The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology

Alison LaCroix

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology

ALISON L. LACROIX

The Philadelphia convention of 1787 looms enormous in many accounts of U.S. constitutional history, serving as the set piece in which various and muddled worldviews, theories, interests, and allegiances gelled into a coherent science and structure of politics. The Convention thus becomes time zero in the chronology of U.S. political and constitutional development, a finite and forward-looking first moment defining, for good or ill, the terms according which subsequent debates regarding the nature of U.S. government would be conducted.

The moment of origin, in other words, sometimes appears to lack origins of its own. Pre-Convention precedents provide antiquarian interest, perhaps, but are seen as offering little useful insight into the “real” legal questions concerning the post-1787 meaning and function of particular constitutional doctrines. Legal scholars sometimes trawl the Convention records for footnote fodder but ignore the context surrounding the remarks they value. Many nonlawyer historians, meanwhile, avoid writing about the Convention altogether, regarding it as a spoiled field overtrampled by the lawyers or else as a moment about which little of interest remains to be said. The strange place that the Philadelphia convention occupies in U.S. constitutional history leads to several unfortunate consequences.

Alison L. LaCroix is assistant professor of law at the University of Chicago Law School. <lacrox@uchicago.edu>. She would like to thank David Armitage, Bernard Bailyn, Richard B. Bernstein, William Birdthistle, Adam Cox, Christine Desan, Noah Feldman, Robert Gordon, Morton Horwitz, Daniel Hamilton, Bernard Harcourt, Daniel Hulsebosch, James Kloppenberg, Larry Kramer, Saul Levmore, Serena Mayeri, William Nelson, Claire Priest, John Phillip Reid, Rebecca Rix, Adam Samaha, David Strauss, Cass Sunstein, the anonymous reviewers for Law and History Review, and the members of the University of Chicago Law School Faculty Workshop and the New York University Law School Legal History Colloquium for their helpful comments and discussion.
Chief among them is a surprising shortage of scholarly attention to the Convention as something other than an unassimilable outlier in historical time, a sui generis moment of genius that set the terms of debate but that resists efforts to place it in a broader temporal context extending before, as well as after, 1787.

Federalism, according to such accounts, emerged as a by-product of this foundational conversation among the men sitting in the Pennsylvania State House during the summer of 1787. Along with judicial review, federalism is frequently regarded as one of the signal American contributions to the science of politics, its origin traceable to the drafting and ratification of the Constitution, despite the lack of any explicit reference to either concept in the document itself. On this view, a set of ideas about government that would later be called "federalism" began to coalesce at the Convention, conjured into action by the exigencies of a fraying confederation and the combined force of fifty-five creative minds. Federalism appears as a new-modeled creation cobbled together out of a mix of necessity (the existence of the states) and theory (the belief that republics could not be easily maintained across a large territory). The product of these imperatives was not simply a constitutional doctrine but rather an entire philosophy of government. In addition to providing the theory of authority that undergirded the whole structure of the new republic, federalism took concrete form in the particular provisions of the document that established that republic, from the enumeration of Congress's powers in Article I, Section 8, to the supremacy clause of Article VI.

The story I have just described is the story of a beginning, with the Convention debates serving as the first act in the unfolding drama of U.S. constitutional history, and therefore as the original moment for purposes of understanding U.S. federalism. This is a familiar story, especially for constitutional scholars. To be sure, any study of the Constitution must devote special attention to the moment of the document's creation. But there is another account of the history of U.S. federalism that focuses not on the period between 1787 and 1789 but on a broader, more diffuse time frame.

The few scholars who have explicitly discussed the question of federalism's origins have pointed to the structures and institutions of the British Empire as the source of the concept of divided authority. Most prominent

1. See, for example, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring): "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected by incursion from the other."

2. See, for example, Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607–1788 (Athens: University of Georgia Press, 1986); Andrew C. McLaughlin, A Constitutional History of
among these scholars is Jack P. Greene, who argues that life under the imperial system introduced American colonists to the notion that political authority could be apportioned between a ruling metropolitan center and a remote but expansive periphery. In Greene’s view, because colonists were subject to multiple ascending layers of political authority (i.e., colonial legislature, royal governor, Parliament, Privy Council), only a minor conceptual adjustment was needed following independence to establish the Constitution’s two-level federal structure of state and national authority. Greene, like constitutional historian Andrew C. McLaughlin before him, argued that continuity characterized the transition from the Britain’s “composite empire” to the United States’ federal republic.

Greene’s story is one of institutions, of the day-to-day political experience of British North Americans, whose ideas about government followed from their interactions with what Greene terms the “negotiated authorities” that operated as a practical matter within the British Empire. Similarly, McLaughlin, writing in 1918, based his argument for imperial-to-federal continuity on what he described as Americans’ “institutionalization and legalization” in the 1770s and 1780s of “the practices of the prerevolutionary imperial system of Britain.” Such accounts focus on the outward manifestations of authority rather than on political beliefs or theories of government. In this sense, they embrace a positivistic vision of political history, treating institutions and experience as more reliable—or, at a minimum, more significant than—arguments or ideology.

Recent books by Daniel Hulsebosch and Mary Sarah Bilder have brought a similarly institutional focus to the question of the nature of the eighteenth-century Anglo-American constitution. Hulsebosch’s *Constituting Empire* focuses on “the way people experienced constitutions rather than on constitutional theory,” while Bilder’s study of what she usefully terms “transatlantic legal culture” is “less interested in constructing a

---

4. For “composite empire” language, see McLaughlin, “Background of American Federalism,” 216.
7. I am grateful to David Armitage for suggesting the experience-arguments distinction.
conceptual demarcation of the legal structure of the empire” than in offering “a practical analysis about how the legal empire worked and, more importantly, how litigants worked within it.” Like McLaughlin and Greene, Hulsebosch and Bilder for the most part bracket questions of ideology and theory, emphasizing the legal and constitutional experience of eighteenth-century British North Americans rather than the processes of argumentation and ideology formation that underpinned that experience. In so doing, these most recent accounts of Anglo-American constitutional history diverge from the ideologically oriented accounts by Bernard Bailyn and Gordon S. Wood that have dominated the historiography of the Founding period since the 1960s.9 Describing late eighteenth-century America as undergoing a “transformation of thought” that culminated by 1787 in “an entirely new conception of politics” based on republican theory, Bailyn and Wood each place ideas at the center of the analysis.10 The new institutional history of early American constitutionalism, in contrast, emphasizes the outward, observable emanation of ideas, in the form of experience.

