originalism's fundamental misunderstanding and misguided misappropriation of the debate on the

constitution.[1]

Thirty years earlier, a strange confluence melded the Constitution’s bicentennial, a triumphant new conservative movement, and the printed ratification materials. The 1987 anniversary—planned during Ronald Reagan’s presidency with its self-described revolution of liberty against government—produced a resurgence of interest in the history of the Constitution. Of particular note, there was a turn towards ratification, which owed an immeasurable debt to the appearance of the posthumous publication of seven volumes of antifederalist writings by University of Chicago political science professor Herbert Storing and the early volumes of *The Documentary History of the Ratification of the Constitution*. The origins of *The Documentary History* stretched back to 1936, but reinvigorated with expanded funding, the editors produced Volume 1 for the 1976 bicentennial. By 1986, the project had published seven volumes. The volumes—the ratification records for Pennsylvania and the early ratifying small states, as well as four volumes of commentaries through May 1788—suggested a manageable corpus of materials. (Although the publication of extensive microform supplements sounded a cautionary note for the astute observer.) This mixture of digestible documentary record and Reagan conservatism, bound together for the bicentennial, provided fertile soil for the 1986 speeches by Antonin Scalia and Edwin Meese declaring a constitutional jurisprudence based on an original public meaning.[2]

During these bicentennial years, Bailyn too found his attention focused on the Constitution. He began work on two volumes of ratification documents for the Library of America, *The Debate on the Constitution* (1993). With no introduction permitted, Bailyn published his interpretation in 1990 as “The Ideological Fulfillment of the American Revolution: A Commentary on the Constitution.” Two years later, he repurposed it as the conclusion to an enlarged version of the *Ideological Origins* (1992). Although the 1796 Madison quote did not appear in the original version, in 1992, the words stood as the epigraph.[3]

Giving Madison the epigraph was somewhat surprising. The famous framers—Madison and Alexander Hamilton—did not really pique Bailyn’s interest. Oh, he wrote about them, but he found far more interesting men with minds like John Stevens, Jr. (Americanus) who produced a more persuasive defense of the extended republic than Madison before Federalist 10. Indeed, Bailyn found the hagiography of the *Federalist* historically irritating. One could show that the essays were politically motivated and not particularly influential at the time. In asides and footnotes, he would repeatedly try to knock the work off the pedestal, finally coming to terms with it and its annoying dominance in a 2003 essay. A comment on the Supreme Court’s usage concluded that the Court drew from papers that “serve the justices’ purposes” and ignored the “papers and arguments that the *Federalist* authors themselves believed to be fundamental.”[4]

Madison’s 1796 words similarly involved wrenching a nice quote from the context. In 1796, Madison spoke in the midst of a bitter partisan fight with President George Washington over the interpretation of the Constitution. Among other arguments, Hamilton (Camillus) declared that the administration position was supported by the Convention and the “people in adopting it.” Washington deposited the

Convention Journal in the State Department, and then cited to it in his message to Congress. In rebuttal, Madison reviewed five interpretive arguments, only two of which related to the drafting and ratification history. After suggesting the difficulty of drawing conclusions about the text based on the Convention record or memory, as well as the term ‘ratify’, Madison proposed that a more legitimate understanding could be gained from the ratification conventions. Of course, as Madison explained, few records survived and those that did he considered inaccurate. So Madison picked various proposed amendments from the ratifying Conventions to Congress. He likely relied in part on a printed collection by Virginia printer Augustine Davis, *The Ratifications and Resolutions of Seven State Conventions* (September 1788). This same pamphlet was the one which Bailyn ended the Library of America volumes’ debates in the press. Like Madison, Bailyn used the document to create the appearance of a coherent conclusion, even though the amendments and statements within refuted any such illusion.[5]

Nonetheless, Bailyn agreed with Madison that the Constitution had been “the draft of a plan” until “life and validity were breathed into it.” The debate *on*, not *over*, the Constitution mattered. The meaning of the debate was explained by a poem: Richard Wilbur’s *Mind*. The poem compared the mind to a bat in a cave, somehow managing to fly without hitting the walls. The elegant but somewhat pedestrian simile transformed in the final three lines.

