



# JAMES MADISON AND THE JUDICIAL POWER

JACK RAKOVE



**A MADISONIAN CONSTITUTION FOR ALL**  
ESSAY SERIES



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BY JACK RAKOVE<sup>1</sup>

## INTRODUCTION

Asking what James Madison would think about some aspect of modern political life is always a challenging exercise. The problem is not only that no time machine exists to pluck Madison out of his era and plop him down in ours. It is also that Madison was a deeply empirical and creative thinker whose ideas were never frozen into one perfect synthesis, and a political actor whose thoughts reflected his rich experience. If one asks, *What would Madison do?*, one has to give Madison the same historical knowledge and political experience that we enjoy, and then let him make up his own mind—an intellectual challenge that lies beyond our own poor powers to add or detract.

A second problem complicates asking how Madison thought about issues relating to the judiciary. Two overarching concerns drove his constitutional thinking in the 1780s. One involved the structure of the federal system and the problem of getting the states to perform their national duties. The other concerned the nature of collective deliberation and legislative decision-making. Madison's seminal experiences in the 1770s and 1780s were primarily legislative in nature. By contrast, only after 1793 did he turn his critical attention to considering the role of the executive in republican governments. His interest in judicial power also took some time to develop. Many of his most telling comments on this subject were written only after 1819, in response to the key decisions in *McCulloch v. Maryland* (1819) and *Cohens v. Virginia* (1821).

Yet Madison was also a close student of Anglo-American law; in Mary Sarah Bilder's phrase, he was something of a "demi-lawyer."<sup>2</sup> In his first sustained discussion of American republican governments in 1785, Madison observed that "*The Judiciary Department* merits every care. Its efficacy is demonstrated in G. Britain where it maintains private Right against all the corruptions of the two other departments & gives a reputation to the whole Government which it is not in itself entitled to."<sup>3</sup> At the Federal Convention, he proposed and vigorously supported the idea of giving the judiciary an active role in legislation. Although he worried that judges would never possess the same political advantages as legislators, he believed that the Supreme Court would play a critical role in maintaining the stability of the entire federal system. The brief statement on this point in *Federalist* 39 remained an orthodoxy to which he still adhered in the 1830s. His criticisms of the Marshall Court notwithstanding, Madison believed that a reliance on the authority of the Supreme Court would offer the South a lasting legal security against northern domination.

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<sup>1</sup> This essay draws upon my prior writings, including "The Origins of Judicial Review: A Plea for New Contexts," *Stanford Law Review* 49 (1996-1997), 1031-1064; "Judicial Power in the Constitutional Theory of James Madison," *William and Mary Law Review* 43 (2001-2002), 1513-1547; *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996); and *A Politician Thinking: The Creative Mind of James Madison* (Norman, OK: University of Oklahoma Press, 2017).

<sup>2</sup> Mary Sarah Bilder, "James Madison, Law Student and Demi-Lawyer," *Law and History Review* 28 (2010), 389-449.

<sup>3</sup> "Letter from James Madison to Caleb Wallace, Aug. 23, 1785," in Jack N. Rakove, ed., *James Madison: Writings* (New York: Library of America, 1999), 42.





## FIVE POSTULATES ABOUT MADISON AS A CONSTITUTIONAL THINKER

Before examining Madison's ideas about the judiciary, it would be helpful to list five essential elements of his constitutional thinking.

1. Madison was first and foremost a student of collective political deliberation. His formative political experiences were his three-and-a-half uninterrupted years of service in the Continental Congress (March 1780-October 1783) and the three consecutive terms he then spent representing Orange County in the Virginia House of Delegates (1784-1786). The problem of improving the quality of legislative deliberation and checking the misuse of legislative power dominated his political thinking, at least down to 1793 and again during the two decades of his retirement at Montpelier (1817-1836). His ideas about judicial power were largely derivative of his desire to curb the "impetuous vortex" of legislative activity.
2. Although Madison shared the American revolutionaries' commitment to the principle of separation of powers, his approach to this subject was never rigid or doctrinaire. As he observed in *Federalist 37*, "Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzles the greatest adepts in political science" (a group in which Madison counted himself). Constitutional statements affirming a rigid separation of powers were just that: so many "parchment barriers" that were never self-enforcing. A general adherence to the principle of separated powers did not preclude creative or pragmatic adaptations that would enable the pursuit of the public good and the protection of private rights, Madison's dual goals of constitutional government.
3. Madison knew that in republican governments, public opinion and popular will were the forces that ultimately drove political decision-making. Those forces were most powerfully expressed in the legislature, and especially in its lower house, the institution that represented the people most directly. To control its dominant political influence and legislative power, expedients might be developed to fortify and unite the weaker institutions, perhaps by linking the presidency with either the Senate or the judiciary. But the best solution of all was the extra-institutional one proposed in *Federalist 10* and restated in *Federalist 51*: to expand the republic to take in a "multiplicity of factions" or interests, so that the formation of the wrong kinds of popular majorities would grow more difficult.
4. It also follows that the most dangerous political forces would coalesce at the state and local levels of government. That was where "factious majorities" could more readily form, and where the plenary authority of state legislatures would leave rights vulnerable to violation. Madison's initial skepticism about amending the Constitution to include the Bill of Rights presumed that a declaration of rights would do little good unless it applied directly against the states. He also doubted that judges would have the political courage to apply federal constitutional guarantees against the mobilized will of public opinion, again particularly within the states. But he never doubted the moral value of such an ambition, and in principle he would have welcomed the growth of modern rights-based jurisprudence through the "incorporation" against the states of the guarantees of Section 1 of the Fourteenth Amendment.
5. Finally, Madison recognized that the ongoing task of making the constitutional system work required a patient willingness to sort out its complexities. As he first explained in *Federalist 37*, political phenomena