The institutional approach thus offers both a methodological and a substantive contrast with the view of many constitutional law scholars and with the republican theorists. In addition to the distinction between ideological and institutional emphases, the approaches privilege different chronologies. The constitutional law story typically begins in 1787 and pays little regard to colonial precedents, while both the institutional and republican stories start more than a century and a half earlier, with the governments created by the first New World charters. The institutional and republican views thus treat the Convention as an endpoint, or perhaps a midpoint, in the process of Anglo-American legal development, while the constitutional law approach venerates the Convention as the crucial point of origin.

10. Quotes from, respectively, Bailyn, Ideological Origins, xiv (1992 ed.); Wood, Creation, viii (1972 ed.). Bailyn was himself responding to the work of Charles Beard, which had emphasized the role of economic, social, and other material factors in bringing about first the Revolution and then the Constitutional Convention; see Charles A. Beard, An Economic Interpretation of the Constitution of the United States (New York: Macmillan, 1913).
Substantively, the three approaches reach sharply different conclusions on the question of federalism’s origins. In keeping with its emphasis on drafting and ratification as foundational moments, the constitutional law version of events holds that American federalism was novel, and that the creation of the Republic constituted a fundamental break with the past. Republican scholars have offered a similar view, albeit with less focus on federalism itself than on broader moments of ideological transformation in late eighteenth-century American politics. The institutional view, meanwhile, implicitly downplays the significance of the Convention, suggesting that 1787 was one of many moments of negotiation and reshuffling among preexisting institutional forms.

Here I seek to enrich the existing array of accounts by offering a different view, from both a methodological and a substantive standpoint, of the origins of U.S. federalism. Methodologically, I seek to bring ideology back into the discussion of the meaning and significance of federalism in the Founding and ratification periods, and to place the Philadelphia convention in the broader context of federal thought in the late eighteenth century. Institutions are, to be sure, an important part of the story, but the ideas surrounding those institutions—the words and concepts that contemporary actors used as they explained to themselves what the institutions meant—themselves played a constitutive role in defining the contours first of colonial and then of early national government.

This ideological interpretation of federalism complements recent, divergent accounts of the Founding era by Max Edling and David Hendrickson. Whereas Edling views federalists in the early Republic as focused entirely on “the need to build a powerful state and to explain how this state would work,” Hendrickson warns against “exaggerat[ing] the significance of the national idea in the era of revolution and constitution-building” and instead emphasizes the role of the Confederation and Constitution as “peace pacts” among “sovereign and independent communities.” An ideological approach offers one possible way to reconcile these seemingly conflicting accounts. If the organizing principle of federal ideology was divided authority, that principle might well have meant divided authority for some contemporaries (whom, following Edling, we might now identify as

nationalists) and divided authority for others (whom, following Hendrickson, we might now call confederalists).

As for the substantive question of the nature of relationship between federalism circa 1789 and what came before, ideas are again central to my account. I argue that although the history of federalism did not begin with the Constitutional Convention, the debates at Philadelphia represented a vital moment in which British imperial precedents, colonial practices, postwar exigency, and political theory came together in the hands of particular individuals to form both a new idea of government and an actual new government. Certainly, some of federalism’s central ideas had begun to emerge in the 1760s and 1770s, cobbled together by members of the colonial opposition in the midst of protracted disputes between British North Americans and their metropolitan counterparts. But the debates, and the constitution that resulted, created and codified federalism in important ways. Arguments about the nature and scope of Parliament’s power to regulate the colonies, which began as the colonists’ response to what they viewed as unconstitutional legislation from Westminster, became by the 1780s a full-blown theory of government authority. With the rebellion against Britain behind them, the members of the Founding generation found themselves able—indeed, required—to consolidate the previous two decades’ many shreds and pieces of structural and political argument into a more or less coherent conception of government. In this sense, then, the debates at Philadelphia represented neither an original moment of genius nor simply another instance of negotiation among existing groups and institutions. Rather, the period from 1787 to 1789 should be understood as a reexamination and reshuffling of fundamental ideas of government with which Americans had begun experimenting decades before. The drafting and ratification of the Constitution served to crystallize a novel, distinctively British North American theory of government that had been developing since at least the mid-1760s.

The story of federalism’s development in the 1780s is thus primarily one of ideology formation. U.S. federalism’s central ideas—multilayered authority, a substantive (as opposed to territorial or personal) approach to jurisdiction, a central government with a brief and identity distinct from the combined wills of the component states—had begun to coalesce in the 1760s and 1770s, when colonial commentators deployed them against metropolitan claims of parliamentary supremacy. Under the British Empire, the belief that a single government might legitimately contain multiple layers of authority underlay colonists’ claims that their own assemblies ought to operate parallel to rather than subject to Parliament. In a 1764 pamphlet, for example, Virginian Richard Bland acknowledged Westminster’s authority over the colonies in matters of external
governance but then insisted that "the legislature of the colony have a right to enact ANY law they shall think necessary for their INTERNAL government." This premise of legislative multiplicity became the basis of a new ideology, in David Armitage's sense of the word: "a systematic model of how society functions" and also "a world-view which is perceived as contestable by those who do not share it." This protofederal ideology of multilayered government required a great deal of explanation throughout the Revolutionary period, as colonial commentators sought to explain why their scheme of what Robert Cover would later term "jurisdictional redundancy" did not violate contemporary political theory's proscription of *imperium in imperio*, or a government within a government.

Multilayered authority thus became a plausible way to arrange government in the course of the Revolutionary-era debates. Yet the specter of *imperium in imperio* continued to haunt political discourse. One need only consider the Articles of Confederation to appreciate the uncertainty with which members of the Founding generation faced the problem of giving structure to their vision of multiplicity. True, the Articles contemplated two levels of government: the several states and the United States of America. Yet the actual operations of the United States of America were to be carried out by an entity denominated "the United States, in Congress assembled" and limited to a handful of "expressly delegated" powers in specific subject areas, including war, treaties, currency, post offices, and Indian affairs. As John Adams's reference to the Massachusetts congressional delegation as "our embassy" suggests, the general government was less a distinct level of government than a shell organization that occasionally served as the venue for meetings of the constituent entities. The United States existed only at the moments when its members were in Congress assembled; it claimed no executive or judiciary. The general government, in other words, was essentially an emanation from the states.


