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# What If Madison had Won? Imagining a Constitution World of Legislative Supremacy

Alison LaCroix

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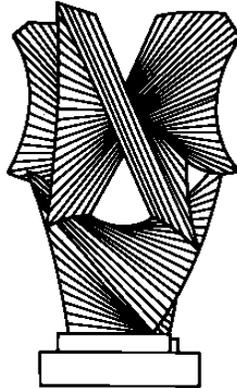
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WHAT IF MADISON HAD WON?  
IMAGINING A CONSTITUTIONAL WORLD  
OF LEGISLATIVE SUPREMACY

*Alison L. LaCroix*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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# WHAT IF MADISON HAD WON? IMAGINING A CONSTITUTIONAL WORLD OF LEGISLATIVE SUPREMACY

ALISON L. LACROIX\*

## INTRODUCTION

In the summer of 1787, when the delegates to the Constitutional Convention gathered in Philadelphia, one of the most formidable hurdles they faced was building a functional federal government that contained more than one sovereign. Throughout much of the colonial period, British North American political thinkers had challenged the orthodox metropolitan insistence on unitary sovereignty vested in Parliament, and the accompanying metropolitan aversion to any constitutional system that appeared to create an *imperium in imperio*, or a sovereign within a sovereign.<sup>1</sup> By the 1780s, despite much disagreement among the members of the founding generation as to the precise balance between sovereigns, both political theory and lived experience had convinced Americans that their system could, and indeed must, not just accommodate but also depend upon multiple levels of government.<sup>2</sup>

Identifying the proper degree of federal supremacy and the best means of building it into the constitutional structure were thus central concerns for many members of the founding generation.<sup>3</sup> Their real project was an institutional one: whether—which soon became how—to replace the highly decentralized, legislature-centered structure of the Articles of Confederation with a more robust, multi-branch general government to serve as the constitutional hub connecting the state spokes. In preparing for the convention, Virginia delegate James Madison, who was at the time also a member of the Confederation Congress, conducted an exhaustive study of ancient and modern confederacies.<sup>4</sup> Madison hoped to find lessons about how to avoid what he viewed as the fatal “defect” that had ultimately destroyed them all: the lack of “subjection in the members to the general authority,” which Madison concluded had “ruined the whole Body.”<sup>5</sup> In order to avoid following these storied confederacies into the dim annals of history, Madison argued that the United States government must be armed with a “negative,” or a veto, on state legislation.<sup>6</sup> The negative would be

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\* Professor of Law, University of Chicago Law School. The author thanks William Birdthistle, Adam Cox, and Aziz Huq for helpful discussions and Gerard Magliocca for organizing this Symposium. Thanks are also due to the Mayer Brown Faculty Research Fund.

1. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 133-34 (2010).

2. See *id.* at 132-33.

3. See *id.* at 83-84, 132-35.

4. *Notes on Ancient and Modern Confederacies*, in 9 *THE PAPERS OF JAMES MADISON* 3, 3-24 (Robert A. Rutland et al. eds., 1975).

5. *Id.* at 8.

6. See LACROIX, *supra* note 1, at 138-39.

vested in Congress—most likely the Senate—and would operate as a broad check by the federal legislature on the states.<sup>7</sup> Madison even went so far as to suggest that congressional approval would be the “necessary final step” in the states’ legislative processes.<sup>8</sup> The negative would thus have given the general government a standing power to intervene in the state lawmaking process.

This Essay asks what would have happened if Madison had convinced his fellow delegates that the negative was desirable and necessary. It then asks what would have happened if the Constitution had therefore vested ultimate supervisory power over federal supremacy in Congress, rather than in the federal courts by way of the mechanism of judicial review that the delegates ultimately adopted via the Supremacy Clause.<sup>9</sup>

One potential response to this question is: nothing, or at least nothing materially different, would have happened. The modern constitutional landscape in a world with the federal negative would look functionally similar to the existing constitutional arrangement in which federal supremacy is doubly secured by judicial review and Congress’s power to preempt state legislation. On this view, the subjunctive of the “what would have happened” inquiry should be refashioned into a declarative “what did happen” statement. Thus, one might argue, both the negative and preemption should be seen as legislative safeguards of federalism’s commitment to the supremacy of the general government.

But the apparent functional equivalence between the negative and preemption begins to erode upon closer examination. In particular, at least three important differences separate the negative and preemption: the scope that each ascribes to Congress’s power to act in arenas beyond its enumerated Article I powers; the default presumption of each approach toward the validity of state legislation; and the meaning each attributes to congressional silence. Moreover, the functional inquiry is a post hoc one that emphasizes abstract similarities between the negative and preemption as determined ahistorically, without reference to any specific constitutional issue or moment in time. The focus of this Essay, in contrast, seeks to be more historical: how would the adoption of the negative have changed the arguments and analysis that contemporaries offered in particular instances of constitutional conflict?

This Essay therefore examines the potential significance of the negative through the lens of a nineteenth-century case study: the debate over Congress’s power to regulate interstate commerce. Had the negative been incorporated into the Constitution in 1787, the combined force of the negative’s distinctive characteristics and the precedent that it established in one constitutional controversy after another might ultimately have led not to the stronger union that Madison desired, but to forceful resistance to federal power by diverse state legislatures in a variety of circumstances. In contrast to Madison’s and many modern commentators’ understanding of the negative as a highly centralizing mechanism, then, the successful negative might potentially have led to

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7. *Id.* at 135.

8. *Id.* at 153.

9. *See id.* at 171-72.

fragmentation and disintegration between the federal center and the state peripheries decades before the sectional crisis ignited in the 1860s.

