

## THE OTHER MADISON PROBLEM

David S. Schwartz\* & John Mikhail\*\*

*The conventional view of legal scholars and historians is that James Madison was the “father” or “major architect” of the Constitution, whose unrivaled authority entitles his interpretations of the Constitution to special weight and consideration. This view greatly exaggerates Madison’s contribution to the framing of the Constitution and the quality of his insight into the main problem of federalism that the Framers tried to solve. Perhaps most significantly, it obstructs our view of alternative interpretations of the original Constitution with which Madison disagreed.*

*Examining Madison’s writings and speeches between the spring and fall of 1787, we argue, first, that Madison’s reputation as the father of the Constitution is unwarranted. Madison’s supposedly unparalleled preparation for the Constitutional Convention and his purported authorship of the Virginia plan are unsupported by the historical record. The ideas Madison expressed in his surprisingly limited pre-Convention writings were either widely shared or, where more peculiar to him, rejected by the Convention. Moreover, virtually all of the actual drafting of the Constitution was done by other delegates, principally James Wilson and Gouverneur Morris. Second, we argue that Madison’s recorded thought in this critical 1787 period fails to establish him as a particularly keen or authoritative interpreter of the Constitution. Focused myopically on the supposed imperative of blocking bad state laws, Madison failed to diagnose the central problem of federalism that was clear to many of his peers: the need to empower the national government to regulate the people directly. Whereas Madison clung to the idea of a national government controlling the states through a national legislative veto, the Convention settled on a decidedly non-Madisonian approach of bypassing the states by directly regulating the people and controlling bad state laws indirectly through the combination of federal supremacy and preemption. We conclude by suggesting that scholars*

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\* Foley & Lardner Bascom Professor of Law, University of Wisconsin-Madison Law School.

\*\* Carroll Professor of Jurisprudence, Georgetown University Law Center. This Essay was prepared for the Symposium entitled *The Federalist Constitution*, hosted by the *Fordham Law Review* on October 2, 2020, at Fordham University School of Law. The authors wish to thank William Ewald, Jack Rakove, Brad Snyder, and David Stewart, as well as all the participants in this Symposium for their helpful comments, and in particular, Mary Sarah Bilder, Jonathan Gienapp, Daniel J. Hulsebosch, and Richard Primus. The authors also thank Corey Matthews, Daniel Meagher, and Saniya Suri for their patient and helpful editing.

*pursue a fresh and more accurate assessment of Madison and his constitutional legacy, particularly with respect to slavery.*

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#### INTRODUCTION

Constitutional law has a James Madison problem. Among historians and constitutional scholars, Madison is the most revered “Founding Father.” His glowing reputation, despite a few dents and scratches, still gleams in the sun. Prominent authors continue to publish repetitive, hagiographical characterizations of him that garner attention and mainstream press royalties. By contrast, critical accounts of Madison continually fail to penetrate the remarkable mythology that has been built around him. Madison thus presents a challenge for American history and constitutional scholarship. His mythic reputation as the main protagonist in the framing and ratification of the Constitution and his status as the premier authority on constitutional interpretation are serious distortions of historical fact, yet they continue to flourish in spite of their tenuous foundations. Moreover, scholars and judges persist in the belief that the Constitution is a “Madisonian” document.<sup>1</sup> All

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1. See, e.g., *Hinrichs v. Speaker of the House of Reps.*, 506 F.3d 584, 601–02 (7th Cir. 2007) (Wood, J., dissenting) (describing judicial review as a “Madisonian idea”); *Pharm. Rsch. & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 87 (1st Cir. 2001) (“Madisonian Influences on Allocation of Legislative Power in the American Legal System.”); GEORGE THOMAS, *THE MADISONIAN CONSTITUTION* (2008); Steven G. Calabresi, *Textualism and the*

of these unjustified narratives unduly block our view of alternative Federalist understandings of the Constitution, the theme this Symposium is devoted to exploring.<sup>2</sup>

According to the received wisdom, Madison was both the single most important actor in the creation of the Constitution—“the father of the Constitution”—and its most authoritative theorist and interpreter.<sup>3</sup> These twin elements of Madison’s reputation are unwarranted, but to date they have successfully resisted efforts to correct them. If anything, Madison’s influence is increasing, thanks to the growing influence of conservative originalists in American law and society, who find many of Madison’s views congenial to their constitutional politics. Seeking to fight fire with fire, liberals likewise often comb Madison’s writings for choice quotes and insights that can be strategically used in judicial opinions, briefs, law review articles, and newspaper op-eds. The majority and dissent in last term’s decision in *Seila Law LLC v. Consumer Financial Protection Bureau*,<sup>4</sup> for instance, read like a sort of rap battle of dueling Madison quotations, and many other cases and academic debates do the same.<sup>5</sup>

What is so troubling about the enduring myths about Madison is that the facts that undermine them are all well known, or at least should be by now. The prodigious paper trail that Madison and other founders left behind and the best scholarship on the creation of the Constitution tell us all we need to know to “right-size” him. Despite this, commentators continue to lionize Madison, exaggerating his contributions to the founding, drawing every possible inference from ambiguous or missing evidence in his favor, and consistently ignoring or explaining away important counterevidence.

*Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1374 (1998) (describing “our Madisonian constitutional regime”); Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 70 (2012) (referencing “the Madisonian Constitution that we have inherited from the founders”); see also Jack M. Rakove, *The Real Motives Behind the Constitution: The Endless Quest*, 48 REV. AM. HIST. 216, 217 (2020) (identifying the “prevailing belief that the United States still inhabits a ‘Madisonian constitution’”).

2. Cf. MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* 7 (2003) (observing that “our knowledge of the Federalists, apart from Madison, is surprisingly limited”).

3. Rakove, *supra* note 1, at 217 (“In nearly every conventional story of the adoption of the Constitution, Madison still stands *primus inter pares*.”). See generally DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS* (Trevor Colborn ed., 1974); LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* (1995); IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800* (1950); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* (1913); MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

4. 140 S. Ct. 2183 (2020).

5. Compare *id.* at 2197 (Roberts, C.J.) (“As Madison explained, ‘[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.’” (alteration in original) (quoting 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834))), with *id.* at 2227 (Kagan, J., dissenting) (“To the contrary, Madison explained, the drafters of the Constitution . . . opted against keeping the branches of government ‘absolutely separate and distinct.’” (quoting THE FEDERALIST NO. 47, at 325 (James Madison) (Jacob E. Cooke ed., 1961))).

To a large extent, the primary academic debate about Madison has centered on a single question that takes for granted the received wisdom about his unrivaled contributions to the founding. To many, Madison's public career can be divided into two distinct periods, which appear difficult to reconcile: throughout the 1780s, and in particular from 1787 to 1789, he was a staunch nationalist who sought to protect and expand the powers of the federal government, whereas from the early 1790s onward, he became a vigorous Jeffersonian proponent of strict construction and states' rights. What happened and why did he change course? But to others, Madison was in fact consistent throughout. This is the so-called "James Madison Problem" to which scholars have devoted much attention in recent years.<sup>6</sup> Crucially, all the participants in that debate agree that we can learn most of what we need to know about the original Constitution from viewing its formation and early operation through Madison's eyes.

The "other" Madison problem to which this Essay refers is the uncritical acceptance of Madison's privileged status in the first place. Particularly in light of Mary Sarah Bilder's pathbreaking scholarship on Madison and the Constitutional Convention, we cannot accurately understand the Constitution's intellectual origins by perceiving them primarily through Madison's eyes,<sup>7</sup> as many commentators have assumed.<sup>8</sup> Madison was an important founding-era figure, to be sure, but he was not the "father of the Constitution," the "indispensable man," or the key actor in the making of the Constitution. Nor was he a uniquely privileged interpreter of the

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6. The problem was first given this name in 2006 by Gordon Wood when he titled a chapter in his book, "Is There a 'James Madison Problem?'" See GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* 141–72 (2006). The topic itself, however, is much older and arguably can be traced as far back as a 1792 letter from Alexander Hamilton to Edward Carrington, in which Hamilton calls attention to Madison's shifting positions during the first years of the republic. See Letter from Alexander Hamilton to Edward Carrington (May 26, 1792), in 11 *THE PAPERS OF ALEXANDER HAMILTON* 426–45 (Harold C. Syrett & Jacob E. Cooke eds., 1966). For a representative sample of recent scholarship on the "Madison Problem" as it is conventionally understood, see, for example, JEREMY D. BAILEY, *JAMES MADISON AND CONSTITUTIONAL IMPERFECTION* (2015); BANNING, *supra* note 3; JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* (1999); Jeff Broadwater, *James Madison and the Constitution: Reassessing the "Madison Problem,"* 123 *VA. MAG. HIST. & BIOGRAPHY* 202 (2015); Alan Gibson, *The Madisonian Madison and the Question of Consistency: The Significant Challenge of Recent Research*, 64 *REV. POL.* 311 (2002); Kevin R. Gutzman, *A Troublesome Legacy: James Madison and "The Principles of '98,"* 15 *J. EARLY REPUBLIC* 589 (1995); Peter S. Onuf, *The "Madison Problem" Revisited*, 28 *LAW & HIST. REV.* 515 (2010).

7. See generally MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015); Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention*, 80 *GEO. WASH. L. REV.* 1620 (2012); Mary Sarah Bilder, *James Madison, Law Student and Demi-lawyer*, 28 *LAW & HIST. REV.* 389 (2010).

8. See, e.g., BANNING, *supra* note 3, at 2 (explaining that "it is Madison on whom we unavoidably depend to comprehend" the "intellectual foundations" of the Constitution and that "[i]f we have misinterpreted his conduct or mistaken his ideas, we have misunderstood the Founding"); RAKOVE, *supra* note 3, at xvi ("Madison was the crucial actor in every phase of the reform movement that led to the adoption of the Constitution . . . . We simply cannot understand how or why the Constitution took the form it did unless we make sense of Madison.").

Constitution, with special insight into its meaning that even his most significant contemporaries lacked. Some of his constitutional ideas were intelligent and penetrating, but many others were half-baked, opportunistic, or just plain mistaken, and they have been rightly rejected by the verdicts of history and legal doctrine.<sup>9</sup>

A comprehensive reassessment of Madison would require confronting at least two related narratives about him: the historian's Madison and the lawyer's Madison. The former conceives of Madison as "[t]he major architect of the Constitution,"<sup>10</sup> while the latter views him as a uniquely privileged constitutional theorist, whose unparalleled authority entitles his interpretations of the Constitution to special weight and consideration.<sup>11</sup>

Although this Essay does not purport to be comprehensive, it addresses both of these conventional narratives, focusing mainly on Madison's pre-Convention writings, Convention speeches, and theory of the "extended republic" that he ultimately expressed in *Federalist 10*. We argue that a careful review of these writings—together with the received wisdom that views these writings as foundational—yields two important conclusions. First, Madison's reputation as father of the Constitution is largely a historiographical artifact that is often simply assumed—and there are compelling reasons to doubt the accuracy of this label. Second, Madison's solution to the problem of federalism—the primary theoretical challenge confronting the Framers—was inadequate and diverged sharply from the solution actually produced by the Convention. Given these inadequacies, the claim that Madison was the chief architect or even an especially perceptive theorist of the Constitution seems untenable.

If this is correct, then Madison's reputation as our leading constitutional theorist must stand or fall on his activities after 1787. That remarkable career

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9. See, e.g., *United States v. Butler*, 297 U.S. 1 (1936) (rejecting Madison's interpretation of the spending power); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (rejecting Madison's theory of implied powers and conclusion about the constitutionality of the bank). Madison's assertion in the 1798 Virginia Resolution that states had the right and duty "to interpose for arresting the progress of" federal laws that were a "deliberate, palpable, and dangerous exercise" of powers "not granted" by the Constitution contributed to a constitutional counterculture of radical states' rights, nullification, and arguably even secession. It has been rejected by the verdict of history. See generally Kentucky Resolutions (Nov. 10, 1798), reprinted in 1 MELVIN I. UROFSKY & PAUL FINKELMAN, DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 158 (3d ed. 2008); Virginia Resolutions (Dec. 21, 1798), reprinted in 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, *supra*, at 162; see also STANLEY ELKINS & ERIC MCKITRICK, AGE OF FEDERALISM 700–01, 719–20 (1993); MARK E. NEELEY, LINCOLN AND THE TRIUMPH OF THE NATION: CONSTITUTIONAL CONFLICT IN THE AMERICAN CIVIL WAR 5–8 (2011).

10. WOOD, *supra* note 6, at 143.

11. See, e.g., NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 24–25 (2019) (describing Madison as "the Father of the Constitution," whose portrait he keeps in his chambers as a reminder of his obligation to be faithful to "the original Constitution"). A third narrative is that of the political scientists, who see Madison as anticipating key theoretical tenets of modern American democracy. See, e.g., ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); MARTIN DIAMOND, AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT (William A. Schambra ed., 1992). Although we do not focus on this third narrative here, we address elements of it in Part II. See generally Part II.

includes many writings and events that figure prominently in early American history, including his other *Federalist* essays, his defense of the Constitution at the Virginia ratifying convention, his leadership in the First Congress, his partisan battles of the 1790s, his presidency, and his extensive correspondence about the Constitution during his retirement from 1817 until his death in 1836. Through these latter activities, Madison undoubtedly made a significant mark on post-ratification constitutional development and interpretation. We believe that both the quality of these ideas and the depth of their influence are also somewhat exaggerated and likewise fail to justify Madison's mythic reputation.<sup>12</sup> But we do not take up these broader topics here. Instead, we leave a more comprehensive assessment of Madison's successes as a politician and his overall legacy for another occasion. Here, we focus on the period between the spring and fall of 1787, when Madison is widely credited with articulating the ideas that shaped the crafting of the Constitution. Although for our purposes, Madison's contributions to *The Federalist* are later developments that should be treated separately, we extend our inquiry to *Federalist 10* because scholars traditionally believe that the ideas formulated there were an integral part of Madison's thinking before and during the Convention. Our primary aim is to open up a new conversation about Madison by arguing that his contributions during this critical period fail to justify his reputation as the Constitution's father and leading theorist.

#### I. NOT YOUR CONSTITUTION'S FATHER

Madison's reputation as the "father of the Constitution" has never been justified by any recognized standards of modern historical scholarship. Instead, it appears to be largely an ongoing historiographical artifact. According to Douglass Adair, this honorific title was first given to Madison by former president John Quincy Adams in 1836,<sup>13</sup> but a study of early American newspapers reveals that the term was frequently applied to

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12. For some recent studies that complicate the received wisdom on Madison and have informed our own thinking on these topics, see BILDER, *supra* note 7; JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018); Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 *LAW & HIST. REV.* 451 (2010); Farah Peterson, *Expounding the Constitution*, 130 *YALE L.J.* 2 (2020); Richard Primus, *The Essential Characteristic: Enumerated Powers and the Bank of the United States*, 117 *MICH. L. REV.* 415 (2018). Madison's role in proposing constitutional amendments and guiding them through the First Congress calls out for separate treatment in this context but requires more attention than we can provide here. For valuable discussions of this topic, see, for example, SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 157–71 (1999); KLARMAN, *supra* note 3, at 546–95; Kenneth R. Bowling, "A Tub to the Whale": *The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 *J. EARLY REPUBLIC* 228 (1988); Scott D. Gerber, *Roger Sherman and the Bill of Rights*, 28 *POLITY* 521 (1996).

13. See JOHN QUINCY ADAMS, *AN EULOGY ON THE LIFE AND CHARACTER OF JAMES MADISON* 84 (Boston, John H. Eastburn 1836) (referring to Madison as "the father of the Constitution of the United States"). See generally Douglass Adair, *The Tenth Federalist Revisited*, 8 *WM. & MARY Q.* 48, 51 (1951).

Madison before then, often for partisan reasons.<sup>14</sup> The paternity claim was repeated throughout the nineteenth century,<sup>15</sup> and it gained modern currency due to its prominent endorsement by two of the leading historians of the Convention at the dawn of the twentieth century, Max Farrand and Charles Beard. Farrand, whose prodigious effort in curating the records of the Convention gave his verdict special scholarly weight, famously called Madison “the leading spirit” and “master-builder” of the Constitution.<sup>16</sup> Beard referred to Madison as “the father of the Constitution” in the course of linking his own economic interpretation of the Constitution to Madison’s ideas in *Federalist 10*.<sup>17</sup> In 1950, Irving Brant made the paternity label even more popular when he affixed it to the third volume of his six-volume biography of Madison.<sup>18</sup> More recently, Douglass Adair, Lance Banning, Jack Rakove, Gordon Wood, and other commentators have continued to use this phrase to describe what they take to be Madison’s unrivaled contributions to the founding. As we shall explain, however, none of these scholars has justified this label, and many of them treat Madison in ways that can only be characterized as hagiographical.

In this part, we argue that Madison’s reputation as the father of the Constitution is unsupported by the available evidence. We begin by calling attention to some notable filiopietistic tendencies that still pervade modern historical scholarship on Madison. We then turn to a close analysis of the unfounded paternity claim itself, identifying its main components and arguing that they do not justify affixing this label to Madison.

#### A. *The Historians’ Madison Myth*

Contemporary historians conceive of their discipline as a serious enterprise that no longer indulges in the kind of distorting hagiography one finds so often in earlier periods of historical writing. Much of the leading modern scholarship on Madison relaxes that necessary methodological rigor. Throughout the first half of the twentieth century, historians repeatedly made extravagant claims about Madison and his influence on the Constitution that have profoundly influenced constitutional scholarship to this day. Yet these claims cannot withstand scrutiny. This pattern owes a great deal to Max Farrand, Charles Beard, and Douglass Adair, three scholars who played an outsized role in shaping the received wisdom about Madison.