16. Articles of Confederation, art. 2; art. 9 (1777).

In the summer of 1787, then, when the delegates to the Constitutional Convention gathered, federalism’s central idea—the possibility that a functional government could comprise more than one sovereign—remained largely untested. Despite the vast changes that Americans’ conception of political authority had undergone since the 1760s, the Articles of Confederation represented a crude attempt to institutionalize the idea of multiplicity in the same forms that had hamstrung British Americans in their debates with metropolitan commentators. From the Stamp Act controversy to the many angry colloquies between royal governors and colonial assemblies to the Articles themselves, colonists had devoted their arguments to proving that multilayered authority, in the form of multiple legislatures, offered a viable method of governing a far-flung empire.

But simply stacking legislatures did not answer several crucial questions, including profound questions of institutional multiplicity’s theoretical and practical significance. If the central intellectual issue of the Revolutionary-era debates was hammering out a conception of multilayered government, the central achievement of the Philadelphia convention was assembling an institutional structure to support that conception. And, in the course of these efforts, participants in the drafting and ratification debates offered not only a plausible form of multilayered authority but also a novel normative vision of composite government distinct from past Anglo-American practice and theory. The legislature-centered approaches to multiplicity that had characterized the 1760s and 1770s gave way in the early Republic to a reexamination of foundational questions of the location of authority within a composite polity, and to practical issues of how such a polity might actually operate. The floor of the Convention became a crucial site for this reexamination.

In particular, the debate surrounding James Madison’s proposal to give Congress the power to negative state laws required delegates to work through the meaning of multiplicity. In the end, the delegates’ rejection of the negative and adoption instead of a judicialized approach to the problem of multilayered authority signaled a fundamental shift from the colonial approach to such issues, and even from the Articles of Confederation. By 1787, the previous decades’ embrace of multiplicity as the response to full-throated metropolitan insistence on unitary authority seemed insufficient to the pressing problems of establishing a government. Colonial commentators’ refrain of multiplicity gave few specifics as to what that idea might mean in practice, or what forms it would take in a postimperial state. The Revolutionary ideology of multiplicity, in other words, seemed by 1787 to demand a new institutional structure. With a mandate to assemble that new structure, the Convention delegates rejected the established legislative solution embodied in Madison’s negative and turned instead
to another institution—the judiciary—to mediate between state and general governments. In so doing, they gave their institutional choice of a judicial approach a normative edge. The Revolutionary belief in multiplicity thus melded with a new structural commitment to a judicial solution. The result was both ideology and institution, and it was called federalism.

Participants in the drafting and ratification of the Constitution thus worked Revolutionary ideology into a new institutional structure, a process that in turn helped create a new ideology. This story, therefore, has to do with institutions, but it is not an institutional story in that it focuses on the ideas and debates that went into setting up the institutions. The debate over Madison’s negative was a debate about federal thinking. The central story line of that debate was the emergence of not just an idea, but an ideology, of multitiered authority.

Curing the Vices of Confederacies

A critical moment for the notion of authority, particularly the species of layered authority that would characterize American federalism, came in 1786, as the American Confederation struggled to solidify its victory over its former imperial master in the face of political unrest, fiscal ruin, and sectional rivalry. Between April and June of that year, during the recess of the Virginia House of Delegates in which he served, James Madison returned to his home in Orange County, Virginia, where he immersed himself in his extensive library of historical treatises. Two trunkfuls of books had recently arrived from Madison’s friend Thomas Jefferson, who had been detailed to Paris in 1784 to replace Benjamin Franklin as American minister to the Court of Versailles, and to whom Madison had given free rein to acquire and relay as many books as possible concerning the fates of confederacies both antique and contemporary.¹⁸ The thirty-five-year-old Madison, already famously hard-working, settled back into his parents’ Piedmont home, Montpelier, and addressed himself to the task of canvassing this precious “literary cargo.”¹⁹ His research


¹⁹. Madison to Jefferson, March 18, 1786, PJM, 8:501. Madison’s devotion to his studies had always been remarkable: Upon completion of his bachelor’s degree at Princeton in two years, Madison was forced to remain in New Jersey an additional year in order to regain his strength while continuing with private studies. Despite taking this care, however, when Madison returned to Montpelier in April 1772, he suffered something like a nervous breakdown. At least one historian posits that the matriculation decision a few years later of another founder, Alexander Hamilton, may have been dictated by Princeton president John
yielded forty-one pocket-sized pages of handwritten notes that surveyed political entities from the Amphyctionic Confederacy of classical Greece to the contemporary United Netherlands.\textsuperscript{20}

Despite some initial misgivings about the prospect of tinkering with the Republic’s foundational document, Madison spent his days and nights (aside from the occasional evening game of whist) searching for answers in the experiences of other confederacies. Madison did find guidance, but in the form of cautionary tales rather than specific models of government.\textsuperscript{21} In his notes he judged the ancient and modern confederacies harshly, enumerating their shortcomings under the heading “Vices of the Constitution.” The chief failing of these storied political systems? In each case, the newly constituted “federal authority” remained beholden to the component states, secondary—in both the power it wielded and the allegiance it demanded—to the entities that had created it. In their efforts to preserve the sovereignty of the members, the creators of these confederacies had rendered the central government impotent. The famed Achaean League of ancient Greece, for example, had failed, Madison believed, because the “defect [i.e., lack] of subjection in the members to the general authority ruined the whole Body.”\textsuperscript{22} Similarly, Madison noted with respect to the contemporary Holy Roman Empire, “Jealousy of the Imperial authority seems to have been a great cement of the confederacy.”\textsuperscript{23} The repetition of the word “authority” here is striking. Overarching both statements is Madison’s conclusion that the confederacies in question were dysfunctional because their structure failed to settle the fundamental question of authority, of which entity possessed ultimate power—the component polities or the general government.