### I. THE FEDERAL NEGATIVE

Long before the Philadelphia Convention began its deliberations, Madison was troubled by what he and many other political thinkers perceived as the dangerous weakness of the federal government.<sup>10</sup> Under the Articles of Confederation, the sole institution through which federal authority operated was “the United States, in Congress assembled.”<sup>11</sup> Madison and others—including George Washington, John Adams, and James Wilson—spent the early 1780s increasingly worried about parochial state legislation, the inability of Congress to collect revenues and thus service the nation’s war debt, the nation’s lack of international credibility, and the consequences of occasional violent uprisings against the general government such as Shays’ Rebellion.<sup>12</sup> Anxious correspondents from Georgia to Maine fretted over what they viewed as the “imbecility” and impotence of the Confederation.<sup>13</sup> “Our situation is becoming every day more [and] more critical,” Madison wrote.<sup>14</sup> “No money comes into the federal Treasury. No respect is paid to the federal authority; and people of reflection unanimously agree that the existing Confederacy is tottering to its foundation.”<sup>15</sup>

But Madison had a solution, which he described in a letter to Thomas Jefferson.<sup>16</sup> “Over [and] above the positive power of regulating trade and sundry other matters in which uniformity is proper,” Madison’s reform plan would “arm the federal head with a negative *in all cases whatsoever* on the local Legislatures.”<sup>17</sup> Based on his archival research, Madison believed that the negative would provide the best institutional solution to what he viewed as the key problem of federal supremacy.<sup>18</sup> Vesting the general government, specifically Congress, with the power to veto any and all laws passed by the state legislatures would ensure that states would no longer be able to engage in purely

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10. The following paragraphs build on my earlier discussions of these topics. *See generally id.* (especially chapter 5, which discusses central government authority).

11. ARTICLES OF CONFEDERATION OF 1781, art. II.

12. *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 11-17 (2010). *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969) (describing the crises of the 1780s).

13. *See* MAIER, *supra* note 12, at 264.

14. Letter from James Madison to Edmund Randolph (Feb. 25, 1787), *in* 9 THE PAPERS OF JAMES MADISON, *supra* note 4, at 299.

15. *Id.*

16. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 THE PAPERS OF JAMES MADISON, *supra* note 4, at 317, 318.

17. *Id.*

18. *See* Madison’s Notes (June 8, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164, 164-65 (Max Farrand ed., 1911).

self-serving regulation to the detriment of their neighbors or to the Union as a whole.<sup>19</sup> If a state passed a law penalizing out-of-state creditors or establishing its own import duties, Congress would have the power to veto that law. Moreover, the state law in question would not need to rise to the level of unconstitutionality, and members of Congress would not be required to make a particularized finding about precisely how the state law would harm the Union. Instead, Madison insisted that Congress must have the power to veto state laws “in all cases whatsoever.”<sup>20</sup>

Indeed, Madison’s notes and correspondence demonstrate that he viewed the negative as the complement to Congress’s power to approve state legislation. To be sure, this approval would be expressed silently, by the absence of a veto; but Madison clearly regarded some action by Congress as the necessary final step in the state legislative process. Under the negative, “[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,” Madison insisted.<sup>21</sup> The negative would therefore have given the federal government a continuous power to intervene in the state lawmaking process and to override state laws.

Despite Madison’s efforts to convince his fellow delegates of the negative’s virtues (including a speech in which he described it as a helpful adaptation of the Privy Council’s power to review colonial legislation under the empire),<sup>22</sup> the negative ultimately failed to win sufficient support in the Convention to become part of the Constitution. Instead, a few days after the final defeat of the negative, the delegates moved toward a different institutional approach to the supremacy question.<sup>23</sup> Instead of a legislative solution, the majority of delegates shifted toward a judicial mechanism.<sup>24</sup> In arguing against the negative, Gouverneur Morris articulated a strong preference for a judicial device: “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 [National] law.”<sup>25</sup> Writing from Paris, Jefferson responded to Madison’s enthusiasm for the negative with a critique of its overbreadth.<sup>26</sup> The negative, Jefferson argued, “proposes to mend a small hole by covering the whole garment. Not more than 1. out of 100. state-acts concern the confederacy. This proposition then, in order to give [Congress] 1. degree of

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19. *Id.*

20. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 4, at 317, 318 (emphasis omitted).

21. Madison’s Notes (June 8, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 165.

22. *Id.* at 168.

23. Madison’s Notes (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 25, 28.

24. *Id.*

25. *Id.*

26. Letter from Thomas Jefferson to James Madison (June 20, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 4, at 63, 64 (1977).

power which they ought to have, gives them 99. more which they ought not to have. . . .”<sup>27</sup> Instead of the negative, Jefferson advocated “an appeal from the state judicatures to a federal court, in all cases where the act of Confederation [controlled] the question.”<sup>28</sup> This judicial remedy would, he argued, “be as effectual a remedy, [and] exactly commensurate to the defect.”<sup>29</sup>

Within a few weeks, the delegates adopted what became the Supremacy Clause of Article VI, which states that the “Constitution, and the laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land,” and that “the Judges in every State shall be bound thereby.”<sup>30</sup> Read in conjunction with the judiciary provisions of Article III, the Supremacy Clause endorsed judicial review of state law for conformity with federal law as the Constitution’s chief supremacy-enforcing mechanism.<sup>31</sup> The Supremacy Clause-Article III complex established a norm of federal supremacy at the level of state legislation and insisted that that norm would be backed by judicial enforcement. Rather than giving Congress the power to wield a negative over state laws, then, the Constitution provided for a Supreme Court with the power to review state laws for compatibility with the Constitution.<sup>32</sup>

## II. PREEMPTION: THE FUNCTIONAL EQUIVALENT OF THE NEGATIVE?

The rejection of the negative by the Philadelphia Convention should be understood not only as a loss for the specific plan that Madison proposed, but also as a move by the delegates away from legislature-based approaches to what they viewed as the problem of supremacy. To be sure, in addition to proposing the negative, Madison’s Virginia Plan emphasized the need to give Congress greater substantive powers,<sup>33</sup> especially over commerce and taxation. The negative would have given Congress the power to stop New York from passing an impost that would require Connecticut residents to pay taxes to New York on goods imported through New York. But Congress’s corresponding affirmative power to regulate import duties was also a vital element of Madison’s reform plan, one that—unlike the negative—ultimately won adoption at the convention.<sup>34</sup> The combination of the congressional powers listed in Article I, Section 8, with the limitations on congressional powers in Section 9 and on the

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27. *Id.*

28. *Id.*

29. *Id.*

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

31. *See* LACROIX, *supra* note 1, at 168-69.