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14. See, e.g., *From the Richmond Whig to the People of Virginia*, AM. MERCURY (Hartford), Nov. 6, 1827 (referring to Madison as the “Father of the Constitution”); see also *Extracts from Mr. Clay’s Speech*, NEW-BEDFORD MERCURY, May 16, 1834 (same); *Mr. Niles—and the Bank of the U.S.*, RICH. ENQUIRER, July 22, 1831, at 2 (same); *Old Times*, INDEPENDENCE (Poughkeepsie), Feb. 8, 1832 (same).

15. See, e.g., JOHN FISKE, *THE CRITICAL PERIOD IN AMERICAN HISTORY, 1783–1789*, at 244 (Boston, Houghton, Mifflin & Co. 1897); WILLIAM CABELL RIVES, *HISTORY OF THE LIFE AND TIMES OF JAMES MADISON* vi (Boston, Little, Brown & Co. 1866) (describing the history of Madison’s public life as “necessarily a history of the Constitution of the United States”).

16. FARRAND, *supra* note 3, at 196.

17. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 14 (1913).

18. BRANT, *supra* note 3.

## 1. Max Farrand

Max Farrand published the first three volumes of his influential collection of the records of the federal Convention in 1911. Two years later, he published a short book on the drafting of the Constitution.<sup>19</sup> In its final chapter, Farrand assessed the relative contributions of the Framers and gave Madison the unequivocal top billing:

In the achievement of [the Convention's] task James Madison had been unquestionably the leading spirit. It might be said that he was the master-builder of the constitution. This is not an over-valuation of his services derived from his own account of the proceedings in convention, for Madison laid no undue emphasis upon the part he himself played; in fact, he understated it. Nor is it intended to belittle the invaluable services of many other delegates. But when one studies the contemporary conditions, and tries to discover how well the men of that time grasped the situation; and when one goes farther and, in the light of our subsequent knowledge, seeks to learn how wise were the remedies they proposed,—Madison stands pre-eminent.<sup>20</sup>

Given how little of the actual drafting of the Constitution Madison did and the relative contributions of other delegates, such as Gouverneur Morris, Edmund Randolph, John Rutledge, and James Wilson, these assertions are far from “unquestionabl[e]” and should have required considerable support.<sup>21</sup> Farrand proffered no evidence for these assertions, however, which apparently the reader is meant to accept on Farrand’s say-so, based on his unrivaled familiarity with the documentary records.

The distorted nature of Farrand’s discussion becomes clear when one examines his descriptions of these and other important Framers. Farrand minimizes their contributions by describing them as “Madison and his supporters.”<sup>22</sup> For example, George Washington’s primary significance at the Convention, according to Farrand, was that his “support was given *to Madison*.”<sup>23</sup> James Wilson “was *Madison’s ablest supporter*” even though he was “[i]n some respects . . . Madison’s intellectual superior,” because Wilson “was not as adaptable and not as practical” as Madison.<sup>24</sup> This claim seems at odds with the fact that Madison’s dogged insistence on a federal negative of state laws “in all cases whatsoever” was highly impractical;<sup>25</sup> likewise, his steadfast refusal to compromise on proportional representation in the Senate was hardly “adaptable.” Moreover, it was Wilson who played the leading role in writing the first complete draft of the Constitution for the Committee of Detail. Significantly, the Convention passed over Madison for that crucial committee assignment in favor of his fellow Virginian, Edmund

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19. FARRAND, *supra* note 3.

20. *Id.* at 196.

21. *See infra* note 173 and accompanying text.

22. FARRAND, *supra* note 3, at 200.

23. *Id.* at 198 (emphasis added).

24. *Id.* at 197–98 (emphasis added).

25. *See infra* notes 209–22 and accompanying text.



Randolph. (Indeed, the Convention did not appoint Madison to an important committee until late August.)<sup>26</sup> When we consider the fact that Wilson, Randolph, Rutledge, and Morris had far greater influence than Madison on the precise structure and content of Articles I, II, and III, along with their responsibility for many of the Constitution's most significant clauses and features—including but not limited to the Vesting Clauses; the Necessary and Proper Clause; the Supremacy Clause; the enumerated powers scheme of Article I, Section 8; the limits on federal and state powers in Article I, Sections 9 and 10; the Commander-in-Chief and Take Care Clauses of Article II; the jurisdictional grants of Article III; and the Constitution's all-important Preamble—Farrand's claim seems, not self-evident, but counterintuitive.<sup>27</sup>

To offset his heavy reliance on Madison's own paper trail, a more self-conscious scholar might have scrutinized his own potential availability bias in assuming that Madison was the leading spirit and preeminent Framer of the Constitution, taking care to distinguish Madison's influence on the historical records of the Convention from his influence on the drafting of the Constitution itself. Despite his brief nod in this direction,<sup>28</sup> Farrand did not do so. Nevertheless, he wrote with a special authority about the framing of the Constitution, since he had worked more closely with the documentary records of the Convention than any other scholar at the time. As a result, his account of the framing took on a special significance and set the dominant pattern for many similar assessments that followed for the next century.

Farrand's two most specific and memorable theses—that Madison was the chief architect or master-builder of the Constitution and that Wilson was his most able supporter and a close second—have been reproduced by countless commentators, sometimes nearly verbatim.<sup>29</sup> What is perhaps most notable is not these assessments themselves but the fact that no one who makes these claims ever bothers to provide any argument or evidence for them. Indeed, no such writer ever pauses to explain how claims like these could be justified or even what it means to attribute the design of the Constitution primarily to

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26. The procedure by which members of Convention committees were appointed remains uncertain, and no delegate left any records clarifying this issue. Nonetheless, the most likely answer appears to be that each state delegation chose its own member for the grand "committees of eleven," while the two five-member committees that did most of the actual drafting of the Constitution—the Committee of Detail and the Committee of Style and Arrangement—were chosen by ballot in which each member of the Convention voted. See David O. Stewart, *Who Picked the Committees at the Constitutional Convention?*, J. AM. REVOLUTION (Sept. 13, 2018), <https://allthingsliberty.com/2018/09/who-picked-the-committees-at-the-constitutional-convention> [<https://perma.cc/H8GR-L2YY>].

27. See generally 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 129–89 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (Committee of Detail documents and drafts, authored principally by Wilson, Randolph, and Rutledge); *id.* at 590–603 (Committee of Style draft, authored principally by Morris).

28. FARRAND, *supra* note 3, at 196.

29. See, e.g., RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 40 (2009); CLINTON ROSSITER, 1787: THE GRAND CONVENTION 247–48 (1966); Adrienne Koch, *Introduction* to JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at vii, xi–xii (Adrienne Koch ed., Ohio Univ. Press 1966) (1840).

the work or thought of one man.<sup>30</sup> Nonetheless, the claims are repeated, generation after generation, until they become pure dogma. Everyone *knows* that Madison was the most important man in Philadelphia. What more needs to be said?

## 2. Charles Beard

Charles Beard's *An Economic Interpretation of the Constitution of the United States*<sup>31</sup> has been enormously influential on founding-era scholarship. Many of his specific claims about the interests and motivations of the founders have been discredited or called into question,<sup>32</sup> but the broader economic approach to constitutional history he advocated has largely endured.<sup>33</sup> One clear illustration of Beard's recurring influence concerns his interpretation of Madison. Beard was the first scholar to place *Federalist 10* at the heart of American constitutional theory, a favored position it has occupied ever since. "The inquiry which follows," he explained in the first chapter of his book, "is based upon the political science of James Madison, the father of the Constitution and later President of the Union he had done so much to create."<sup>34</sup> Beard then reproduced Madison's famous remarks on factions and their origin in "the various and unequal distribution of property" in society, characterizing it as "a masterly statement" of the theory of class conflict and economic analysis in politics.<sup>35</sup>

Before Beard, no historian had been so crass as to list, one by one, the delegates to the Convention and their respective holdings of real estate, scrip, slaves, and other assets in order to call into question the purity of their motives. Beard did so in minute detail in the infamous chapter that more than anything else earned him his subversive, bad-boy reputation.<sup>36</sup> Among other entries in this chapter, Beard devotes two and a half pages to detailing George Washington's vast investments in real estate, stocks, and bonds; three pages to outlining Robert Morris's extensive mercantile interests; four pages to describing Elbridge Gerry's large holdings in public securities; and fourteen pages to explaining how Alexander Hamilton—"the colossal genius of the new system"—managed to devise a financial program that appealed to

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30. See William Ewald, *James Wilson and the American Founding*, 17 GEO. J.L. & PUB. POL'Y 1, 6 (2019) (describing how Oxford University's new "Project Quill" has graphically represented the extraordinary complexity of the Federal Convention, including approximately 2500 decision points and concluding on that basis that the question "Who is the Father of the Constitution?" is misconceived); accord Sanford Levinson, *The United States and Political Dysfunction: "What Are Elections For?,"* 61 DRAKE L. REV. 959, 967 (2012) (questioning the "great man theory" of the founding on analogous grounds).

31. See BEARD, *supra* note 17.

32. See generally ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" (1956); FORREST McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958).

33. See, e.g., WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (2007); KLARMAN, *supra* note 3.

34. BEARD, *supra* note 17, at 14.

35. *Id.* at 15 (quoting THE FEDERALIST NO. 10 (James Madison)).

36. *Id.* at 73–151.

various economic interests and consolidated their support for the new government.<sup>37</sup> And Madison? Alone among the delegates, Beard credits him with disinterested public service. In contrast to his more self-interested colleagues, Beard confidently reports, Madison's "inclinations were all toward politics," so he was "able later to take a more disinterested view of the funding system proposed by Hamilton."<sup>38</sup>

Significantly, Beard was an early representative of what has become the dominant political science view of *Federalist 10*, resting on an interest group theory of politics.<sup>39</sup> In general, his work suggests that anyone wishing to characterize the Constitution as an antimajoritarian, property-protecting instrument has a major stake in playing up Madison's influence. Yet Beard managed to exempt Madison himself from this interest group theory. Madison is thus conceived by Beard as smart enough to understand the true nature of the Constitution, yet virtuous enough to stand above the fray. Yet the most basic sociological fact about Madison, that he was one of the most successful politicians of the founding era, who represented the largest, wealthiest, and biggest slaveholding state in the nation—a state with much to lose from Hamilton's financial program and the other measures Madison fought tooth and nail in the First Congress—somehow escapes Beard's critical attention. And Beard set the pattern for how Madison would be perceived by progressive historians during the first half of the twentieth century and beyond: brilliant, virtuous, and generally beyond reproach.<sup>40</sup>

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37. See *id.* at 95–99 (Gerry); 100–14 (Hamilton); 133–36 (Morris); 144–46 (Washington).

38. *Id.* at 125. Beard's favorable treatment of Madison was repeated two years later in his next book. See CHARLES A. BEARD, *ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY: HOW HAMILTON'S MERCHANT CLASS LOST OUT TO THE AGRARIAN SOUTH* 142 (1915) ("Madison, who did not hold any securities himself and was able to take a dispassionate view of the merits of several claims against the United States.").

39. For an influential history of this development, see Paul F. Bourke, *The Pluralist Reading of James Madison's Tenth Federalist*, 9 *PERSPS. AM. HIST.* 271 (1975). As Bourke notes, along with Harold Laski, Walter Lippman, and others, Beard continued to contribute to this interpretation of Madison in his later publications. See *id.* at 272 n.2 (citing CHARLES BEARD, *THE ECONOMIC BASIS OF POLITICS* (1922)).

40. Cf. Rakove, *supra* note 1, at 217 ("[A]t least since Charles Beard first emphasized *Federalist 10* . . . , Madison has been our preeminent [constitutional] authority."). Not all scholars in this era adulated Madison to this extent. Charles Warren, for example, considered Madison but one of the "[t]en men [who] stand out as chiefly responsible for the form which the Constitution finally took—Madison, Randolph, Franklin, Wilson, Gouverneur Morris, King, Rutledge, Charles Pinckney, Ellsworth, and Sherman." CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 57 (1928). Moreover, if there was a first among equals, it was not Madison but Washington. "Of all the delegates, there was one [Washington] whose presence in the Convention was absolutely essential to its success, and without whose approval, the work of the Convention would have failed of acceptance by the American people." *Id.* at 61. Despite all this, Warren still felt it necessary to make a somewhat incongruous obeisance to Madison's reputation: "No one who reads Madison's letters and his speeches in the debates will wonder that he has been termed, without dissent, the 'Father of the Constitution.'" *Id.* at 57.

## 3. Douglass Adair

A major development in the unfolding of Madison's reputation as the father of the Constitution was the mid-twentieth-century surge of interest in *Federalist 10*. This process began with Beard but took off with the work of Douglass Adair, who holds a special place among early American historians for his influential PhD dissertation,<sup>41</sup> his fruitful intellectual genealogy of the antecedents to—and authorship of—important *Federalist* essays,<sup>42</sup> and his service as editor of the prestigious *William & Mary Quarterly* during its renaissance from 1944 to 1955. Adair endorsed Beard's assessment of the centrality of *Federalist 10* to the founding, while seeking to rescue Madison's essay from what he took to be Beard's crude "Marxian" interpretation of it as an analysis of class struggle by uncovering the essay's intellectual origins.<sup>43</sup> Adair's principal argument in this context was to link *Federalist 10* to David Hume's essay on the "Idea of a Perfect Commonwealth," in which Adair found "the germ for Madison's theory of the extended republic."<sup>44</sup> Embellishing an outline first sketched by Madison himself,<sup>45</sup> Adair connected the dots between these ideas in *Federalist 10* and Madison's

41. See DOUGLASS G. ADAIR, *THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE, AND THE VIRTUOUS FARMER* (Mark E. Yellin ed., 2000). In his introduction to this posthumously published volume, editor Mark Yellin reports that Adair's dissertation, which was completed at Yale in 1943, "is one of the most influential dissertations" ever written on the founding, "with a list of borrowers that resembled 'a who's who in early American history.'" Mark E. Yellin, *Introduction* to *THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE AND THE VIRTUOUS FARMER*, *supra*, at xiii, xiii (quoting Trevor Colbourn, *Introduction* to *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* xi, xv (Trevor Colbourn ed., Liberty Fund 1998) (1974)).

42. See generally Douglass Adair, "That Politics May Be Reduced to a Science": *David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIB. Q. 343 (1957); Douglass Adair, *The Authorship of the Disputed Federalist Papers* (pt. 2), 1 WM. & MARY Q. 235 (1944); Adair, *supra* note 13.

43. Adair, *supra* note 13, at 48–49, 60.

44. ADAIR, *supra* note 3, at 93. In a passage that anticipates Madison's theory of the extended republic in *Federalist 10* in several respects, Hume wrote:

Though it is more difficult to form a republican government in an extensive country than in a city; there is more facility, when once it is formed, of preserving it steady and uniform, without tumult and faction. . . . In a large government, which is modelled with masterly skill, there is compass and room enough to refine the democracy, from the lower people, who may be admitted into the first elections or first concoction of the commonwealth, to the higher magistrates, who direct all the movements. At the same time, the parts are so distant and remote, that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest.

DAVID HUME, *Idea of a Perfect Commonwealth*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 512, 527–28 (Eugene F. Miller ed., rev. ed. 1985) (1777).

45. See, e.g., JAMES MADISON, *A Sketch Never Finished nor Applied*, reprinted in *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, *supra* note 29, at 3, 16 (crediting his own April 8, 1787, letter to Randolph as "the earliest" outline "of a Constitutional Gov't for the Union . . . to be sanctioned by the people of the States, acting in their original and sovereign character" and proceeding to discuss the fate of the federal negative Madison proposed to Randolph in that letter).

other writings, including “Notes on Ancient and Modern Confederacies,”<sup>46</sup> “Vices of the Political System of the United States,”<sup>47</sup> his pre-Convention letters to Jefferson, Randolph, and Washington,<sup>48</sup> and *Federalist 51*.<sup>49</sup> Finally, Adair also highlighted the purported connections between all these writings and the Virginia Plan, thereby forging the links of interrelated ideas that, he was convinced, sparked the formation of the Constitution.<sup>50</sup>

For Adair, the upshot of these discoveries was that Madison was a constitutional theorist of the first rank whose “abstract speculative thought played a significant role in the writing and ratification of the United States Constitution.”<sup>51</sup> This bold thesis helps to explain the soaring rhetoric Adair used to describe Madison. Adair lionized him as a “philosopher-statesman” whose “greatest glory” was that “he transcended the impossible by inventing a completely new type of federal state, which while solidly resting on majority rule at the same time provided adequate safeguards for the rights of minority groups.”<sup>52</sup> According to Adair, Madison “evolved an original theory of republican federalism differing completely from the principles of any of the historic confederations.”<sup>53</sup> Even before the delegates gathered in Philadelphia, “he had elaborated his novel scheme” in his memoranda and correspondence, and he had begun drawing up “the blueprint of a governmental structure which would institutionalize his theory.”<sup>54</sup> Elevating Madison’s reputation even further, Adair concluded:

It was a brilliant intellectual achievement which won for the thirty-five-year-old Madison the right to be called the philosopher of the American Constitution. His theory, embodied in the structure of the American Union, was to prove also the greatest triumph in practical application of the Enlightenment’s ideal of scientific political research.<sup>55</sup>

For good measure, Adair described Madison’s pre-Convention preparation “as probably the most fruitful piece of scholarly research ever carried out by an American.”<sup>56</sup> The accolades here are truly breathtaking but merely indicative of the extraordinary reputation Madison had earned in Adair’s influential account, which came to dominate perceptions of Madison during the postwar period.