Moreover, the way Madison used the term “authority” also reveals a more specific conclusion. Throughout the “Notes,” the term “authority” is nearly always allied with one of three other terms: “federal,” “general,” or “imperial.” In the course of examining existing structures of authority, Madison also addressed the unasked question that had likely motivated his task in the first place: What was the nature of authority in a republic comprising multiple preexisting entities that had long considered

Witherspoon’s desire to avoid a repeat of Madison’s experience, which led Witherspoon to deny Hamilton’s request to proceed through the curriculum at his own (rapid) pace, and he consequently sent Hamilton north to King’s College in New York; see Ron Chernow, \textit{Alexander Hamilton} (New York: Penguin, 2004), 48; see also Ralph Ketcham, \textit{James Madison: A Biography} (Charlottesville: University of Virginia Press, 1990), 51–52.

\textsuperscript{20} Ketcham, \textit{James Madison}, 184.

\textsuperscript{21} Ibid.

\textsuperscript{22} “Notes on Ancient and Modern Confederacies,” \textit{PJM}, 9:8, 22.

\textsuperscript{23} Ibid., 22.
themselves to be independent, sovereign states? If that republic was to succeed where its predecessors had failed, the answer was clear to Madison: Authority must be tied to that which was federal, general, or imperial—that is, in the case of the United States, to a national government.

Recognition of this problem led Madison to conclude that the Articles of Confederation, premised on a vague hierarchy of legislatures, were insufficient to the task of bringing the states together under a strong central government.24 "Our situation is becoming every day more & more critical," Madison wrote to Edmund Randolph in February 1787, as he sat in an increasingly idle Confederation Congress awaiting the approaching Philadelphia convention. "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."25 The question for Madison—and for the Constitutional Convention—became how to save the United States from the fate that, he believed, had reduced other confederacies to little more than impotent leagues, the power of which was limited to serving the will and convenience of their component states. Madison would deploy his analysis throughout the Constitutional Convention of 1787 and the Virginia ratifying convention of 1788, and in his contributions to The Federalist during the winter and spring of 1787–88.26

By the time the delegates to the Constitutional Convention began trickling into Philadelphia in May 1787, Madison had arrived at a solution that he believed would establish the supremacy of the general government.27

24. Jack Rakove describes Madison's revelation thus: "Madison now understood that any federal system based on the voluntary compliance of the states was likely to fail, for three reasons that could be formulated almost as theoretical postulates. First, because states had different interests, it was unlikely that they would have an equal stake in carrying out every federal policy. Second, in every state there would be politicians—'courtiers of popularity,' Madison called them—who would always hope to advance their own interests by criticizing national measures. Third, and most important, even where the states did share common interests, mutual doubts as to whether other states would comply with national decisions would encourage shirking" (Jack N. Rakove, James Madison and the Creation of the American Republic, 2nd ed. [New York: Longman, 2002], 52–53).


26. Federalist 18 focused on the ancient confederacies, especially the Amphyctonic and Achaean leagues; Federalist 19 discussed contemporary confederacies, including the Holy Roman Empire, Poland, and the Swiss confederacy; and Federalist 20 considered the contemporary United Netherlands (The Federalist, ed. Jacob E. Cooke [Middletown, Conn.: Wesleyan University Press, 1961]).

27. Madison had arrived in Philadelphia on May 5, in time for the Convention's first scheduled meeting on May 14, but the lack of a quorum postponed the initial session until May 25. Madison reported these events to Jefferson on May 15, noting, "The number as yet assembled is small... . There is a prospect of a pretty full meeting on the whole,
a coded letter to Jefferson, he laid out his prescription: "Over & above the positive power of regulating trade and sundry other matters in which uniformity is proper, to arm the federal head with a negative in all cases whatsoever on the local Legislatures." "Without this defensive power experience and reflection have satisfied me that however ample the federal powers may be made, or however clearly their boundaries may be delineated, on paper, they will be easily and continually baffled by the Legislative sovereignties of the States." Madison's remedy for the vices of the American Confederation appeared simple enough: to vest the general (federal) government with the power to veto laws passed by the state legislatures.

This "federal negative" proved to be the linchpin of Madison's plan for reforming the national charter. In a trio of letters to Jefferson, Randolph, and Washington written in March and April 1787, which Douglass Adair has called the seedbeds of "the first shoot in his thoughts of a plan of Federal Government," Madison elaborated on his vision. Taking a cue from his earlier observations concerning the jealousies of the states, Madison now presented the federal negative as the cure to both the problem of authority that had dogged every other confederation and to what he viewed as the related problem of the states' increasing tendency to carry rule by majority to dangerous excess. The effect of incorporating though there is less punctuality than was to be wished. Of this the late bad weather has been the principal cause" (Madison to Jefferson, May 15, 1787, PJM, 9:415).


29. Scholars have employed a variety of terms to refer to Madison's proposed negative, including "the negative on state laws," "the federal veto," and "the federal negative." In his intellectual biography of Madison, Lance Banning uses the latter two phrases; see Banning, The Sacred Fire of Liberty, 117, 188. This article will use the term "federal negative."


31. Many scholars who have studied Madison's federal negative have emphasized its role as a weapon against majoritarian tyranny, and have therefore viewed it as inextricably linked with Madison's discussion in Federalist 10 of the problem of faction and the consequent need for a large republic; see, for example, Kramer, "Madison's Audience"; Rakove, Original Meanings, 51, 197. These and other scholars have viewed it as evidence of a creeping nationalist, even consolidationist, tendency in Madison's thought; see, for example, Charles F. Hobson, "The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government," in The Federal Constitution, ed. Peter S. Onuf (New York: Garland, 1991), 258; Forrest McDonald, States' Rights and the Union:
the federal negative into the amended charter, he wrote, would be "not only to guard the national rights and interests against invasion, but also to restrain the States from thwarting and molesting each other, and even from oppressing the minority within themselves by paper money and other unrighteous measures which favor the interest of the majority."\(^{32}\)

The federal negative, therefore, would remedy several of the twelve "Vices of the Political System of the United States" that Madison enumerated in his essay of the same name, written in April 1787 as he prepared for the Philadelphia convention: "Failure of the States to comply with the Constitutional requisitions"; "Encroachments by the States on the federal authority"; and "Trespasses of the States on the rights of each other"; and four other provisions concerning the "Multiplicity," "Mutability," "Injustice," and "Impotence" of state laws under the Confederation.\(^{33}\)

The concept of granting a central legislative authority the power to veto the acts of a subordinate legislature was not Madison’s innovation, as he readily acknowledged. Indeed, his own words laid bare the source of Madison’s solution to the problem of authority: the British Empire.\(^{34}\)

Regarding the national government, Madison wrote to Randolph on April 8, “Let it have a negative in all cases whatsoever on the Legislative Acts of the States as the K. of G. B. heretofore had.” In a more formal, less shorthand-laden letter to Washington eight days later, Madison elaborated. A “negative in all cases whatsoever on the legislative acts of the States, as heretofore exercised by the Kingly prerogative,” Madison wrote, was “absolutely necessary” and constituted “the least

---

possible encroachment on the State jurisdictions.” The centerpiece of Madison’s plan to reconstitute the Republic, therefore, sprang directly from the institutions and practices of the British Empire, the thralldom of which the American colonies had escaped only four years before.