32. *Id.* at 165.

33. *See* Virginia Plan, para. 6, in 10 THE PAPERS OF JAMES MADISON, *supra* note 4, at 12, 16 (1977) (“Resolved . . . that the national Legislature ought to be impowered [sic] . . . to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation . . .”).

34. *See id.*

states in Section 10,<sup>35</sup> together with the principle of enumeration itself, suggested that the delegates were intensely focused on setting clear boundaries that would define the respective substantive powers of the state and federal legislatures.

Nevertheless, the enumeration of Congress's powers in Article I was, for many delegates to the Philadelphia Convention, not an adequate solution to the problem of establishing federal supremacy. The Articles of Confederation had sought to maintain a balance between the powers of the states and those of the general government by focusing entirely on the powers of the two levels of legislature.<sup>36</sup> The Confederation Congress had the power to declare peace and war, to enter into treaties, to settle disputes between the states, to regulate the value of coinage, to establish a post office, and to regulate trade with Indian tribes.<sup>37</sup> It could also request, but not require, that the states contribute funds to the common treasury.<sup>38</sup> The Articles thus represented an attempt by American thinkers of the revolutionary period to enshrine in the new general government the type of subject-matter separation between the respective powers of the states and the general government for which they had argued during the constitutional crisis with the British Empire in the 1760s and 1770s.<sup>39</sup> The colonial rejoinder to metropolitan assertions of unitary parliamentary sovereignty and against *imperium in imperio* had insisted that no *imperium in imperio* existed when the powers and duties of the imperia in question were clearly demarcated and did not overlap.<sup>40</sup> Thus, commentators such as John Dickinson, John Adams, and Thomas Jefferson had labored during the 1760s and 1770s to demonstrate that the separate legislative domains of Parliament and the colonial assemblies might coexist, as long as all parties agreed on an overarching distinction between the types of authority each might permissibly wield.<sup>41</sup> For Dickinson, the dividing line lay between taxation to regulate the empire (permissible for Parliament to regulate) and taxation to raise a revenue from the colonies (reserved to the colonial assemblies).<sup>42</sup> For Adams and Jefferson, as for some agents of the British Empire such as colonial governors Thomas Pownall and Francis Bernard, the line of separation was somewhat murkier but lay between the general arenas of external matters concerning the entire empire (overseen by Parliament) and matters internal to each province (reserved to the colonial assemblies).<sup>43</sup>

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35. U.S. CONST. art. I, §§ 8-10.

36. See generally ARTICLES OF CONFEDERATION OF 1781.

37. *Id.* at art. IX.

38. *Id.* at art. VIII.

39. See LACROIX, *supra* note 1, at 60-67; see also Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733, 734 (2011) [hereinafter LaCroix, *Rhetoric*].

40. See LaCroix, *Rhetoric*, *supra* note 39, at 733-34.

41. See *id.*

42. See [John Dickinson], *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies* 17 (1767), available at [http://ia700407.us.archive.org/11/items/cihm\\_14505/cihm\\_14505.pdf](http://ia700407.us.archive.org/11/items/cihm_14505/cihm_14505.pdf).

43. See John Adams, *Novanglus No. III*, in 4 THE WORKS OF JOHN ADAMS, SECOND

Much of the energy driving the constitutional reforms of the 1760s through the early 1780s thus focused on allocating specific powers between different levels of legislatures. By the mid-1780s, however, the perceived exigencies of the postwar period had driven Madison and many of his contemporaries to believe that a functioning constitution must do more than describe arenas of legislative authority.<sup>44</sup> A functioning constitution, one that would provide a normative vision for government in addition to a simple description of institutions and powers, would provide some supervening authority to assess whether the competing legislatures had in fact trenched on each other's power in a given situation.<sup>45</sup> Indeed, although Madison's negative offered a legislative solution to the problem of supremacy, it did not make more specific declarations about the relative powers of each legislature. Instead, the negative promoted one of the legislatures—Congress—to the level of umpire, with the authority to decide when the state legislatures had overstepped their powers.<sup>46</sup> The negative, therefore, like the judicial review that supplanted it, added an overarching structural mechanism aimed at settling boundary disputes between various branches of legislative power. Although their supporters emphasized different institutions (Congress for one, the Supreme Court for the other),<sup>47</sup> the negative and judicial review shared a similar commitment to writing a fundamental, structural rule of intergovernmental conflict resolution into the Constitution. This focus by the mid-1780s not just on “who decides,” but on “who decides who decides,” represented a shift from enumeration and boundary-demarkation toward the identification of an ultimate interpretive authority as a means of ameliorating what contemporaries came to view as the inevitable friction between American federalism's multiple levels of government.<sup>48</sup> The negative, therefore, was not

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PRESIDENT OF THE UNITED STATES 29, 37-38 (Charles Francis Adams ed., 1851); FRANCIS BERNARD, SELECT LETTERS ON THE TRADE AND GOVERNMENT OF AMERICA; AND THE PRINCIPLES OF LAW AND POLITY, APPLIED TO THE AMERICAN COLONIES (Kessinger Publishing 2007) (1774); THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (Limitless Press 2010) (1774); THOMAS POWNALL, THE ADMINISTRATION OF THE COLONIES (2d ed. 1765).