The mind is like a bat. Precisely. Save

That in the very happiest intellection

A graceful error may correct the cave.

This insight—that intellection may correct the cave—captivated Bailyn. *Intellection* is a splendid word, whose meanings mostly are labeled *Obsolete* in the *Oxford English Dictionary*. The word meant the “action or process of understanding; the activity or exercise of the intellect.” Intellection suggested a creative reasoning process, intriguingly distinguished from imagination. In intellection, the mind may correct the cave. That is, through creative reasoning, the mind could alter the parts of the cave which no longer conformed to present realities.[6]

Intellection had begun to breathe life into the draft of the Constitution as people read it and worried. As Bailyn explained, the federalist leaders had one “overriding problem.” The words of the Constitution triggered deep anxieties about the misuse of power and nothing about the semantic wording provided security. And so, by intellection, people began to think about why the new system in present circumstances would not lead to the dangers of old. As Bailyn explained:

They had to reach back into the sources of the received tradition, confront the ancient, traditional fears that had lain at the heart of the ideological origins of the Revolution, and identify and reexamine the ancient formulations that stood in the way of the present necessities: take these ideas and apprehensions apart and where necessary rephrase them, reinterpret them—not reject them in favor a new paradigm, a new structure of thought, but reapply them and bring them up to date. They did not leave the cave, they corrected it.

Abstractions were “lanced and drained of distortions” and instead “the hard realities of the real, functioning world were everywhere revealed.” Intellection was a process of updating the framework. As Bailyn put it later, “The past would have to be laid to rest; not rejected in favor of some other, different set of beliefs, but refined, renewed, brought up to date—worked out, fulfilled.”<sup>[7]</sup>

In 1990, Bailyn grasped that the life and validity came from the debate itself—not a specific fixed meaning to be found somewhere in the debate. Indeed, the “great range and variety of thinking” in the extraordinary outpouring of responses—and then responses to responses—mattered. When Bailyn published the Library of America volumes, the *Documentary History* was intended to be 19 volumes. It grew to thirty-four. And digital technologies increased access—albeit not necessarily understanding—to nearly everything printed in the 1787-1789 period. At home through on computer, we can read more about what people wrote in this period than any person living in 1787 ever could. We interpret the period as gods, fooling ourselves that knowing all is knowing more. It is no surprise that as the historical record expanded, originalism shifted to a constitutional jurisprudence that sought to cabin the multi-vocal array by fixating on dictionaries and the disaggregating glossing of individual words.<sup>[8]</sup>

Originalism missed everything that mattered about the debate on the constitution. In 2010, Bailyn spoke at Boston College in a talk, entitled, “How Historians Get It Wrong: The American Constitution, for Example.” At the end of that talk, as had become usual as he noted to me with wry bemusement, there were questions about the Second Amendment. As the reporter noted, Bailyn “came down squarely on the militia side,” in contrast to *District of Columbia v. Heller* (2008). Bailyn explained that the framers had other concerns: they “were afraid of standing armies, janissaries, or the president forming a palace guard, and they were looking for armed protection against that. The individual right to bear arms wasn’t the issue.” But, as Bailyn continued, “the Second Amendment, by a malign twist of fate, was worded ‘a little ambiguously,’” he said. “If they’d worded it a little differently, there would never have even been a discussion.”<sup>[9]</sup> Bailyn grasped—and I think he thought this is what Madison had himself glimpsed briefly—that the Constitution only lived through intellection. What mattered about the framing generation was that they provided a remarkable example of the necessity to take the received traditions and “reapply them and bring them up to date”—to correct the cave as it were. As Bailyn ended his essay, “In that spirit we too—in the very happiest intellection—may continue to correct the cave.”<sup>[10]</sup>

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[1] Bernard Bailyn, “Preface,” in *The Essential Debate on the Constitution: Federalist and Antifederalist Speeches and Writings: The Brilliant Battle of Ideas That Still Shapes the Nation*, eds. Robert J. Allison and Bernard Bailyn (Library of America, 2018), xiii, xv.

