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## James Madison and the Supreme Court The Evolution of the Madisonian First Amendment in Early America

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**James Madison and the Supreme Court**  
**The Evolution of the Madisonian First Amendment in Early America**

by

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**HIS 490 Honors History Thesis**

**Department of History and Classics**

**Providence College**

**Spring 2023**



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## Introduction

After the United States won its independence from Great Britain in the Revolutionary War, the founding fathers faced the monumental task of structuring and organizing the newfound Republic. Framers from across the new states congregated to debate the founding of the new American government. However, because of the countless different perspectives from delegates, it is impossible to understand *exactly* what the Constitution meant. Scholars have worked tirelessly to discern the true meaning of the Constitution and how modern judges, politicians, and citizens should interpret the founding document. The First Amendment is a prime example of the ambiguity of the Constitution. Debate and interpretation of its meaning over the next two centuries shaped the Constitutional landscape and the rights and liberties of the citizens of the United States.

Investigating Supreme Court cases in the context of the First Amendment in the early 1800s offers an opportunity to depart from this seemingly irreconcilable problem of true Constitutional meaning and decipher the Court's intentions during the period. In addition to the Supreme Court, the political philosophy and work of James Madison, who is often considered to be the "Father of the Constitution," is vital to the story of the First Amendment in the early 1800s and beyond. Understanding Madison's values and ideals that inspired the Bill of Rights offers new insights to the First Amendment. Contextualizing Madison in the events leading up to his writing of the First Amendment offers a better understanding of the Supreme Court's eventual interpretations of the First Amendment in the early 1800s at the height of the Marshall Court era. Thus, connecting Madison's political philosophy that inspired the first five freedoms

in conjunction with three Supreme Court decisions offers a new and valuable insight into the earliest interpretations of the U.S. Constitution.

The important early Supreme Court cases in Early America that interrogated the First Amendment were *U.S v. Hudson and Goodwin* (1812), *Dartmouth College v. Woodward* (1819), and *Anderson v. Dunn* (1821). Considering connections between Madison and the Supreme Court's decisions on the First Amendment while also considering the political climate of the early 1800s and the power dynamics between the Court and the Legislative and Executive offers an extensive and cohesive study of the topic. During the early 19<sup>th</sup> century, the Court was testing the First Amendment in practice, rather than creating precedent. The Court could not rule on First Amendment bases in these cases for two main reasons. First, the Amendment did not apply to the states. However, the Court still laid Constitutional groundwork within the body of these decisions. The second reason is that the Amendment itself was too ambiguous to interpret without Constitutional precedents. Thus, the Court chose to broadly protect the freedom of Americans in *Anderson*. Contextualizing the cases with the political philosophy and writings of James Madison offers a story on his legacy. This is largely due to Madison's party shift after he wrote the Bill of Rights. His opinions on the decisions of these cases are therefore nuanced and different in each of these three cases. It is imperative to separate Madison the Constitutionalist and Madison the politician. Understanding this distinction offers a new insight into Madison's politics, his opinions of the Supreme Court, and his thoughts on the Amendment as a living and interpretive document.

The creation of the First Amendment is best understood with the prior political context of the Constitutional Convention. Specifically, during the Constitutional Convention, Madison kept notes about the events that were taking place, such as executive power, slavery, and

representation, to name a few. Madison wrote mainly to report to figures such as George Washington of the contents of the Convention. In her book *Madison's Hand*, Mary Sarah Bilder provides a detailed analysis of the notes themselves, offering an insight into Madison's thought process as the Convention progressed. Bilder suggests that one of Madison's primary concerns was whether the federal government or state governments would be more powerful in both Constitutional writing and practice. During the writing of both the Constitution and Bill of Rights, Madison was a Federalist who favored a strong centralized federal government. As Bilder notes, Madison strived for "National supremacy extended to the creation of a National Executive and Judiciary Departments."<sup>1</sup> Madison's goal was to create a strong and united national identity under the United States of America.

The history of the ratification of the Bill of Rights mirrors the controversy that surrounded the Constitution. In his book *James Madison: A Biography*, historian Ralph Ketcham outlines the history of the eventual ratification of the First Amendment. During the Constitutional Convention, Madison originally believed that a Bill of Rights was not necessary to include in the Constitution. This was met with heavy opposition from anti-Federalist delegates such as George Mason, who refused to sign the Constitution because it did not include a Bill of Rights. Madison was then persuaded to draft and supported the ratification of a Bill of Rights due to political pressure from his opponents. Madison originally opposed his possibly most influential and impactful piece of legislation, but he came to understand its value and importance for the function of a cohesive Republican government. Thus, the Bill of Rights was created from political strife, and sought to unify the Republic to satisfy states such as North Carolina and Rhode Island, which had yet to ratify the Constitution. Madison sought to draft a Bill of Rights

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<sup>1</sup> Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Cambridge, Massachusetts: Harvard University Press, 2017), 43.

during his tenure in the First Continental Congress, however there was still debate on whether the Bill would be embedded in the Constitution itself, or its own document at the end of the Constitution. Madison favored amending the Constitution within the document itself, rather than a separate Bill of Rights. However, he was met with opposition from Roger Sherman, who asserted that the amendments should be included at the end of the Constitution to preserve the original text. Madison ultimately compromised, and the Bill of Rights was ratified and included as a separate entity from the Constitution.<sup>2</sup>

Ketcham continues his narrative on the construction of the new American government by describing Madison's inspiration for the Bill of Rights. Madison was most reliant on the ideas put forth by John Locke, specifically his theory of natural rights. The First Amendment is derived from the Lockean unalienable rights of "life, liberty, and property."<sup>3</sup> Ketcham further expands on this idea, writing "He had suggested that the Bill of Rights begin with these Lockean principles... that the legitimate powers of government were derived from the people (and) that government existed to promote the happiness and safety of the people."<sup>4</sup> Driven by Locke, Madison saw a strong government as essential to ensure the rights of the American people. This would follow Madison's ideals as a Federalist, most of whom favored a strong central government as opposed to strong states' rights. Thus, the Bill of Rights was protected by a strong federal governmental authority.

Ketcham also details which freedoms Madison deemed as most essential to include in the Bill of Rights and specifically in the First Amendment. Madison's pursuit of the first five

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<sup>2</sup> Ralph Ketcham, *James Madison: A Biography* (Newtown, CT: American Political Biography Press, 2019).

<sup>3</sup> John Locke, *Locke: Two Treatises of Government Student Edition* (Cambridge University Press, 1988).

<sup>4</sup> Ketcham, *James Madison: A Biography*, 291.



freedoms was “to give the widest possible scope to freedom of conscience and to demonstrate the diversity of a republican government could safely accommodate.”<sup>5</sup> For example, the freedom of religion is widely derived from New Englanders who were concerned with Congressional interference with their Churches. Although the freedom of religion accomplished Madison’s goal of a “wide scope,” it also presented the country with a new set of challenges in the coming years regarding how to interpret the freedom itself. In conjunction with the freedom of religion, Madison also placed heavy emphasis on freedoms of speech, association, and press. These ideas were influenced from the English Bill of Rights. Although the founders sought to break away from the English monarchical system, some of their thinking was still predicated on English law. For example, Ketcham writes that Madison asserted “the freedom of press and conscience had come to much wider meaning in America than in England... Madison suggested this ought to be stated clearly in a Bill of Rights suitable to the United States.”<sup>6</sup> This is because the British Crown was a Constitutional Monarchy, so citizens were granted rights by the Crown. Prominent Constitutional scholar Jack Rakove asserts that although Madison favored a strong central government, it was imperative that the federal could not infringe upon the Bill of Rights “the constitutional theory of James Madison was still predicated on the need to erect fences around legislative power.”<sup>7</sup> Thus, the First Amendment ensured the rights of the American people through the boundaries it set between the government and the people. After the Bill of Rights was ratified on December 15th, 1791, the power now laid with the federal government to protect the freedoms and liberties entailed in that very document.

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<sup>5</sup> Ketcham, *James Madison: A Biography*, 292.

<sup>6</sup> Ketcham, *James Madison: A Biography*, 290.

<sup>7</sup> Jack Rakove, “The Origins of Judicial Review: A Plea for New Contexts,” *Stanford Law Review* 49, no. 5 (May 1997): 1040.

Rakove expands on much of Ketcham's work in his book *Original Meanings*. Specifically, Rakove focuses on early meanings and interpretations of the Constitution. Although he is not focused on the First Amendment, his analysis of the Constitution concerning the judiciary offers necessary context for the cases studied in this thesis. In his book, Rakove asserts that Americans have always had two Constitutions, stating "the formal document adopted in 1787-88, with its amendments; and the working constitution comprising the body of precedents, habits, understandings, and attitudes that shape how the federal system operates."<sup>8</sup> Rakove believes this to be the foundation originalism, which entails the relationship of the Constitution to not only other state constitutions but also to the "interpretative predictions... and processes that developed afterward."<sup>9</sup> Originalism, and by extension, the Constitution itself is both text and discourse. This points to a living Constitution that is constantly open to new interpretations, which made the decisions of the Supreme Court vital to the Constitution itself.

The interpretations of the text of the First Amendment are therefore equally paramount to the preservation of these freedoms as the text of the Amendment itself. Rakove asserts that it would be "the civic virtue of the people that would prevent the republican government from degenerating into mobocracy."<sup>10</sup> The civic duty of the people includes the Justices that would be appointed to the Supreme Court. As more Justices were appointed and more cases were heard and decided, the country began to take shape through the precedents that were established. The First Amendment's purpose was to provide Americans with the freedom to think and speak as individuals, which the Supreme Court was tasked with protecting through the Constitution. Thus,

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<sup>8</sup> Jack Rakove, *Original Meanings*, (Norwalk, Connecticut: The Easton Press, 1996), 339.

<sup>9</sup> Rakove, *Original Meanings*, 342.

<sup>10</sup> Rakove, *Original Meanings*, 49.

Constitutional debate is a mere extension of the mission of the First Amendment. In *Madison's Hand*, Bilder writes “By 1789, in the First Congress, he (Madison) embraced interpretive questions arising from constitutional ambiguity.”<sup>11</sup> Constitutional ambiguity, rather positive or negative, had a massive impact on Early America and was an undoubtedly critical issue facing all three branches of the newly formed United States government.