44. See LACROIX, *supra* note 1, at 169-71.

45. See generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (analyzing the American Revolution). Morton Horwitz has characterized the work of Bailyn as distinguishing between small-c constitutions and large-C Constitutions. See Morton J. Horwitz, *A Historiography of The People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813, 817 (2006).

46. Note that under the Virginia Plan, Congress was not the sole arbiter of the balance between federal and state legislation. Article VIII of the plan proposed a “[c]ouncil of revision” comprising “the Executive and a Convenient number of the National Judiciary,” who would be vested with “authority to examine every act of the National Legislature before it shall operate, [and] every act of a particular Legislature before a Negative thereon shall be final.” Virginia Plan, para. 8, in 10 THE PAPERS OF JAMES MADISON, *supra* note 4, at 12, 16 (1977).

47. See *supra* Part I.

48. Cf. DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 88 (Wilson Carey McWilliams & Lance Banning eds., 2003) (describing the Coercive

simply a more elaborate form of enumeration.

Moreover, the negative differed in important ways from the modern form of interlegislature dialogue: preemption. Recall Gouverneur Morris's critique of the negative on the floor of the convention, moments before it was voted down once and for all: "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 [National] law."<sup>49</sup> Morris's succinct statement set forth a spectrum of potential solutions to the problem of supremacy: (1) the negative; (2) judicial review; and (3) preemption, or repeal of a state law by a national law. For Morris, as for many of his contemporaries, the negative presented an altogether distinct (and undesirable) mode of policing federal supremacy that differed in important ways from both judicial review and preemption.

Morris's reference to the possibility that a state law might be "repealed by a [National] law" is intriguing because it appears to assume that even without any specific textual grant of power to Congress, that body could override state laws. A similar presumption had long underpinned Anglo-American law under the empire, for the earliest colonial charters had mandated that laws passed by the provincial assemblies be "as neere as conveniently may, agreeable to the forme [sic] of the lawes [sic] [and] pollicy [sic] of England."<sup>50</sup> Throughout the seventeenth and early eighteenth centuries, most British and British North American commentators adhered to the view that Parliament had at least some authority to legislate for the colonies by specifically mentioning them in its acts.<sup>51</sup> In addition, the hybrid legislative-adjudicative body of the Privy Council had the power to invalidate specific colonial laws from its seat in Whitehall.<sup>52</sup> By 1787, when Morris set forth his array of alternatives to the negative, his fellow delegates seemed comfortable with the notion that Congress could

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Acts of 1774 as standing for the proposition not that Parliament was to decide every issue, but that it "was to decide where everything was to be decided").

49. Madison's Notes (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 25, 28.

50. See Letters Patent from Elizabeth I to Sir Humfrey Gylberte (1578), in 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 49, 51 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

51. See, e.g., WILLIAM BLACKSTONE, COMMENTARIES \*107-08 ("Our American plantations are . . . distinct (though dependent) dominions. They are subject, however, to the control of the parliament; though (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named."). See generally MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE (2004) (discussing the "transatlantic constitution" and the applicability of the laws of England to the colonies); 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (Paul A. Freund ed., 1971).

52. See JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 503 (1950); 2 EDWARD RAYMOND TURNER, THE PRIVY COUNCIL OF ENGLAND IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 1603-1784, at 47-48, 293-94 (1928).

effectively nullify a state law by passing federal legislation that superseded or conflicted with it. This view of Congress's power likely stemmed from Americans' familiarity with the multilayered hierarchy of laws under the empire. It was also reflected in the "supreme law of the land" language of the Supremacy Clause, which in the hands of Chief Justice John Marshall and later interpreters came to amount to a textual basis for Congress's power effectively to repeal state law by preempting it through federal legislation.<sup>53</sup>

The negative might appear to be functionally similar to preemption insofar as both are mechanisms by which Congress can effectively override state laws. Although less formal or textually grounded than the negative, preemption operates as a means of maintaining federal supremacy by giving Congress a check on the actions of state legislatures.<sup>54</sup> Modern case law divides preemption into three categories: express, field, or conflict preemption.<sup>55</sup> Express preemption, based upon Congress's explicit intention to nullify state law, provides the closest parallel with the negative. However, all three species of preemption might possess the potential to achieve the purposes that Madison identified: reducing parochial state legislation, augmenting the power of the federal government (especially with respect to taxation and commerce), and increasing individuals' attachment to the Union. Indeed, implied preemption—whether categorized as "field" or "conflict"—might be viewed as allowing members of Congress to reap the centralizing, power-consolidating benefits of the negative more covertly than Madison's scheme would have permitted.

Yet three important differences between the negative and preemption suggest

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53. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824) ("[T]he acts of New-York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous."); see also *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). But cf. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 778-81 (1994); S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 842-55 (1992) (challenging the view that broad preemption principles necessarily follow from the Supremacy Clause).

54. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353-54 (2006) (arguing that the Supreme Court has used preemption doctrine to protect national commercial uniformity); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. (forthcoming 2012) (discussing preemption by federal agencies). See generally WILLIAM W. BUZBEE ET AL., *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* (William W. Buzbee ed., 2009).

55. See *Gade*, 505 U.S. at 98 ("Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' . . . [W]e have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' and conflict pre-emption, where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (citations omitted).

that the functional-equivalence hypothesis fails to capture either the foundational beliefs that lay behind Madison's vision of the negative, or the consequences of how it would have operated in practice. These differences center on (1) the scope that the negative and preemption each ascribes to Congress's power to act in areas beyond its enumerated Article I powers; (2) the default presumption of each toward the validity of state legislation; and (3) the meaning each ascribes to congressional silence.