[2] *The Complete Anti-Federalist*, eds. Herbert J. Storing and Murray Dry (University of Chicago Press, 1981), 7 vols. ; *Constitutional Documents and Records, 1776-1787 (The Documentary History of the Ratification of the Constitution*, ed. Merrill Jensen (State Historical Society of Wisconsin, 1976); *Ratification by the States: Pennsylvania (The Documentary History of the Ratification of the Constitution*, ed. Merrill Jensen, John P. Kaminski, Gaspare J. Saladino (State Historical Society of Wisconsin, 1976); *Ratification by the States:*

*Delaware, New Jersey, Georgia, Connecticut* (*The Documentary History of the Ratification of the Constitution*, ed. Merrill Jensen (State Historical Society of Wisconsin, 1978); *Commentaries on the Constitution, public and private* (*The Documentary History of the Ratification of the Constitution*), ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler (State Historical Society of Wisconsin, 1981-86), vols. 1-4. In 1988, an eighth volume, the first of three on Virginia appeared. On Storing, see Michael P. Zuckert, Two Great Americanists, *National Affairs*, Spring 2018. Meese gave several speeches in 1986 and Scalia gave an Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986). See Calvin Terbeek, "Originalism's Obituary," Utah OnLaw: The Utah Law Review Online Supplement: Vol. 2015 : No. 1, Article 2, available at: <http://dc.law.utah.edu/onlaw/vol2015/iss1/2>; see also Robert Post and Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution," 75 *Fordham Law Review* 545 (2006); Paul Baumgardner, "Originalism and the Academy in Exile," 37 *Law and History Review* 787-807 (2019).

[3] *The Debate on the Constitution*, ed. Bernard Bailyn (The Library of America, 1993), 2 vols.; "The Ideological Fulfillment of the American Revolution: A Commentary on the Constitution," in Bernard Bailyn, *Faces of Revolution: Personalities and Themes in the Struggle for American Independence* (Knopf, 1990), 225-267; Postscript: Fulfillment: A Commentary on the Constitution," in Bernard Bailyn, *The Ideological Origins of the American Revolution* (Enlarged edition: Harvard University Press, 1992), 321-379.

[4] "The *Federalist Papers*" and "A Note on *The Federalist* and the Supreme Court," in Bernard Bailyn, *To Begin the World Anew: the Genius and Ambiguities of the American Founders* (Random House, 2003), 100-130 (quote at p. 130).

[5] For Madison's 1796 remarks, see "Jay's Treaty, [6 April] 1796," *Founders Online*, National Archives, <https://founders.archives.gov/documents/Madison/01-16-02-0195>. [Original source: *The Papers of James Madison*, vol. 16, 27 April 1795–27 March 1797, ed. J. C. A. Stagg, Thomas A. Mason, and Jeanne K. Sisson. Charlottesville: University Press of Virginia, 1989, pp. 290–301.]. For context, see Mary Sarah Bilder, "How Bad were the Official Records of the Federal Convention?," 80 *George Washington Law Review* 1620, 1674-1679 (2012). For pamphlet, see *The Debate on the Constitution*, 2:536-574.

[6] "The Ideological Fulfillment," at 226; "Postscript: Fulfillment," "intellection, n." OED Online. September 2020. Oxford University Press. <https://www.oed.com/view/Entry/97384?redirectedFrom=intellection> (accessed November 20, 2020).

[7] "Postscript: Fulfillment," at 351, 376-377.

[8] *The Debate on the Constitution*, at 1:1123.

[9] David Reich, "A more perfect union?," *Boston College Magazine*, <https://bcm.bc.edu/index.html%3Fp=562.html>

[10] "Postscript: Fulfillment," at 379.