were inherently difficult to classify, describe, and delineate. Grand theoretical statements or simple invocations of popular or state sovereignty would not do this work. The American system was a real “non-descript”: it had no true precedents and could only be analyzed inductively, in its messy details.

Save for postulates 4 and 5, the judiciary does not hold a commanding place in these discussions. Yet Madison’s thoughts on the subject still offer important clues to his thinking and to our notions of the Madisonian constitution that we often invoke but rarely describe in any serious detail (beyond citing *Federalist* Nos. 10 and 51).

## EARLY THOUGHTS ABOUT THE JUDICIAL POWER

When Madison praised the “efficacy” of the British judiciary in 1785, he reflected the prevailing American belief that the independence that Parliament had gained in the Glorious Revolution had since been corrupted by the modes of patronage and influence that allowed the Crown to control Parliament. Parliament could not fulfill its prescribed duty as the embodiment of legislative supremacy because too many members of its members had become “placemen” who served as the willing “tools” of the reigning ministry. Madison’s concerns with the role of the judiciary in American republican constitutions were also driven by his perception of the misuse of legislative power. But he was troubled, not by the *corruption* of American legislatures, but by the defects of deliberation and decision-making that lawmakers routinely revealed.

These defects were the subject of the four concluding items in his seminal April 1787 memorandum on the Vices of the Political System of the United States. Those items addressed the “multiplicity,” “mutability,” “injustice,” and “impotence” of the “laws of the States.”<sup>4</sup> Madison conceded that the burden of waging a revolutionary war had placed an unprecedented burden on their legislatures, and that allowance had to be made for “the situation in which the revolution has placed us.” Yet the problems he identified could not be reduced to that factor alone. “Try the Codes of the several States by this test,” he complained, “and what a luxuriandy of legislation do they present.” Laws enacted so hastily led to their repeal or supersession even “before any trial can have been made of their merits.”

Worse than the “want of wisdom” that these impulsive processes revealed was the “still more alarming” problem of legislative injustice, “not merely because it is a greater evil in itself, but because it brings into question 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.” Madison offered two diagnoses for this fundamental problem. The first involved the “ambition” and “personal interest” that distorted the decisions of many lawmakers, including those newcomers who fell prey to the manipulations of factious leaders. The second and far more important concerned “the people themselves,” *particularly within the boundaries of individual states*, where self-interested and passionate majorities could too easily form.

Madison’s solutions to these problems were both institutional and political. On the *institutional* side, he wanted to improve the quality of legislative deliberation: by giving the amateur lawmakers who staffed most assemblies longer terms, so they would learn their business better; by constituting select committees to serve as veteran drafters of bills; and by creating genuine senates possessing the confidence to check the impulses of the lower house. On the *political* side, as he famously proposed in *Federalist* Nos. 10 and 51, the best cure for the “mischiefs of faction” would lie in creating an “extended republic.” This social complexity would discourage the wrong kinds

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<sup>4</sup> “Vices of the Political System of the United States,” in *Madison: Writings*, 74–80, for this and the following paragraphs.



of factious majorities from forming nationally and also produce a more qualified class of national lawmakers superior to the lesser lights who flourished within the states.