The potential scope of Congress's power in a world with the negative would have been far broader than the actual scope of Congress's power when it preempts state law. According to Madison's broadest version of the negative, Congress would have had the authority to veto any state law that in Congress's view was not consistent with the federal interest. As originally presented to the convention, the Virginia Plan granted Congress the power to negative state laws "contravening in the opinion of the National Legislature the articles of Union."<sup>56</sup> When the negative became the central topic of debate just over a week later, Charles Pinckney of South Carolina moved that the scope of the power be expanded to cover any state act that Congress deemed "improper."<sup>57</sup> Madison seconded the motion, insisting that "an indefinite power to negative legislative acts of the States" was "absolutely necessary to a perfect system," but the broader language failed to win majority support.<sup>58</sup> Madison also argued that Congress ought to deploy agents into the states to allow for rapid federal assent to state legislation—and, not incidentally, to drive home the point that the federal level of government was a necessary participant in state lawmaking.<sup>59</sup>

Whether the delegates had ultimately granted Congress a negative "in all cases whatsoever" (as Madison initially described it in his letters)<sup>60</sup> over "improper" state laws, or only over state laws that contravened the Constitution, the result would have given Congress dramatically broader supervisory power over the state legislatures than it possesses even under the broadest possible conception of preemption. Most significantly, the negative would have been an enumerated power of Congress. Had it been adopted, the negative would itself have been committed to text as a structural provision built into the Constitution, either in Article I or else, like the Supremacy Clause, in a subsequent provision describing the functions of the constitutional system as a whole. A Congress invoking the negative would not need to point to a separate, enumerated, substantive power under which it was acting. In other words, a negating Congress would not be engaging in regulation, but rather exercising its structural

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56. Virginia Plan, para. 6, in 10 THE PAPERS OF JAMES MADISON, *supra* note 4, at 12, 16 (1977).

57. Journal (June 8, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 162.

58. *Id.* at 164, 168.

59. *Id.* at 168 ("The case of laws of urgent necessity must be provided for by some emanation of the power from the [National Government] into each State so far as to give a temporary assent at least.").

60. *See supra* notes 14-17 and accompanying text.

authority to oversee the product of the state legislatures.

This structural power to negative stands in sharp contrast to the preemption power. Preemption doctrine permits Congress to override state laws in many situations, but the preempting federal legislation must always be consistent with Congress's enumerated Article I powers.<sup>61</sup> In effect, the enumeration principle provides a substantive limitation on when Congress can preempt state laws. Moreover, in moments when the Supreme Court is construing Congress's enumerated powers narrowly, Congress might have more difficulty preempting state legislation, or it might be less eager to attempt preemption.

A second important difference between the negative and preemption is the default presumption of each mechanism toward the validity of state legislation. Under the regime of the negative, if Congress did not veto a particular state law, the state law would stand. But Madison's presumption was that Congress could intervene and brandish the negative whenever it chose. Recall Madison's statement in the convention that "[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>62</sup> On this view, Congress and the states would operate as a single compound legislature for purposes of state lawmaking.<sup>63</sup>

The Supreme Court's case law on preemption, in contrast, has at least at times articulated "the assumption that the historic . . . powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress."<sup>64</sup> To be sure, commentators have questioned whether this presumption against preemption truly exists,<sup>65</sup> while others have criticized the presumption.<sup>66</sup> Still, the fact remains that preemption's invasiveness on state lawmaking processes varies widely depending on the subject matter of the particular legislation and on the particular species of preemption (express, field, or conflict) that Congress is arguably exercising. Moreover, preemption is a complex doctrinal area requiring judicial interpretation, especially with respect to difficult questions of congressional intent.<sup>67</sup> Taken together, these differences

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61. The fact that federal regulations, as well as statutes, may have preemptive effect can add an additional layer to this analysis. See *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). But such regulations must nevertheless be adopted pursuant to a validly enacted federal statute, and therefore the enumeration analysis still applies.

62. Madison's Notes (June 8, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 165.

63. See LACROIX, *supra* note 1, at 152.

64. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citing *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605 (1926); *Allen-Bradley Local v. Wis. Emp't Relations Bd.*, 315 U.S. 740 (1942)), *rev'd sub nom. Rice v. Bd. of Trade of Chi.*, 331 U.S. 247 (1947); see also Bradford R. Clark, *Process-Based Preemption*, in BUZBEE ET AL., *supra* note 54, at 192, 193.

65. See, e.g., Susan Raeker-Jordan, *The Pre-Emption Presumption That Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998).

66. See Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000).

67. See, e.g., Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption?*:

in the two mechanisms' default presumptions suggest that even the narrowest version of the negative would have involved the federal government in state lawmaking to a far greater degree than the current regime of preemption.

Finally, congressional silence would carry different meaning in the context of the negative from the import it bears in the preemption context. According to Madison's vision of the negative, if Congress did not veto a particular state act, the act would stand.<sup>68</sup> Although the negative was based on the premise that Congress could intervene whenever it chose (the coordinate legislatures idea), any action Congress did take would be clear cut: either a veto, or assent via one of the agents of federal authority that Madison described as an "emanation of the power from the [National Government] into each State."<sup>69</sup> But in a system with the negative, what would be the meaning of silence—neither a veto nor assent—from Congress? At some point, would silence become in effect a ratification of state law?