The Constitution left the actual powers of the Supreme Court somewhat unknown. Although Article III expresses some powers, the Court was not clearly and definitively expressed. This gave the Court the latitude to establish itself as a legitimate power in the federal government, specifically as a coequal with the two other branches. It took the Supreme Court a decade to eventually establish itself as the final arbiter of the Constitution. This critical decision is found in the landmark case *Marbury v. Madison* (1803), which is the singular most important ruling in the expansion of the Supreme Court's power. The case of *Marbury v. Madison* concerned Madison's refusal to deliver commissions to appoint dozens of circuit court judges by outgoing President John Adams. These attempted circuit court nominations have come to be known as the midnight appointments. One of these undelivered commissions would have appointed William Marbury of Maryland as a circuit court judge. After Madison's refusal, Marbury then filed a lawsuit demanding that the commission be delivered. However, the Supreme Court's decision is not important because of the case itself, but rather the precedent that it established. The Justices ruled that Madison's refusal to deliver the commissions was illegal. The decision written by John Marshall did not order Madison to deliver the commissions, rather it claimed that the Judiciary Act of 1789 that allowed Marbury to bring his claim to the Court was unconstitutional because it extended the Court's power beyond its original guidelines.

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<sup>11</sup> Bilder, *Madison's Hand*, 154.

Through this decision, *Marbury v. Madison* established judicial supremacy, which is the notion that the Supreme Court is the final arbiter of Constitutional interpretation and have the power to declare a law unconstitutional. Thus, *Marbury v. Madison* established the Supreme Court's power in the structure of the government, specifically their judicial authority over the Constitution.

After the ratification of the Bill of Rights and the establishment of judicial review, the next century was marked by an absence of First Amendment interpretation by the Supreme Court. Rather, the story of the First Amendment in early America is an often-neglected part of American history. This is largely through no fault of the Court itself. Author Michael Gibson asserts that many First Amendment cases from the lower State Courts did not reach the Supreme Court due to particular societal pressures, threats of violence, and financial burdens among the population.<sup>12</sup> In addition to these pressures, the Supreme Court did not hear many cases that regarded the First Amendment because they were under the impression that the First Amendment did not apply to the states, which was later changed due to the incorporation of the due process clause of the Fourteenth Amendment. However, this was not officially "added" until 1937, despite the incorporation of the Fourteenth Amendment in 1868. The Amendment limited state laws and actions from infringing on First Amendment grounds, thus granting the Supreme Court to overtly protect the First Amendment through concrete Constitutional grounds.

Many scholars have overlooked the history First Amendment in early 1800s America. Michael Gibson offers valuable insight into the freedom of expression in his article but neglects the freedom of religion as a valuable aspect of measuring the Court's view on the First Amendment. His study of *Goodwin* and *Anderson* offers a starting point to consider the context

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<sup>12</sup> Michael Gibson, "The Supreme Court and Freedom of Expression from 1791 to 1917," *Fordham Law Review* 55, no. 5 (1986): 268, <https://core.ac.uk/download/pdf/144223039.pdf>.

of these cases. However, while Gibson offers a study of an extended period of time, the years 1812 to 1821 were particularly important to the development of First Amendment interpretations. Using a smaller time period allows for a deeper understanding of these cases when considering the intricate political context of the Supreme Court and other political actors. Thus, a deeper study of this specific period rejects the notion that the First Amendment was an unimportant aspect of the Supreme Court during early America. Rather, it emphasizes the complex and roundabout way the Supreme Court ruled upon the First Amendment during this critical juncture in American history. The Supreme Court cases in this decade offer a new Constitutional narrative on the importance and interpretation of the First Amendment, despite its lack of precedence for actual decisions during early America. To thoroughly study the cases of *Goodwin*, *Dartmouth*, and *Anderson*, it is necessary to analyze all aspects of each case. These include exploring political biases, considering interpretations, and the impacts of the various political figures on the decisions of these cases. Considering these components allows for a robust inquiry into the importance of these cases in the history of the First Amendment.

Although secondary scholarship on the First Amendment and its interpretation in early America tends to be scarce, the secondary scholarship on these cases offers critical context on how these cases were ruled. For example, Gary Rowe highlights the vital relationship between the judiciary and the First Amendment in his article on *U.S. v. Hudson and Goodwin* “it was intimately bound up with the central institutional actor of the period: the jury.”<sup>13</sup> The early Supreme Court was concerned with the “common law freedom of the press: the freedom to

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<sup>13</sup> Gary Rowe, “The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes,” *The Yale Law Journal* 101, no. 4 (January 1992): 937, <https://openyls.law.yale.edu/handle/20.500.13051/8685>

publish without prior restraint.”<sup>14</sup> Rowe’s article, although impactful, only glosses over the impact of the First Amendment on the case itself. He rather focuses on the impact of the case on Constitutional history, which was the abolition of federal common law crimes in the United States. Although this is certainly important, *Goodwin*, in addition to the other two cases studied, also have a subliminal impact on Constitutional history of the First Amendment.

Historians have yet to draw a link between these three cases, however studying them in sequential order offers numerous connections across their decisions, especially centering around the First Amendment. *Dartmouth* is similar to *Goodwin* because both cases merely imply the First Amendment, yet do not use it for Constitutional justification. Rather, these cases rule on more concrete grounds. The Supreme Court respected their Constitutional boundary to not apply the First Amendment to the states. Contrary to the prior two cases, *Anderson v. Dunn* serves as a different example, where the Supreme Court ruled on the functions of the federal government, rather than the states. However, the Court still refused to directly indicate precedent on the First Amendment, rendering the freedoms open to interpretation for nearly a century. Although the Court never explicitly used the First Amendment to justify a decision, the Justices of the Court still found ways to incorporate their interpretations of the Amendment into the written opinions. Thus, the impact of the Supreme Court on the First Amendment is not direct; rather, the Justices opted to use more concrete Constitutional grounds to Constitutionally justify cases, while also shaping the future of First Amendment cases.

Placing these three cases in the necessary context of a critical moment of American history offers new insights into the intentions of both the political actors and Supreme Court Justices. The political strife between the Democratic-Republicans and Federalists in conjunction

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<sup>14</sup> Rowe, “The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes,” 937.

with the Marshall Court provides nuance to these cases that have been previously missing throughout secondary Constitutional scholarship. Considering the originality of the Madisonian political philosophy allows for a cohesive overview of these Cases that aims to frame Madison's intentions for the First Amendment in a practical and pragmatic timeline of the often-forgotten legacy of the First Amendment in early the 1800s United States. Therefore, although the Supreme Court is often thought of as an unbiased and coequal branch of government to check both the legislative and executive branches, these three cases reveal the underlying factionalism and party politics that existed during the early formation of America. The Court's powers outlined in the Constitution may point to objectivity, however the nature of disagreement of what the Constitution meant evolved the Supreme Court into a political entity in practice.

## Chapter One: The Connection of Freedom of Speech in *U.S. v. Hudson and Goodwin* (1812)

The branches of the federal government began to take shape as the country itself matured. The Federalists held complete power over all three branches during the Washington presidency from 1789-1797. With George Washington serving as President during this frame, the Federalists remained in firm control throughout the three branches. An example of Federalist domination during the early 1790s was Supreme Court nominations and confirmations. As the President, Washington had the vested power through the Constitution to appoint the first Supreme Court. Supreme Court Justices are not democratically elected by the population of the United States like Presidents, Senators, and House Representatives. Rather, the President nominates a judge from district or circuit court, and the Legislative branch then confirms the nominee. Therefore, whichever party is in power of the Executive also controls Supreme Court nominations. Federalist President George Washington chose to appoint John Jay as the first Chief Justice of the Supreme Court. Although Jay was qualified, Washington chose him for the position because their political beliefs aligned. In addition to Jay, Washington was able to appoint numerous Justices, in addition to John Jay, that aligned with Federalist values and ideas of Constitutional interpretation. Thus, Federalist Justices ruled in favor of Federalist policies, which conveyed the inherent political bias that existed in the Supreme Court. The judicial branch of the United States was therefore as equally politically driven as the Legislative and Executive branches from the onset of the new Republic.

Madison's political beliefs proved to be somewhat fluid with his crucial, yet slow and deliberate shift from the Federalist to the Democratic-Republican party in 1792. Madison's shift in party indicated a shift in his attitude toward the federal government, as the Democratic-



Republicans were in favor of states' rights over federal government power. The ambiguity that was left in the Constitution allowed the Supreme Court and other areas of the federal government to expand its own power. Madison and the Federalists of the Convention are therefore somewhat responsible for the expansion of power the federal government saw in the early Republic because of the ambiguity of the founding document. The paradox of James Madison lies in the difference of Madison the Constitutional writer and philosopher and his eventual career as a politician. As the Constitution came to be a living and breathing document, Madison's position on the power dynamics of the new government drastically changed. Thus, his shift in 1792 creates an opposing relationship between the man who is credited with much of the writing of the Constitution and the politician that would eventually take office as the Fourth President of the United States.

After James Madison left the Federalists, a new political party began to rise to prominence. The years that followed his departure saw a political relationship form between Madison and Thomas Jefferson. Together, these political giants created the Democratic-Republican party, which would stand in opposition to the Federalist part for the next four decades. The popularity of the Democratic-Republican party came to ahead in 1800. In what came to be known as the Jeffersonian Revolution, the new party began to unseat the Federalists from power. This was of major concern to Marshall, who wrote to Alexander Hamilton in 1801: "By weakening the office of President, he (Jefferson) will increase his personal power. He will diminish his responsibility, of the fundamental principles of the government & become the leader of that party which is about to constitute a majority of the legislature."<sup>15</sup> The quote is contradictory: how would decreasing Presidential power increase President Jefferson's power?

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<sup>15</sup> John Marshall, "To Alexander Hamilton from John Marshall 1 January 1801," *Founders Online*, National Archives, Accessed October 22<sup>nd</sup>, 2022, <https://founders.archives.gov/documents/Hamilton/01-25-02-0154>

Although Jefferson would decrease his own Presidential influence, weakening the office and therefore the federal government more broadly was in opposition to the Federalist agenda. In favor of a strong national government, Marshall's concern was over the weakening of the Presidential role itself, thus decreasing the authority of the federal government over the states. However, the Marshall led Supreme Court would stand against the newly controlled Democratic-Republican government, in what would mark a generation political strife that would persist until the early 1820s.