Prior to the Convention, Madison initially gave the judiciary little thought. He was not even sure whether there should be a separate national judiciary. Some national courts of appeal were needed for “cases to which foreigners or inhabitants of other States may be parties,” but perhaps all else that was required was to have state judges swear “fidelity” to the “general” constitution.<sup>5</sup> His thinking did evolve in the succeeding weeks. The Virginia Plan provided for the establishment of “one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature.” Judges would enjoy tenure during good behavior, following the rule set in the parliamentary Act of Settlement of 1701, and their salaries would not be subject to legislative alteration. The jurisdiction of national courts would broadly cover “questions which may involve the national peace and harmony,” a tentative yet still quite open-ended grant of authority.<sup>6</sup>

Here was a preliminary basis for making the judiciary an independent department. Yet Madison’s most intriguing thoughts about judicial power bent in a different direction. His most striking proposal was to create a joint executive-judicial council of revision (modeled on the New York constitution) possessing a limited negative (or veto) over legislation. Under Article 8 of the Virginia Plan, this council would have “authority to examine every act of the National Legislature before it should operate, & every act of a particular [state] Legislature before a Negative thereon should be final.” (The latter part of the clause related to the congressional negative on state laws, which we will discuss below.) On the three occasions when this provision was debated, Madison defended it vigorously. One justification for the council rested on the perceived weakness of both the executive *and* the judiciary. It was to safeguard their authority against the “impetuous vortex” of legislative power that the two politically weaker departments should be formally allied.

It was, however, the other rationale that offers the best insight into Madison’s thinking. Madison wanted leading members of the national judiciary to have an active role in the drafting of legislation. Rather than have judges wait for some suitable case to come before them *legally*, after a statute was enacted, he wanted them to participate in its adoption. One could fairly object, Madison observed on June 6, “that the judges ought not to be subject to the bias which a participation in the making of the laws might give in the exposition of them” at a later point. Two other points outweighed this concern. First, there would be few occasions when this would occur. Second, and more important, the prior involvement of the judiciary would contribute positively to the enactment of legislation. As Madison remarked on July 21, just before the Framers conclusively rejected the council:

It would be useful to the Judiciary departmt. by giving it an additional opportunity of defending itself agst. Legislative encroachments; It would be useful to the Executive, by inspiring additional confidence & firmness in exerting the revisionary power: It would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check agst. a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities.

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<sup>5</sup> “Letter from James Madison to George Washington, April 16, 1787,” in *Madison: Writings*, 82.

<sup>6</sup> “Letter from James Madison to George Washington, April 16, 1787,” in *Madison: Writings*, 90-91.

There was thus a trade-off to be weighed and paid. One could impair the strict theory of separated powers that the first state constitutions had endorsed. But the net improvement in lawmaking gained by foreseeing and removing difficulties before they occurred was, in Madison's eyes, worth this theoretical cost. James Wilson amplified Madison's point by arguing the value of allowing judges to "remonstrat[e]" against laws that were "unjust," "unwise," "dangerous," or "destructive," yet not "so unconstitutional" as to demand rejection.<sup>7</sup>

The opponents of the council of revision predictably held that the only way that judges could participate in legislation was in their proper judicial capacity, and not as an advisory body. If judges participated in making laws, that might compromise their capacity to adjudicate them in subsequent proceedings. Perhaps most important, the opponents of the council declared that the judiciary already possessed the capacity to declare laws unconstitutional. In other words, Americans would not have to wait until 1803 for Chief Justice John Marshall to "establish" the legitimacy of judicial review in *Marbury v. Madison*. The concept of judicial review, though still novel and only partly formed, was something that the Framers already grasped.

The defeat that Madison suffered on these points did not lead him to reject his opinions. A year later, in his Observations on Jefferson's proposed revision of the Virginia constitution, Madison restated his support for a council of revision—but with several intriguing modifications. The great objective remained to provide "a check to precipitate, to unjust, and to unconstitutional laws." Rather than submit a bill to a joint council, pending measures should be sent to the executive and judiciary independently. If one department objected, a legislative override would need a two-thirds vote; if both objected, a three-quarters vote. But once the legislature made its decision, "It sd. not be allowed the Judges or the Ex[ecutive] to pronounce a law thus enacted, unconstitul. & invalid."<sup>8</sup>

That qualification would preserve the principle of ultimate legislative supremacy, admittedly exercised under tough super-majoritarian rules. Madison reaffirmed this point in the next paragraph of the Observations, which addressed the dawning recognition of the doctrine of judicial review.

In the State Constitutions & indeed in the Fedl. one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making their decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended, and can never be proper.<sup>9</sup>

Madison recognized the inherent existence of judicial review, but his analysis questioned whether the judiciary should be the final voice on the constitutional validity of statutes.

## TWO DEEPER CONCERNS

Beyond Madison's concerns with the deliberative qualities of representative bodies, two further problems shaped his attitude toward the judiciary. The first concerned the future uses of legislative power in a commercial and territorially expanding republic. The second was related to the fundamental problems of federalism that had troubled Madison ever since he entered the Continental Congress in 1780.

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<sup>7</sup> Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press 1911, 1937, 1966), I, 138-139; II, 73-80.