The records of Madison's plans do not provide many details about how he envisioned the negative actually operating in practice. Besides his statement that the negative ought to be "lodged in the senate alone," and his reference to emanations of federal authority into the states,<sup>70</sup> it is difficult to obtain a sense of, for example, the timeline for the negative's exercise. Had the delegates approved the negative, one imagines that within a few decades, the Senate would have formed a committee to oversee the review of state laws and would have established rules governing procedural matters such as the deadline for vetoing a state law and the point at which a state law could be considered ratified and not simply not vetoed. This committee on the negative would presumably also have had to coordinate the Senate's processes with those of the Council of Revision,<sup>71</sup> perhaps by sending notice to the Council of the Senate's intention to veto a state law. Such notice would then trigger the Council's duty to "examine . . . every act of a particular Legislature before a Negative thereon shall be final," in the words of the Virginia Plan.<sup>72</sup>

In short, putting the negative into operation would have required Congress, as well as the other branches of the federal government, to produce a significant body of procedural rules. Uncertainty regarding Congress's intentions would have meant enormous costs to state law, norms of state sovereignty, and individuals' reliance on stable legal rules. Eighteenth-century Americans' experiences waiting for the Privy Council's verdict on specific colonial statutes had taught them the perils of long periods of review. Indeed, charges that George III had permitted his councilors to delay their review of colonial laws had formed

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*A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35 (1996).

68. See *supra* notes 16-21 and accompanying text.

69. Madison's Notes (June 8, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 168.

70. *Id.*

71. See Virginia Plan, para. 8, in 10 THE PAPERS OF JAMES MADISON, *supra* note 4, at 12, 16 (1977).

72. *Id.*

one of the particular grievances listed in the Declaration of Independence.<sup>73</sup> Consequently, one can reasonably assume that the Constitution's drafters and ratifiers would not have been content to leave the details of the negative's operation ambiguous, especially the key question whether a veto had issued or not.

In the preemption realm, by contrast, many unresolved questions surround the meaning of congressional silence. As in the context of the Dormant Commerce Clause, courts and commentators are routinely forced to try to determine when congressional silence exists, when it is meaningful, and when it is simply the result of inattention, unintentional inaction, or the hierarchy of legislators' priorities.<sup>74</sup> Also like the Dormant Commerce Clause, preemption analysis is paradigmatically undertaken by courts, unlike the negative's legislature-centered procedures.<sup>75</sup>

In short, important textual, functional, and ideological differences between the negative and preemption suggest that not only does the modern American constitutional system not have the negative, the preemption doctrine that it does have would have failed to satisfy many of the central concerns about the issue of supremacy that occupied late-eighteenth-century constitutional thinkers.

### III. A COUNTERFACTUAL NINETEENTH-CENTURY CASE STUDY

Given these arguments that preemption is not the modern equivalent of the negative, and that the key aspects of Madison's negative therefore did not survive the Philadelphia Convention, it is possible to ask the true what-if question: what if the Constitution had contained the negative? Possible sites of counterfactual historical exploration abound. Let us focus on an example from the early nineteenth century: the debates over Congress's power to supersede state legislation in the realm of interstate commerce as those debates were crystallized in the case of *Gibbons v. Ogden*.<sup>76</sup> This case study suggests that rather than leading to greater centralization, the presence of the negative might well have helped foment sectional crisis by raising the stakes of federalism-related debates throughout the early national period.

The facts of *Gibbons* present the paradigmatic early-nineteenth-century scenario of state regulation intersecting with federal legislation in the context of

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73. See THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776) ("He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.").

74. See, e.g., *Duckworth v. Arkansas*, 314 U.S. 390, 400 (1941) (Jackson, J., concurring) (observing that some state and local restraints on interstate commerce are "individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters," and therefore the Court is justified in engaging in Dormant Commerce Clause analysis).

75. See Yates's Notes (June 8, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 169, 169-70.

76. 22 U.S. (9 Wheat.) 1 (1824).

the technological and commercial developments of the post-1815 market revolution.<sup>77</sup> Familiar as they are, facts are particularly important for a counterfactual inquiry, so let us briefly review them.<sup>78</sup> Aaron Ogden acquired a license from John Livingston, who had previously required it from Robert Fulton and Robert Livingston, to operate a ferry between Manhattan and Elizabethtown Point in New Jersey.<sup>79</sup> Livingston had been chancellor of New York; Fulton had invented and patented the first steamboat.<sup>80</sup> A New York statute gave Fulton and Livingston the exclusive right to operate steamboats in New York waters; Ogden claimed that that right was transferred to him along with the license.<sup>81</sup> Subsequently, Ogden's former partner Thomas Gibbons began operating a competing ferry service in New York waters.<sup>82</sup> Provoked by Ogden's claims that his license was exclusive, Gibbons challenged Ogden to a duel, but Ogden—prudently and in keeping with changing mores of conflict resolution in the early nineteenth century—instead filed a trespass action.<sup>83</sup> Subsequently, Ogden filed an injunction suit in New York's Court of Chancery arguing that Gibbons's competing ferry violated the state legislature's grant of a monopoly to Fulton and Livingston, and therefore to Ogden.<sup>84</sup> Ogden prevailed in the Court of Chancery, where Chancellor James Kent upheld the New York grant.<sup>85</sup> The chancery decision was affirmed by New York's Court for the Trial of Impeachments and Correction of Errors,<sup>86</sup> and Gibbons later appealed to the U.S. Supreme Court.<sup>87</sup> In support of his claim, Gibbons cited a 1793 act of Congress titled "An Act for Enrolling and Licensing Ships or Vessels to be Employed in the Coasting Trade and Fisheries, and for Regulating the Same."<sup>88</sup> Gibbons argued that his steamboats (the *Bellona* and the *Stouddinger*) were licensed under

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77. See generally DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848 (David M. Kennedy ed., 2007) (characterizing the early nineteenth century as a communications and technological revolution); CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846 (1991) (characterizing the same period as a market revolution).