Marshall's tenure as a Supreme Court Justice influenced his colleagues' perspectives on Constitutional interpretation. Marshall aimed to employ the Constitution as something beyond a referential guideline, as Chester Farr writes "The Constitution, a shadowy vision of political theories, grand, indeed, to behold, but intangible and elusive, became under his (Marshall) hands, a living and breathing entity."<sup>16</sup> Marshall sought to interpret the Constitution through the lens of a Federalist. He used many of the same political philosophies as his mentor and close friend George Washington. Through his rigorous Constitutional interpretation, Marshall expanded and clarified the ambiguity of the Constitution through the Supreme Court. As B.J. Ramage notes "It was Marshall, indeed, who took up the work laid down by Washington, and, by a long series of masterly decisions, converted the American constitution into a living instrument for carrying out those far-reaching conceptions of federal government which had been thrust upon most thinking men during the critical period of our early existence."<sup>17</sup> Marshall's brilliance of converting the Constitution into a living and breathing entity is seen in the most influential decision of the

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<sup>16</sup> Chester Farr, "John Marshall," *The American Law Register and Review* 42, no. 6 (1894): 428, <https://www.jstor.org/stable/i272895>.

<sup>17</sup> B.J. Ramage, "John Marshall, Southern Federalist," *The Sewanee Review* 9, no. 4 (1901): *John Hopkins University Press*, 129. <https://www.jstor.org/stable/27528172>.

Marshall Court era. *Marbury v. Madison* (1803) established the notion of judicial review. Recognizing itself as the highest Constitutional authority granted the Court justification to any decision. Thus, the Marshall Court largely interpreted the founding document through a Federalist lens without Constitutional opposition from the other branches

The first Supreme Court case that regarded the First Amendment was *United States v. Hudson and Goodwin* (1812). In 1808, Barzarali Hudson and George Goodwin owned a newspaper named the *Connecticut Courant*. The owners published an article that stated the Jefferson administration, in conjunction with Congress, had paid \$2 million dollars to Napoleon Bonaparte, the leader of France. In return, the United States would have been able to enter a new treaty with Spain. The federal government then sued the owners of the newspaper for seditious libel. The case was taken to the Connecticut State Court, where the owners of the newspaper were convicted of seditious libel. Hudson and Goodwin then appealed to the Supreme Court. The Court overturned the state court decision, unanimously ruling that Hudson and Goodwin could not be punished because the Constitution did not explicitly state a law that outlawed this specific type of libel. Democratic-Republican Justice William Johnson delivered the Court's unanimous decision stating "And such is the opinion of the majority of this Court: For, the power which congress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects."<sup>18</sup> The case established that since there was no federal law against seditious libel, the Supreme Court nor the circuit courts didn't have the right to convict the defendants of the crime. Thus, *Goodwin* did not directly rule on the First Amendment. However, the implicit protection of the freedom of speech and press is found in its connections directly to the history of the legality seditious libel in the early United States.

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<sup>18</sup> *United States v. Hudson and Goodwin*. 11 U.S. 32. (1812).

Although the First Amendment is implied in *Goodwin*, it was not the focus of the Supreme Court. The main question of the case evolved into whether the federal courts could use common law to prosecute those who did not violate a specific Constitutional law. The defense of Hudson and Goodwin centered around the federal court's inability to expand their power to rule on common law. This is an inherent Republican argument, because it would decrease the power of the Supreme Court and the federal government. Conversely, the Jefferson administration argued that the Supreme Court should be able to expand their definition of common law crimes to convict Hudson and Goodwin. Therefore, this case serves as a paradoxical example of the fluidity of both parties. Although both sides would have argued for the other, Constitutional ambiguity allowed for either side to be argued for, regardless of the political biases of both the prosecution and the defense.

It is crucial to consider the political biases of the *Connecticut Courant* to comprehend why the newspaper would have published an article falsely criticizing the Jefferson administration. As two strong Federalist citizens and writers, Hudson and Goodwin took obvious opposition to the new political power of the Republicans. Author E. Wilder Spaulding writes "They (Hudson and Goodwin) were regular attendants at the First Church and Federalist in politics, Goodwin was probably the most active manager of one of the largest print-shops in country. Hudson and Goodwin were indeed citizens of Congregational and Federalists."<sup>19</sup> Therefore, Hudson and Goodwin likely saw Jefferson and Madison as a threat to their values and ideals. Their attempted slander of the Jefferson Administration is thus best understood by the political context of the evolving time period of American politics.

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<sup>19</sup> Wilder Spaulding, "The Connecticut Courant, a Representative Newspaper in the Eighteenth Century," *The New England Quarterly* 3, no. 3 (1930): 443, <https://doi.org/10.2307/359397>.

The *Connecticut Courant* was an overtly Federalist newspaper, as they had even published political satire about the Jeffersonian presidency in a previous issue. The newspaper proclaimed Jefferson to be a “king”. This vigorously condemned his adequacy as the newly elected President, even in a satire. After they had escaped the grip of the English crown, this accusation would have served as a warning to readers that the Jefferson presidency and Republican leadership writ large would resemble the English monarchy. The satire also indirectly criticizes Madison, who became the Secretary of State under the Jefferson administration. Hudson and Goodwin’s political biases are therefore equally as important as the biases of the Court. By investigating the motives behind the defendants’ publication of the article, it becomes clear how Federalist’s sentiments shaped their response to the emergence of the Democratic-Republicans. Political divide and strife are inherently tied into *Goodwin*, as well as the subsequent cases that followed.

*United States v. Hudson and Goodwin* indirectly regarded the freedom of the press. The Court could not rule directly on First Amendment grounds in *Goodwin* because the freedoms did not yet apply to the states. Despite some passing references, the Court couldn’t emphasize the Amendment. Instead, the Court justified its ruling through more concrete and clear Constitutional means. However, Johnson still offered small insights into the protection and interpretation of the Amendment. Although the Court did not want to overstep its boundary enforced by the Constitution, even mentioning the Amendment provided framework for future interpretation. Since First Amendment cases sparingly made it to the Court, the Justices took advantage of opportunities to protect the rights of citizens, even if they could not directly rule on the First Amendment. Thus, the Court used the ambiguity of the Constitution to allow

themselves to lay the foundation of future First Amendment interpretation without violating the Constitution.

Madison's involvement in shaping policy that regarded seditious libel during the late 1790s has a direct connection to *Goodwin*. The newly formed United States Congress passed the "Alien and Sedition Acts of 1798", which established various regulations regarding naturalization of aliens, imprisonment of non-citizens, and seditious statements against the government. One crucial aspect of *Goodwin* was the illegality of seditious libel, which established that publishing any defamatory or slanderous material against the U.S., government was a criminal offense.<sup>20</sup> After two years of existence, the Acts are nullified as a failure of domestic American policy. The election of 1800, which saw Jefferson elected as the third President of the United States, signaled an end to the Alien and Sedition Acts, and therefore an end to regulation that was influenced by English common law.<sup>21</sup> Jefferson's election also signaled an end to the Federalist party and a push for federal governmental control. The tandem of Madison and Jefferson acted early in the Presidency, as the "election of Jefferson as president and an influx of Democratic- Republicans in Congress signaled the end of the Sedition Act of 1798. As Wagner writes "The law expired in 1801 with Jefferson pardoning anyone punished under the act and the House returning any fines collected."<sup>22</sup> The emphasis of the First Amendment in the Jeffersonian presidency signaled a sense of importance for these freedoms from the Executive and Legislative branches. However, the political context and biases of the

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<sup>20</sup> Congress, *Draft, Alien Sedition Acts*. 1798.

<sup>21</sup> Jay Wagner, and Anthony Fargo, "Criminal Libel in the Land of the First Amendment," *International Press Institute*, (October 2012): 5, <http://legaldb.freemedia.at/wp-content/uploads/2015/05/IPI-CriminalLibel-UnitedStates.pdf>.

<sup>22</sup> Wagner and Fargo, "Criminal Libel in the Land of the First Amendment," 11.

various actors during this time period and surrounding *Goodwin* offers an alternative view on the role of the First Amendment in *Goodwin*.

One of the Jefferson administration's earliest political actions was the nullification of the Alien and Sedition Acts of 1798. The founders of the new Democratic-Republican party co-wrote the Virginia and Kentucky Resolutions before Jefferson entered office. The Resolutions of 1798 denounced the Alien and Sedition Acts as an unconstitutional overreach of federal power not that was explicitly granted in the Constitution. They reasoned that the laws usurped the rights of the states and violated the civil liberties of Americans. Jefferson and Madison wrote in the Resolutions "the freedom of religion, of speech, and of the press, insomuch that whatever violated either throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."<sup>23</sup> This quote is vital to understanding Madison's opinion on *U.S v. Hudson and Goodwin*. Jefferson and Madison themselves emphasized the importance of the First Amendment in opposition to the Alien and Sedition Acts, stating that the laws violated numerous freedoms of the people. However, in the first Supreme Court decision that regarded seditious libel, the first amendment is not included in any capacity.

The nullification of the "Alien and Sedition Acts" was considered to be in accordance with the Constitution. Jefferson and Madison's campaign to abolish the Act was one of the earliest protections of the freedoms of speech and press by any important political figures. However, when considering the larger political context, it is equally vital to remember the motivations of Jefferson and Madison during the early period of the Jefferson Presidency. The "Virginia and Kentucky Resolutions" were ultimately rejected by numerous states. However,

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<sup>23</sup> Congress, *Draft, Alien Sedition Acts*. 1798

their writings served a larger purpose. The Resolutions of 1798 united the Democratic-Republican party, as Americans became wearier of the growing control of the federal government under the Federalists. The “Virginia and Kentucky Resolutions” should therefore be seen as a precursor to not only the Jeffersonian Presidency, but also the Supreme Court’s eventual ruling in *Hudson v. Goodwin*, which would mirror Jefferson and Madison’s arguments found in the Resolutions. The paradox in the case of *Goodwin* is that the Federalist defense relied on the same arguments that Jefferson and Madison used to oppose the Alien and Sedition Acts. Therefore, Jefferson and Madison’s own reasoning was used against their own case, which furthered the inconsistency of early American politics.