<sup>8</sup> "James Madison, "Observations on the 'Draught of a Constitution for Virginia," in *Madison: Writings*, 417.

<sup>9</sup> "James Madison, "Observations on the 'Draught of a Constitution for Virginia," in *Madison: Writings*, 417.

Madison had a very modern conception of the future uses of legislative power. He understood that legislatures would henceforth form the institutional locus within which multiple economic and social interests would try to bend public power to their own benefit. The business of colonial legislatures had been far more parochial. They enacted few general-purpose statutes; most of their work involved answering petty petitions that emanated from counties, towns, and interested individuals. They were not developing turnpikes and canals or providing for the building of bridges. In many ways, legislatures were still adjudicatory bodies that spent a great deal of time resolving local disputes.<sup>10</sup> That was one of the many complications that made Madison so skeptical about any neat or rigid theory of separated powers.

But once Americans had to govern a vast terrain stretching from the Atlantic to the Mississippi, the local knowledge that amateur lawmakers had carried to their provincial capitals would no longer suffice. National legislators had to acquire national knowledge. Although Madison hoped some members of Congress would aspire to serve more than one term, he rightly foresaw that each biennial Congress would bring major rotations in membership. Even though the Constitution did not require it, rotation in office remained the pervasive practice until the late nineteenth century. Each biennial session created its own educational cycle, as new members arriving from widely scattered districts learned the complexities of public policy on a national scale. *Indeed, nothing better indicates how much our political world differs from theirs than this basic disparity in the importance of incumbency.* Any political scientist working today assumes that reelection is the dominant motive shaping the behavior of our representatives. That presumption was manifestly not the case in the political world of the founders.

Yet lawmakers would also be active advocates for their constituents' immediate interests. As one fascinating paragraph of *Federalist* 10 suggests, legislators would effectively serve as "judges and parties, at the same time." Particularly in the realm of economic legislation, lawmakers would act judicially, because "what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes which they determine?" In the realm of economic policy—laws covering creditors and debtors, producers and consumers, and modes of taxation—all decisions were both judicial and legislative in nature, because they would have different effects on different forms of property, which Americans regarded (along with freedom of conscience) as the most fundamental right of all.

This blurring of lines between what is formally legislative in appearance but latently judicial in nature illustrates the complexity of Madison's thinking. It also demonstrates why he felt few qualms about blurring or crossing the boundary between the distinct realms of legislation and adjudication, as the council of revision manifestly would have done. If the ultimate end was to secure the best legislation possible before it was enacted, why not adopt a procedure that would bring more "consistency, conciseness, perspicuity & technical propriety" to the task, especially when many representatives were relative amateurs at the legislative game?

Had it been approved, the work of the council of revision would have implicated Madison's other radical proposal: the negative on state laws that Congress could use either to protect the national government against interference from the states or to protect individuals and minorities against unjust acts. On July 17, the day after it approved the equal state vote in the Senate—to Madison's great regret—the Convention replaced the negative on state laws

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<sup>10</sup> See the important article by Christine Desan, "The Constitutional Commitment to Legislative Adjudication in the Early American Tradition," *Harvard Law Review* 111 (1998), 1381.



with the initial weak version of the Supremacy Clause. The language of that Clause was soon silently strengthened. It ultimately obliged *state* judges to treat the Constitution, federal laws, and national treaties as “the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Although even today skeptics argue that the Constitution did not explicitly provide for the exercise of judicial review, that is what the Supremacy Clause actually accomplished.

The principle underlying the Supremacy Clause resolved a problem that had long vexed Madison. From the start of his congressional career, he actively worried about how the states could be persuaded, encouraged, or coerced to fulfill their federal obligations. The prevailing theory underlying the Articles of Confederation was not a “proto-Calhoun”<sup>11</sup> belief that the states had a sovereign right to decide whether or not to implement the measures that Congress sent their way. It was rather that the states should adapt all those measures to local conditions, acting in effect as administrative arms of Congress. In the early 1780s, Madison believed that Congress should have the authority to compel states to do their duty. Although Congress never pursued this idea, Madison was still contemplating the advantages of coercing delinquent states in 1787.

Yet once the Convention began, Madison concluded that schemes of coercion were more likely to provoke civil conflict rather than orderly governance. The negative on state laws, which was modeled on the veto power the king had previously exercised over the colonies, became the next solution to this problem. The power would vest in Congress, but the council of revision would in turn use its limited negative to ensure that Congress acted appropriately. Once these two provisions were eliminated, the default option for policing conflicts over federalism fell to the federal judiciary, or more specifically to the Supreme Court.