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46. JAMES MADISON, *Notes on Ancient and Modern Confederacies*, in 9 THE PAPERS OF JAMES MADISON 3 (Robert A. Rutland et al. eds., 1975).

47. JAMES MADISON, *Vices of the Political System of the United States*, in 9 THE PAPERS OF JAMES MADISON, *supra* note 46, at 345, 345.

48. *See infra* Part I.B.2.

49. THE FEDERALIST NO. 51 (James Madison) (Jacob E. Cooke ed., 1961).

50. *See* ADAIR, *supra* note 3, at 190–94.

51. MADISON, *supra* note 45, at 49–50.

52. ADAIR, *supra* note 3, at 192.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 191.

### B. *The Unfounded Paternity Claim*

Against this historiographical background, we turn now to the unfounded paternity claim itself. The idea that Madison deserves to be characterized as the father or main architect of the Constitution has never been laid out methodically. Madison's admirers have been surprisingly inattentive to this elementary step. Instead, they typically assert one or two elements of the claim and then rely on the great myth itself to do most of the analytical heavy lifting. Compiling the various accounts in the literature, we find that the unfounded paternity claim consists of four main components.

- (1) Madison came to the Convention better prepared than any other delegate.
- (2) Madison arrived at the Convention with a set of novel ideas about the structure of government that were not held by the other delegates. He advocated them and persuaded his fellow delegates to adopt them.
- (3) Madison was the primary author of the Virginia Plan and used that plan to seize control of the Convention. His plan served as the working model for the final document, hence it should be credited as the basis or blueprint of the Constitution.
- (4) Madison's ideas and agenda are reflected in the final text, structure, and institutional design of the Constitution more than those of any other delegate.

All of these claims have been made, in one way or another, by highly respected scholars.<sup>57</sup> They are all unproven and, absent major qualifications, probably false. Significantly, each of these claims is comparative: it requires comparing Madison's preparation, ideas, arguments, or contributions to the Constitution with those of other Convention delegates.<sup>58</sup> Nevertheless, none of the scholars who make these claims on behalf of Madison have provided, let alone evaluated, any comparative evidence in support of them. On closer scrutiny, the claims fall apart, either for lack of evidence or under the weight of contrary evidence.

#### 1. Madison's Pre-Convention Preparation

Many historians appear deeply attached to the idea that Madison was the best prepared delegate to the Convention. The editors of *The Papers of James Madison* make this assertion in characteristically unqualified terms:

No other delegate came to that historic meeting so well prepared as JM, ready to confront the complex problems of establishing an energetic national government based on republican principles. His many years of public service on both the state and continental level had provided JM with an unrivaled knowledge of American affairs. Yet what distinguished JM from his fellow delegates, apart from his superior intellectual gifts, was not so much his firsthand experience in public life—extensive though it was—

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57. See generally *infra* Parts I.B.1–4.

58. See generally *infra* Parts I.B.1–4.

as his diligent effort to apply to that experience a scholarly study of the principles of government.<sup>59</sup>

The essential claim of this passage has been repeated by numerous scholars over the years. Lance Banning, for instance, affirms that “Madison had come to Philadelphia the best prepared of all who gathered for the Federal Convention.”<sup>60</sup> Jeff Broadwater concurs: “Madison reached Philadelphia on May 5, the best prepared of all the delegates . . . .”<sup>61</sup> So does Adrienne Koch, who confidently relates that Madison “outdistanced all the other delegates by his initial preparation” for the Convention.<sup>62</sup> On its face, these claims compare Madison’s preparation to that of the other delegates. Yet none of these commentators actually engages in such a comparison—that is, none of them points to, let alone weighs, any evidence or information concerning the pre-Convention preparation of *any* other delegate.<sup>63</sup>

What scholars have in mind when they highlight Madison’s unrivaled preparation for the Convention consists primarily of two unfinished memoranda and three short letters. In addition, they occasionally refer to Madison’s seven years in the Confederation Congress and the Virginia legislature from 1780 to 1787—and sometimes even to his undergraduate training at Princeton and his youthful service on the Virginia Council of State and at the Fifth Virginia Convention.<sup>64</sup> We will return below to a close analysis of Madison’s pre-Convention writings. Before doing so, however, it seems worthwhile to pause and consider why the claim that Madison was the “best prepared” member of the Convention seems implausible on its face and at odds with any sober historical assessment of the relevant experiences of the men who gathered in Philadelphia that summer to create a new form of government.

Consider briefly some examples of other delegates whose “many years of public service on both the state and continental level”<sup>65</sup> had prepared them for the essential business of the Convention. More than twice as old as Madison, Benjamin Franklin brought decades of public service to the Convention, including serving as a member and Speaker of the Pennsylvania legislature; a delegate to the 1754 Albany Congress and chief draftsman of the Albany Plan of Union; a colonial agent to the Crown on behalf of Pennsylvania and several other colonies; a delegate to the Continental Congress and author of an early draft of the Articles of Confederation; the first postmaster general of the United States; commissioner and minister to

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59. MADISON, *supra* note 47, at 345, 345 (editorial note to *Vices of the Political System of the United States*).

60. BANNING, *supra* note 3, at 115.

61. JEFF BROADWATER, JAMES MADISON: A SON OF VIRGINIA AND A FOUNDER OF THE NATION 44 (2012).

62. Koch, *supra* note 29, at xiii.

63. Perhaps aware of this problem, Jack Rakove more cautiously credits Madison only with making “critical preparations” aimed at “shaping the agenda for the convention.” JACK N. RAKOVE, A POLITICIAN THINKING: THE CREATIVE MIND OF JAMES MADISON 44 (2017).

64. See, e.g., MADISON, *supra* note 47 (editorial note to *Vices of the Political System of the United States*).

65. *Id.*

France; and president of Pennsylvania.<sup>66</sup> Along with John Adams and John Jay, Franklin negotiated the 1783 Treaty of Paris that ended the Revolutionary War on behalf of the United States.<sup>67</sup>

From 1775 to 1783, George Washington led the entire Continental Army in its war against the British Empire. In that capacity, Washington directly or indirectly commanded twenty-three of the forty men who signed the Constitution, all of whom had served in uniform during the Revolutionary War.<sup>68</sup> In addition to his military experience (which included serving as a British officer in the French and Indian War), Washington was a seasoned legislator. He served in the Virginia House of Burgesses from 1758 to 1765, where he led the opposition in Virginia to the Stamp Act of 1765,<sup>69</sup> the Declaratory Act of 1766,<sup>70</sup> and the Townshend Acts of 1767,<sup>71</sup> and later served in the Continental Congress from 1774 to 1775.<sup>72</sup>

Three decades older than Madison, Roger Sherman brought a wealth of legislative, executive, judicial, and practical experience to the Convention. Among other activities, he had been a member of the Connecticut House of Representatives, the mayor of New Haven, a justice of the Connecticut Superior Court, a member of the Governor's Council of the Connecticut General Assembly, and a delegate to the Continental Congress.<sup>73</sup> Sherman helped frame and signed the 1774 Articles of Association, the Declaration of Independence, and the Articles of Confederation.<sup>74</sup>

Nearly twenty years older than Madison, John Dickinson also came to the Convention well prepared for the business of framing a new constitution. A lawyer by training who spent four years studying at Middle Temple, Dickinson attended the 1765 Stamp Act Congress, led American opposition to the Townshend Acts, published the renowned *Letters from a Farmer in Pennsylvania*, served as a delegate to the Continental Congress, drafted the Articles of Confederation, fought in the Revolutionary War, and served as the president of not one, but two, of the thirteen states: Pennsylvania and Delaware.<sup>75</sup>

Short biographies like these highlighting their relevant experiences could be given for George Mason, John Rutledge, Robert Morris, James Wilson,

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66. See generally EDMUND S. MORGAN, *BENJAMIN FRANKLIN* (2002).

67. *Id.*

68. See ROBERT K. WRIGHT JR. & MORRIS J. MACGREGOR JR., *SOLDIER-STATESMEN OF THE CONSTITUTION* 3 (1987). This figure includes Convention Secretary William Jackson.

69. 5 Geo. 3 c. 12 (Eng.).

70. 6 Geo. 3 c. 12 (Eng.).

71. 7 Geo. 3 c. 41 (Eng.).

72. For biographies of Washington, see, for example, RON CHERNOW, *WASHINGTON: A LIFE* (2010); JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* (2005); DAVID O. STEWART, *GEORGE WASHINGTON: THE POLITICAL RISE OF AMERICA'S FOUNDING FATHER* (2021).

73. See generally MARK DAVID HALL, *ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC* (2013).

74. *Id.*

75. See JANE E. CALVERT, *QUAKER CONSTITUTIONALISM AND THE POLITICAL THOUGHT OF JOHN DICKINSON* 14–17 (2009); 1 *THE ENCYCLOPEDIA OF U.S. POLITICAL HISTORY* 110–14 (Andrew W. Robertson ed., 2010).



Gouverneur Morris, Edmund Randolph, and several other delegates with an equal claim to being prepared as well as, if not better than, Madison for the Convention. Why is it useful to recall these facts here? Because they should cause us to view the common refrain that Madison was the “best prepared” delegate to the Convention with considerable skepticism. Simply because we lack comparably well-preserved records of what other delegates read and wrote before the Convention, we should not infer that they were less prepared than Madison on this score. Certainly, the actions by some of the delegates at or near the start of the proceedings suggest that they came well prepared indeed.<sup>76</sup>

Furthermore, it is crucial to recognize that while Madison was a rising star in 1787, he was still relatively young and inexperienced in comparison with many of the other delegates. In terms of how they viewed each other, he was not one of the most imposing or influential men at the Convention. He was not one of the “demigods” to whom Jefferson referred;<sup>77</sup> indeed, he was not even one of the most prominent Virginians, plausibly ranking below several other deputies from his native state in this respect. The uncritical repetition of the claim that Madison was the best prepared delegate and intellectual leader of the Convention obscures all of these facts, propping up the Madison myth instead of placing his actual contributions to the framing of the Constitution in their genuine historical context.

## 2. Madison’s Pre-Convention Ideas

Conventional scholarship on the founding generally perpetuates Farrand’s unsupported assertion that “Madison’s ideas were the predominating factor in the framing of the constitution.”<sup>78</sup> What were those ideas? Madison scholars generally agree that the bulk of Madison’s pre-Convention thinking about the Constitution is distilled in five documents: first, his “Notes on Ancient and Modern Confederacies,”<sup>79</sup> composed in the spring of 1786; next, his three letters to Jefferson, Randolph, and Washington,<sup>80</sup> written on March 19, April 8, and April 16, 1787, respectively; and finally, his undated memorandum on the “Vices of the Political System of the United States.”<sup>81</sup> In light of the extraordinary accolades they have received—recall that Adair

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76. See, e.g., 1 FARRAND’S RECORDS, *supra* note 27, at 16 (indicating that Charles Pinckney had prepared a draft plan of government before the Convention, which he presented on May 29); *id.* at 65–69 (indicating that James Wilson came prepared to argue for a single chief executive, who would be elected by the people for a relatively short term and eligible for reelection, all of which he proposed on June 1).

77. See Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 66, 69 (Julian P. Boyd ed., 1955).

78. FARRAND, *supra* note 3, at 198.

79. See generally MADISON, *supra* note 46.

80. See *infra* notes 88–100 and accompanying text.

81. Banning creates the impression that Madison wrote voluminously and in great depth in preparation for the Convention; one has to scour his endnotes to see that only these five documents are cited. See BANNING, *supra* note 3, at 115–19. Rakove more forthrightly identifies four of these as the key documents, omitting the “Notes on Ancient and Modern Confederacies.” See RAKOVE, *supra* note 63, at 45–46.

called Madison's two memoranda "the most fruitful piece[s] of scholarly research ever carried out by an American"<sup>82</sup>—one might expect these writings to be a deep and voluminous, and perhaps even forbidding, read. They are not. More importantly, a close analysis of them reveals that they cannot justify the claim that Madison was the father of the Constitution.

*a. "Notes on Ancient and Modern Confederacies"*

We begin with Madison's "Notes on Ancient and Modern Confederacies,"<sup>83</sup> written shortly before the Annapolis Convention. Unlike, say, Jefferson's *Notes on the State of Virginia*—a full-length book—Madison's "Notes" really are just notes—not even an essay. In fact, the document reads like the notes of a graduate student from a seminar on "Ancient and Modern Confederacies." For each of five main confederacies, Madison jots down a series of factual bullet points about their history and organization, followed by a section stating the "vices" of each. As to the Helvetic confederacy, for example, Madison concludes:

VICES of the Constitution

1. disparity in size of Cantons
2. different principles of Governmt. in diff. Cantons
3. intolerance in Religion
4. weakness of the Union. The Common bailages wch. served as a Cement, sometimes become occasions of quarrels. Dictre. de Suisse.<sup>84</sup>

Like so many ambitious graduate school study outlines, the document was unfinished.<sup>85</sup> Had these notes been found in the papers of, say, Georgia delegate Abraham Baldwin or New Jersey delegate Jonathan Dayton, it is hard to imagine them generating much scholarly interest, let alone causing historians to extol Baldwin's or Dayton's prodigious learning or preparation for the Convention. More significantly, there is nothing in the "Notes on Ancient and Modern Confederacies" showing any real effort by Madison to connect whatever he learned from this study to the circumstances of the United States. Rakove seems to recognize this, acknowledging that "Madison came away from his reading frustrated with how little useful information he had gained from this line of research."<sup>86</sup> Madison appears to have used these notes in some of his Convention speeches and *Federalist* essays, and his post-Convention letter to Jefferson indicates that the research convinced him that the primary vice of these confederacies was the absence

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82. ADAIR, *supra* note 3, at 192.

83. MADISON, *supra* note 46, at 3.

84. *Id.* at 11.

85. The manuscript ends with the heading "Gryson Confederacy," with no notes on that one. *Id.* at 22. The editors remark: "JM's notes end here. He apparently meant to add on to them at a later time." *Id.* at 24 n.34.

86. RAKOVE, *supra* note 63, at 8.

of a federal negative over the mischievous laws of the confederated states.<sup>87</sup> Yet in light of the fanfare around these notes, what seems most striking about them is how little impact they would ultimately have on the founding.

*b. Letters to Jefferson, Randolph, and Washington*

In his April 16 letter to Washington, Madison spelled out the crux of his views on federalism in a mere sixty-five words:

Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty; and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.<sup>88</sup>

This quote is not an introduction to a longer passage but the entirety of it, and calling this a “theory” of federalism would be quite an exaggeration. Moreover, ample documentary evidence confirms that this “middle ground” was a dominant idea of most of the delegates who attended the Convention.<sup>89</sup> The whole point of the gathering was to create a new form of government that would overcome the “individual independence of the States,” while stopping short of a complete “consolidation” in which the States ceased to exist altogether.<sup>90</sup> That some compromise between these extremes would be sought was a foregone conclusion that needed no spark from Madison.

What other important ideas can be gleaned from Madison’s pre-Convention letters to Jefferson, Randolph, and Washington? First, on the scope of federal authority, Madison proposed that “the national Government should be armed with positive and compleat authority in all cases which require uniformity; such as the regulation of trade, including the right of taxing both exports & imports, the fixing the terms and forms of naturalization &c &c.”<sup>91</sup> Here, again, Madison was saying nothing remotely unique or original: plenary authority over interstate and foreign commerce had been proposed in Congress by John Witherspoon of New Jersey in 1781, for example, and it was the core mission of the Annapolis Convention in 1786.<sup>92</sup> By the spring of 1787, these ideas were completely familiar. Note,

87. See generally THE FEDERALIST NOS. 18–20, *supra* note 49 (James Madison); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 46, at 205.

88. Letter from James Madison to George Washington (Apr. 16, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 46, at 382, 383. For an almost identical passage, see Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 46, at 368, 369.

89. See *infra* Part II.A.

90. Letter from James Madison to George Washington, *supra* note 88, at 382.

91. *Id.* at 383.

92. See 19 JOURNALS OF THE CONTINENTAL CONGRESS 110 (Gaillard Hunt ed., 1912) (Feb. 3, 1781) (recording a motion by John Witherspoon to vest Congress “with a right of superintending the commercial regulations of every State . . . [and] with the exclusive right of laying duties upon all imported articles”). Madison was serving in Congress when Witherspoon made this motion and voted against it. See *id.* at 111 (showing that the motion

too, that Madison failed to advocate here a direct power of taxation, but rather folded the all-important taxing power into trade regulation—thus missing one of the primary ideas that would be embodied in the new Constitution.