The inspiration to import the negative to American shores seems to have been brewing in Madison’s mind as early as spring 1786, when he composed his “Notes on Ancient and Modern Confederacies.” The causal cascade between the other confederacies’ lack of a mechanism by which the central government could police the laws of the component entities, the perceived failings of those confederacies, and the presence of such a mechanism in the British Empire echoed throughout his writings in 1786–87. In order to save the Union, Madison proposed grafting onto the founding charter a provision requiring the same type of ex ante review of state legislative acts that the British monarch, through the mechanism of the Privy Council, had formerly wielded over the acts of the colonial assemblies.

Imperial Modes of Review

The Privy Council was a hybrid executive and legislative body comprising the king and his councillors, many of whom were peers and therefore also members of the House of Lords. Since the early twentieth century, a few legal historians have focused on the Privy Council’s appellate review of colonial legislative acts and judicial decisions. Beginning with a brace of articles published by Arthur M. Schlesinger Sr. in 1913, scholars have argued that the structure of review established by the Privy Council influenced American colonists’ understanding of the hierarchical array of legal authorities in which they lived. As the legal historian Joseph

36. Blackstone defined the Privy Council as “the principal council belonging to the king” and describes its composition as follows: “The king’s will is the sole constituent of a privy counsellor; and this also regulates their number”; see William Blackstone, Commentaries on the Laws of England (1765–69; reprint, with an introduction by Stanley N. Katz, Chicago: University of Chicago Press, 1979), 1:222–23; see also Black’s Law Dictionary, 6th ed., s.v. “Privy Council”: “In England, the principal council of the sovereign, composed of the cabinet ministers, and other persons chosen by the king or queen as privy councillors.”
Henry Smith demonstrated, medieval theories of kingship—still widely espoused in the late seventeenth century in the form of the legal fiction that the colonies qualified as “king’s dominions” by right of conquest—dictated that the colonies did not fall within the ambit of domestic English appellate procedure. Thus, instead of bringing his case before the King’s Bench, as his counterpart at home in Swindon or Bristol might, a colonist who wished to appeal an adverse decision by his highest colonial court could request a hearing before the Crown, in the form of the Privy Council. Such practices fell under the rubric of royal prerogative and therefore tied the colonies directly to monarchical authority. Mary Sarah Bilder has recently elaborated on Smith’s findings, arguing that the Privy Council’s standard of review, which interrogated colonial laws to determine whether they were repugnant to the laws of England, connected the New World to the Old by creating a “transatlantic constitution” based on specific levels of hierarchical authority.

---

39. Technically, the forum for such appeals was a specially designated committee of the Privy Council. From 1675 to 1696, that committee was variously nominated the Committee of Trade and Foreign Plantations and subsequently the Committee for Trade and Plantations; the members of both entities were also known as the Lords Committee of Trade and Plantations. Between 1675 and 1696, the committee fluctuated in size from as few as twelve to as many as thirty-three members, occasionally comprising the entire membership of the Privy Council. A 1696 act of William III reorganized the committee and renamed it the Board of Trade and the Committee for Hearing Appeals from the Plantations; see Smith, *Appeals to the Privy Council*, 71–72, 132–38; see also Julius Goebel Jr., *Antecedents and Beginnings to 1801*, Vol. 1, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, ed. Paul A. Freund (New York: Macmillan, 1971), 60–65. Smith notes that “all these committees were conciliar derivatives—their decisions gained force only through Orders in Council issued by the Council Board itself”; see Smith, *Appeals to the Privy Council*, 72. I therefore follow the usage of Smith and others and employ the general phrase “Privy Council” to refer to the body responsible for hearing appeals from the colonies and evaluating colonial acts for conformity to the laws of England.
40. Smith, *Appeals to the Privy Council*, 464–523. The doctrine of the king’s dominions was a holdover from the Middle Ages, when English kings held lands outside the realm, such as Aquitaine or Normandy. By the time English colonization of the New World began in 1607, however, these overseas holdings had dwindled to the Channel Islands, which alone possessed the standing to claim a right of appeal to the Crown; see Goebel, *Antecedents and Beginnings*, 36.
These histories have focused primarily on one species of the Privy Council’s activity—its review of colonial judicial decisions—as part of a project of tracing continuities between imperial and colonial modes of appellate jurisdiction, and ultimately the origins of American judicial review. Yet the Privy Council’s power to scrutinize colonial law extended beyond reviewing the decisions of colonial courts. In addition to exercising this protojudicial review, the Privy Council wielded a power over the colonies that modern legal scholars would now call legislative review: that is, the power to evaluate the acts of colonial legislatures, unattached to a specific case or set of parties, and to declare those acts either valid or invalid as applied prospectively to all persons and all scenarios. Fewer scholars have focused on the impact of this parallel practice of legislative or administrative review.

Certainly, as many scholars have argued, the parsing of distinctions between such modern notions as judicial and legislative review and applying them retrospectively to seventeenth- and eighteenth-century legal proceedings is fraught with peril. Anglo-American jurists of the period did not recognize a firm distinction between adjudication and legislation; this was why, as Charles McLlwain and others have ably demonstrated, the medieval English Parliament could be characterized as both a high court and as a legislative body. The ambiguity endured in the

42. See, for example, Bilder, Transatlantic Constitution, 6; Hamburger, “Law and Judicial Duty.”

43. In modern jurisprudence, of course, the only way to challenge a law’s operation in all situations and with respect to all parties is to mount a facial challenge: that is, a challenge to the statute on its face, as opposed to an as-applied challenge, which takes on the statute only as it is applied to a particular type of party or set of facts. In both cases, however, an aggrieved party must bring the challenge; courts will not take up the issue of their own volition, as such an act would violate the Constitution’s case or controversy requirement; see U.S. Constitution, art. 3, sec. 2. Because the application of facial challenges is so broad, courts have erected substantial barriers to their successful prosecution, rendering them relatively rare. Examples are the Supreme Court’s holding in National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998): “Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort” (internal quotation marks omitted); United States v. Salerno, 481 U.S. 739, 745 (1987): “A facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” On this distinction generally, see Richard H. Fallon Jr., “As-Applied and Facial Challenges and Third-Party Standing,” Harvard Law Review 113 (2000): 1321–70.