Madison remained unconvinced that this was the best means to ensure that the states would conform to the new federal system. Privately, he still viewed the negative on state laws as a better mechanism than judicial enforcement. He laid out his rationale in a lengthy letter to Jefferson, written a month after the Convention adjourned:

It may be said 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. The answer is that it is more convenient to prevent the passage of a law, than to declare it void after it is passed; that this will be particularly the case where the law aggrieves individuals, who may be unable to support an appeal against a State to the supreme Judiciary, that 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, and that a recurrence to force, which in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible.<sup>12</sup>

Yet in the months after Madison drafted this impassioned letter, he accommodated himself to the constraints that the Constitution imposed.

The critical passage illustrating his thinking appeared in *Federalist* 39. The second half of this essay was devoted to a five-pronged assessment of the federal (that is, state-based) and national properties of the Constitution. Near the close of this analysis, Madison raised the delicate question of the resolution of the inevitable controversies over the respective jurisdictions of the state and national governments.

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<sup>11</sup> John C. Calhoun was a South Carolina senator who used a states’ rights argument to protect slavery during the Nullification Crisis of 1832-33.

<sup>12</sup> “Letter from James Madison to Thomas Jefferson, Oct. 24, 1787,” in *Madison: Writings*, 148-149.



It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general Government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local Governments; or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

In fact, thirty years later, Spencer Roane, chief judge of the Virginia court of appeals (and Patrick Henry's son-in-law), did actively combat this conclusion. But the succinct statement of *Federalist* 39 defined the orthodoxy that Madison consistently defended.

Madison's principle merits two important comments. First, it demonstrates conclusively not only that judicial review was clearly part of the original meaning of the Constitution—its existence textually confirmed by the Supremacy Clause—but also that its main or more obvious use would involve questions of federalism rather than separation of powers. Second, when one turns to Madison's seminal essays on the separation of powers in *Federalist* 47-51, judicial power is made conspicuous by its absence. Perhaps this was a mere omission on Madison's part; perhaps it reflected his belief that the critical issue of separation of powers was the relationship between president and Congress; or perhaps it reflected his sense that the whole "doctrine" was too messy and "obscure" a subject to be amenable to any tidy resolution. Once one reaches the concluding essay, *Federalist* 51, it is striking how little Madison finally says about separation of powers. He devoted only a single paragraph to the institutional workings of checks and balances; instead, the second half of the essay largely restates the ideas of *Federalist* 10, which said almost nothing about institutions but was devoted instead to the mischief-curing benefits of a multiplicity of factions in society. The awkward conclusion remains that in 1787-88 Madison's nominal commitment to the role the judiciary would play in resolving conflicts of federalism did not inspire him to say all that much about how the judiciary would operate.

## LESSONS LEARNED

Three decades later, in retirement at Montpelier, experience gave Madison a different framework for thinking about the role of the judiciary in the federal republic.

When George Washington began staffing the federal judiciary in 1789, loyalty to the Constitution was the first criterion of appointment. One had to have been part of the Federalist *movement* that supported ratification of the Constitution. Twelve years later, President John Adams made membership in the Federalist *Party* the first criterion for seats in the new circuit courts the Judiciary Act of 1801 had just created. Madison's most celebrated contribution to the annals of constitutional case law took place as the named (though absent) defendant in *Marbury v. Madison* (1803), over his refusal to deliver the same magistrate's commission that Secretary of State John Marshall had failed to transmit to William Marbury. It says something about the institutional weakness of the federal judiciary at this point to note (a) that President Jefferson and Madison simply ignored Marbury's case; (b) that Marshall's opinion went out of its way to render grand pronouncements superfluous to the resolution of the case; and (c) that a week after *Marbury* was decided, a majority of the Court ducked its real challenge, holding in *Stuart v. Laird* that the abolition (through the Repeal Act of 1802) of the circuit court positions created in 1801 was constitutionally permissible, even though the new judges enjoyed the "tenure during good behavior" rule of Article III.



That rule presumed that this condition of tenure, reinforced by professional norms of behavior and republican honor, would maintain judicial independence. The fidelity to the Constitution that Washington expected of the first generation of national jurists was more a minimal condition of recruitment than a hard test of political loyalty. But the partisan tumult of the 1790s raised the entry price of this fidelity. The Judiciary Act of 1801 was a calculated Federalist response to the party's loss of control over all three political institutions of the national government. If one had reliable ways to know or test the political commitments of judicial appointees, Article III, if exploited quickly, would enable the Federalists to ensure their control of one branch of government for years to come. The real logic of Article III thus promoted the opposite of judicial independence. One could argue, not all that perversely, that the judicial ambitions of the Federalist Party in 1801 anticipated the judicial ambitions of the Federalist Society almost 200 years later.