Second, Madison proposed a national government divided into three departments, with supreme legislative, executive, and judicial powers, including a bicameral legislature whose upper house would be less numerous and sit for longer terms.<sup>93</sup> These skeletal ideas were also in wide circulation and, in fact, were reflected in almost every state constitution at the time.<sup>94</sup> In January 1787, for instance, Washington received letters from John Jay and Henry Knox arguing for this exact structure of a tripartite national government with a bicameral legislature, whose upper house would consist of fewer, longer-tenured members.<sup>95</sup> As to a national executive, Madison admitted having “scarcely ventured as yet to form my own opinion either of the manner in which it ought to be constituted or of the authorities with which it ought to be clothed.”<sup>96</sup>

Third, Madison argued that the new Constitution would have to be ratified by the people themselves: “To give a new system its proper validity and energy, a ratification must be obtained from the people, and not merely from the ordinary authority of the Legislatures.”<sup>97</sup> But he did not say much more about this. Although many Madison scholars credit him with this idea, it too appears to have been widely shared. For example, Jay’s January 1787 letter to Washington argued that the state legislatures lacked authority to amend the Constitution, and that “[n]o alterations in the Government should I think be made, nor if attempted will easily take place, unless deducible from the only Source of just authority—the People.”<sup>98</sup> Knox, on a related note, argued that the Convention should originate from “the people themselves” rather than the state legislatures.<sup>99</sup>

Fourth, Madison advocated granting the national government the power to use armed force against the states to guarantee compliance with federal law and “expressly guarantying the tranquility of the States agst. internal as well as external dangers.”<sup>100</sup> Madison had misgivings about armed coercion of the states, however, and he quickly abandoned this notion at the Convention;

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was defeated by a 5 to 4 vote, with Madison and the entire Virginia delegation voting “no”). On the Annapolis Convention, see generally JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 368–80* (1979).

93. Letter from James Madison to George Washington, *supra* note 88, at 383–84.

94. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 125–255 (2d ed. 1998).

95. See Letter from John Jay to George Washington (Jan. 7, 1787), in 4 *THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 502* (W. W. Abbot ed., 1995); Letter from Henry Knox to George Washington (Jan. 14, 1787), in 4 *THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES, supra*, at 518.

96. Letter from James Madison to George Washington, *supra* note 88, at 385; cf. Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 *THE PAPERS OF JAMES MADISON, supra* note 46, at 369. These two letters contain nearly identical passages.

97. Letter from James Madison to George Washington, *supra* note 88, at 385.

98. Letter from John Jay to George Washington, *supra* note 95, at 504.

99. Letter from Henry Knox to George Washington, *supra* note 95, at 521.

100. Letter from James Madison to George Washington, *supra* note 88, at 385.

whereas his idea about protecting the states against “internal . . . dangers” merely reflected the widespread concern about popular uprisings like Shays’s Rebellion and, in the Southern states, slave revolts.<sup>101</sup>

Madison’s fifth point, and one of the two on which he dilated at greatest length, was proportional representation in the Senate.<sup>102</sup> Today, many of us regret the malapportionment stemming from equal state voting power in the Senate, and we are inclined to think that Madison was right (even though Madison was probably more concerned to promote Virginia’s dominance in Congress than with representativeness *per se*). But proportional representation in the Senate was hardly an idea unique to Madison<sup>103</sup> and, in any event, it failed. Madison can hardly be called the father of the Constitution for an idea that not only was rejected but which would likely have derailed the Convention had it not been compromised away (over Madison’s vehement opposition).<sup>104</sup>

The idea contained in these letters that could truly be said to belong to Madison in any meaningful way was the national legislative veto, or federal negative.<sup>105</sup> While Madison did not exactly invent the veto—he candidly describes it “as heretofore exercised by the Kingly prerogative”<sup>106</sup>—he was undoubtedly the leading proponent of the idea at the Convention, along with Charles Pinckney.<sup>107</sup> The other delegates recognized that it was Madison’s pet project. Wilson called it “novel,” and Gerry, attacking it, observed that “[i]t has never been suggested or conceived among the people. No speculative projector . . . has in any pamphlet or newspaper thrown out the idea.”<sup>108</sup>

The federal negative bordered on an obsession for Madison. His three pre-Convention letters spent more effort advocating it than any other idea.<sup>109</sup> And of all the vicissitudes of the Convention and the arguable shortcomings of its final product, this was the one over which Madison expressed the greatest regret. Madison’s famous Convention postmortem in his October 24, 1787, letter to Jefferson contains a 2400-word disquisition on the federal

101. For extensive histories of the 1786 uprising led by Daniel Shays and Luke Day along with its constitutional implications, see, for example, SEAN CONDON, *SHAYS’S REBELLION: AUTHORITY AND DISTRESS IN POST-REVOLUTIONARY AMERICA* (2015); LEONARD L. RICHARDS, *SHAYS’S REBELLION* (2002); DAVID P. SZATMARY, *SHAYS’ REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* (1984). For the Southern fear of slave revolts, see, for example, ALAN TAYLOR, *THE INTERNAL ENEMY: SLAVERY AND WAR IN VIRGINIA 1772–1832* (2013).

102. See, e.g., Letter from James Madison to George Washington, *supra* note 88, at 387.

103. See *infra* note 152 and accompanying text.

104. See *infra* notes 188, 191 and accompanying text.

105. One might assume that Madison’s ideas about an extended republic should also be included here, but this would be a mistake. As Bilder notes, while other elements of the “Vices” manuscript can be found in his pre-Convention correspondence, the “extended republic” idea does not appear in any of these letters. See BILDER, *supra* note 7, at 244, 335 n.3.

106. Letter from James Madison to George Washington, *supra* note 88, at 383.

107. See 1 FARRAND’S RECORDS, *supra* note 27, at 164; 2 *id.* at 390. See generally BILDER, *supra* note 7.

108. See 1 FARRAND’S RECORDS, *supra* note 27, at 165–66.

109. See *supra* notes 87, 88 and accompanying text.

negative—Madison’s most developed statement of the idea anywhere.<sup>110</sup> The primary takeaway from his study of confederacies was that “[t]he want of” “the royal negative or some equivalent controul” “seems to have been mortal to the antient Confederacies, and to be the disease of the modern.”<sup>111</sup> Yet the Convention squarely rejected Madison’s theory, undercutting the core element of his vision for how the Constitution should be designed.

*c. “Vices of the Political System of the United States”*

Madison’s most in-depth analysis of the problem of constitutional reform before the Convention was his memorandum, “Vices of the Political System of the United States.”<sup>112</sup> Yet, contrary to its billing, though consistent with its title, the “Vices” memorandum is neither a blueprint for a national government nor a theory of federalism. While Madison’s contemporaries were primarily concerned with the “imbecility” of the national government—its inadequate powers to make and enforce legislation—Madison’s primary focus was on state legislative excesses and deficiencies.

Madison listed twelve vices in total in this manuscript, which Bilder and other scholars have tended to divide into three groups.<sup>113</sup> The first through the fourth vices emphasize the vicious character of state laws from an interstate perspective—their adverse effects on other states or the governing of the Confederation. These are: (1) “Failure of the States to comply with the Constitutional requisitions,” (2) “Encroachments by the States on the federal authority,” (3) “Violations of the law of nations and of treaties,” and (4) “Trespasses of the States on the rights of each other.”<sup>114</sup>

While some scholars view the second group of vices as an analysis of federalism, Madison in fact offers very little thinking here on the division of state and national powers. The fifth vice continues to focus on state malfeasance, blaming the states for “want of concert in matters where common interest requires it.”<sup>115</sup> Notably, in this brief discussion, Madison does not conclude that the states’ lack of coordination on common objectives should be transformed into a justification for affirmative national legislative power. The sixth vice, “want of Guaranty to the States of their Constitutions & laws against internal violence,”<sup>116</sup> points out that minority factions could take over state governments and implies that a national government might have a remedial role. The eighth vice, “want of ratification by the people of

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110. In his documentary supplement to the Convention records, Farrand cut all of this discussion except for a single sentence. See 3 FARRAND’S RECORDS, *supra* note 27, at 134, 135 (ellipses indicating the omissions). One might wonder whether Farrand was embarrassed or felt sorry for Madison on account of his persistent advocacy of this unsuccessful idea.

111. Letter from James Madison to Thomas Jefferson, *supra* note 87, at 210.

112. See MADISON, *supra* note 47, at 345–58.

113. See, e.g., BILDER, *supra* note 7, at 45.

114. MADISON, *supra* note 47, at 348–50.

115. *Id.* at 350.

116. *Id.*

the articles of confederation,”<sup>117</sup> argues that a constitution derived from state legislatures is not supreme over state law and is a mere league.

The seventh vice “is want of sanction to the laws, and of coercion in the Government of the Confederacy.”<sup>118</sup> Rakove calls it “a mini-treatise” on “the most important and revealing element in Madison’s analysis of the underlying problem of American federalism.”<sup>119</sup> But the only thing of note about federalism Madison says in this passage is that the national government needs coercive sanctions for its general laws; otherwise, states will resist them due to self-interest or dissatisfaction with their unequal impact among the states.<sup>120</sup> This is neither a particularly penetrating nor original analysis of the defects of the Confederation, nor any sort of “treatise” on federalism, since it does not even touch on how to balance an effective central government with local control. More importantly, Madison’s analysis is out of step with the theory of federalism that was soon to be adopted by the Convention. Rather than envisioning a national government empowered to act directly on the people—a point absent from the discussion in the seventh vice—Madison apparently assumes that the national government needs “a sanction” to coerce *states* to comply with federal policies.<sup>121</sup>

The ninth through twelfth vices deal with the vicious character of state laws from an intrastate perspective.<sup>122</sup> The ninth and tenth vices criticize the “multiplicity” and “mutability” of state laws—there are too many of them and they are too easily changed.<sup>123</sup> The twelfth vice consists only of a heading, the “Impotence of the laws of the States,”<sup>124</sup> with no further comment, suggesting the manuscript was unfinished.

The eleventh vice, the “Injustice of the laws of States,”<sup>125</sup> lays out a version of Madison’s theory of the extended republic. Madison questions “the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.”<sup>126</sup> But where the majority consists of self-interested factions, the state laws will result in vicious and unrepugnant oppression of creditors, property owners, and religious minorities.<sup>127</sup> The extended

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117. *Id.* at 352.

118. *Id.* at 351.

119. RAKOVE, *supra* note 63, at 47.

120. MADISON, *supra* note 47, at 351.

121. Madison criticizes laws “which depend[] for their execution on the will of the state legislatures, wch. are tho’ nominally authoritative, in fact recommendatory only.” *Id.* at 351. One could perhaps read this, out of context, as consistent with direct national regulation of the people of the states. But Madison’s letter to Washington makes clear that he was contemplating use of force to obtain state compliance. See Letter from James Madison to George Washington, *supra* note 88, at 383 (observing that “the right of coercion should be expressly declared” to “operat[e] by force on the collective will of a State”).

122. MADISON, *supra* note 47, at 353–57.

123. *Id.* at 353–55.

124. *Id.* at 358.

125. *Id.* at 354.

126. *Id.*

127. *Id.*

republic answers a “great desideratum in Government,”<sup>128</sup> since such factions will not control the general government, which will be neutral among the state-level factions and “controul one part of the Society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole Society.”<sup>129</sup>

We will return to both Madison’s federal negative and his theory of the extended republic in Part II. For now, we simply note that while the “Vices” memorandum is interesting in several respects, it is a major disappointment for any reader looking for an incisive analysis of American federalism. Only two of the vices are explained at any length, and none of the discussions makes a direct proposal for a specific government structure or theorizes how sovereignty might be divided between the states and a national government. None of the first ten vices can reasonably be characterized as penetrating or highly original. The far more original and interesting elaboration of the extended republic in the eleventh vice is anomalous for its length—at 1200 words, it takes up 40 percent of the length of the entire manuscript—but, as Bilder has demonstrated, there are significant reasons to question whether it was written before the Convention in April 1787, at the time Madison wrote up the other vices.<sup>130</sup> Either way, the main proposal emerging from Madison’s effort seems clear. Unlike the structural provisions of the Constitution ultimately proposed and ratified, the “Vices” memorandum points to a national legislative veto as the only sure way to satisfy “the great desideratum” in a national government.<sup>131</sup>

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128. *Id.* at 357.

129. *Id.* at 358.

130. See BILDER, *supra* note 7, at 243–44 (documenting several of these reasons, including the fact that the eleventh vice is written on different paper than the others).

131. We suspect that one reason many scholars rely on secondary source descriptions of Madison’s pre-Convention writings, rather than reading them on their own, is because they assume that the primary sources are lengthy and formidable. Yet they are not. The “Notes on Ancient and Modern Confederacies” is the longest of the five documents, totaling just over 6900 words. See MADISON, *supra* note 46. Madison’s three letters to Jefferson, Randolph, and Washington total about 5400 words, less than half of which deal with Madison’s ideas for a new government. See *supra* notes 87, 88 and accompanying text. These ideas were repeated in the three letters, of course, some passages almost verbatim. Taking that fact into account, Madison laid out his ideas for a new government in these letters in no more than 1200 words—what today would be merely a substantial blog post. The “Vices” memorandum, written in mid-April of 1787, is about 3100 words, though as a result of Bilder’s scholarship, it seems likely that the 1140-word section on the extended republic under the heading of “Vice 11” was written during or after the Convention. See BILDER, *supra* note 7, at 243–46. If this is correct, then Madison’s most significant analytical writing in preparation for the Convention in the spring of 1787 consists of approximately 3200 words—the equivalent of about six-and one-half pages in this law review. By way of comparison, the published version of James Wilson’s “Considerations on the Nature and Extent of the Legislative Authority of the British Parliament” is about 12,000 words, and his “Considerations on the Bank of North America” is about 8000 words. See 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 3–31, 60–79 (Kermit L. Hall & Mark David Hall eds., 2007).



*d. The Missing Idea*

As we shall see, the most fundamental principle that animated the Constitution's federalism design is the idea that the new national government would operate directly on the people and not act through the states. This would allow the national government to bypass the states, and control them indirectly, through affirmative legislative supremacy rather than a direct veto over state laws or a direct coercive power over the states as corporate bodies. If Madison had truly shaped the Convention's agenda and molded the final form of the Constitution, we should expect to find this idea developed, or at a minimum, clearly anticipated in his pre-Convention writings. Instead, Madison's focus was on controlling state governments. His discussion of the seventh vice connected "want of sanction to the laws" with the absence of "coercion" over the states, who resist national mandates.<sup>132</sup> Nowhere do the vices mention direct regulation of the people, and in only two sentences in his letter to Washington does he even hint at the idea.<sup>133</sup> Presumably, Madison believed that the national government would directly collect import/export taxes, as did the other advocates of a national impost in the Confederation period.<sup>134</sup> But to interpret this belief as a broad understanding that Congress would indirectly control the states by legislating directly on the people requires considerable interpretive enrichment, if not presentism and confirmation bias. By "compleat authority," Madison may also have meant, and probably did mean in most cases, a power to bind the states—for example, to force them to comply with a uniform commercial treaty—rather than to bypass them by regulating individuals directly. Had Madison possessed a well-developed notion of regulating the people directly, there would have been little or no need for a power to coerce the states by force. But in the letter to Washington, Madison expressly advocated that "the right of coercion should be expressly declared"<sup>135</sup> in a new Constitution.

To be sure, all of Madison's pre-Convention writings were cursory and did not purport to be highly developed theoretical or institutional proposals. Yet it would have been a simple matter, in a sentence or two, to explain that Congress should be empowered to regulate the people directly, if that idea had been part of Madison's thinking. Indeed, he would express that idea in a few sentences in his Convention speech on July 14—but only after his

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132. See *supra* notes 118–22 and accompanying text.

133. See Letter from James Madison to George Washington, *supra* note 88, at 383 (mentioning "a system which would operate in many essential points without the intervention of the State Legislatures"); *id.* ("[I]n addition to the present federal powers, the national Government should be armed with positive and compleat authority in all cases which require uniformity; such as the regulation of trade, including the right of taxing both exports & imports, the fixing the terms and forms of naturalization, &c. &c.").

134. See, e.g., Letter from James Monroe to James Madison (Sept. 12, 1786), in 9 THE PAPERS OF JAMES MADISON, *supra* note 46, at 122 (expressing fears that the Confederation government would be endangered without a national impost). See generally RAKOVE, *supra* note 92, at 337–38 (discussing widespread but not unanimous support for a national impost).

135. Letter from James Madison to George Washington, *supra* note 88, at 385.

leading colleagues had been making the point for weeks.<sup>136</sup> It is also true that Madison was apparently queasy about coercing the states, expressing reservations about it both to Washington and early in the Convention.<sup>137</sup> But he saw the alternative, not as a power to regulate the people directly, but rather to control the states through the national legislative veto. Given “the difficulty & awkwardness of operating by force on the collective will of a State,” Madison hoped that “the negative on the laws might create such a mutuality of dependence between the general and particular authorities, as to answer this purpose.”<sup>138</sup> We elaborate on the discrepancy between Madison’s focus on controlling states and the Convention’s solution of regulating the people directly further in Part II.

### 3. Madison and the Virginia Plan

The fifteen resolutions known as the Virginia Plan were introduced by Virginia delegate Edmund Randolph on May 29, the Convention’s first day of substantive discussion, and set the initial agenda for the proceedings.<sup>139</sup> Commentators generally assume that Madison authored the plan or that, at a minimum, he “played the leading role” in drafting it.<sup>140</sup> Madison’s reputation as “father of the Constitution” owes a great deal to this assumption.<sup>141</sup> But, as with so many other elements of the persistent mythology surrounding Madison, the claim is adopted uncritically. Madison’s admirers either treat it as common knowledge that needs no evidentiary support or else subtly misconstrue or overinterpret the relevant evidence. Typical in this regard is Lance Banning’s sweeping assertion that “Madison . . . was the man to whom Virginia politicians customarily deferred on federal issues. He had suggested all the key provisions of the plan in his pre-Convention writings. Contemporaries understood that it was principally his work . . . .”<sup>142</sup> To support these claims, Banning points to three letters—two written by Madison himself—all of which indicate that the Virginia Plan

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136. See *infra* Part II.A.2.