The connection between seditious libel and freedom of the press is integral to understand the implications of the First Amendment in *Goodwin*. Although the case does not explicitly mention freedom of the press, the interpretation of seditious libel in the case is inherently connected to the First Amendment. This is because one’s ability to speak or publish against the government was prohibited in the “Alien and Sedition Acts” and was then threatened in the *Goodwin* case. The Acts were therefore connected to the First Amendment, which relates the Amendment to *Goodwin*. Justice Johnson was therefore justified by including the freedoms of speech and press, although the Court did not establish precedent on the First Amendment.

Libel is an obvious implication of the press, however what constituted libel in early America was a contested topic. Joe Mathewson argues in his book *The Supreme Court and the Press*, common libel cases “generally required only proof of publication of critical words about someone plus some indication that they were defamatory, harmful to a person’s reputation.”<sup>24</sup>

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<sup>24</sup> Joe Mathewson and Fred Graham, *The Supreme Court and the Press: The Indispensable Conflict* (Northwestern University Press, 2011,) 152.



This simplistic definition, although not congruent to the definition held today, was certainly understood as the role of the First Amendment in *Goodwin*. The First Amendment was therefore not used for Constitutional ruling but was nevertheless implied as a component of ruling on seditious libel and its legality. This notion is further expanded upon by Gary Rowe, “*Hudson* formally incorporated this Jeffersonian understanding into Constitutional law so that, although the opinion was short and sketchy, it was built on bedrock.”<sup>25</sup> Although Johnson did not directly cite the First Amendment, Chief Justice William Johnson’s reasoned that to destroy the fundamental foundation of seditious libel, he also had to destroy the presupposition of which seditious libel rested. Thus, he saw the abolition of common law crimes as a necessity in the destruction of seditious libel in the court system. Therefore, the destruction of common law crimes also protected First Amendment freedoms, as seditious libel couldn’t be considered common law. *Goodwin* used more concrete Constitutional grounds, such as the abolishment of federal common law crimes, to protect the First Amendment. Simple framework was therefore established which would eventually be used for future precedents that were not established until the early 1900s.

Analyzing Madison’s opinion of this case is nuanced because of the evolution of his beliefs on the power of the federal government. Madison’s transition from the Federalist party to the Democratic-Republicans signaled a shift in his opinion of seditious libel and his interpretations of the First Amendment. Madison’s older Federalist ideals would have disagreed with the weakening of the federal government. However, Madison’s shift to the Democratic-Republican party and his writing of the Virginia and Kentucky Resolutions would have found Madison the Constitutionalist lawmaker satisfied with the Supreme Court’s decision. Juxtapose

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<sup>25</sup> Rowe, “The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes,” 935.

to Madison the Republican, who would have been unsatisfied with slanderers against the Jefferson regime left unpunished. Despite this shift and paradox, Madison's opinions on how the freedoms of press and speech should be interpreted did not change. Madison's issue would not have been with how these freedoms were interpreted and protected, or even the Court's assertion of Hudson and Goodwin's innocence. Rather, his dissatisfaction would have laid with the defaming of the Jefferson administration and the Democratic party. However, it would have been relatively impossible for Madison to object to this ruling under Constitutional grounds.

Madison's role in the history of *Goodwin* extends past his opinion of the Supreme Court's decision. His main impact in *Goodwin* was his writing of the Resolutions. The Supreme Court's decision was rooted in Jefferson and Madison's opinions on the Alien and Sedition Acts, as Rowe asserts "The Jeffersonian understanding of the Constitution, which Justice Johnson summarily articulated in *Hudson*, was forged in the furnace of the Sedition Act."<sup>26</sup> The *Goodwin* case revealed several paradoxes in Madison's thought process and the opinion delivered by the Supreme Court. First, was the ironic nature of the relationship between Madison, seditious libel, and Hudson and Goodwin. The story defamed Jefferson and his administration, however it was Jefferson and Madison who believed that newspapers should be allowed to publish without prior restraint. Therefore, Jefferson and Madison were libeled and slandered, but their interpretation of the freedom of the press permitted Hudson and Goodwin to publish their article. Thus, although Madison himself was slandered, he nonetheless would have approved of the Court's interpretation of the freedom of the press. The "Resolutions of 1798" ultimately hurt the case against Hudson and Goodwin and rendered them innocent citizens of the crimes the Administration accused them of.

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<sup>26</sup> Rowe, "The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes," 936.

The even larger paradox in connection with Jefferson and Madison was the hypocrisy of the case against Hudson and Goodwin. The same administration that nullified the Alien and Sedition Acts brought the lawsuit against Hudson and Goodwin accusing the writes of seditious libel. Therefore, the Jefferson administration sued the Connecticut Courant for a crime they sought to abolish a decade earlier. The Jefferson administration did not sue the proper Constitutional grounds, but rather out of political spite. Their argument of seditious libel is a departure from the Republican ideals that shaped the Jeffersonian presidency. Jefferson championed the Republicans as the party of freedom of expression and the exchange of ideas, but his suit against Hudson and Goodwin betrayed his own beliefs. This abandonment of their own political philosophy amplifies the underlying current behind this case which was political power. The Jefferson administration, who abolished seditious libel in name of the freedom of the press, prosecuted free American for seditious libel, which many viewed as a direct violation of freedom of the press. Thus, the case is inherently political and hypocritical, as Jefferson was not concerned with the freedoms or rights of Hudson and Goodwin, but rather his own political power and standing. The contradiction highlights the tension between the government's desire to maintain its authority and the respect of the freedoms of speech and press.

Gary Rowe defined the early understanding of the freedom of the press as “guaranteeing nothing more than the common law definition of freedom of the press: the freedom to publish without prior restraint.”<sup>27</sup> Supreme Court’s decision to abolish federal common law crimes in *U.S. v. Hudson and Goodwin* expands this early understanding of the freedom of the press. With no law against common libel at a federal level, the Supreme Court expanded the definition of the freedom of the press through Constitutional framework, not precedent. Although the Court

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<sup>27</sup> Rowe, “The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes,” 936.

aligned with the original Madisonian interpretation of the Constitution, their decision was ultimately against the federal government. Thus, this case has two different aspects to understand Madison's opinion on its outcome. He would have been satisfied with the outcome based on his opinion on seditious libel earlier in Jefferson's presidency. However, the Supreme Court ruling against the federal government was ironically counterintuitive to the desires of the Jefferson administration. This case therefore serves as a paradoxical example of the dynamics of policymaking and political bias, which were in direct opposition in the pretext and decision from the Court.

*U.S. v. Hudson and Goodwin* serves as the genesis of the Supreme Court's ability to create foundation for First Amendment interpretation without precedent, despite the distractions of political biases. The rise of the Republican party and the descension of the Federalists was a critical moment in American history. The First Amendment was caught in the crossfire of this conflict. However, the Amendment was still somewhat interpreted. The cases that follow *Goodwin* saw a rise in Federalist opposition from within the Court itself. The smaller yet powerful Federalist political figures would therefore shape the foundation of the First Amendment through these cases. Thus, the theme of political biases and power dynamics persists past *Goodwin* and into the late 1810s in the "golden age" of the John Marshall Court era.

## Chapter Two: The Freedom of Religion in *Dartmouth College v. Woodward* (1819)

The time period between 1812 and 1819 marked further Democratic-Republican representation in both the Executive and Legislature. The election of 1814, although historically insignificant, saw the Democratic-Republicans hold control in both the House and Senate. The Election of 1816 saw an end to Madison's term as President, but a further extension of Democratic-Republican power. James Monroe was elected the fifth President of the United States, handily defeating Federalist opponent Rufus King. Democratic-Republicans continued their success, as the election of Monroe catapulted the country into what is commonly known as The Era of Good Feelings. This sense of unity was in large part due to the aftermath of the War of 1812. The Era is also commonly known for being the end of Federalist influence, as the elections into the early 1820s saw an eventual dissolution of the party completely. Although the Federalists fell out of power in the Executive and Legislative, the influence of John Marshall and other Federalist political figures remained a factor in Constitutional interpretation. Although "The Era of Good Feelings" is largely remembered as a transitional period into Democratic-Republican control, Republican legislative agendas were often thwarted by John Marshall and the Supreme Court. Although Democratic-Republican Presidents appointed their own Supreme Court Justices, earlier interpretations of the Supreme Court before the Jacksonian Revolution saw Federalist influence across Constitutional interpretations. Thus, the newly appointed Justices were held to previous Federalist precedents and the influence of the wise and influential John Marshall.

Federalists and Republicans differed on many issues that would be sent to the Supreme Court in the early 1800s. For example, the adversaries differed on the establishment of a national

bank. Landmark Supreme Court Case *McCulloch v. Maryland* (1819) further exemplified the political divide between the Federalist led Supreme Court and the Democratic-Republican figureheads. Much to the objection of figures such as Jefferson and Madison, the Marshall Court ruled that the national government did have a right to establish a national bank due to the Necessary and Proper Clause of the Constitution. This case also contributes to the larger Constitutional narrative on the expansion of federal power by the Supreme Court. Although the rise of the Republicans marked the end of Federalist influence in the Executive and Congressional, the Judiciary was far different because there was no specified term limit in the Supreme Court. Thus, the Judicial branch remained a Federalist led arm of the national government, despite the efforts of Democratic Presidents to appoint new Supreme Court Justices. Federalists had withstood anti-Federalists during the inception of the United States and writing of the Constitution., Chief Justice John Marshall was now the last one of the Federalists in a position of significant power by 1819. Marshall's three-decade stint as Chief Justice ensured Federalist influence would persist beyond their stints in the Executive and Congressional branches.

By 1819, Marshall was the well-established Chief Justice of the Supreme Court was an evolving time period of American political history. *McCulloch v. Maryland* was not the only case that stood as an example for this There is perhaps no greater example of the political strife between Marshall and the Democratic-Republicans than *Dartmouth College v. Woodward* (1819). On its face, *Woodward* is a simple Constitutional law case, however its larger implications on the First Amendment and the political division during the early 1800s offers a unique perspective on the power dynamic of numerous political actors and institutions.