Yet beyond the repeal of the 1801 Act and the failed impeachment of Justice Samuel Chase, Jefferson and Madison did *not* pursue a radical effort to reshape the federal judiciary. High among the various explanations for their moderation was their avowed desire to restore a political system in which the contentious party loyalties of the 1790s would dissipate and disappear. The goal of the first party system, in their view, was to drive the Federalists into collapse, and then to restore a system in which organized national parties would play no part. Under this presumption, using tenure during good behavior to stock the judiciary with loyalists was not their highest priority.

What did persist in Madison's thinking about the judiciary were two other concerns: first, that the Supreme Court not endorse the full Hamiltonian interpretation of the Necessary and Proper Clause, as expressed during the bank debate of 1791; and second, that it play the umpiring role Madison had assigned it in *Federalist* 39. The best elaboration of these views came after Judge Spencer Roane tried to recruit Madison to support his proposition that the federal and state supreme courts acted on a level plane of authority, and that disagreements between them did not require an ultimate resolution. Roane began forming these ideas in response to *Martin v. Hunter's Lessee* (1814), but the key exchanges took place after *McCulloch v. Maryland* (the bank case, 1819) and *Cohens v. Virginia* (1821), a contrived case involving the interstate purchase of lottery tickets that Chief Justice Marshall used to restate the principle of federal judicial supremacy.

In his first response to Roane, Madison politely deflected the invitation to equate the authority of federal and state supreme courts by focusing instead on Marshall's opinion in *McCulloch*. That opinion decidedly echoed Hamilton by emphasizing the discretionary power the Necessary and Proper Clause invested in Congress. Madison had long conceded that the course of discussion since 1791 had legitimated the incorporation of a national bank. But he still distinguished that particular precedent from the general doctrine Marshall was propounding. If one read the Clause as broadly as Marshall did, no effective restraint would prevent Congress from defining the scope of its own legislative authority. Marshall's mode of interpretation "seems to break down the landmarks [a favorite Madison word] intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned."<sup>13</sup> Had the Federalists presented such a reading of the Clause to the American people in 1787, the Constitution might well have been rejected. (This tracks the inventive approach to originalism that Madison had pioneered in 1796.)

When Roane renewed his plea in 1821, however, the discussion transcended a clausal reading of the Constitution to focus on the deeper problem of jurisdiction. In two further letters—one labored, the other more direct—Madison

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<sup>13</sup> "James Madison to Spencer Roane, Sept. 2, 1819," in *Madison: Writings*, 733-736.

refuted Roane's request on two basic grounds. If one wished to secure "the reserved sovereignty of the States" within the federal system, he argued, the greater danger lay not in the Supreme Court but in the expansive legislative power of Congress. Implicit in this response was the recognition that the South would hereafter be a political minority needing protection against the North. Second, and more important, Madison saw no alternative to supporting the primacy of the Supreme Court over the contending claims Roane had made for its counterparts in the states.<sup>14</sup>

Roane had another prominent reader, however, who proved more sympathetic to his claims: Thomas Jefferson. If serious conflicts arose between state and federal courts, on Roane's model of a parity between them, why not submit these disputes, Jefferson asked, to the "ultimate arbiter[,] the people of the Union, assembled by their deputies in convention, at the call of Congress or of two-thirds of the States"<sup>15</sup> This revised a proposal Jefferson had made back in the 1780s, and which Madison had subjected to respectful but devastating criticism in *Federalist* Nos. 49-50. Believing that the stability of the republic rested in part on the "salutary veneration" that the people should express for the Constitution, Madison offered two responses to this proposal. The first was to argue that courts at both levels should try to limit the danger of judicial confrontations by avoiding the kinds of grand overstatements of positions that both Marshall and Roane were prone to giving. Judicial doctrine should evolve case by case, the better to "obviate the dilemma of a Judicial rencounter [sic] or a mutual paralysis" between state and national benches. The second was finally to adhere to the wisdom of *Federalist* 39 and work to ensure that the sources of "impartiality" in judicial decision-making would be protected, while conceding that in the final analysis there could be no alternative to federal judicial supremacy.<sup>16</sup>

## LESSONS FOR THE PRESENT

Madison's desire for impartiality in interpretation now seems a lost fantasy of innocence from another constitutional age. True, much of the legal work that modern judges and justices perform reliably depends on precedent, doctrine, and professional competence. The judiciary as a whole is hardly running amok. But when one leaves the well-ploughed fields of ordinary law to tramp the cratered terrain of constitutional interpretation, our confidence in judicial independence evaporates. The ever-escalating crisis of judicial appointments—a one-way ratchet of politicization—makes Madison's belief that tenure during good behavior would secure judicial independence and impartiality appear delusional.