78. See generally MAURICE G. BAXTER, THE STEAMBOAT MONOPOLY: *GIBBONS V. OGDEN*, 1824 (Paul Murphy ed., 1972) (discussing the facts of *Gibbons v. Ogden*); THOMAS H. COX, *GIBBONS V. OGDEN, LAW, AND SOCIETY IN THE EARLY REPUBLIC* (2009) (discussing *Gibbons v. Ogden*); Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398 (2004) (discussing *Gibbons v. Ogden*).

79. See Williams, *supra* note 78, at 1408.

80. *Id.* at 1407.

81. *Id.* at 1407-08.

82. *Id.* at 1408.

83. See BAXTER, *supra* note 78, at 32.

84. *Id.* at 33.

85. See *Ogden v. Gibbons*, 4 Johns. Ch. 150 (N.Y. Ch. 1819), *aff'd*, 17 Johns. 488 (N.Y. 1820), *rev'd*, 22 U.S. (9 Wheat.) 1 (1824).

86. *Gibbons*, 17 Johns. 488.

87. Williams, *supra* note 78, at 1410.

88. Act of Feb. 18, 1793, ch. 8, 1 Stat. 305.

this federal statute, and consequently that the New York monopoly was invalid.<sup>89</sup>

Chief Justice John Marshall's opinion for the Court today seems to bear an aura of hornbook inevitability, making it an ideal candidate for counterfactual examination. After engaging in a wide-ranging exploration of the Commerce Clause, Marshall determined that Congress did have the power to involve itself in steamboat traffic in New York Harbor.<sup>90</sup> The Court concluded that the New York monopoly must yield before the federal coasting statute.<sup>91</sup> Marshall found that the New York statute came into "collision" with the act of Congress, and that the Supremacy Clause therefore required the Court to strike down the state law.<sup>92</sup> "[T]he framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it," Marshall wrote.<sup>93</sup> In cases of collision such as this one, "the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."<sup>94</sup> Thus, the Court held that the federal coasting statute applied to the steamboat trade in New York Harbor, that it was a valid exercise of Congress's commerce power, and—most important for our purposes—that the New York monopoly grant conflicted with the federal statute, and the state law therefore must give way.<sup>95</sup>

Thus for the factual; now to the counterfactual. What would the result have been in *Gibbons* in a constitutional world with the negative? Is this even a valid question, or in such a world would the case even have come before the Court as it did?

On one view, *Gibbons* would have produced the same result even in the regime of the negative. Marshall's argument can be read to point strongly in this direction. Here the timeline becomes important. Congress passed the federal coasting statute in 1793; New York granted the original monopoly to Fulton and Livingston in 1798, and in 1807—upon Livingston and Fulton's production of a steamboat capable of reaching the speed of five miles per hour—extended the monopoly for thirty years.<sup>96</sup> With the negative at its disposal, Congress might well have simply vetoed either the original 1798 state monopoly grant or the 1807 extension. Had Congress needed to offer a justification for the veto, it could have cited the conflict with the coasting statute or a general federal interest in promoting interstate commerce (both points that Marshall's decision later emphasized).<sup>97</sup> Especially given contemporary uncertainty on the question whether Congress's power over interstate commerce was exclusive rather than

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89. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 239-40 (1824).

90. *Id.*

91. *Id.* at 240.

92. *Id.* at 221.

93. *Id.* at 210.

94. *Id.* at 211.

95. *Id.* at 221-22.

96. Williams, *supra* note 78, at 1407.

97. See *Gibbons*, 22 U.S. (9 Wheat.) at 206, 210.

concurrently held with the states,<sup>98</sup> one can easily imagine a coalition of Federalist or National Republican senators, senators from landlocked interior states who depended on navigable rivers, and senators who generally supported commerce and development coming together to wield the negative against the New York monopoly.

Yet it is also possible to question the apparently seamless logic of Marshall's reasoning.<sup>99</sup> Indeed, one need look no further than the writings of the great Chancellor Kent to find rebuttals to the Chief Justice's arguments. In upholding the New York monopoly, and in his later *Commentaries*, Kent took note of the federal coasting statute but disputed Marshall's interpretation of the statute's purpose and effect.<sup>100</sup> Kent argued that it was not clear that Congress had intended to supplant all state regulation of interstate commerce on water.<sup>101</sup> Moreover, Kent and other critics (including Ogden's lawyers) argued that the purpose of the federal coasting statute might simply be to designate a vessel as American in order to avoid its being subjected to foreign-vessel tariffs.<sup>102</sup> The federal law might not actually confer an affirmative right to navigate, let alone an exclusive right, contrary to Marshall's suggestion. Thus, the combined arguments of Ogden's advocates, Kent for the court below, and Kent and others as commentators offered strong challenge to Marshall's premise that the case presented a "collision" between state and federal law. Challenging that premise in turn calls into question Marshall's conclusion that simple application of the Supremacy Clause required that the state law be invalidated.

Counterfactual interpretation depends in large part on the version of the facts that the counterfactualist chooses to begin with. If one accepts Marshall's interpretation of the *Gibbons* facts, in a world with the negative, Congress would most likely have simply vetoed the New York monopoly at some point prior to 1824; Gibbons would clearly have been able to operate his competing steamboat concern; and the case would never have come before the Court. But if one adopts Kent's competing theory of the facts, Congress might never have vetoed the New York monopoly, *even if it had the power of the negative*, because it would not have occurred to Congress that it ought to block state laws of this type. The Kent theory, then, suggests that the presence of the negative might well have made little difference, and that the dispute between Gibbons and Ogden—and the

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98. See, e.g., *id.* at 209 ("It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. . . . There is great force in this argument, and the Court is not satisfied that it has been refuted."). *But see generally* *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (resolving the question in favor of concurrence and rejecting the exclusive view of Congress's commerce power).