Dartmouth College was founded in 1769 by Congregational Minister Eleazar Wheelock, who was granted a charter by the British Royal Crown. The Charter specifically reads the purpose of the institution was the “Christianizing children of pagans.”<sup>28</sup> Three years before the case was brought to Court, the legislature of New Hampshire, which was mainly comprised of Democratic-Republicans, amended the original charter to restructure the College’s administration. These changes effectively made Dartmouth a public, state-run institution. The state then sought to replace the original Board with its own members, however the Trustees then sued on the grounds that the state violated numerous laws. Unsurprisingly, the Republican led Supreme Court of New Hampshire originally sided with the state of New Hampshire. The original board of trustees then sued the newly installed Board, which was comprised of New Hampshire legislators who were members of the Republican party. In a 5-1 decision, the Supreme Court ruled that it was unconstitutional for the state to convert Dartmouth from private to public based on the language of the Contract Clause. The Court vowed to protect the importance of contracts in this case as an essential aspect of ensuring a functional Republic. Although the precedents that were set around the Contract Clause are vital in Constitutional history, the lesser-explored elements of the *Dartmouth* decision, such as the Court’s stance on religious freedom, hold significance in the narrower First Amendment history.

The decision of the Court was written by Chief Justice John Marshall. The lengthy document details the founding of Dartmouth College, it’s purpose and intentions, and ultimately why the original charter is protected under the Contract Clause. As the case reads, mainly writing on the Contract Clause, “From the instrument itself, it appears, that about the year 1754, the Rev.

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<sup>28</sup> Theodore Atkinson, *Dartmouth College Charter*, 1769, accessed January 3<sup>rd</sup>, 2023, <https://www.library.dartmouth.edu/digital/digital-collections/dartmouth-college-charter>.

Eleazer Wheelock established, at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion.”<sup>29</sup> The Christianization of Native Americans in colonial America was controversial, but also common. The original intent of Dartmouth College was therefore used to spread Christianity, thus, in the 18<sup>th</sup> century, Dartmouth was a religious institution. Although the education of natives did not last past the 1800s, Dartmouth certainly kept its religious background. It extended mainly into the early 1900s with famous Dartmouth President William Jewett Tucker, however Dartmouth has become far more secular in the modern age.

The priority of the *Dartmouth* case was to interpret the legitimacy of the Dartmouth College Charter in context with the text of the Contract Clause. The case text reads “From this summary examination it follows, that Dartmouth College was, under its original charter, a private eleemosynary corporation, endowed with the usual privileges and franchises of such corporations, and among others, with a legal perpetuity, and was exclusively under the government and control of twelve trustees, who were to be elected and appointed, from time to time, by the existing board, as vacancies or removals should occur.”<sup>30</sup> The Court therefore sought to rule directly on the legitimacy of the Charter itself through the Contract Clause, however the nuance of the Charter itself allowed to Court to broaden its ruling to include structural interpretation of the First Amendment. Thus, *Dartmouth* is similar to what is found in

Although *Dartmouth* specifically ruled on the Contract Clause, the freedom of religion is innately ruled upon by the Supreme Court. Similar to *Goodwin*, the First Amendment is not directly ruled upon because it did not apply to the states. Despite the lack of precedent, the

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<sup>29</sup> *Trustees of Dartmouth Coll. v. Woodward* (1819) 17 U.S. 518.

<sup>30</sup> *Trustees of Dartmouth Coll. v. Woodward* (1819), 17 U.S. 518.



impact of *Dartmouth* on future First Amendment interpretations is vital in Constitutional history. Despite its impact, the case is nonetheless influenced by the politics of the Court, the prosecution, and the defense. The juxtaposition between the Federalist Supreme Court and the Democratic-Republican led Executive and Congressional proved to be a sticking point in political power, especially with James Madison's shift from Federalist to Democratic-Republican. His influence on the freedom of religion during the early 19<sup>th</sup> century is unquestionably essential to understanding *Dartmouth's* role in the undervalued role of the First Amendment in 1819.

James Madison is well-known for his interest in the practice and expression of religion in America. His fascination with religious freedom and liberty began far before his time as a politician. He developed a passion for religious pursuits while he was a student at Princeton University. Most of his friends at Princeton were eventual clergymen or studied theology. For example, Madison was classmates with future U.S. Attorney General William Bradford,<sup>31</sup> who studied divinity at Princeton. Bradford's education of Christianity and his eventual career as a politician was common in early America, as clergymen often became political leaders. The influence of Christianity was rampant throughout the early politics of the Republic. Madison even stayed at Princeton six months after graduation to study theology under Rev. Witherspoon, who is one of Madison's earliest influences on his values and ideals he would bring forth to founding the new Republic. Before the ratification of the Bill of Rights in 1791, Madison had already written extensively on the topic of religion at a state level. His previous experience informed his eventual writing of the First Amendment.<sup>32</sup> In 1776, a younger Madison, led by his

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<sup>31</sup> Joseph Loconte, "Faith and the Founding: The Influence of Religion on the Politics of James Madison," *Journal of Church and State* 45, no. 4 (2003): 699, <https://www.jstor.org/stable/23920935>.

<sup>32</sup> Loconte, "Faith and the Founding: The Influence of Religion on the Politics of James Madison," 701.

future ally Thomas Jefferson, took a key role in devising the Virginia Declaration of Rights, in which Madison suggested the subtle, yet vital change in wording from “fullest Toleration” of religion to the “free exercise of religion.”<sup>33</sup> Years after the Virginia Declaration of Rights, Madison was again forced to defend his stance on the freedom of religion in his home state. Madison therefore wrote “Memorial and Remonstrance” which served as a fifteen-point defense of his own interpretation of freedom of religion. This established the pretenses for the eventual writing of the First Amendment: complete separation of church and state in America and secondly the free exercise of religion among its citizens.

Madison’s “Memorial and Remonstrance” was presented to the Virginia General Assembly in 1785. He wrote the speech in response to a law that would require Virginians to pay a tax for the salaries of Christian teachers. The speech specifically reads “The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator.”<sup>34</sup> Emphasizing both faith and intellect, Madison uses both the work from Locke conjunction with Christianity to argue for a completely free exercise of religion. Furthermore, “Memorial and Remonstrance” follows Locke’s *Second*

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<sup>33</sup> George Mason, *Declaration of Rights*, 1776, *National Archives*, Accessed February 22<sup>nd</sup>, 2023, <https://www.archives.gov/founding-docs/virginia-declaration-of-rights>

<sup>34</sup> James Madison, “Memorial and Remonstrance Against Religious Assessments.” *Founders Online*, National Archives and Records Administration, Accessed December 1<sup>st</sup>, 2022, <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

*Treatise and A Letter Concerning Toleration*.<sup>35</sup> The importance of the conscience itself was therefore integral to Madison's philosophy behind the freedom of religion. The brilliance of Madison was in his ability to combine two separate disciplines of religion and Enlightenment philosophy into one doctrine. It is further noteworthy because the two components seem to oppose each other. John Locke was against the full toleration or allowance of the freedom of religion. However, Madison was still able to use aspects of his philosophy to justify his definition of the freedom of religion. Madison asserted that the freedom of conscience was endowed by the *Creator*, not human beings. Thus, Madison's commentary in "Memorial: and Remonstrance" serves as a precursor to the eventual ratification of the Bill of Rights in 1791 and offers more context into the seemingly subjective First Amendment.

James Madison was chosen to draft the Bill of Rights primarily due to his expertise and advocacy for individual liberties and personal freedoms. His experience both with political philosophy and legislation made him the ideal candidate. Madison's work on the freedom of religion could have been seen as precedent for the Court. However, even with the multitude of sources on Madison's opinions, there was a diversification of opinion among Supreme Court Justices and politicians. Scholars have extended this debate, even questioning Madison's meaning in his earliest writings. For example, Vincent Muñoz challenges the popular notion of Madison as a "strict separationist" in his article *James Madison's Principle of Religious Liberty*. Muñoz asserts that Madison advocated for a "religion-blind"<sup>36</sup> method of freedom, where the government did not cognizance religion. Muñoz draws his thought from "Memorial" which can be summed up by a quote directly from the speech: "Because Religion be exempt from the

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<sup>35</sup> Phillip Vincent Munoz, "James Madison's Principle of Religious Liberty," *The American Political Science Review*, no. 1 (2003): 22, <https://www.jstor.org/stable/3118218>.

<sup>36</sup> Muñoz, "James Madison's Principle of Religious Liberty," 23.

authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited regarding the co-ordinate departments, more necessarily is it limited with regard to the constituents.”<sup>37</sup> Madison strongly advocated for a “religiously blind” interpretation of the Amendment, however this is not incompatible with a “strict separationist” definition. Madison held both to be true, the government should be separated from religion, and it should also avoid favoring religious groups. This definition would directly impact Marshall’s ruling in *Dartmouth* and influence the actual precedents that structured the First Amendment in the early twentieth century.

The freedom of religion in the First Amendment contains two separate clauses: the Free Exercise Clause and the Establishment Clause. These two separate notions were prevalent throughout Madison’s earlier writings. However, when written in the Constitution, the components of the freedom of religion left the Amendment to be interpreted in various lenses. Both Clauses were subject to interpretation, however the freedom of religion is divided into two related aspects. The Establishment Clause prevents the government from establishing a national religion, which would therefore infringe on the citizen’s right to freely exercise. Thus, when one Clause was ruled upon, the related Clause was also impacted in some manner. The Amendment is specifically linked to Madison’s beliefs in “Memorial.” The interpretation of Madison’s political philosophy would prove to be an entirely different challenge than the writing of the Amendment itself.