Exactly the opposite result now applies. In a system that supports the intense ideological vetting of judicial candidates, apparently often conducted by advocacy groups acting outside of government, the sacred rule of tenure during good behavior operates as an independent variable that promotes the appointment of politically reliable judges. Nominees happily pledge to perform as umpires calling balls and strikes or faithful adherents of the original Constitution—nothing more and nothing less. No candid observer can take those claims seriously. But the discovery of this potentiality was made in 1801, not two centuries later in *Bush v. Gore* (2000). Although the force and appeal of political reliability have waxed and waned over time, the ever-worsening deterioration and weaponization of the federal judicial appointments process is less a deviant departure from a disinterested norm than a sour fulfillment of the Constitution's latent possibilities.

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<sup>14</sup> "James Madison to Spencer Roane, May 6 and June 29, 1821," in *Madison: Writings*, 772-779.

<sup>15</sup> "Letter from Thomas Jefferson to Justice William Johnson, June 12, 1823," retrieved at <http://teachingamericanhistory.org/library/document/letter-to-justice-william-johnson/>.

<sup>16</sup> "James Madison to Thomas Jefferson, June 27, 1823," in *Madison: Writings*, 798-802.

Madison offers no obvious solution to this problem. His ideal notion of judicial appointments rested on distinguishing the professional credentials of jurists from the novice legislators who would rotate in and out of Congress. The best outcome he hoped for was that if one could leave the contested politics of the 1790s astern, the partisan bonds of the first party system could give way to a more professional, moderated mode of judging. But if intense partisanship continues to color and distort judicial appointments, as every sign indicates it will, Madison offers no ready answer to the problem, beyond hoping that the process would select judges prepared to resolve controversies on a case-by-case basis, avoiding grand statements of interpretive theory in order to focus on working out the inherently messy details of the American constitutional system. The question that is left open today is whether some other feasible form of judicial appointment could be imagined. Any move in that direction would require the daunting project of an Article V amendment.

On two other matters, however, one can draw strong inferences about the norms that Madison would apply to contemporary dilemmas of constitutional jurisprudence. On one of these points, Madison's conclusions seem fairly obvious; on the other, some creative thinking could reshape one of his ideas to contemporary purposes.

As I have proposed elsewhere, the most Madisonian part of the Constitution may well be Section 1 of the Fourteenth Amendment, which was ratified thirty-two years after his death.<sup>17</sup> At first glance this claim seems inherently specious. Yet the dominant motif in Madison's approach to the protection of constitutional rights rested on the belief that the real danger to rights in a republic would not come from the arbitrary concentrated power of a central government. It would arise instead from popular majorities acting instrumentally through the legislature, and these majorities would form much more easily at the state and local level than in an extended national republic.<sup>18</sup> The congressional negative on state laws was his preferred, if likely impracticable, solution to this problem. Yet if over time federal justices and judges acquired the confidence and demonstrated the capacity to enforce rights against legislative majorities within the states, that outcome would have delighted Madison. The three prongs of Section 1 (equal protection, due process, and privileges and immunities) made that protection possible, even if many decades passed before the incorporation doctrine became a living possibility.

No better illustration of this phenomenon exists than the system of racial segregation that emerged in the late nineteenth century. That was and remains — along with its precursor, the peculiar institution of chattel slavery that Jim Crow replaced — the primary example of the denial of civil rights in American history. As Madison privately observed in 1791, "In proportion as slavery prevails in a State, the Government, however democratic in name, must be aristocratic in fact . . . . The Southern States of America, are, on the same principle aristocracies."<sup>19</sup> One could easily apply the Republican Guarantee Clause of Article IV to reach a similar conclusion about Jim Crow, which was the logical continuation of that situation: a clear demonstration of the way in which state-based majorities could trample fundamental rights. One could similarly argue that the predictable consequences of the Supreme Court's disastrous decision in *Shelby County v. Holder* (2013), which quickly inspired fresh efforts to suppress or minimize the African American vote, embodies yet another modern application of this same animus.

Of course, one cannot unthinkingly transpose Madison's eighteenth- and early-nineteenth century opinions into contemporary debates. One cannot formulate an intelligent prediction of how Madison would have thought about

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<sup>17</sup> Rakove, *Original Meanings*, 336-338.

<sup>18</sup> The classic analysis comes in Madison's letter to Jefferson of Oct. 17, 1788, in *Madison: Writings*, 419-423.

<sup>19</sup> Robert Rutland et al., eds., *The Papers of James Madison* (Chicago and Charlottesville: University of Chicago Press, 1962-1999), 14: 163-164.