137. See *supra* text accompanying notes 100–01.

138. Letter from James Madison to George Washington, *supra* note 88, at 385.

139. 1 FARRAND’S RECORDS, *supra* note 27, at 20–23 (text of plan); see also *id.* at 30 (recording that the Virginia Plan was “taken up” for discussion “to consider the State of the American union”); see also BRANT, *supra* note 3, at 23–31.

140. BANNING, *supra* note 3, at 113; accord, e.g., BEEMAN, *supra* note 29, at 87 (“The plan was largely Madison’s handiwork . . . .”); FISKE, *supra* note 15, at 251 (noting the Plan’s “chief author was Madison”). Even Forrest McDonald, who argues that the final Constitution differed markedly from Madison’s views, assumes that Madison authored the Virginia Plan. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 205 (1985).

141. See, e.g., RICHARD B. MORRIS, *WITNESSES AT THE CREATION* 19 (1985) (observing that Madison is called “‘the father of the Constitution’ because the initial plan attributed to him provided the basic blueprint for the final document”); Gordon Wood, *The Company of Giants*, *NEW REPUBLIC*, Apr. 2011, at 25, 27 (reviewing ANDREW BURNSTEIN & NANCY ISENBERG, *MADISON AND JEFFERSON* (2013)) (explaining that “there is no doubt that no single person contributed more to the Constitution than [Madison] did, since his Virginia Plan remained the working model for the final document”).

142. BANNING, *supra* note 3, at 115.

was the *joint* product of the Virginia delegation, with likely input from other delegations as well.<sup>143</sup> Furthermore, none of these letters, nor any other historical records known to us, supports Banning's further contention that Madison had proposed *all* of the key provisions of the Virginia Plan before the Convention or that his contemporaries "understood that [the plan] was principally his work."

Because the Virginia Plan is so important to the standard narrative about Madison, it is worth elaborating these points. To begin with, consider two notable evidentiary gaps. First, none of the Virginia delegates—including Madison himself—ever attributed the Virginia Plan to him, and both during and after the Convention, the uniform practice was to attribute the resolutions it contained to Randolph.<sup>144</sup> Second, there is no pre-Convention draft of the Virginia Plan in Madison's papers. Charles Pinckney arrived in Philadelphia with a draft Constitution; Madison, despite being purportedly the "best prepared" delegate, apparently did not.<sup>145</sup>

More generally, there is no evidence that Madison or any other Virginian arrived in Philadelphia with the Virginia Plan resolutions fully conceived. Instead, the limited evidence we possess suggests that these resolutions were drafted sometime between May 14 and May 29, the two-week period during which two large state delegations—Virginia and Pennsylvania—met regularly while waiting for the other delegates to trickle in.<sup>146</sup> The idea that Madison dominated the exchange of ideas produced in these meetings seems improbable. The Virginia delegation included at least four men—Washington, Mason, George Wythe, and John Blair—who were more accomplished and influential than Madison in 1787, and a fifth—Randolph—who was at least equally so.<sup>147</sup> Mason, for example, was an experienced

143. The three letters Banning cites are: Letter from George Mason to George Mason Jr. (May 20, 1787), in 3 FARRAND'S RECORDS, *supra* note 27, at 22, 23 (attributing the main ideas of the Virginia Plan to "the principal States," not just to the Virginia delegation); Letter from James Madison's to Noah Webster (Oct. 12, 1804), in FARRAND'S RECORDS, *supra* note 27, at 409, 409 ("[T]he deputies from Virginia . . . agreed among themselves on the outline of a plan . . ."); Unsent Letter from Madison to John Tyler (n.d.), in 3 FARRAND'S RECORDS, *supra* note 27, at 524, 525 (noting that the Virginia Plan resolutions "were the result of a consultation among the deputies, the whole number, seven being present").

144. *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 27, at 20 ("Resolutions proposed by Mr. Randolph in Convention."); *id.* at 313 (discussing "the resolutions offered by the honorable Mr. Randolph"); *id.* at 321 ("the scheme of Mr. Randolph"); *id.* at 322 (noting "Mr. Randolph's plan"); 3 *id.* at 532 (referring to "[t]he propositions of Mr. Randolph"); *id.* at 535 (noting "Mr. Randolph's plan"); *id.* at 593 ("These resolutions, commonly known as the Randolph Resolutions . . ."); *see also, e.g.*, BEEMAN, *supra* note 29, at 87; MADISON, *supra* note 45, at 16–17.

145. *See supra* Part I.B.1.

146. *See infra* notes 163–68 and accompanying text.

147. In 1787, George Wythe was sixty-one years old and one of the most respected jurists in the United States. Among other activities, he began serving in the Virginia House of Burgesses in 1754, played an active role in opposing the Stamp Act in 1765, represented Virginia in the Second Continental Congress, and signed the Declaration of Independence. *See generally* IMOGEN E. BROWN, AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE (1981). He also was a judge on the Virginia High Court of Chancery, a law professor at the College of William & Mary, and an instructor of and mentor to many prominent Virginia lawyers, including Thomas Jefferson, John Marshall, James Monroe, and St. George Tucker.

constitution drafter who had written Virginia's Declaration of Rights, which served as a model for other state constitutions up and down the continent,<sup>148</sup> while Randolph was the sitting governor and former attorney general of Virginia, as well as one of its best lawyers and the scion of its most powerful and illustrious family.<sup>149</sup> Like Madison, Randolph served for several years in the Continental Congress and attended the Annapolis Convention. He drafted or helped to draft many significant memoranda and legislative proposals during his career—including the first draft of a constitution for the Committee of Detail—and he was good at it.<sup>150</sup> Furthermore, it was Randolph who first suggested to Madison that Virginia take the lead at presenting resolutions at the Convention rather than the other way around.<sup>151</sup> In short, one cannot simply assume that Randolph or any of these men would have been bereft of constitutional ideas or simply deferred to Madison “on federal issues.”

Although Banning is not alone in holding that there is a conclusive match between the Virginia Plan and Madison's pre-Convention writings, this claim does not hold up under close scrutiny.<sup>152</sup> Most of the plan's fifteen resolutions expressed either widespread ideas of constitutional reformers in the spring of 1787 or details that are absent from Madison's pre-Convention writings. In particular, Resolutions I through V propose that the Confederation be “enlarged” with a bicameral legislature based on proportional representation in both houses.<sup>153</sup> Resolutions VII and IX deal respectively with the executive and judiciary, to which Madison gave only passing attention.<sup>154</sup> Resolution X deals with admission of new states, and Resolutions XII through XIV deal with lesser, fairly obvious details, which Madison had not addressed at all in his pre-Convention letters.<sup>155</sup> Madison

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*Id.* For his part, John Blair was fifty-five years old at the start of the Convention—two decades older than Madison—and likewise a seasoned veteran of Virginia law and politics. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 77–78 (Kermit L. Hall ed., 1992). Beginning in 1766, Blair served for over twenty years in the Virginia House of Burgesses, Governor's Council, Privy Council, General Court, Court of Appeals, and Court of Chancery. *Id.* For Randolph's relevant biographical details, see *infra* notes 150–51 and accompanying text.

148. *See* JEFF BROADWATER, GEORGE MASON: FORGOTTEN FOUNDER 77–99 (2006).

149. *See id.*

150. *See, e.g.*, 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 92, at 861–71 (documenting a report drafted primarily by Randolph on regulating U.S. admiralty courts); *id.* at 894–96 (including a report by Randolph, Oliver Ellsworth, and James Varnum on enlarging the powers of Congress); 2 FARRAND'S RECORDS, *supra* note 27, at 137–50 (featuring Randolph's draft constitution for the Committee of Detail); H.R. REP. NO. 1-17 (1790), *reprinted in* 1 AMERICAN STATE PAPERS: MISCELLANEOUS 21 (Walter Lowrie & Walter Franklin eds., Washington, Gales & Seaton 1834) (reprinting a report by Randolph on reforming the federal judiciary).

151. *See* Letter from Edmund Randolph to James Madison (Mar. 27, 1787), *in* 9 THE PAPERS OF JAMES MADISON, *supra* note 46, at 335.

152. *See, e.g.*, BANNING, *supra* note 3, at 115; RAKOVE, *supra* note 3, at 60; *see also* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1052 n.25 (2014) (citing additional sources).

153. 1 FARRAND'S RECORDS, *supra* note 27, at 20–21.

154. *Id.*

155. *Id.* at 21–23.

might have been out front with the idea of ratification by state conventions rather than state legislatures (Resolution XV), though as we have seen he was not alone in embracing this idea. Likewise, Madison was not the only advocate of a council of revision (Resolution VIII).<sup>156</sup>

The most distinctively Madisonian proposals in the Virginia Plan are contained in parts of Resolution VI, including the federal negative and the use of force against noncomplying states, and Resolution XI, guaranteeing the states a republican government.<sup>157</sup> But the other delegates in these pre-Convention meetings quickly clipped the wings of Madison's proposed federal negative "in all cases whatsoever" in favor of a more limited power to negative state laws "contravening . . . the articles of union"—a significant and notable revision.<sup>158</sup> Moreover, as one of us has explained in depth, the affirmative grant of legislative power in Resolution VI uses terms different from those in Madison's pre-Convention correspondence and more like the language that Wilson, Franklin, and other Pennsylvanians had advocated for many years to delineate the scope of congressional power.<sup>159</sup> In his 1785 essay on the Bank of North America, for example, Wilson had argued that the national government was empowered to act "whenever" states were not "competent" or their joint actions were unlikely "to produce a harmony."<sup>160</sup> In contrast, Madison's description of federal legislative power had focused only on the need for "uniformity" and did not address state collective action problems as a general category of congressional authority.<sup>161</sup> In general, Madison proposed to address state disharmony through the federal negative, rather than affirmative legislation.<sup>162</sup>

Wilson's apparent fingerprints on Resolution VI raise a key question to which few historians have given sufficient attention: how extensively were the Virginians collaborating with the Pennsylvania delegates at this stage?<sup>163</sup> These two "large state" delegations were closely allied on many of the key issues at the start of the Convention, especially proportional representation in the Senate. Pennsylvania's delegation had intellectual firepower that easily matched the Virginians. In addition to Wilson and Franklin, the Pennsylvania delegation included the brilliant and highly opinionated Gouverneur Morris and the domineering Robert Morris, who had strong ideas about national power based on his tenure as superintendent of finance. There is circumstantial evidence of joint discussions between these two delegations.<sup>164</sup> They were the only two groups that showed up at the statehouse for the appointed first day on May 14, and they continued to do

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156. See, e.g., Letter from John Jay to George Washington, *supra* note 95, at 503.

157. See 1 FARRAND'S RECORDS, *supra* note 27, at 20–21.

158. *Id.* at 21.

159. See Mikhail, *supra* note 152, at 1051, 1072–78.

160. See JAMES WILSON, *Considerations on the Bank of North America*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 131, at 60, 66–67.

161. See Mikhail, *supra* note 152, at 1073–78.

162. See *id.*

163. Virtually none of the standard histories of the Convention address this issue. The only exception of which we are aware is Richard Beeman's. See BEEMAN, *supra* note 29, at 41–57.

164. See *id.* (recounting the occasions on which the two delegations conferred).

so daily in hope of a quorum.<sup>165</sup> They met for a lengthy dinner at Franklin's house on May 16.<sup>166</sup> George Washington was staying at Robert Morris's home.<sup>167</sup> In his May 20 letter to his son, George Mason reported having "occasional conversation with the deputies of different States," from which he discerned that "the principal States"—which undoubtedly included Pennsylvania—share the "prevalent idea" of creating "a total alteration of the present federal system" containing the elements of what would be the Virginia Plan.<sup>168</sup>

We have little doubt that Madison had important input in formulating the Virginia Plan. But his unlikely authorship of the affirmative grant of legislative authority in Resolution VI and his grudging compromise on the precise form of the federal negative—during the Convention he would move unsuccessfully to restore his "in all cases" version after his preferred version was brushed aside as early as May 20<sup>169</sup>—demonstrate that he did not dominate the May gatherings that produced the Virginia Plan. Furthermore, the common assumption that Madison simply wrote the plan by himself is not supported by any documentary evidence—and is arguably at odds with the fact that the plan was generally attributed to Randolph, not Madison, during and after the Convention.<sup>170</sup> To assume that Randolph was merely Madison's mouthpiece in introducing the plan is to beg the question. In light of everything we know or can reasonably infer about how this particular sausage was made, the Virginia Plan was most likely a collective effort, probably drafted by Randolph, which incorporated prevalent ideas shared by most of the Virginia and Pennsylvania delegates who were present in Philadelphia from May 14 to 29. As such, the Virginia Plan offers a flimsy basis for the claim that Madison was the father of the Constitution.

#### 4. Madison and the Finished Constitution

Madison was unquestionably active at the Constitutional Convention, making more recorded speeches than all but two delegates—Gouverneur Morris and James Wilson.<sup>171</sup> He made or seconded numerous motions from the Convention floor to add, delete, or amend provisions of the draft

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165. *See id.*

166. *See id.* at 34–35.

167. *See id.* at 52–53.

168. 3 FARRAND'S RECORDS, *supra* note 27, at 23. Notably, Mason reported on May 21 that the federal negative envisioned by "the principal States" was the power of "a negative upon all such laws as they judge contrary to the principles and interest of the Union," a formulation that seems closer to the one included in the Virginia Plan than Madison's preferred version. *Id.* at 24.

169. *See id.*

170. *See supra* note 144 and accompanying text.

171. *See Delegates' Speeches, Motions, and Committee Assignments in the Constitutional Convention*, CTR. FOR THE STUDY OF THE AM. CONST., <https://csac.history.wisc.edu/document-collections/the-constitutional-convention/delegates-speeches-motions-and-committee-assignments-in-the-constitutional-convention> [<https://perma.cc/QAP3-UEWK>] (last visited Mar. 16, 2021). For earlier tabulations with similar results, see ROSSITER, *supra* note 29, at 252; WARREN, *supra* note 40, at 125.

Constitution—though more than half were defeated—and he occasionally suggested specific language that made its way into the finished Constitution.<sup>172</sup> Yet the idea that Madison was the leader of the Convention or indispensable to its success cannot be squared with the historical record. The documentary evidence suggests that the two principal draftsmen of the Constitution, who were responsible for the bulk of the specific language and structure of the final text, were Wilson and Morris.<sup>173</sup> Randolph, Rutledge, and Charles Pinckney made important contributions in this regard,<sup>174</sup> and Roger Sherman also had a substantial impact, shaping the course of the Convention at important moments.<sup>175</sup> Other delegates who played a leading role in supplying specific language or important structural features that were retained in the final document include John Dickinson, George Mason, Oliver Ellsworth, and William Paterson.<sup>176</sup> Judged by his actual influence on the final design and language of the Constitution, Madison might most accurately be included in this second or third group of most important delegates, but either way, one would be hard pressed to show that he was significantly more influential than any of them.

Madison was passed over in favor of Mason and Randolph for the first two crucial committee assignments: the Grand Committee that proposed the Great Compromise in mid-July and the Committee of Detail that produced the first draft of the Constitution in early August.<sup>177</sup> In fact, he was not selected for an important committee assignment until August 22.<sup>178</sup> Madison was a member of the Committee of Style and Arrangement that made final revisions to the Constitution, but there is no evidence that he made any discernible impact on its work, which was led by Morris, with an apparent assist from Wilson.<sup>179</sup> Furthermore, Madison's two most significant proposals over the course of the summer—the federal negative and proportional representation in the Senate—were defeated.<sup>180</sup>

As Michael McConnell aptly remarks, Madison “was a quintessentially legislative personality,”<sup>181</sup> and it is well known that he gave less reflection, and supplied relatively little input, to the design of the executive and judicial

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172. See, e.g., 2 FARRAND'S RECORDS, *supra* note 27, at 489 (recording Madison's successful effort to modify the language of the Full Faith and Credit Clause).

173. See, e.g., WARREN, *supra* note 40, at 686–88; William Ewald & Lorraine Updike Toler, *Committee of Detail Documents*, 135 PA. MAG. HIST. & BIOGRAPHY 239 (2011); William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197 (2012); John Mikhail, *Fixing Implied Constitutional Powers in the Founding Era*, 34 CONST. COMMENT. 507 (2019); William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 119 MICH. L. REV. (forthcoming 2021).

174. See 1 FARRAND'S RECORDS, *supra* note 27, at 137–50, 163–75 (Randolph and Rutledge); see also, e.g., 2 *id.* at 324–26 (Pinckney).

175. See, e.g., HALL, *supra* note 73, at 92–121.

176. See, e.g., BEEMAN, *supra* note 29, at 161–64, 282–83; WARREN, *supra* note 40, at 57.

177. See *supra* note 26.

178. See BILDER, *supra* note 7, at 141–43.

179. See WARREN, *supra* note 40, at 686–88 (summarizing the evidence that Morris and Wilson were jointly responsible for the final revisions to the Constitution).