Similar to Madison’s stances on freedom of speech and press, his views on religion did not shift during his party change. The Democratic-Republicans continued to hold the same view as

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<sup>37</sup> Madison, “Memorial and Remonstrance,” 1785.

the Federalists regarding freedom of religion after the Jeffersonian Revolution. As Jefferson expresses in a letter to William Carver “A devoted friend myself to freedom of religious enquiry and opinion, I am pleased to see others exercise the right without reproach or censure; and respect their conclusions, however different from my own.”<sup>38</sup> His toleration of those who held different opinions than his own embodies the essence of the Free Exercise Clause, agreeing with the sentiments and intentions that Madison wrote with in 1791. Jefferson also expressed his views on the Establishment Clause, specifically in a letter to the Danbury Baptist Association in Connecticut. On January 1<sup>st</sup>, 1802, Madison wrote “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," building a wall of separation between Church & State. Adhering to this expression of the supreme will of the nation on behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.”<sup>39</sup> Jefferson’s emphasis on “conscience” likens his ideas to Madison’s Lockean inspired principles of individual rights. Thus, Madison and Jefferson did not deviate from their original interpretation of the freedom of religion. Both Federalists and Republicans therefore held similar interpretations of the freedom of religion. However, when the First Amendment was interpreted by the Supreme Court, even subliminally, the Federalist Supreme Court used the Amendment to ensure the strengthening of the Federal Government and

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<sup>38</sup> Thomas Jefferson, “From Thomas Jefferson to William Carver, 4 December 1823,” *Founders Online*, National Archives and Records Administration, Accessed March 2<sup>nd</sup>, 2023, <https://founders.archives.gov/documents/Jefferson/98-01-02-3903>.

<sup>39</sup> Thomas Jefferson, “Jefferson's Letter to the Danbury Baptists the Final Letter, as Sent,” *Library of Congress*, 1802, Accessed March 7<sup>th</sup>, 2023, <https://www.loc.gov/loc/lcib/9806/danpre.html>.

protect their own power in the process. Interpretation of the Amendment that is found in *Dartmouth* is therefore influenced by Federalist policies and politics.

The interpretations of the freedom of religion in *Dartmouth* are influenced by the political actors who took part in the case. In addition to Chief Justice Marshall, attorney Daniel Webster was also a key figure in *Dartmouth*. Before representing the old board of trustees, Webster was the leader of the Federalist Party in the House of Representatives. He stood as a chief opposition to the Jeffersonian Revolution. Before his nomination as a Representative, Webster was selected as a delegate to the Rockingham Convention, which stood as an opposition coalition to the election of none other than James Madison.<sup>40</sup> Webster began to solidify himself as a bullwork against Madison from the beginning of his Presidency. Although the Democrats gained popularity, New England remained key battlegrounds where Federalists remained in power. It was not until after the *Woodward* case when Webster would return to the House to fight against the Jacksonian revolution and serve as a founding member of the Whig Party, which would find success in American politics for years to come. But in between stints, Webster served as an attorney, and was able to safeguard Dartmouth from Democratic control.

Daniel Webster's role in the *Dartmouth* case was defending his alma mater to protect Dartmouth College from state takeover. Although his chief aim was to defend the institution, he attended and cherished, Webster had ulterior motives to defend the former Board of Trustees. With the influence of the Democrats in the legislative branch in New Hampshire, the overtaking of Dartmouth College contributed to their larger effort of publicizing private businesses. This granted more power to the states themselves. Thus, Webster took specific interest in this case to also protect Federalist values in New England while also defending the rights of his alma mater.

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<sup>40</sup> Robert Remini, *Daniel Webster: The Man and His Time* (New York, New York: W.W. Norton and Company, 1997).

*Dartmouth* would ultimately solidify Webster as one of the biggest opponents to the Democratic-Republicans through the defense of a private institution. The duality of Webster's motivation is the untold story of *Dartmouth*, as a small Federalist coalition emerged to defend religious freedom through the Contract Clause.

Webster's prominence as an attorney was well known throughout the country. He was Dartmouth educated, a skillful speaker, and an influential leader. Despite these attributes, his political affiliation was far more important than any skill Webster possessed. This is not to discredit his brilliance; rather, to amplify the small, yet powerful anti-Democratic coalition that existed in the late 1810s to early 1820s. Webster quickly learned how to apply his own Federalist ideas on the Constitution to Chief Justice Marshall's. Thus, while he served as an attorney, Webster and Marshall were a powerful duo that upheld the Federalist Constitutional agenda, which would please the Madison of 1791, but certainly disappoint the Madison the Democrat.

Webster's arguments at the Dartmouth College case are well-known, specifically his peroration. There is no official transcript of the peroration given after his argument, which is why Thomas Burack of the New Hampshire Law Review refers to his words as "mythology."<sup>41</sup> Webster gave an impassioned speech on his love for Dartmouth, after his Constitutional argument. His words have earned him the unofficial title as "re-founder" of Dartmouth. The end of his impassioned peroration spoke as such "Sir, I know not how others may feel, (glancing at the opponents of the college before him), but for myself, when I see my *Alma Mater* surrounded like Cesar in the senate house, by those who are reiterating stab upon stab, I would not for this

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<sup>41</sup> Thomas Burack, "Wax, Wick, and Flame: Performing Daniel Webster's Peroration from the Dartmouth College Case." *New Hampshire Law Review*, (November 20, 2019) 4, [https://scholars.unh.edu/cgi/viewcontent.cgi?article=1376&context=unh\\_lr](https://scholars.unh.edu/cgi/viewcontent.cgi?article=1376&context=unh_lr).

right hand have her say to me.”<sup>42</sup> The speech brought tears to Marshall’s eyes. Although Webster vigorously defended his alma mater, his remarks could also be taken as how the Federalists saw the rise of the Democrats. Marshall and Webster were *literally* surrounded by Democrats in the Court Houses and Governmental buildings. Their power was dwindling, however keeping Dartmouth a private institution was a massive moral win for the Federalists. Men like Marshall and Webster were not chiefly concerned with the theological aspect of Dartmouth, but they were worried about the Democratic and state power rhetoric that had overtaken the federal government and much of the country. For example, aiming to display a Constitutional unity under Federalist guise, Marshall refused to officially rule on the case until he was able to persuade his colleagues to rule with Webster.<sup>43</sup> Thus, these men were thrust into a defense of the privatization of citizens and institutions, and in a “slight of hand” of Constitutional law, were able to protect and defend the freedom of religion through more concrete Constitutional grounds that would establish both the precedent for the Contract Clause and framework for the freedom of religion and the First Amendment as a whole.

In cases that directly reference the freedom of religion, the Supreme Court referenced either the Establishment or Free Exercise Clause to justify their decision. However, the Court uses neither in *Dartmouth*. Despite this apparent discrepancy, religion is still referenced numerous times in the *Dartmouth* decision. These small thoughts from the Supreme Court offer insight into the Justice’s opinions on the First Amendment. For example, Chief Justice Marshall specifically asserts his view on the Free Exercise Clause: “Be it further enacted, that perfect

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<sup>42</sup> Daniel Webster, “Peroration of Daniel Webster, Dartmouth College.” <https://www.constitution.org/2-Authors/dwebster/peroration.htm>

<sup>43</sup> Remini, *Daniel Webster: The Man and His Time*, 159.



freedom of religious opinion shall be enjoyed by all the officers and students of the university; and no officer or student shall be deprived of any honors, privileges or benefits of the institution, on account of his religious creed or belief.”<sup>44</sup> This quote exemplifies the influence of Webster and the Constitutional brilliance of Marshall. This quote also affirms Munoz’ theory of the “religion-blindness” that Madison advocated for in his writings. The Court ruled that religion cannot have bearing on “privileges or benefits” of that institution. Thus, the Court asserted that institutions themselves should also remain blind to religion, which aligned with Madison’s beliefs.

The *Dartmouth* case continues the same themes prevalent in the *Goodwin* case. The freedom of religion was not used to justify the Court’s decision, yet the Court laid the foundation for what the freedom of religion meant and how it would be protected in the judiciary. The underlying issue of *Dartmouth* was the balance of political power within the federal government. Both the Republicans and Federalists sought to respectively gain or retain power through the *Dartmouth* case and decision. The Democratic-led state legislature of New Hampshire wanted to publicize *Dartmouth* for the political influence the institution would incur rather than what was conducive to the success of the College. Conversely, Federalist actors such as Chief Justice John Marshall and Daniel Webster were concerned with both decreasing Democratic power and defending the rights of the institution itself. The brilliance of both men was their ability to accomplish both in this case. Thus, Marshall and Webster served as a Federalist coalition against the Democratic-Republican influence of the New Hampshire state legislature. This coalition sought to preserve the rights of the private institution of Dartmouth College and Federalist political power and Constitutional interpretation. The First Amendment is therefore inherently

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<sup>44</sup> *Trustees of Dartmouth Coll. v. Woodward* (1819) 17 U.S. 518.

tioned to both Marshall and the Court through its protection in the Contract Clause because the freedom was protected by the validity of Dartmouth's charter.

Madison's writing of the First Amendment as a Federalist in 1791 counteracted his goals as a Democrat by the early 18<sup>th</sup> century. Despite the Democrats and Federalists sharing a standard definition of the freedom of religion, the effects of its interpretations heavily favored the Federalists in *Dartmouth*. Marshall used the Charter to justify the protection of freedom of religion, which Madison would agree is Constitutional under the First Amendment. However, this reasoning and justification weakened the Democratic Party, as the federal government protected the privatization of the institution. The decision thwarted Democratic power through the Contract Clause. Although Marshall and Webster protected the freedom of religion through a Federalist perspective, both Federalists and Republicans would have approved of the protection of the freedom of religion. This creates another Constitutional and political paradox: a majority of Republicans would have agreed Constitutionally but disagreed politically. This therefore serves as another example of the incongruent nature of early American politics. Thus, Madison the Constitutional author would agree with this decision Constitutionally, however Madison the Republican would have disagreed with the decision. *Dartmouth* was a loss for the Democrats because of the Constitutional brilliance of Marshall and Madison. The case also amplifies how the Supreme Court used Madison's ideas from prior years to weaken Madison's position years later.

### Chapter Three: *Anderson v. Dunn*: The Supreme Court Ruling on a Federal Case

Only two years after *Dartmouth*, the Supreme Court heard *Anderson v. Dunn*. The two years between *Woodward* and *Anderson* brought no changes to the political balance of the three branches of government. James Monroe was re-elected to a second Presidential term in 1820, running as the unopposed Republican incumbent. The Federalist Party, which had put forth a candidate in every election since 1796, saw its power decrease immensely by the 1820s. The party would eventually dissolve entirely by the middle of the decade. However, John Marshall still occupied the Chief Justice office on the Supreme Court, which extended Federalist influence within the federal government. Until 1821, the Court had only hinted at the First Amendment in *Dartmouth*. However, *Anderson* presented an opportunity for Marshall to exert federal authority over the Democratically controlled Legislative branch through Constitutional interpretation and implied First Amendment.