*Roe v. Wade*. Or as Justice Samuel Alito quipped in an exchange with Justice Antonin Scalia during the oral argument in *Brown v. Entertainment Merchants Association*, “I think what Justice Scalia wants to know is what James Madison thought about video games.”<sup>20</sup> Of course, there are some issues where one *can* draw reasonably plausible, perhaps even persuasive inferences about how Madison would have thought about particular cases. Given his known qualms about chaplains pronouncing essentially sectarian invocations for public meetings, it is difficult if not indeed impossible to imagine Madison endorsing the Supreme Court’s opinion in *Town of Greece v. Galloway*, permitting just such a routine.<sup>21</sup> But to conjure a coherent prediction about how Madison would have thought about cases like *Hobby Lobby v. Burwell* or *Masterpiece Cakeshop v. Colorado Civil Rights Commission* beggars the historian’s imagination. Such predictions, to borrow the lawyer’s phrase, would depend on “facts not in evidence.”

Yet on another more fundamental point, it is indeed possible, I believe, to posit a Madisonian position on the role of the judiciary in the American “political system” (to evoke Madison’s April 1787 memorandum formulating his agenda for the Philadelphia convention). The underlying premise of Madison’s entire theory of republican government was that the wrong kinds of “factious” majorities were more likely to form within the states individually than nationally. If the Supreme Court acquired the capacity and authority to act vigorously to protect rights *within* the states, Madison would have been all in favor of that result. Given a choice between the Warren Court, on the one hand, and the Rehnquist or Roberts Courts, on the other, I strongly suspect Madison would have preferred the former. (This is why the Federalist Society should renounce its perfidious expropriation of Madison’s profile as its institutional logo.)

The second contemporary dilemma relates to Madison’s council of revision. The specific case that Madison and James Wilson made for the council no longer seems relevant. With the professionalization of legislative service, the growth of congressional staffs, and the amount of knowledge available to both Congress and especially to the presidency, there is no obvious need to involve jurists in lawmaking for the purpose of improving the quality of legislative deliberation. Yet one could still wonder whether prior judicial involvement in lawmaking would reduce and mitigate the constitutional storms that sometimes rage over legislation, as the post-enactment history of the Affordable Care Act illustrates so amply. In 1787 one could have hardly imagined the extent to which constitutional law has become (to give Clausewitz’s famous dictum a fresh application) a continuation of politics by other means. Constitutional law, as such, did not really exist before 1789. It had no real precedent in British or colonial practice, and Americans were still grappling to define what it would mean to treat a constitution as supreme fundamental law.<sup>22</sup> Yet Madison’s idea of a council of revision did at least realize that judicial counsel on the constitutional aspects of a statute could be helpful in its formation. Modern constitutional courts in other nations now often operate in a similar fashion, encouraging *ex ante* review rather than *ex post* litigation. Applying the lessons they have learned while avoiding a direct replication of the American approach to judicial review might provide some helpful lessons. Rather than ratchet up the tensions that accompany the post-enactment testing of the constitutionality of a statute, in a Supreme Court that is acutely divided on partisan lines and often reaches predictable 5-4 decisions on just these kinds of cases, some moderated version of Madison’s council of revision might have beneficial consequences.

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<sup>20</sup> *Brown, et al. v. Entertainment Merchants Assn*, 564 U.S. 786 (2011).

<sup>21</sup> *Town of Greece v. Galloway*, 134 U.S. 1811 (2014).

<sup>22</sup> On this massively important point, see Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press 1969), chapter 8; and Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge: The Belknap Press of Harvard University Press, 2018).

A bit of wisdom from *Federalist 49* would be helpful here. In that essay, midway through his discussion of the separation of powers, Madison went out of his way to analyze a proposal that no one else in 1788 was discussing: Jefferson's idea, espoused in his *Notes on the State of Virginia*, to resolve constitutional disputes among the branches by calling popularly elected conventions to settle the matter. Amid his various criticisms of this idea, Madison mentioned the dangers that would arise from a repeated use of this expedient: "frequent appeals," he warned, "would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability." Veneration itself had a positive value in maintaining the stability of a constitutional system. Suspecting as we plausibly do that too many constitutional decisions made today nakedly reflect the political biases that inflect and infect the entire judicial appointments process, who can "venerate" modern constitutional jurisprudence as a principled endeavor to clarify (or "liquidate," as Madison would have said) the meaning of the Constitution? Allowing Justices to participate at some prior point in the adoption of legislation—in a manner akin to the rejected council of revision—would not wholly eliminate the partisan impulses that wrack our constitutional system, but it might help to enhance our veneration of constitutional norms.

## CONCLUSION

The Madison who did so much to frame the Constitution in 1787, though never inclined to practice law, was a keen and informed observer of the Anglo-American legal tradition. A concern with legislative deliberation was then the dominant variable in his constitutional thought. But he was also a deeply empirical thinker, and as the Constitution took effect, reassessing the nature of the power that the executive and judiciary branches would wield became subjects to which he gave fresh attention. We are entitled to reassess the judicial power of the United States with a similar critical commitment.