99. See Williams, *supra* note 78, at 1399 (describing Marshall's interpretation of the federal coasting statute as "a stretch").

100. See *id.* at 1409.

101. See *Ogden v. Gibbons*, 4 Johns. Ch. 150, 156 (N.Y. Ch. 1819), *aff'd*, 17 Johns. 488 (N.Y. 1820), *rev'd*, 22 U.S. (9 Wheat.) 1 (1824).

102. See *id.*

ensuing collision between federal and state law—would have unfolded just as it did.

*Gibbons* demonstrates the degree to which a counterfactual inquiry into the negative returns again and again to the issue of congressional silence. In a regime with the negative, if New York passes the monopoly statute and Congress does nothing, what result? Might that inquiry depend on the particular moment in question—Congress doing nothing when the monopoly was first granted in 1798, versus doing nothing when the monopoly was extended in 1807? Congressional silence might mean, or be taken by contemporaries used to dealing with this question in the regime of the negative to mean, that New York could grant the monopoly. This result would be a very different outcome from the decision in *Gibbons*. Or, on the contrary, congressional silence might mean that New York could not grant the monopoly, insofar as the silence amounted to a lack of federal assent. Such a view might have been most compatible with Madison's goals for the negative. In addition, the view that congressional silence was fatal to the state monopoly would have been consistent with Marshall's hint in *Gibbons* that federal power over interstate commerce might be exclusive. So, if in a world with the negative, Congress did not veto the New York monopoly and the case ended up before the Court, a justice of Marshall's convictions might have simply pointed to the lack of congressional assent to hold that the state law was invalid. Each of these counterfactual scenarios presents one significant difference from the actual constitutional world of the nineteenth century, and indeed the twentieth century: the possibility that the contours of the federal commerce power might have been elaborated by conflict between Congress and the state legislatures, rather than the Supreme Court.

Of course, as Madison pointed out in the convention debates, the mere fact of the negative's existence might well deter the states from regulating for fear of prompting a veto.<sup>103</sup> Whether such a chilling effect on state legislation would be desirable or not, however, one can equally imagine the effect of the negative in the early nineteenth century as driving some states to become more resistant to federal power. By explicitly building state-federal conflict into the Constitution, the negative would arguably have prompted conflict between the levels of government, rather than confining it to a specific case or controversy, as judicial review for the most part did. One consequence of the negative might therefore have been to galvanize state sovereignty at an early moment in the Republic's history. Rather than state sovereignty arguments occasionally surfacing (e.g., the Virginia and Kentucky Resolutions of 1798-99, the Hartford Convention during the War of 1812) before reaching a constant roar in the nullification conflict of the 1830s and the secession crisis of the 1860s, the constitutional shouting and brinkmanship would have begun in the nation's first years. Moreover, the friction from below would likely have been widespread, sweeping in not only slaveholding states but diverse interests such as New York's impulse to protect

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103. See Madison's Notes (June 8, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 164 (quoting Madison's statement that "[t]he existence of such a check would prevent attempts to commit" aggressive acts of legislation against other states or the Union).

its harbor traffic<sup>104</sup> and Maryland's and Ohio's opposition to the Bank of the United States.<sup>105</sup>

One can certainly tell an optimistic counterfactual story about a constitutional world with the negative. On this view, the negative might have staved off the sectional crisis, and perhaps even the Civil War, by establishing a clear rule of federal supremacy and staving off the expansion of slavery into the territories, and perhaps even the continuation of slavery where it existed.<sup>106</sup> But one can also tell at least two more sinister stories. In one, the negative would have permitted slaveholding interests to have captured the federal level of government far more completely than the "slave power conspiracy" that periodically held the Court, the Senate, and the presidency was able to do, resulting in a federalization of proslavery views.<sup>107</sup> A more diffusely pessimistic story suggests that whatever its substantive outcomes, the presence of the negative would have increased the salience of state sovereignty claims, creating more arenas of dispute between state and federal power, and perhaps uniting diverse states behind a broad banner of resistance to federal—or at least congressional—authority.

#### CONCLUSION

The federal negative is a fundamentally different species of structural mechanism from the Constitution's existing modes of judicial review and congressional preemption. The negative is typically seen as a highly centralizing mechanism; that was clearly Madison's purpose in promoting it at the Philadelphia Convention, and indeed for the rest of his life.<sup>108</sup> Madison and others believed that the negative was the best available solution to the problem of institutionalizing federal supremacy.<sup>109</sup> Commentators ever since have viewed it as evidence of Madison's nationalism.<sup>110</sup> But had the negative succeeded, it

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104. See *Ogden*, 4 Johns. Ch. at 164-65.

105. See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

106. See generally Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327 (1964) (describing the Civil War as resulting in large part from the channeling of many disputes into a framework of constitutional law).

107. See generally LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780-1860* (1st ed. 2000) (discussing and analyzing the slave power thesis).

108. As late as 1831, five years before his death, Madison continued to defend his proposal for the negative. See Letter from James Madison to Nicholas Trist (Dec. 1831), in 9 THE WRITINGS OF JAMES MADISON 471, 473 (Gaillard Hunt ed., 1910).

109. See Madison's Notes (June 8, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 164-70 (citing discussion of the Negative at the Federal Convention of 1787).

110. See Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 462 n.31 (2010).

might well have led to fragmentation and disintegration between the federal center and the state peripheries in the early years of the nation's history, long before the antebellum sectional controversy began. The negative might have brought more centralization, but at the price of raising every conflict to a constitutional crisis decades before the Civil War.

Readers with comments may address them to:

Professor Alison LaCroix  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
[lacroix@uchicago.edu](mailto:lacroix@uchicago.edu)

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