*Anderson v. Dunn* originated from the House of Representatives, leading to the Supreme Court to consider a case that directly pertained to the federal government's authority. In 1818, Congressman Lewis Williams brought forth a letter he had received from Captain John Anderson, which contained a bribe of \$500. Anderson was brought before the House and held for two months in custody by Sergeant-at-Arms Thomas Dunn. Anderson was held guilty of contempt, which the House held as an implied power vested in the Constitution. Anderson then sued Dunn for assault and battery and false imprisonment after his release. The case reads, "This was an action of trespass, brought in the Court below, by the plaintiff in error, against the defendant in error, for an assault and battery, and false imprisonment: to which the defendant

pleaded the general issue, and a special plea of justification.”<sup>45</sup> The Court unanimously decided that Congress had could punish citizens for contempt. The Court therefore denied recovery to Anderson. The Court held that “Congress had a right to preserve itself and its authority, meaning that Congress had to be able to punish those who disobeyed its subpoenas and orders.”<sup>46</sup> Similar to both *Goodwin* and *Dartmouth*, the First Amendment was not used to justify its decision. However, *Anderson* is the first time the Supreme Court directly references and protects the Amendment.

The latter part of the Supreme Court’s ruling functions as a cautionary message to Congress. While affirming Congress’ right to impose punishments for contempt, the Court issued a warning that it could not employ its authority in a manner that violated First Amendment freedoms. The Court Case reads “Privilege of Congress is reduced by the sixth section, art. 1. of the constitution, to exemption from arrest, and freedom of speech. From the nature of the enumerated privileges, it is evident, that the sole object of giving them was to prevent interruption of the business of the Houses, not to render the person and feelings of members more sacred than those of other citizens.”<sup>47</sup> Although Congress had the implied power to punish an individual for contempt, the threat of Congress to overstep its boundaries was a factor that Justice Marshall and his colleagues were aware of. The difference between *Anderson* and the prior cases is that the decision directly references a protection of the First Amendment. Although the decision did not establish precedent, the freedoms were importantly safeguarded against the Congressional branch. The Court therefore protected First Amendment freedom by warning

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<sup>45</sup> *Anderson v. Dunn* 19 U.S. 204. (1821)

<sup>46</sup> Gibson, “The Supreme Court and Freedom of Expression from 1791 to 1917,” 276.

<sup>47</sup> *Anderson v. Dunn* 19 U.S. 204. (1821)

Congress that their power is limited. *Anderson* is the first time in American history that the first five freedoms were prioritized in a Supreme Court decision. Whereas *Goodwin* and *Dartmouth* imply or indirectly mention freedoms, *Anderson* is a direct protection the Amendment itself, despite the lack of precedent it establishes. Although the Court made no official decision, the unanimous protection of the Amendment conveyed a sense of unity and solidity among the Justices of the Court. Thus, despite political differences, the Federalists and Republicans of the Supreme Court protected the First Amendment. This unified the two political parties in First Amendment interpretation and marked a key Constitutional decision where the Court warned against an overreach of federal power.

The Contempt of Court and the First Amendment are directly linked in *Anderson*. Because of the ambiguity of the Constitution, Contempt of Congress could have been interpreted broadly and narrowly, like the First Amendment itself. Contempt of Congress, in theory, encompasses numerous different crimes that an individual could commit against Congress. When considering contempt in a broad definition, anyone could use the law to justify any type of crime or punishment. The contempt could mean a multitude of actions or words, which makes the contempt of Congress impossible to interpret objectively. Therefore, the Court took a narrow stance of contempt. A further study of the unification of Constitutional interpretation among the Supreme Court offers a clearer understanding of the meaning of the Court's decision.

The decision was written by Justice William Johnson, who also registered the judgment in *Goodwin*. Johnson was the first appointment of Thomas Jefferson and wrote nearly half of the dissents against the Marshall Court. Johnson is famously known for being the first Democratic-Republican Supreme Court Justice and dissenter from Marshall. His opposition to Marshall marks his legacy. Despite the commonality found in *Anderson*, his opposition to John Marshall is

well-covered in scholarship. Concerning political biases, Johnson also had reservations of Marshall's true intentions when ruling on Supreme Court cases. In *Fletcher v. Peck* (1810), Johnson refused to rule on Constitutional grounds. This was because Johnson was weary of Chief Justice Marshall's political motivations for the decision, rather than objective Constitutional ruling. Johnson claimed that Marshall's broad interpretation of the Contract Clause was unconstitutional, stating "I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court."<sup>48</sup> Clearly, Johnson challenged Marshall not on his Constitutional interpretation, but his actual allegiance to his civic duty as a Supreme Court Justice. Furthermore, this quote by Johnson solidifies that the Justices were aware of each other's political biases and parties. Although Johnson made diligent efforts to impede Marshall's Federalist agenda, challenging Marshall was a daunting and sometimes unsuccessful undertaking. Marshall was a strong, powerful, and respected leader and Constitutional interpreter. His prominence as Chief Justice gave Marshall the power to persuade many of the Democratic Justices to continually rule in his favor.

Popular history of the disagreements between Marshall and Johnson fails to account for the times the two Constitutional giants were on the same side of cases, as found in *Anderson*. Examining *Anderson* in context of the First Amendment offers a clear explanation for this apparent aberration of agreement between Marshall and Johnson. The commonality found in

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<sup>48</sup> *Fletcher v. Peck* (1810) 10 U.S. 87.

First Amendment interpretation united the Justices. Although the two constantly battled over Constitutional interpretation, the power and importance of the First Amendment superseded any differences the two had. Thus, *Anderson* is a critical case in Constitutional history and marked the first sign of agreement over the importance of the freedoms by the Supreme Court.

The commonality of interpretation between Marshall and his Democratic counterparts in First Amendment cases was not a coincidence. These three decisions are all connected for a specific reason. The recurring theme among these three cases is that the Supreme Court had a fundamental consensus on the construal of the First Amendment, despite the freedoms not being the central issue in these cases. Despite the political leanings of Justices like Marshall, the dominant agreement on Constitutional law between Federalists and Democrats during the early 1800s indicated a steadfast dedication to safeguarding the protections afforded by the Bill of Rights. However, because the Amendment remained ambiguous, the Court refused to set solid precedent on what the First Amendment meant in practice. Rather, the Justices offered framework on the Amendment for future Supreme Court's to rule on the First Amendment in future cases. Thus, even when the Supreme Court did not have to worry about the states, they still opted to only provide framework for the Amendment, rather than strict precedent. Thus, even when the Court was not required to consider the states, they chose to establish framework for the Amendment, instead of strict precedents.

*Anderson* serves as an extension of Marshall's influence over the Court that was prevalent throughout the early 1810s and early 1820s. The political strife between the Federalists and Democrats had ceased in the Legislative and Executive, but Marshall kept his seat as Chief Justice through the rise of the Republicans. The appointment of Democratic justices should have marked an end to Marshall's power. However, it was not until after the *Anderson* decision that

Marshall was overwhelmed by the Democratic majority in the Court. While scholars have attributed a range of accomplishments to Marshall, his most notable achievement within the Court itself was his ability to influence the other Supreme Court Justices. Even as a minority in the Court, Marshall was able to maintain a Federalist lens of the Constitution through his prominence as a Justice. This is a testament to Marshall's brilliance as a Constitutionalist. His ability to maintain power even as a minority Justice influence the history of early First Amendment interpretation and impacted the cases that would establish precedence on the Amendment in the early 1900s.

*Anderson v. Dunn* is a specifically intriguing case when considering the larger narrative of the First Amendment in early America for numerous reasons. Contextualizing the language used by William Johnson and Madison's original thoughts is important considering the history of the First Amendment. The protection of the Amendment is important, but there was still no concrete ruling from the Supreme Court on what the First Amendment protected. Therefore, the case does not contain a real connection to Madison's past except for his perceived importance of the First Amendment itself. Considering this connection to Madison is simple: Madison came to believe that the First Amendment was essential to American liberty, thus he would have approved of the Court's emphasis of the freedoms in *Anderson*. However, this case does not lend any substantial insight into the contextualization of Madison's opinions on the *rulings* of the Amendment itself.

Although there is no record of comment from Madison on *Anderson*, there is a letter Madison received from George Hay, on April 23<sup>rd</sup>, 1821. George Hay was a Democratic-Republican lawyer and judge in Virginia and noted friend of Madison. In his letter, Hay disapproved of the Court's decision, writing "I have devoted some time lately to an investigation



of the decision and reasoning of the S. Court in the Case of *Anderson vs. Dunn*; involving the question concerning the power of the H.R. to punish for a Contempt. If you have not attended to this decision, published in the *Nat: Intr.* you will be amused by looking into it. The decision is erroneous, and the doctrines ultra-federal. Yet they seem to have made no impression here, or indeed anywhere else.”<sup>49</sup> Hay’s message to Madison is interesting for two main reasons. First, it proves that *Anderson* was an important case regarding political division in America.

Interestingly, the unanimous decision by the Supreme Court unified the Federalists and Democrats on the Court, but Democrats such as Hay were left unsatisfied. Hay does not specify what the “ultra-federal” aspect of the decision, but prior context on Hay’s politics can offer insight into his viewpoint on the decision.

George Hay was an outspoken advocate for freedom of the press. In 1803, Hay issued an open letter to Thomas Jefferson, claiming that Congress had no control over the freedom of the press, as well as claiming that the Alien and Sedition Acts were unconstitutional. Therefore, his opinion on the *Anderson* case being “ultra-federal” is yet another concern over partisan politics rather than a First Amendment concern. The “ultra-federal” nature of the decision was the Supreme Court granting the House of Representatives the power to fine and imprison citizens if they were found guilty of Contempt of Court. Hay’s concern was that this power was not *explicitly* expressed in the Constitution; rather, it was an implied power. Thus, the federal government grew stronger. Therefore, he took particular issue with *Anderson* because the Court asserted an implied power that granted more power and regulation to the federal government.