180. See *supra* notes 102–08 and accompanying text.

181. MICHAEL MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING* 21 (2020).

branches of government.<sup>182</sup> The chief architect of the presidency was not Madison, but Wilson, who clearly came prepared with strong ideas about executive power and who, as William Ewald recounts,

from the first week of the Convention until its end, argued consistently and ultimately successfully for the structure that eventually emerged: a single President, elected for a relatively short term, eligible for re-election, wielding a veto power, and enjoying authority independently both of the Congress and of the legislatures of the states.<sup>183</sup>

Together with Rutledge and the other members of the Committee of Detail, Wilson was also principally responsible for the general allocation of royal powers and the specific enumeration of executive powers in Article II.<sup>184</sup> Meanwhile, the judicial powers and jurisdictional grants of Article III were primarily crafted by Wilson and Randolph, with some input from others.<sup>185</sup> Again, Madison was not a key figure in this process. Even the so-called “Madisonian compromise,” to which legal scholars commonly refer when discussing the discretionary authority lodged in Congress to create inferior federal courts, cannot be considered principally Madison’s contribution.<sup>186</sup> When the Convention voted to eliminate the mandatory nature of these courts on June 5, it was Wilson, seconded by Madison, who argued for giving Congress the discretionary power to create them.<sup>187</sup> Calling this compromise “Madisonian” rather than “Wilsonian” is another illustration of the tendency to exaggerate Madison’s contributions to the framing of the Constitution at the expense of other delegates.

Apparently, it never occurred to any historian to compare Madison’s views on specific proposals and provisions with the Constitution reported out by the Convention, until Forrest McDonald did so in 1985.<sup>188</sup> In a brisk four-page summary, McDonald “reconstructed a Madisonian Constitution” by “working through all the particular proposals” that Madison supported or

182. This one-sided nature of Madison’s constitutional thinking is reflected in the fact that his contributions to *The Federalist* are predominantly focused on legislative power (and, to a lesser extent, federalism). See generally THE FEDERALIST NOS. 10, 14, 18–20, 37–58, 62–63, *supra* note 49 (James Madison). The division of labor in these essays, in which Hamilton took the primary responsibility for discussing executive and judicial powers, along with fiscal and military affairs, and Jay addressed foreign affairs, is not given enough attention by scholars.

183. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 1004 (2008).

184. See MCCONNELL, *supra* note 181, at 38–39, 67–74.

185. See 2 FARRAND’S RECORDS, *supra* note 27, at 129–89 (reproducing Wilson’s and Randolph’s drafts for the Committee of Detail).

186. For the origin of this questionable label, see Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 145 n.12 (1982); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 47–48, 48 n.8 (1975).

187. The documentary records on this point are somewhat ambiguous. Compare, e.g., 1 FARRAND’S RECORDS, *supra* note 27, at 118 (Madison’s notes) (stating that “Mr. Wilson & Mr. Madison moved” to add this power), with *id.* at 127 (Yates’s notes) (“Mr. Wilson then moved . . .”).

188. MCDONALD, *supra* note 140, at 205–09.



opposed, as reflected in the Convention records.<sup>189</sup> For example, McDonald points out that Madison never advocated state sovereignty or even agency at the Convention but instead subordinated state sovereignty to other concerns; advocated limiting suffrage to “freeholders”; proposed a Senate based on proportional representation and structured to represent wealth, with its members chosen by electors representing the freeholder-voters (rather than by state legislatures); and advocated a six-member executive advisory council that would be authorized to make treaties of alliance and peace without a two-thirds Senate majority and whose members, with the U.S. Supreme Court, would sit on a council of legislative revision.<sup>190</sup> With some understatement, McDonald concludes that the final Constitution endorsed by the Convention “bears limited resemblance” to Madison’s favored ideas.<sup>191</sup>

Given the centrality of the federal negative to Madison’s overall plan for the Convention, it is surprising how many commentators maintain the view of Madison as the father of the Constitution. Admiring scholars either explain its absence away<sup>192</sup> or sweep it under the rug.<sup>193</sup> Moreover, an unbiased reading of Madison’s October 24, 1787, letter to Jefferson yields the strong impression that Madison was both dissatisfied with the Constitution and less integral to how it was drafted than many scholars have assumed.<sup>194</sup> In sum, like the other elements of the unfounded paternity claim, the final product of the Convention does not support Madison’s privileged status as the father of the Constitution.

## II. NOT YOUR CONSTITUTION’S THEORIST

Madison is widely held to be the leading constitutional theorist of the founding era.<sup>195</sup> This reputation is based largely on his supposed ideas about the Constitution’s federalism structures. The primary problem of constitutional reform in 1787—rearranging the balance of power between the states and the general government—sounded in federalism. So did Madison’s most sustained thinking about constitutional reform before the Convention. While Madison had important ideas on other constitutional subjects over the course of his career, his reputation as “the philosopher of the Constitution” and “America’s leading constitutional theorist” rests

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189. *Id.*

190. *See id.*

191. *Id.* For two other detailed studies along these lines, see Ewald, *supra* note 183; David Brian Robertson, *Madison’s Opponents and Constitutional Design*, 99 AM. POL. SCI. REV. 225 (2005).

192. *See, e.g.,* BANNING, *supra* note 3, at 118–19 (arguing that Madison’s negative reflected “a critical acuity that proved unanswerable” and paved the way for significant reforms.).

193. *See, e.g.,* 3 FARRAND’S RECORDS, *supra* note 27, at 135 (reprinting Farrand’s edited version of Madison’s October 24, 1787, letter to Jefferson, which excises Madison’s ongoing advocacy of the federal negative).

194. *See* Letter from James Madison to Thomas Jefferson, *supra* note 87.

195. *See, e.g.,* ADAIR, *supra* note 3; BANNING, *supra* note 3; RAKOVE, *supra* note 63.

primarily on the ideas of federalism he formulated in 1787, before, during, and shortly after the Convention, culminating in *Federalist 10*.<sup>196</sup>

Confusingly to those scholars interested in making a fresh assessment, Madison's leading interpreters have long tended to vacillate on what exactly his brilliant ideas were—flitting between *Federalist 10* and his earlier writings and then back again, insisting that the other is the brilliant bit whenever the one under consideration seems lacking, treating widely shared ideas as Madisonian innovations, or elaborating Madison's underdeveloped ideas with pages of exegesis for every sentence of Madison's own.<sup>197</sup> “In our eagerness to make Madison the most profound political theorist . . . in all American history,” writes Gordon Wood, “we may have burdened this eighteenth-century political leader with more theoretical sophistication than he or any such politician can bear.”<sup>198</sup> So true. What, in this part, we will call Madison's “Convention corpus”—the surprisingly thin body of writings comprising his Convention speeches and pre- and post-Convention correspondence, together with “Vices” and *Federalist 10*—amounts to the length of approximately one law review article. It can be read and assessed without feeling overawed by its length, brilliance, or the exegesis of other scholars.

Taking this body of work as a whole, we find little reason to believe that Madison was an unusually skilled or perceptive constitutional theorist in 1787, at least when compared with his most important peers. As Alison LaCroix has observed, the core theoretical problem of federalism was “to explain why [a] scheme of . . . ‘jurisdictional redundancy’ did not violate contemporary theory's proscription of *imperium in imperio*, or a government within a government.”<sup>199</sup> Madison recognized this issue, and in his post-Convention gloom, he concluded that the Constitution would be a flop because it had failed to solve “the evil of *imperia in imperio*.”<sup>200</sup> Yet

196. RAKOVE, *supra* note 63, at 5. As indicated, we recognize that a complete assessment of Madison's constitutional ideas would require considering additional sources and episodes of his career. For example, to evaluate fully his ideas about federalism, one would need to consider his analysis of federal-state relations in THE FEDERALIST NOS. 39, 45–46, *supra* note 49 (James Madison). Because of the word limits of this Essay, our discussion is necessarily circumscribed. See *infra* notes 9–11 and accompanying text.

197. See *supra* note 131 and accompanying text.

198. WOOD, *supra* note 6, at 155. Rakove gestures in this direction yet seems uncertain about what lessons to draw. Compare RAKOVE, *supra* note 63, at 5–7, 17–18 (observing “how little [Madison] wrote for publication and persuasion” and that his ideas were those of “an exceptionally creative politician” rather than an “authoritative commentator on the origins of the American constitution”), *with id.* at 5 (“Madison is our leading constitutionalist, both as a political actor and a political theorist”), and *id.* at 20 (arguing that Madison was “the one delegate who worked hardest . . . to make sense of [the Constitution's] meaning”).

199. LaCroix, *supra* note 12, at 457 (quoting Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 638 (1981)); see also BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 358 (1967) (“The key doctrine of federalism could survive criticism only to the extent that it could somehow be distinguished from the ancient belief that *imperium in imperio* was an illogical and unresolvable solecism . . .”); Daniel J. Hulsebosch, *Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750–1777*, 16 LAW & HIST. REV. 319 (1998).

200. Letter from James Madison to Thomas Jefferson, *supra* note 87.

Madison was mistaken. His own diagnosis of the core problem of federalism—the vices of the states—was misguided, and his cure for this misdiagnosed problem—the federal negative—was impractical and rejected by the other delegates. Instead, the Framers opted for a system of affirmative legislative supremacy and federal preemption, controlling the states not by a direct veto over their lawmaking but by regulating the people directly and thereby bypassing the states entirely. Madison’s postmortem assessment of this system as a failure reflected his own inability or unwillingness to appreciate how this solution would work—and thereby, how the new Constitution proposed to address the core problem of federalism. For its part, *Federalist 10* had little or no impact on the founding. To a large extent, this is because relatively few Americans were even aware of Madison’s famous essay at the time, as Larry Kramer has demonstrated;<sup>201</sup> but it also stems from the fact that the problem to which Madison’s theory of the extended republic in *Federalist 10* was addressed was not the core problem of American federalism.

#### A. Madison’s Misguided Theory of Federalism

In diagnosing the flaws of the confederation system, Madison obsessed over the vices of state governments: their domination of minorities, their interferences with one another, and their encroachment on federal authority. For Madison, “[t]he great desideratum” in advance of the Convention was to configure national authority as a “disinterested & dispassionate umpire in disputes between different passions & interests” emanating from state factions.<sup>202</sup> Madison’s analysis may have been accurate as far as it went, but it was myopic and radically incomplete, and it led him to fixate on a flawed solution, the federal negative, which was a structural idea for controlling *state governments*. As he explained to Jefferson, the negative was Madison’s solution to “the evil of *imperia in imperio*.”<sup>203</sup> In a penetrating analysis, Alison LaCroix captured its true significance: Madison was proposing nothing less than “merging two levels of government power into one compound legislature.”<sup>204</sup>

By contrast, Madison’s most influential colleagues believed that the Confederation’s principal weakness was the “imbecility” of the general government—its lack of sufficient powers to enact and enforce legislation. The main thrust of constitutional reform, as they saw it, was to empower the national government to act directly and affirmatively on the people.<sup>205</sup> This

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201. See Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 664–71 (1999).

202. Letter from James Madison to George Washington, *supra* note 88, at 384.

203. Letter from James Madison to Thomas Jefferson, *supra* note 87.

204. LaCroix, *supra* note 12, at 487.

205. See, e.g., 1 FARRAND’S RECORDS, *supra* note 27, at 255 (“Mr. Randolph[] was not scrupulous on the point of power . . . . He painted in strong colours, the imbecility of the existing confederacy.”); cf. EDLING, *supra* note 2, at 7 (“Far from concerning themselves with how to erect barriers to government, the Federalists argued for a national government with the ability to act. In this sense, Madisonian Federalism seems strangely out of tune with the basic thrust of the Federalist argument.”); see also *infra* Part II.A.2.

would require the recognition of some new powers and the transfer of others from the states to the general government. Above all, the power to regulate the people directly would eliminate the general government's dependence on the states; this technique would effectively control the state legislatures indirectly, by bypassing them. Ironically, empowering the national government in this way left the states with more residual sovereignty than Madison's negative would have, even though Madison's own professed objective was to design a federalist system that would "be the least possible encroachment on the State jurisdictions."<sup>206</sup>

The federal negative was the keystone of Madison's thinking about federalism. Few scholars have both emphasized that fact and appreciated its full significance for assessing Madison's constitutional thought.<sup>207</sup> While the federal negative may have been an apt solution for Madison's idiosyncratic diagnosis of the principle vices of the Confederation—the lack of national control over state legislation—it bore so little resemblance to the theoretical and practical solutions adopted by the Convention that his persistent advocacy of this idea should by itself cause us to question his celebrated status as "as our leading constitutional thinker."<sup>208</sup> But even more than that, Madison's insistence that the Constitution was fatally defective without his legislative veto reveals his questionable grasp of how the Constitution in fact attempted to solve the problem of imperium in imperio.

### 1. A Flawed Remedy: Madison's Federal Negative

Madison advocated a national legislative veto that would operate, in effect, as a preclearance remedy for all state and local laws. He urged this in his March and April letters to Jefferson, Randolph, and Washington.<sup>209</sup> As noted above, this was one of the ideas that most distinctively belonged to Madison, although his colleagues forced him to scale it down from a negative applying

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206. Letter from James Madison to George Washington, *supra* note 88, at 383.

207. Charles Hobson's 1979 article may have been the first to emphasize the centrality of the negative to Madison's constitutional ideas. See Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215, 216 (1979); see also LaCroix, *supra* note 12. Gordon Wood is especially perceptive on this score, explaining that, for Madison, "the weaknesses of the Confederation, which nearly everyone seemed to acknowledge, seemed secondary to the vices within the several states." WOOD, *supra* note 6, at 157. "Many" of Madison's nationalist colleagues "did not agree with the strange judiciallike manner in which [Madison] hoped to deal with the factional politics he found in the states"—by means of the "truly odd" federal negative. *Id.* at 158. Madison, Wood concludes, was less interested in building a true national government than to create a central "judiciallike umpire" to "simply control[] popular politics in the states and protect minority rights." *Id.* at 165. We agree with Wood's analysis. Yet Wood neglects to follow these insights through to their logical conclusion: that Madison's entire theory of American federalism in 1787 was flawed, that he failed at the time to appreciate or understand the solution his colleagues adopted, and that his colleagues were more insightful about how to solve the problem of federalism than he was. Even more strangely, five years later, Wood reverted to calling Madison "the major architect of the Constitution." Wood, *supra* note 141, at 26.

208. RAKOVE, *supra* note 63, at 5.

209. See *supra* Part I.B.2.

“in all cases whatsoever” to one limited to laws “contravening the articles of union”<sup>210</sup> before presenting it as part of the Virginia Plan. In the first detailed debate on the negative on June 8, Charles Pinckney signaled his support for Madison’s idea when he moved to replace the Virginia Plan’s negative on unconstitutional state laws with a power “to negative *all Laws* which [the national legislature] shd. judge to be improper.”<sup>211</sup> Madison quickly seconded the motion, arguing that “an indefinite power to negative legislative acts of the States [w]as absolutely necessary to a perfect system.”<sup>212</sup> For Madison, the negative flowed directly from his analysis in the “Vices” memorandum, and he summarized the principal vices to support Pinckney’s motion: “Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties, to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions.”<sup>213</sup>

Madison apparently assumed that the negative would operate as preclearance-type remedy, suspending state laws until they could be reviewed and approved by the national legislature. As Madison explained in a second debate on the negative on July 17, this remedy was needed because otherwise states “can pass laws which will accomplish their injurious objects before they can be repealed by the General Legislature or be set aside by the National Tribunals.”<sup>214</sup> Under his federal negative, therefore, “[t]he States could of themselves then pass no operative act, any more than one branch of a Legislature where there are two branches, can proceed without the other.”<sup>215</sup> In effect, as LaCroix observes, Madison was proposing a compound legislature.<sup>216</sup> “The negative (on the State laws),” Madison explained, “will make [Congress] an essential branch of the State Legislatures.”<sup>217</sup>

Aside from its political impracticality—several delegates persuasively argued that the negative would undermine any hope of ratification<sup>218</sup>—Madison’s negative suffered from a major procedural impracticality. Each year, hundreds of laws, regulating the location of butcher shops, the storage of gunpowder, the height of fence posts, and the like<sup>219</sup> would be submitted to Congress, where they would hang in suspended animation awaiting

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210. Compare Letter from James Madison to George Washington, *supra* note 88 (containing a reference to “all cases”), with 1 FARRAND’S RECORDS, *supra* note 27, at 21 (using the new language of “contravening . . . articles of Union”).

211. 1 FARRAND’S RECORDS, *supra* note 27, at 164 (emphasis added).

212. *Id.* at 164.

213. *Id.*

214. 2 *id.* at 27.

215. 1 *id.* at 165.

216. LaCroix, *supra* note 12, at 481.

217. 1 FARRAND’S RECORDS, *supra* note 27, at 447.

218. See, e.g., *id.* at 165 (Gerry) (stating that Madison’s proposal “would enslave the States”); 2 *id.* at 28 (Morris) (“The proposal of it would disgust all the States”); *id.* at 391 (Rutledge) (“If nothing else, this alone would damn and ought to damn the Constitution”).

219. See generally WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA (1996).

congressional action, clogging its agenda and distracting it from national business. When these objections were raised by other delegates, Madison responded unconvincingly. The negative could be lodged in the Senate, he suggested, which Madison anticipated would sit year-round; and state laws “of urgent necessity” could be given temporary approval “by some emanation of the power from the Natl. Govt. into each State” as had been “the practice in Royal Colonies before the Revolution.”<sup>220</sup> Federally appointed governors in the states? Despite his supposedly unrivaled preparation, Madison clearly had not thought his idea through.<sup>221</sup>

A second problem apparently eluded all of the delegates, but Madison, at least, should have seen it, if his thinking were as systematic as his admirers would have us believe. One of Madison’s chief assumptions about states—emphasized in “Vices”—was their unwillingness to comply with congressional commands. For Madison, the federal negative was necessary in part because of this bad state behavior. Yet Madison gave no explanation, either before, during, or after the Convention, of how the negative would solve this problem, except to assert hopefully that the mere “existence of such a check would prevent” states from attempting to enact mischievous laws.<sup>222</sup> Yet it is hard to see why states would be more likely to comply with a national legislative veto than with a tax requisition, treaty, or other federal mandate. What was to stop the states from simply enforcing their laws without waiting for congressional approval and then ignoring any negative issued by Congress? Madison never addressed this question.