44. Goebel refers to such practices as "administrative control of colony legislation," but Smith terms them "legislative review" (Goebel, Antecedents and Beginnings, 60); see also Smith, Appeals to the Privy Council, 523.

45. The ur-text on this subject is Charles H. McLlwain, The High Court of Parliament: An Historical Essay on the Boundaries Between Legislation and Adjudication (New Haven, Conn.: Yale University Press, 1910). More recent interpretations of this issue in the
American colonies. Consequently, to expect the legal forms of the period to conform neatly to modern taxonomies is to court anachronism.

Yet it is possible to analyze the substance of the action at hand and to categorize it as more like one or the other form of review, as jurists today understand them. The hallmark of adjudication is specificity: particular parties bring a particular dispute before a decision-making body, which body then issues a ruling that applies primarily to the particular case at hand and, secondarily, as a precedent to aid in deciding future cases that materially resemble the case. Judicial review is similarly specific: particular parties bring before a decision-making body either the ruling of another, inferior decision-making body or else a statute promulgated by a lawmaking body. Legislation and legislative review, by contrast, aspire toward generality, if not universality. Unlike bodies responsible for adjudicating disputes, legislative bodies issue rules that apply to all persons and scenarios covered by the terms of the legislation; moreover, the rules apply only prospectively.

The Privy Council exercised both varieties of review with respect to the American colonies in the seventeenth and eighteenth centuries, albeit to varying degrees depending on each colony’s particular legal organization. By positing that lands beyond the realm were held by the monarch alone by virtue of conquest, the doctrine of the king’s dominions vested the king’s council with authority to oversee colonial legislation and to review the decisions of colonial courts. The extent of the Privy Council’s authority over the legislative acts and judicial decisions of a given colony therefore depended on the quantum of royal control that underpinned the colony’s founding. In the initial decades of North American colonization, the general taxonomy was as follows: royal colonies were clearly subject to the maximum level of royal control, including both legislative and judicial American context include Barbara A. Black, “The Constitution of Empire: The Case for the Colonists,” University of Pennsylvania Law Review 124 (1976): 1157-1211.


47. At the risk of spoiling the ending of my story, I should here point out that the case or controversy requirement ultimately found its way into the Constitution in order to prevent just such practices as the Privy Council’s ex ante legislative review from taking root in the federal courts (U.S. Constitution, art. 3, sec. 2). The alternative to a case or controversy standard is to permit courts to issue advisory opinions—that is, judicial statements as to whether a law is valid without an aggrieved party’s having first challenged the law. For more on this distinction and the rationale behind it, see Erwin Chemerinsky, Federal Jurisdiction, 4th ed. (New York: Aspen, 2003), 44-56.
review by the Privy Council; 48 charter colonies were subject to varying levels of royal control depending on the specific provisions and reservations of their charters; 49 and proprietary colonies were subject to minimal amounts of royal control and thus typically lacked appeal to the Privy Council, except as otherwise provided by local assemblies. 50 Following the 1675 and 1696 establishment of the Committee of Trade and Plantations and the Board of Trade, respectively, the Crown sought to tighten its control over the colonies by expanding the Privy Council's jurisdiction to review colonial legislative acts and judicial decisions. 51

In cases of judicial review, an aggrieved colonial party first sought permission to appeal to the metropolitan authority, via either a grant of permission from the colonial court or, failing that, the grant of a petition from the Privy Council itself. Upon receiving one or the other form of permission, which involved meeting certain procedural and jurisdictional requirements, such as a minimum damage amount, the appellant presented his or her case during a hearing before the Privy Council's Committee for Appeals. The verdict, which required the monarch's imprimatur, came in the form of an order in council. Between 1680 and 1780, the Privy Council heard 265 such appeals from the thirteen American colonies. 52

In contrast to this highly judicialized role, when the Privy Council engaged in its parallel mode of legislative review, it issued a sweeping declaration either approving or disallowing a colonial legislative act. 53 In

48. See Smith, *Appeals to the Privy Council*, 77–78 (discussing the early precedents of the Channel Islands), 79–82 (discussing Virginia and New Hampshire). In both royal and proprietary colonies, the local assembly was subject to an additional level of imperial oversight in the form of the governor's veto; see Bernard Bailyn, *The Origins of American Politics* (New York: Knopf, 1968), 67.

49. See Smith, *Appeals to the Privy Council*, 45–46 (discussing "the recalcitrance of Massachusetts Bay" in repeatedly challenging the royal power to hear appeals from the colony during the first half of the seventeenth century), 51–54 (canvassing Connecticut, Rhode Island, and the Carolinas).

50. Ibid., 85–86 (discussing New Jersey and Maryland).


52. Schlesinger, "Colonial Appeals to the Privy Council, II," 437–38, 446. Schlesinger notes that after 1734 or 1735, the Privy Council records drop the phrase "for Appeals" and refer to the decision-making body simply as "the Committee" (ibid., 439).

53. The breadth of the Privy Council's reach prompted Charles M. Andrews to emphasize the relationship between disallowance and the royal prerogative. Andrews described disallowance as "an executive rather than a legislative act" because it was "performed not by the king but by the Council as his executive agent." The power of disallowance was thus "an exercise of the royal prerogative, an expression of the king's supreme authority in the enacting of laws by inferior law-making bodies, whose right to make laws at all rested on the king's will." Andrews concluded, therefore, that disallowance was "not a veto but an
some special cases, the Privy Council went even further by holding a co-
nexion act void ab initio—not only invalidating the act prospectively but also
declaring that the act had never been valid in the first place. Julius Goebel
found only four examples of legislative declarations of nullity ab initio
during the colonial period, observing that the Privy Council seems to
have preferred to issue such rulings in specific cases that came before it
on appeal and that thus required it to act in its judicial capacity. This pre-
ference likely arose out of prudential concerns, as well as what Goebel
terms “the indurated common law tradition that issues of such moment
should be settled in true adversarial proceedings.”