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<sup>49</sup> George Hay, “To James Madison from George Hay, 23 April 1821,” National Archives and Records Administration, Accessed March 1<sup>st</sup>, 2023, <https://founders.archives.gov/documents/Madison/04-02-02-0256>.

This assertion would be in opposition to the Republican motive of weakening the central government and granting more power to state governments.

Hay had underlying motivations when considering the Court's decision in *Anderson* to be "erroneous." Because of his dedication to limiting federal power and his loyalty to the Republican party, he disagreed with the Court's ruling that Congress had the. Implied power to punish for Contempt. Hay's lack of commentary on the Court's restriction of the federal government's limited scope of punishment power could be attributed to his concentration on the expansion of implied powers. This resulted in a seeming rift between Democrats such as Hay and Johnson, who clearly differed on the Constitutional interpretation of implied powers which directly impacted the First Amendment. Thus, the decision in *Anderson* is nuanced for both the Republican and Federalist parties, as the power of the Federal government was expanded, but was also warned of future actions that could be taken against the First Amendment. The Court expanded federal power but warned only to a certain point. Therefore, *Anderson* should be seen as a Constitutional compromise which benefitted both parties.

Although secondary scholarship is limited on *Anderson*, author Michael Gibson offers a deep analysis of the case in his article for the Fordham Law Review. Gibson offers a viewpoint from the nullification of Sedition Act. Harkening back to *Goodwin*, Gibson asserts that the federal government found new ways to stifle criticism from the public.<sup>50</sup> The utilization of the Contempt of Court served this purpose. The fascination aspect of the *Anderson* verdict is that it restricted solely the extent to which Congress could impose penalties, not the basis for the action. Even though *Anderson* was the first Supreme Court case to clearly express the freedoms of speech and press, it did not explicitly protect these freedoms Constitutionally. As author Michael

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<sup>50</sup> Gibson, "The Supreme Court and Freedom of Expression from 1791 to 1917," 276-277.

Stern highlights “Thus, while the *Anderson* case established that each house of Congress had some power to punish nonmembers for contempt, the scope of that power and the extent to which its exercise would be subject to judicial review were left to future cases.”<sup>51</sup> The Marshall Court did not establish any precedent in *Anderson*. Rather, it laid the groundwork for future cases of Contempt to rule on First Amendment structure as the Court continued to rule on cases. *Anderson* furthered the trend of the Supreme Court’s unwillingness to create Constitutional precedent around the First Amendment. However, it is largely different in context to the prior two cases studies because the First Amendment was applicable to the federal government, however the Court still refused to establish precedent. The official case reads: “the House of Representatives will confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporal punishment, or even death, and exercise it in cases affecting the liberty of speech and of the press.”<sup>52</sup> The decision sent a warning to Congress, one that was similar but more pronounced than the decision that was found in *Goodwin*. The Court would not stand for any inclination of the infringement of the First Amendment. Thus, the Marshall Court, after two failed attempts in *Goodwin* and *Dartmouth*, made a broad yet *direct* claim to protect the First Amendment against the powers of Congress.

*Anderson* should be seen as a deviation from the previous two cases in terms of content. The case rules on the First Amendment in a different but equally important way. The Supreme Court’s protection of the First Amendment in a case where it was not necessary is different from the previous two. *Goodwin* and *Dartmouth* are implied First Amendment cases, whereas *Dunn* is

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<sup>51</sup> Michael Stern, “Point of Order: Colonel Anderson’s Contempt,” *Point of Order: A Discussion of Congressional Legal Issues*, (October 2019). <https://www.pointoforder.com/2019/10/13/colonel-andersons-contempt/>.

<sup>52</sup> *Anderson v. Dunn* 19 U.S. 204. (1821).

an indirect defense of the First Amendment from federal power. The Marshall Court, which had previously only implied the First Amendment in previous cases, outwardly and explicitly warned the federal government that infringement would not be tolerated. *Anderson* was the first true and measurable decision that protected the First Amendment rights of American citizens. Thus, *Anderson* serves as a small step forward, but nonetheless a step in ensuring First Amendment rights for American citizens.

Although *Anderson* was a net positive for the freedoms of press, speech, and association, it was still not a definitive and conclusive protection of the First Amendment. In this sense, the case falls in line with both *Goodwin* and *Dartmouth*. It established no precedent on what the First Amendment meant, nor what constituted the specific freedoms protected. Rather, the Marshall Court mentions the First Amendment, but offers no substance in Constitutional interpretation of the Amendment itself. The importance of *Anderson* in First Amendment history was the overt protections of the Amendment, rather than framework found in *Goodwin* and *Dartmouth*. *Anderson* is no more or less important than the others, yet it offers a different insight into the First Amendment's importance. The case propels the First Amendment into relevance beyond simple framework and places an importance of freedoms of citizens. The first protection of citizens' rights is therefore crucial to establishing the First Amendment as a vital aspect of Constitutional history.

### **Conclusion: What It All Means**

The First Amendment was not a highly contested topic in the early portion of the 19<sup>th</sup> century by the federal government for two main reasons. First, the Supreme Court was more concerned with party politics than Constitutional interpretation. Each decision in these three cases contain a different political motive or action that attempted to further either Democratic or Federalist politics. This was the result of a tumultuous political climate marked by instability and uncertainty of the rise of the Republicans and decline of the Federalists. The Supreme Court cases that implied the First Amendment are clouded by the politics of the Justices of the Supreme Court. The rise of the Republicans marked the beginning of Republican influence in the Supreme Court. Although Democratic Presidents nominated and confirmed Democratic Justices, Marshall's power and influence over Constitutional interpretation upheld Federalist ideals until the early 1820s. First Amendment cases largely fell to the background of these cases. Thus, the political power dynamics of the post-Washington era superseded concerns of protecting First Amendment freedoms.

The second reasoning for a lack of importance around the First Amendment was the ambiguity of the Amendment. Madison himself understood the obscurity of the Constitution and the First Amendment. For this reason, he favored a living Constitution that would take shape as the document was interpreted. Since the Amendment was ambiguous, it was interpreted in numerous different ways. Thus, a living Constitution is crucial to understanding why Court encountered immense difficulty ruling on the First Amendment. Since there was no previous precedent, the Court chose to rule with more concrete Constitutional means such as the Contract

Clause. Using these Constitutional means offered the decisions a stronger basis, while also offering subliminal structure around the First Amendment.

A thorough examination of this era and these three cases reveal the Court as a highly politicized branch of the federal government. Since its inception, the Court has not been an objective nor centrist branch. Rather, it is as equally politicized as both the Executive and Legislative branches. *Marbury v. Madison* (1803) granted the Supreme Court the right of judicial review as the final arbiters of Constitutional law. However, those arbiters were not objective, especially during the inception of the Court. Despite the unprecedented success of the Marshall Court and its impact on Constitutional history, political strife persisted throughout its tenure. Marshall's influence over the Democratic Justices which is evidenced by their support for Federalist-favored decision. Marshall therefore used his power to interpret the Constitution through a Federalist lens, which therefore

The story of the Marshall Court in relation to the First Amendment was the beginning to a history of Constitutional interpretation. Although it would be unfair to assert that every decision made by the Court was for political motivation, different views and interpretations of the Constitution evolved into political parties favoring specific interpretations of the First Amendment. Thus, the Supreme Court has always been a highly politicized branch of the federal government. The political polarization of the Court in modernity has therefore existed since the inception of the United States. The story of the often forgotten and neglected First Amendment in early American history serves as the starting point for political polarization in the Supreme Court. However, the Court would come to rule on First Amendment cases in the future. For example, author John Gibson used the example of *Marshall v. Gordon* (1917), where the Supreme Court used the precedent it had set in *Anderson* nearly a hundred years later. The Court

found a congressman innocent of contempt of the court when he used offensive language that the House of Representatives found insulting. As Michael Gibson eloquently writes “That end was the preservation of the legislature’s ability to perform its duties, and the Court flatly declared that criticism of the House did not impede House’s abilities to perform its duties.”<sup>53</sup> The House was then forced to release the congressman because of a citation of First Amendment freedoms. Thus, although *Anderson* did not directly rule on the freedom of speech itself, the Court’s warning in 1821 was conducive for the Court’s decision in 1917. Therefore, although *Anderson* still did not explicitly outline precedent for the First Amendment, it paved the way for clearer and tighter rules regarding the First Amendment in years to come.

The *Marshall* case represents a larger narrative surrounding the evolution of the Supreme Court’s decisions. Although cases such as *Goodwin*, *Dartmouth*, and *Anderson* did not establish precedent, they did express specific principles that would later be used in other First Amendment cases to establish precedents that are still used today. The larger context of studying First Amendment cases in conversation with each other offers insight into the eventual precedents that eventually took place.

The eleven years that spanned across *Goodwin*, *Dartmouth*, and *Anderson* would have politically upset James Madison the Democrat. The decisions from the Federalist leaning Marshall Court certainly weakened his party’s standing despite an overwhelming majority in the Legislative and control of the Executive. However, Madison the First Amendment writer would have agreed with the principles that the Court established regarding the First Amendment. The abolishment of the Alien and Sedition Acts, the protection of both the Establishment and Free Exercise Clause, and warning of the protection of these rights would have satisfied Madison as a

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<sup>53</sup> Gibson, “The Supreme Court and Freedom of Expression from 1791 to 1917,” 278.

Constitutional writer. The nuance in this realm is that the Court did not explicitly cite Madison's ideas or reasons, yet their ideas on the First Amendment aligned with Madison. Thus, the Federalists and Democrats were both aligned with Madison on the First Amendment; however, it was never important nor intentional during this time period. The Court's inability to rule on First Amendment cases during the early 1800s was ironically what Madison intended: a Constitution that would be interpreted pragmatically and realistically to build a coherent and sound governmental structure. James Madison's goal was achieved when the Supreme Court established precedents in the early 1900s after nearly a century of Constitutional interpretation beforehand. The often-forgotten story of the First Amendment in the early 1800s should be considered an essential part of First Amendment history, rather than a neglected section of the Amendment's evolution.



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