## 2. Madison’s Faulty Conception of Federalism

As we have seen, Madison believed the core problem of federalism was the need for direct federal control of state legislatures. He apparently failed to understand how the power to regulate the people directly could also indirectly control the states by bypassing them and making state laws irrelevant. In his pre-Convention letters, Madison did no more than hint that the national legislature would have a small handful of direct legislative powers over the people.<sup>223</sup> But none of his pre-Convention writings said anything about the importance of regulating the people directly as a means of bypassing and thereby controlling the states. Instead, Madison consistently emphasized controlling state legislatures directly by means of the negative.

At the Convention, while many of his colleagues viewed the problem of federalism as one of coordinating two levels of affirmative governmental powers, Madison was stuck on viewing constitutional reform as primarily aimed at the direct control of state governments. From June 4 to July 17, the Convention debated federalism: the structure of representation in the national legislature, the theoretical nature of the general government—

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220. 1 FARRAND’S RECORDS, *supra* note 27, at 168.

221. *Accord* Hobson, *supra* note 207, at 215.

222. 1 FARRAND’S RECORDS, *supra* note 27, at 164.

223. *See supra* notes 88–91 and accompanying text.

national or federal—and the sovereignty of the states.<sup>224</sup> In this period, Madison made over a dozen significant speeches, all of them demonstrating that his primary concern was to control state legislative excesses. As late as June 19, in a speech attacking the New Jersey Plan, Madison stated his view that the twofold purpose of the Constitutional Convention was “1. To preserve the Union. 2. To provide a government that will remedy the evils felt by the States both in their united and individual capacities.”<sup>225</sup> Throughout this period, Madison focused particularly on proportional representation in the Senate. The Senate was to serve as a neutral umpire, supplying the “great desideratum” of resolving “disputes between different passions & interests” in the states by means of the federal negative.<sup>226</sup> In Madison’s mind, equal suffrage in the Senate would undermine that neutrality, presumably because the members would channel the majority factional interests of their respective states. How proportional representation in the Senate would counteract that was something of a mystery—particularly once the Convention decided on June 25 (against Madison’s wishes) that state legislatures would choose senators.<sup>227</sup> Regardless, proportional representation in the Senate was far more important for Madison than theoretical questions about sovereignty. As the smaller states’ demand for equal voting strength in the Senate persisted, Madison increasingly gravitated toward the view that the states were not sovereign entities and might be better conceived as corporations or counties.<sup>228</sup> That drift revealed that his commitment to proportional Senate representation predominated over his other federalism concerns.

During this time, Wilson, Hamilton, and King all found theoretical significance in the national government’s positive power to regulate the people directly. For Hamilton, national legislative power would generate “distributive justice, and all those acts which familiarize & endear Govt. to a people”; for that reason, he believed the national legislature should be empowered “to pass all laws whatsoever.”<sup>229</sup> Wilson argued, “A private citizen of a State is indifferent whether [the legislative] power be exercised by the Genl. or State Legislatures, provided it be exercised most for his happiness.”<sup>230</sup> The “[general government] . . . is an assemblage” of “the individuals . . . to be represented in it.”<sup>231</sup> For Wilson, regulation and representation were reciprocal: the power to regulate the people directly required not only proportional representation in the Senate but direct popular election of its members.<sup>232</sup> King explained that “the proposed Government

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224. See 1 FARRAND’S RECORDS, *supra* note 27, at 93 (June 4, 1787); 2 *id.* at 21 (July 17, 1787).

225. 1 *id.* at 168.

226. *Id.* at 384.

227. *Id.* at 408.

228. *Id.* at 449, 463–64.

229. *Id.* at 284, 291.

230. *Id.* at 344; *see also id.* at 253.

231. *Id.* at 406.

232. *Id.* at 151, 154, 344, 405–06, 413.

[is] substantially and formally, a General and National Government over the people,” which would “never . . . act as a federal Government on the States.”<sup>233</sup> Because the government “was to operate on the people,” it had to be “proportioned to them.”<sup>234</sup>

Not until June 28 did Madison come around to emphasizing that the Virginia Plan proposed a “national” rather than a “federal” constitution because it operated directly on the people.<sup>235</sup> But he did so only after his Convention allies repeatedly made this point and, moreover, he did not conceptualize that relationship as a way to control the states by bypassing them.<sup>236</sup> Instead, he argued that the “complete power of taxation” and the “[m]any other powers” to regulate the people that would be added under the proposed national government would “assimilate it to the Govt. of individual states.”<sup>237</sup> On July 14, Madison rhetorically “called for a single instance in which the General Government was not to operate on the people individually.”<sup>238</sup> He then made the oft quoted statement that, to many lawyers and judges, epitomizes the idea of American federalism: “The practicability of making laws, with coercive sanctions, for the States as political bodies has been exploded on all hands.”<sup>239</sup> But Madison was a relative newcomer to this idea, having previously thought that national coercion of the states was an essential element of federalism. In any case, with this remark, Madison was not stating a theory of federalism, let alone proposing one. He was parroting the argument advanced by Wilson and King that proportional representation in the Senate was the just and necessary reciprocal consequence of the national government’s power to regulate the people directly, rather than through the states.<sup>240</sup> At this point in the debate, the federal negative had not yet been rejected, and Madison still evidently hoped that direct federal control over state legislation was going to be part of the Constitution.

On the next two Convention days, July 16 and 17, Madison suffered crushing defeats, as the two proposals of greatest importance to him were successively voted down. On July 16, the Convention narrowly adopted the Great Compromise, rejecting proportional representation in the Senate in favor of equal state suffrage.<sup>241</sup> On July 17, the Convention rejected the federal negative.<sup>242</sup> As a result of these defeats, as Bilder has observed, “Madison was intellectually stuck.”<sup>243</sup> His notes of the July 17 debate over

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233. 2 *id.* at 6.

234. *Id.* at 7.

235. *See* 1 *id.* at 446–47.

236. *See id.*

237. *Id.* at 447.

238. 2 *id.* at 9.

239. *Id.* For Supreme Court quotations of this line, see, for example, *Alden v. Maine*, 527 U.S. 706, 714 (1999); *Printz v. United States*, 521 U.S. 898, 919 (1997); *New York v. United States*, 505 U.S. 144, 164 (1992).

240. *See* 2 FARRAND’S RECORDS, *supra* note 27, at 6 (King); *id.* at 10 (Wilson).

241. *See id.* at 13.

242. *See id.* at 22.

243. BILDER, *supra* note 7, at 114.



the negative—“recorded briefly and half-heartedly”<sup>244</sup> after the proposal went down in flames—are revealing. Other than his own speech defending the negative, with arguments repeated from his June 8 speech, Madison summarized the opposing speeches in one or two sentences each.<sup>245</sup> Gouverneur Morris argued that the negative “would be terrible to the states, and not necessary, if sufficient legislative authority should be given to the general government.”<sup>246</sup> Sherman agreed that it was unnecessary, since “the courts of the states would not consider as valid any law contravening the authority of the Union, and which the legislature would wish to be negatived.”<sup>247</sup> Madison responded that state laws “will accomplish their injurious objects before they can be repealed by the Genl Legislr. or be set aside by the National Tribunals” and that state judges could not be trusted to uphold federal laws.<sup>248</sup> Morris countered that “[a] law that ought to be negatived will be set aside in the Judiciary department, and if that security should fail; may be repealed by a Nationl. law.”<sup>249</sup> Sherman argued that an unconstitutional state law would be void even if not prevented by a legislative negative.<sup>250</sup> Immediately after the rejection of Madison’s negative, Luther Martin’s motion to incorporate what eventually became the Supremacy Clause<sup>251</sup> passed unanimously; Madison included no debate on it, though there would likely have been speeches, at a minimum to move and second the proposal and explain it.<sup>252</sup>

This segment of the proceedings should be unpacked, because it was all-important to the non-Madisonian theory of federalism built into the Constitution. Where state laws interfered with the federal Constitution, laws, or treaties, by imposing conflicting obligations on individuals, those state laws would be invalidated, not at the point of enactment, as Madison had insisted on, but at the point of enforcement. Individuals who are burdened under a state law that is repugnant to the federal constitution, laws, or treaties could challenge those laws in federal or state court, where the Supremacy Clause required that the federal law control the case. Though moved by Martin on July 17, the original proposal for a judicially enforced Supremacy Clause was included in the New Jersey Plan one month earlier.<sup>253</sup> It was later enlarged by Wilson and the Committee of Detail to cover countervailing state constitutional provisions as well as other state laws.<sup>254</sup> The solution, imperfect as it may be, is what we now know as federal supremacy, judicial review, and preemption. The Supremacy Clause operates as a fundamental

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244. *Id.*

245. See 2 FARRAND’S RECORDS, *supra* note 27, at 27.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 28.

250. See *id.*

251. U.S. CONST. art. VI, cl. 2.

252. See 2 FARRAND’S RECORDS, *supra* note 27, at 28–29.

253. 1 *id.* at 245 (New Jersey Plan); 2 *id.* at 28–29 (Martin’s motion).

254. 2 *id.* at 169 (Wilson’s draft); *id.* at 183 (Committee of Detail’s August 6 draft).

choice-of-law rule binding on “the judges in every State.”<sup>255</sup> Numerous Convention delegates clearly understood how this clause would implement federal supremacy and cover the same ground as the national legislative veto but in a manner less “terrible to the states.”<sup>256</sup> The best lawyers among them probably understood how courts well versed in choice-of-law problems would proceed when multiple sovereignties were involved.<sup>257</sup> The New Jersey Plan that originally included the Supremacy Clause, for example, was authored by former New Jersey attorney general and future U.S. Supreme Court Justice William Paterson, with likely input from New Jersey Supreme Court Justice David Brearley.<sup>258</sup> The legally sophisticated Gouverneur Morris later explained that, in light of it, federal legislation could in effect “repeal” state laws.<sup>259</sup> Morris’s assumption that the federal negative would be unnecessary by giving “sufficient legislative authority” to Congress implies a conception of *affirmative* legislative power with which lawyers were familiar.<sup>260</sup> But Madison’s desultory account of this all-important debate raises the question of how well he understood the Supremacy Clause and the concept of judicially enforced preemption.

Whether or not Madison fully understood how this process would work, he evidently believed that it would not work. As he complained to Jefferson in his remarkable October 1787 Convention postmortem, rejection of the negative resulted in the Convention’s failure to solve “the evil of *imperia in imperio*.”<sup>261</sup> Thus, Madison concluded, “it is evident I think that without the royal negative or some equivalent controul, the unity of the system would be destroyed.”<sup>262</sup> Madison continued to reject the notion that “the Judicial authority under our new system will keep the States within their proper limits, and supply the place of a negative on their laws,” because “a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them.”<sup>263</sup> Again, if this is correct, then the same disobedience would have undermined his negative—a problem Madison never squarely confronted.

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255. U.S. CONST. art. VI, cl. 2.

256. See 2 FARRAND’S RECORDS, *supra* note 27, at 27 (Morris).

257. Cf. *Printz v. United States*, 521 U.S. 898, 907 (1997) (noting that eighteenth-century courts “applied the law of other sovereigns all the time”).

258. See DONALD SCARINCI, DAVID BREARLEY AND THE MAKING OF THE UNITED STATES CONSTITUTION 18, 171 (2005).

259. See 2 FARRAND’S RECORDS, *supra* note 27, at 28.

260. For instance, in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 30 (1824), Daniel Webster argued “Congress has no power of revoking State laws, as a distinct power. It legislates over subjects; and over those subjects which are within its power, its legislation is supreme, and necessarily overrules all inconsistent or repugnant State legislation.” See also Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 236–53 (2000) (arguing that the Framers understood that affirmative federal laws would abrogate contrary state laws under the Supremacy Clause).

261. Letter from James Madison to Thomas Jefferson, *supra* note 87, at 212.

262. *Id.*

263. *Id.*

Some commentators have tried to rehabilitate Madison's federal negative on the ground that it anticipated the Fourteenth Amendment.<sup>264</sup> After all, the argument goes, it was Madison who insisted that states posed the greatest threat to civil liberties, and the Fourteenth Amendment's protection of rights against the states for all practical purposes vindicated his vision. There are undoubtedly parallels between the federal negative and the Fourteenth Amendment, but to retrofit the latter as "Madisonian" seems questionable and arguably indulges the tendency to automatically credit Madison with virtually every significant constitutional idea, especially when it comes to federalism and rights. Doing so also treats these two structural remedies at a level of abstraction that makes the comparisons hollow. Madison's federal negative was a proposal designed to *avoid* the two enforcement mechanisms supplied by the Fourteenth Amendment: judicial review and affirmative federal legislation.<sup>265</sup> Those remedies were implicit in the approach advocated by other delegates but that Madison complained were inadequate. This is to say nothing about the irony of crediting Madison with anticipating an amendment designed to remedy an antebellum constitutional evil—domestic slavery and its myriad associated forms of racial discrimination and oppression—that Madison did so much during the course of his career to protect from federal interference.<sup>266</sup>

### 3. A Madisonian National Legislature: Vortex or Vacuum?

Madison seems to have been unable to understand, or at least unwilling to credit, that states could be controlled without a federal negative through the exercise of affirmative legislative power regulating the people directly, coupled with a judicially enforced supremacy clause. This notable gap was consistent with what appears to have been Madison's general aversion to legislation. His primary analysis of the vices of the Confederation was the profusion of unjust state laws that encroached on federal jurisdiction, on other states, and on property rights within the states. One of the vices, indeed, was too much state legislation.<sup>267</sup> His proposed solution to this problem was the federal negative, a check on state legislation.

But Madison's thinking about the national government at the Convention was also dominated by checks on *federal* legislation. Throughout June, his speeches emphasized "the necessity of providing more effectually for the security of private rights."<sup>268</sup> The national legislature was no different from those of the states in its "tendency . . . to throw all power into the Legislative

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264. See, e.g., RAKOVE, *supra* note 63, at 191 (describing Section 1 of the Fourteenth Amendment as "arguably the most Madisonian element of our Constitution"); James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837 (2004) (invoking Madison to gain acceptance of a progressive theory of Fourteenth Amendment judicial review).

265. See *supra* Part II.A.

266. See *infra* note 310 and accompanying text.

267. See *supra* notes 122–23 and accompanying text.

268. 1 FARRAND'S RECORDS, *supra* note 27, at 134.

vortex.”<sup>269</sup> The Senate was to act as a negative within the national legislature: its purpose was not only to wield the negative over state laws but also “to protect the people against their rulers” and against their own “transient impressions,” which presumably would be voted into bills in the lower house.<sup>270</sup> Since these “transient impressions” tended to produce paper money and debtor relief, Madison left little doubt that the Senate would protect creditors’ rights. Robert Yates recorded Madison as saying that the Senate would “protect the minority of the opulent against the majority.”<sup>271</sup> For Madison, a council of revision would provide still another check on legislation; when this proposal failed, he supported an executive veto subject to override only with a near-impossible three-fourths majority in Congress.<sup>272</sup> His beloved federal negative would also check national legislation by requiring time-consuming congressional oversight of the profusion of state laws, thereby crowding out affirmative national legislation. Finally, the extended republic would itself tend to check legislation, at least to Madison’s way of thinking, by making majority coalitions difficult to form in the national councils.

While Madison’s vision of the legislative process was filled with checks and negatives, he had comparatively little to say about affirmative legislative powers. His pre-Convention letters mentioned “complete authority in all cases which require uniformity; such as the regulation of trade, including the right of taxing both exports & imports, the fixing the terms and forms of naturalization &c. &c.”<sup>273</sup> At the Convention, when Roger Sherman asserted that national powers should extend only to defense, diplomacy, foreign commerce, “and a few lesser matters,” Madison expressly “differed from” Sherman only to add “the necessity of providing more effectually for the security of private rights, and the steady dispensation of justice.”<sup>274</sup> During the first half of the Convention, Madison believed the question of national legislative powers should be deferred, either because of its difficulty or lack of agreement on the legislature’s structure.<sup>275</sup> Other delegates wanted to consider powers first, then structure.<sup>276</sup> When Madison finally turned his attention to the question of affirmative powers in the weeks following the Committee of Detail’s report in August, his efforts were sporadic and unsystematic. For Wilson and other nationalists, the core problem with the Confederation government was that it did too little, and Wilson accordingly drafted the Necessary and Proper Clause<sup>277</sup> to promote “capable federalism” and empower Congress to legislate on behalf of the common defense and

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269. 2 *id.* at 35.

270. 1 *id.* at 421.

271. *Id.* at 431.

272. *Id.*

273. Letter from James Madison to George Washington, *supra* note 88, at 383.

274. 1 FARRAND’S RECORDS, *supra* note 27, at 134.

275. *Id.* at 53, 551.

276. *Id.* at 551 (Gerry); 2 *id.* at 25 (Morris).