The realities of contemporary transportation meant that a declaration that
a law had never been valid would almost certainly give rise to further dis-
putes about the status of contracts and obligations entered into during the
period between the passage of the act in the colonies and the arrival there
of news that it had been invalidated by the Privy Council. In the majority
of cases in which the Privy Council invalidated a colonial act, it held that
the act had been valid during the interim period prior to the invalidation,
and that therefore rights could vest under the act. Consequently, as
Goebel points out, disallowance by the Privy Council cannot accurately
be likened to a veto, insofar as disallowance would permit an interim
period of validity, because a veto would immediately negate the act,

act of regulation and control” (Charles M. Andrews, “The Royal Disallowance,”

54. Here Goebel and Smith differ in their interpretations. While Goebel suggests that the
Privy Council in its judicial capacity declared void ab initio multiple, albeit very few, co-
nexion acts, Smith states that there was only one such case: Winthrop v. Lechmere (P.C. 1728),
reprinted in Public Records of the Colony of Connecticut (Hartford, Conn.: Lockwood &
Brainard Co., 1873) 7:578, in which a 1699 Connecticut intestacy law was held void as con-
trary to English law and the colonial charter. The two scholars agree, however, that the
mechanism of voiding a colonial statute ab initio was used when the Privy Council was act-
ing both in its legislative and its judicial capacities; see Goebel, Antecedents and Beginnings,
72–73; but also see Smith, Appeals to the Privy Council, 537.

55. Goebel, Antecedents and Beginnings, 72.

56. Goebel distinguishes thus between declarations of nullity ab initio and disallowance:
“A declaration of nullity was something close to catastrophic, for everything that might have
been done under [the act] was rendered nugatory” (ibid., 69).

57. Goebel does note, however, that some colonial acts included a suspending clause
explicitly stating that the act was not final, and therefore that no rights and duties could
be created pursuant to it, until it was affirmatively validated by the Privy Council. The
Crown pressed for such clauses as a means of emphasizing the incompleteness of colonial
legislative authority. Goebel states, however, that many—perhaps the majority—of colonial
acts went into effect with no ruling one way or the other by metropolitan authorities. Thus,
he concludes that “whatever the theory, the Crown was practically not an indispensable
party” (ibid., 68).
permitting no such period. According to one estimate, the Privy Council disallowed 5.5 percent of the colonial statutes that it reviewed.

The most vigorous contests between Crown and colonies concerning the Privy Council's authority originated in the chartered colonies after 1696. The administrative reorganization that resulted in the establishment of the Board of Trade heralded a renewed metropolitan effort to bring the chartered colonies to heel by drawing them into the ambit of the Crown's appellate power. Although some early grants explicitly reserved to the Crown the authority to hear judicial appeals (beginning with a 1664 patent to the Duke of York), after 1696 royal officials routinely argued that such authority inhered in the very nature of the colonies as portions of the king's dominions.

58. In other words, rights could vest pursuant to an act even if that act was subsequently disallowed, but no rights could vest pursuant to an act that was vetoed and thus never took effect (ibid., 68–72).

59. Elmer Beecher Russell, The Review of American Colonial Legislation by the King in Council (New York: Columbia University Press, 1915), 221. Forrest McDonald gives a similar number, reporting that the Board of Trade disallowed 469 of the 8,563 mainland colonial acts that it reviewed, or 5.47 percent (McDonald, States’ Rights and the Union, 2).

60. See Smith, Appeals to the Privy Council, 138; accord Bilder, Transatlantic Constitution, 74.

61. The relevant language appeared in the Grant of the Province of Maine from Charles II to the Duke of York and reserved to the Crown “ye receiving hearing and determining of the appeal and appeales of all or any person or persons, of in or belonging to ye territoryes or islands aforesaid in or touching any judgment or sentence to be there made or given” (Grant of the Province of Maine (1664), in Francis Newton Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America. Compiled and Edited Under the Act of Congress of June 30, 1906 [Washington, D.C.: GPO, 1909], 3:1638–39); see also Smith, Appeals to the Privy Council, 53.

62. See Goebel, Antecedents and Beginnings, 40–41. Opponents of this expanded royal power, among the most vocal of which were Connecticut and Massachusetts, countered by arguing that the Crown possessed appellate jurisdiction only to the extent that such jurisdiction was expressly reserved by charter. Absent a specific reservation of appellate power to the Crown as was found, for example, in the charter of the proprietary colony of Pennsylvania (“Saving and reserving to Us, Our heires and Successors, the receiving, heareing, and determining of the appeale and appeales of all or any Person or Persons, of in, or belonging to the Territories aforesaid, or touching any Judgement to bee there made or given”), opponents of royal appellate power argued that Privy Council had no business reviewing the decisions of colonial courts (Charter for the Province of Pennsylvania (1691), in Thorpe, Federal and State Constitutions, 5:3038). Massachusetts judges apparently felt little compunction to assist parties in bringing appeals—those who sought appeal from the decisions of the colony's highest court were often frustrated by the court's refusal to provide a written record or to order execution of its final judgment; see William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830 (Athens: University of Georgia Press, 1994), 16. Crown officials
Along with these assertions of royal appellate power following the 1675 and 1696 reorganizations, the Crown argued during the same period for an increasingly robust power of legislative review. As was the case with judicial review, this flexing of imperial muscle through legislative review aroused a storm of controversy. No monarch deployed the analogous domestic power to strike down parliamentary legislation after 1707, by which time colonists had begun to feel keenly any metropolitan challenge to the authority of their local assemblies. Intent on checking those assemblies' pretensions to power, imperial administrators ordered colonial governors in royal and proprietary colonies automatically to veto certain categories of local legislation. In addition, imperial officials increasingly required that colonial legislation include suspending clauses, which made the enactment of such legislation contingent on Privy Council approval.

The statutory basis for this power of legislative review was the ninth section of the “Act for Preventing Frauds, and Regulating Abuses in the Plantation Trade,” which provided, in relevant part,

That all Lawes By-lawes Usages or Customes att this tyme or which hereafter shall bee in practice or endeavoured or pretended to be in force or practice in any of the said Plantations which are in any wise repugnant to the before mentioned Lawes or any of them soe far as they doe relate to the said Plantations or any of them or which are wayes repugnant to this present Act or to any other Law hereafter to be made in this Kingdome soe farr as such Law shall relate to and mention the said Plantations are illegal null and void to all Intents and Purposes whatsoever.