277. U.S. CONST. art. I, § 8, cl. 18.

general welfare.<sup>278</sup> Madison apparently did not agree, and he spent a good part of his career after the Convention fashioning constitutional arguments designed to limit the scope of federal legislative authority.<sup>279</sup>

### B. *The Enduring Myth of Federalist 10*

*Federalist 10* is widely held to be the most important piece of theoretical writing about the Constitution ever published.<sup>280</sup> The essay lays out Madison's famous theory of the extended republic in which the great size of the United States will create such a multiplicity of factional interests that none will likely be able to form a dominant majority that can tyrannize minority interests. Together with its elaboration in *Federalist 14* and its coda in *Federalist 51*, *Federalist 10* was the "final statement—but also the first public one" of Madison's extended republic theory.<sup>281</sup> Less developed versions—or in some cases, hints of it—can also be found scattered through the Convention corpus.<sup>282</sup> Whether *Federalist 10* lives up to its reputation for brilliance—and we have our doubts—it is quite true that, as Larry Kramer observes, scholars "imagine the Constitution to be built on Madisonian foundations" because of "Madison's uniquely original ideas about the role of an extended republic in controlling faction" in *Federalist 10*.<sup>283</sup>

Granting its powerful rhetorical effect that has captivated so many readers since Beard first redirected attention to this essay in 1913,<sup>284</sup> why do we question the analytical brilliance and genuine importance of *Federalist 10*? To begin with, *Federalist 10* is not a theory of federalism. By the time Madison published this essay, the people of New York and other states were considering the Constitution as proposed by the Convention—without Madison's negative. Madison did not offer the extended republic theory as a justification for any particular federalism structure or for federalism in general. He did not explain how the extended republic would control factious legislation in the states, which he had repeatedly insisted was the primary cause of constitutional reform. As Rakove perceptively observes, *Federalist*

278. 2 FARRAND'S RECORDS, *supra* note 27, at 10; *accord* 1 *id.* at 483–84; *see also* Mikhail, *supra* note 152; David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573 (2017).

279. *See, e.g.*, THE FEDERALIST NO. 41, *supra* note 49, at 223 (James Madison) (arguing for a narrow interpretation of the General Welfare Clause); THE FEDERALIST NO. 45, *supra* note 49, at 247 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined."); Primus, *supra* note 12; David S. Schwartz, *Mr. Madison's War on the General Welfare Clause* (2021) (unpublished manuscript) (on file with authors).

280. *See, e.g.*, Alan Gibson, *Madison's Republican Remedy: The Tenth Federalist and the Creation of an Impartial Republic*, in THE CAMBRIDGE COMPANION TO THE FEDERALIST 263 (Jack N. Rakove & Colleen A. Sheehan eds., 2020) ("Madison's famous essay has been rivalled only by the Declaration of Independence and the Constitution itself as the most important political writing of the American founding.")

281. RAKOVE, *supra* note 63, at 9.

282. *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 27, at 136 (Madison's June 6 speech); MADISON, *supra* note 47, at 354 (the eleventh vice).

283. Kramer, *supra* note 201, at 611, 615.

284. *See* BEARD, *supra* note 17, at 14.

10 “identifies a set of political conditions that will make it possible to regard a *national* government as remaining republican in character.”<sup>285</sup> By itself, the extended republic theory is at best an argument that the national government will be less faction ridden than state governments and therefore “produce results superior to those found in the states.”<sup>286</sup> But, significantly, it does not purport to explain the distribution of power or even the relationship between the national government and the states.

Madison was correct to recognize a basic tension between the imperative to maintain respect for individual rights and the majority-rule element at the core of republican government. And his core observation that society comprises factional interests was undoubtedly a theoretical advance over earlier eighteenth-century political theories dividing society into “the one, the few, and the many.”<sup>287</sup> But Madison’s fundamental premise, that factional takeover was less likely at the national level, while a plausible idea, was not as well thought through as its admirers lead us to believe. The mere notion of size does all the analytical work. Worse, Madison failed to consider how readily the interests that cause factions within a state—debtors, for example, or perhaps more plausibly, slaveholders—can cross state lines and grow commensurately to play a comparably influential or even amplified role at a national level. Instead, Madison seemed to assume that interests would not cross state lines sufficiently to produce nationwide majority factions. That was a rather dubious assumption for a political observer who came of age during the American Revolution, when the colonies formed a transcontinental faction to resist taxes, boycott imports, and eventually wage war against imperial Britain, and when the “contagion of liberty” generated by these events spawned America’s first abolitionist societies whose activism spilled over state lines.<sup>288</sup> Madison also failed to acknowledge that *minority* factions could capture a state or national legislature—something Madison would soon charge the Federalists with doing and that should have been obvious even in 1787.<sup>289</sup>

As Kramer has demonstrated, Madison’s much-celebrated theory of the extended republic got little or no traction at the Convention.<sup>290</sup> Moreover, it had little or no discernable impact on the ratification debates and was

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285. Jack Rakove, *A Biography of Madison’s Notes of Debates*, 31 CONST. COMMENT. 317, 344 (2016) (reviewing BILDER, *supra* note 7).

286. *Id.*

287. We are indebted to Jack Rakove for this observation. See Email from Jack Rakove, Professor of Hist. & Am. Stud., Stanford Univ., to authors (Mar. 24, 2021) (on file with authors). The originality of Madison’s core observation nonetheless seems questionable. See generally, e.g., ROBERT LEVERIE BRUNHOUSE, *THE COUNTER-REVOLUTION IN PENNSYLVANIA, 1776–1790* (1942); H. JAMES HENDERSON, *PARTY POLITICS IN THE CONTINENTAL CONGRESS* (1974); STAUGHTON LYND, *CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION* (1967).

288. See, e.g., MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789*, at 135–36 (1950). See generally ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* (1967).

289. See, e.g., ELKINS & MCKITRICK, *supra* note 9, at 266–69 (describing Madison’s attack on Federalists as a minority faction).

290. See Kramer, *supra* note 201, *passim*.

virtually ignored before 1913. Kramer suggests that its lack of influence stems from the fact that Madison's theory was so sophisticated that it flew over the heads of his contemporaries.<sup>291</sup> We question this interpretation and suspect that the reasons are more basic than that: simply put, Madison's theory was irrelevant to the framing of the Constitution and remains of limited value in understanding its theoretical foundations today. *Federalist 10* is a theory without a specific institutional proposal, and it functioned primarily to rebut the Anti-Federalist argument from Montesquieu that large republics were impossible. Yet, as Rakove observes, "there is little evidence . . . that the Framers were sitting around worrying about how to reconcile their agenda of constitutional change with [Montesquieu's] strictures on the size of republics."<sup>292</sup>

Finally, it seems worth noting that Madison's extended republic theory likely had little or no impact on the Convention for another more basic reason: a critical mass of delegates was already committed to conceiving the United States as an "extended republic" before arriving in Philadelphia. From the moment John Jay established the country's new western boundary along the Mississippi River during the Treaty of Paris negotiations,<sup>293</sup> it was clear to all informed observers that the United States would eventually control an enormous land mass comprising half a continent. The Convention was called to strengthen a government for the entire Union, including both its extensive original seaboard and this vast western territory. The most influential delegates (including Washington)<sup>294</sup> intended that this government should be a true national government, with supreme legislative, executive, and judicial powers that acted directly on the people. Furthermore, everyone assumed the new government would be republican; no one seriously considered a monarchy or other nonrepublican forms. And although several delegates occasionally bandied threats of breakup into smaller confederacies, no one really considered smaller republics to be an acceptable alternative to a continental government—an extended republic—for the people of all thirteen states, along with the new states expected to join the Union.<sup>295</sup> As Mary Sarah Bilder, Daniel J. Hulsebosch, and other

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291. *Id.* at 632, 645–48.

292. Rakove, *supra* note 285. Kramer's explanation that the other Convention delegates could not wrap their heads around Madison's theory also may be undermined by Bilder's research on Madison's Convention notes. Bilder has plausibly argued that the speeches and writings Kramer relied on may have been written after the fact and essentially backdated by Madison. *See* BILDER, *supra* note 7, at 45, 117, 244–45, 309 n.13. If this is correct, then it is another reason why Madison's extended republic theory might be less important than is commonly assumed.

293. *See* JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783–1789*, at 67–68 (2015).

294. *Id.* at 109 (explaining that Washington "was, in truth, the most nationalistic of the nationalists, because he had invested more than anyone else in making the American Revolution succeed, and he had concluded during the course of the war that success entailed a consolidated national government").

295. *Cf.* Letter from James Madison to Thomas Jefferson, *supra* note 87, at 206 ("No proposition was made, no suggestion was thrown out, in favor of a partition of the Empire into two or more Confederacies.").

scholars have explained, the Framers' experience of the British Empire taught them most of what they needed to know about the strengths and limitations of a government with multilayered authority at the center and periphery.<sup>296</sup> They did not need to learn this from Madison.

#### CONCLUSION

The persistence of Madison's unwarranted reputation as the father of the Constitution<sup>297</sup> distorts both constitutional history and constitutional law. It overstates the significance of Madison's ideas, occludes the contributions of other delegates, and obscures the Framers' actual designs and intentions. Beyond its most basic features, such as its tripartite scheme of government and bicameral legislature, which were expected and quickly supported by virtually all of the delegates, the Constitution reported out on September 17 bore little resemblance to Madison's specific suggestions before the Convention. Most significantly, the final Constitution was not "Madisonian" in any significant sense of that term. It was based on a theory of federalism—of solving the problem of imperium in imperio—that diverged sharply from Madison's own vision. For Madison, the core problem of federalism was state legislative interference with private rights, along with state legislative obstruction of federal commands.<sup>298</sup> His solution was to impose direct control over the states in the form of a national legislative negative that would in effect "assimilate" each state legislature into a compound national legislature. But for the majority of the Framers, as reflected in the finished Constitution, the core problem of federalism was the lack of affirmative national power to tax and regulate the people directly. The solution was the grant of affirmative legislative powers and a regime of judicially enforced federal constitutional and legislative supremacy. Apart from the explicit restrictions in Article I, Section 10, the states would be controlled as far as necessary, and indirectly, through this regime. Madison may not have appreciated or fully comprehended how that system would work; in any case, he evidently believed it would not. These fundamental differences between Madison's vision and the finished product of the Convention by themselves make the claim that he was the Constitution's leading theorist, let alone its "father," unsustainable.

Stripping the unfounded paternity claim and preeminent constitutional theorist label is only the first step in clearing away the remarkable mythology that has built up around Madison. It is equally important to place *Federalist 10* and other parts of Madison's Convention corpus in a more accurate historical perspective. Doing so has both methodological and substantive aspects. Methodologically, we think it is essential for scholars to control for, rather than give in to, the powerful confirmation bias and halo effects that

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296. MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004); Hulsebosch, *supra* note 199; *see also* LaCroix, *supra* note 12, at 453–57.

297. *See supra* Part I.B.

298. *See supra* Part I.B.2.



perpetuate the tenacious conventional wisdom about Madison. We see confirmation bias in the tendency to slip into hagiography, overinterpret Madison's thin texts, credit him with originality for commonplace ideas, resolve all doubts or ambiguities in his favor, and disregard conflicting or unflattering evidence in the historical record. Avoiding confirmation bias requires approaching Madison's writings without the settled expectation that he was the leading political theorist or constitutional oracle of the founding generation, with unparalleled insight into the Constitution's meaning. Methodological rigor also requires setting aside various halo effects—such as allowing Madison's genuinely admirable qualities to color our assessments of his life and work. Madison's remarkable combination of success as a politician and statesman, combined with his “adorkability”—his shy, studious, and bookish personality—are endearing to academics.<sup>299</sup> By maintaining and preserving his own massive paper trail, Madison gave us invaluable windows into more than fifty years of the political history of the early republic. Historians are understandably grateful: Jack Rakove writes that “Madison may well be regarded as a patron saint of American history,”<sup>300</sup> and Mary Sarah Bilder notes that the Library of Congress classifies Madison's notes of the Federal Convention as a “Top Treasure” in its collection—as well they are.<sup>301</sup> Furthermore, Madison's efforts on behalf of religious liberty and other individual rights, such as his 1785 “Memorial and Remonstrance Against Religious Assessments” and his dogged pursuit of what would become the Bill of Rights, are praiseworthy in many respects. Arguably, Madison directly participated in more important episodes in the constitutional history of the early republic than any other single individual. We can acknowledge his admirable qualities and remarkable career without unduly inflating his reputation or grossly exaggerating his contributions to the founding.

Substantively, we suspect that a fresh assessment of Madison's post-Convention words and actions, from the *Federalist* essays through the end of his life, will reveal a more accurate, and very different, portrait than that of the nonpartisan constitutional sage. Rather than a deep constitutional thinker and authoritative oracle, Madison might be better regarded as—in Rakove's apt phrase—“a politician thinking” and in particular, one often thinking up constitutional arguments to win the dispute of the moment without due regard for their longer-term implications. Madison was an early adopter—and arguably the most influential practitioner—of the American penchant for turning arguments over politics and policy into constitutional questions. Once he clearly emerged as the leader of a national opposition party in the 1790s, his skepticism about “parchment barriers” faded and he recognized the utility of using constitutional interpretation as the best available check on

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299. See, e.g., FARRAND, *supra* note 3, at 17 (characterizing Madison as “essentially a scholar in politics”); RAKOVE, *supra* note 63, at 15 (observing that in a less revolutionary era, Madison would have gone to graduate school rather than entering politics).

300. RAKOVE, *supra* note 3, at 4.

301. BILDER, *supra* note 7, at 1.

government actions he opposed. In this sense, the conventional “Madison Problem” might not be the best way to produce an accurate portrait of Madison as constitutional theorist. “Interpret the Constitution at all times to defeat Hamiltonian political economy and implied national powers that could threaten slavery” may be a consistent constitutional *ideology*, but it is a dubious and inconsistent principle of constitutional *interpretation*.<sup>302</sup>

Yet this seems to be how Madison frequently operated. Based on what he took to be the greatest policy challenge at a particular moment in time, he devised a structural remedy or interpretive “principle,” only to abandon that idea when changed circumstances converted his former solution into a problem. When the challenge in 1787 was (in his view) faction-dominated state legislatures running rampant with debt relief laws, paper money issues, and other statutes that threatened “different kinds of property,”<sup>303</sup> the solution was an extended republican government with a national legislative veto over state laws.<sup>304</sup> When the challenge in 1798 was a faction-dominated *national* legislature overreaching by enacting the Alien and Sedition Acts<sup>305</sup> on the basis of implied national powers, the solution was, in effect, the reverse: a state legislative veto over national laws.<sup>306</sup> When the challenge was a Federalist administration creating a national bank and embracing Hamilton’s ideas about political economy in 1791, the solution was to appeal to a government of limited and enumerated powers.<sup>307</sup> But when the challenge was the desperate need for a national bank to reign in rampant currency nonconformity in 1816, Madison created an exception to limited enumerated powers in cases where the violation of that principle lasted long enough to furnish a different constitutional interpretation.<sup>308</sup> Finally, when the challenge in the 1830s was a state inappropriately (in Madison’s view) using this veto against a national policy that did not rise to the level of the Alien and Sedition Acts, the solution was to claim that his 1798 position on federal-state relations was being misconstrued.<sup>309</sup>

Throughout his life, Madison cultivated a reputation for honesty, probity, and ideological sincerity that most historians have largely accepted. The actual record, however, suggests that he often engaged in tactics that, while perhaps typical of politicians, are at odds with his reputation as an above-the-

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302. Madison’s prominent role in attacking implied powers in favor of a “strict” conception of enumerated powers is well known. What is perhaps less familiar is how inadequate those arguments are. *See, e.g.*, Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3 (2019); Schwartz, *supra* note 278.

303. MADISON, *supra* note 47, at 355.

304. *See supra* Part I.B.2.

305. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798); Act of July 14, 1798, ch. 74, 1 Stat. 596.

306. *See* DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF McCULLOCH V. MARYLAND* 27 (2019); Virginia Resolutions, *supra* note 9.

307. *See, e.g.*, Primus, *supra* note 12.

308. *See* David S. Schwartz, *Madison’s Waiver: Can Constitutional Liquidation be Liquidated?*, 72 STAN. L. REV. ONLINE 17, 21–22 (2019).

309. *See, e.g.*, Gutzman, *supra* note 6.

fray constitutional sage. In the Virginia ratifying convention, in the First Federal Congress, as president, and at other points throughout his career, Madison often made flimsy, opportunistic constitutional arguments, with little regard for consistency and only a superficial concern for neutral principles. On many occasions, he did so on behalf of the most unjust and repressive institution in American history: chattel slavery. Although he is not normally characterized in this fashion, Madison was arguably the most brilliant and effective slave-power constitutionalist this country has ever known, who perhaps was more responsible than any other single individual for creating and shaping the “federal consensus” that protected slavery from democracy for almost eight decades.<sup>310</sup> Like the Garrisonians before them, when Americans today conclude that the original Constitution was proslavery, they are largely channeling Madison’s ideas. The original Constitution, however, was not a proslavery constitution as that phrase is usually understood. Most importantly, it vested the United States with the implied power to abolish slavery, a power Madison did everything he possibly could to kill and bury forever.

As we emphasized at the outset, our overriding purpose is not to “trash” Madison but to start a new scholarly conversation about him. As that conversation unfolds, with contributions by scholars from a variety of perspectives, we hope that a more accurate and nuanced picture of Madison will emerge. With his giant shadow reduced to more realistic, human proportions, all of us will be better able to see and grasp alternative understandings of the original Constitution.

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310. For Madison’s role in taking advantage of the 1790 antislavery petitions to establish the federal consensus, see JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 81–119 (2000); GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS’ UNION* 191–203 (2010); Howard A. Ohline, *Slavery Economics and Congressional Politics, 1790*, 46 *J.S. HIST.* 335 (1980). In his book-length study of Madison and slavery, Drew McCoy concluded that “Madison’s antislavery credentials can fairly be described as impeccable.” DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 260 (1989). Needless to say, we disagree with this assessment.