In addition, most colonial charters contained provisions prohibiting the enactment of laws that were contrary or repugnant to the laws of England. The charter of the Massachusetts Bay Colony, for example, included a clause permitting the governor and company “to make Lawes and Ordinances for the Good and Welfare of the saide Company, and for the Government and ordering of the saide Landes and Plantacon, and the People inhabiting and to inhabite the same, as to them from tyme to tyme shalbe thought meete, soe as such Lawes and Ordinances be not strenuously resisted such interpretations, fueling a dispute that lasted well into the eighteenth century.

64. Ibid.
65. 7 and 8 Wm. III, c. 22 [1696].
66. See Smith, Appeals to the Privy Council, 525. Rhode Island was an exception: the terms of its charter did not require acts of the colonial assembly to be reviewed by the Privy Council before taking effect; see Bilder, Transatlantic Constitution, 55–56.
The roots of the Privy Council’s legislative review lay beyond the boundaries of the mainland North American colonies, in earlier English imperial projects. Ex ante legislative review by the Crown had originated in 1494 with the efforts of Henry VII to subdue Ireland by mandating that all acts of the Irish Parliament be approved by the English king and his council before passing into law. This requirement, known as Poynings’s Law, endured until 1782.68 Closer to the American case in both space and time was the situation of Jamaica, which in the 1670s attracted the attention of the Lords Committee for Trade and Plantations, which targeted the Caribbean colony as the first test case for the new policy of tightening the leash on colonial legislatures.69 With precedents such as these, the purpose of legislative review of colonial statutes appeared clear to American colonists in the seventeenth and eighteenth centuries: to subordinate local assemblies to the twofold jurisdiction of royal prerogative and imperial administration.

Defeat of Madison’s Negative

In 1787, the long history of Privy Council review formed an important part of the U.S. constitutional landscape. Madison explicitly drew on this precedent as he marshaled his arguments for giving the general government of the United States the power to negative state laws. But why look to a cornerstone of British imperial organization when searching for models of government for the new republic? Put simply, Madison believed that what had been lacking in every other confederacy in history was also lacking in the American Confederation, but that it had been present under the British Empire: a firm authority emanating from the center, establishing the foundational rules of union and policing the extremes of the states’ behavior. “Without this defensive power, every positive power that can be given on paper will be evaded & defeated,” Madison wrote. “The States will continue to invade the national jurisdiction, to violate treaties and the law of nations & to harrass [sic] each other with rival and spiteful measures

67. Massachusetts Bay Charter (1629), in Thorpe, Federal and State Constitutions, 3:1857 (emphasis added). The subsequent Massachusetts charter of 1691 provided that colonial acts would take effect if the Crown did not take contrary action within a set time period; see Goebel, Antecedents and Beginnings, 66.

68. 10 Hen. VII, c. 4 (1485); repealed 21 & 22 Geo. III, c. 47 (1781).

dictated by mistaken views of interest.” In short, Madison believed that the lessons of the empire could be applied to the problem of authority in the American republic.

Moreover, Madison’s words demonstrate that he had imperial practice in mind when he conceived the notion of the federal negative—recall his recommendation to Washington of a “negative in all cases whatsoever on the legislative acts of the States, as heretofore exercised by the Kingly prerogative.” Madison envisioned the federal negative functioning in the same manner as the Privy Council’s practice of reviewing statutes ex ante, in a general posture, before they could be applied in individual cases or challenged by specific parties. He thus selected one of the two strands of British imperial practice and sought to graft it onto the revised American charter—without adopting what legal historians have generally recognized as the Privy Council’s embryonic power of judicial review. Madison endorsed its alternative procedure of legislative review. Just as the pre-Revolutionary Privy Council had periodically reviewed new colonial acts to gauge whether they were repugnant to English law, the newly minted general government of the United States would possess a procedural mechanism by which to “prevent encroachments by the states on each other and on the general government itself.” As Lance Banning notes, historians of the Founding period cannot help being surprised at the degree to which Madison based the architecture of his constitution upon a foundation built in England: “It is stunning to remark how clearly he was thinking, at this point, of a republican replacement for the old imperial regime, complete with the prerogative to overturn provincial legislation that was incompatible with the requirements of the ‘empire’ as a whole.”

To be sure, Madison’s theory did diverge somewhat from British imperial practice. Most significantly, the plan aimed to remedy not just the binary problem of state laws that ran afoul of the laws of the general government—analogous to the imperial problem of colonial acts that conflicted with English law—but the more complex challenge of state laws that suppressed the will of minorities within a given state or trenched on the laws of other states. The federal negative would give the general government the power to police both a state’s relationship with its inhabitants and its relationship with its fellow states. Consider the litany of woes that

72. See, for example, Smith, Appeals to the Privy Council; see also Black, “Constitution of Empire”; McIlwain, High Court of Parliament.
73. See Zuckert, “System without Precedent,” 144.
Madison outlined in his letter to Washington, cited above, that would result if the general government lacked such a power: “The States will continue to invade the national jurisdiction, to violate treaties and the law of nations & to harrass each other with rival and spiteful measures dictated by mistaken views of interest.” Invasions of the national jurisdiction, violations of treaties and the law of nations—these, clearly, are conflicts on the national level, classic examples of matters within the purview of the general government of even the weakest confederacy. But laws passed by one state that had the effect of harassing other states? This was something new, something that had not been contemplated by the Privy Councillors.

For Madison, this state-on-state aggression was the real danger, because in his view the states simply could not be trusted to behave themselves. A balancing agent would have to be found. And Madison found it in the mechanism of the federal negative. “The great desideratum which has not yet been found for Republican Governments,” he wrote to Washington, “seems to be some disinterested & dispassionate umpire in disputes between different passions & interests in the State.” A son of the Enlightenment, Madison embraced the era’s vision of passions and interests as equal and countervailing elements of individual and social life, with important consequences for political order. The federal negative would import the Privy Council’s legislative review mechanism to American shores, establishing the central government as an umpire over the fractious states with authority to oversee both their internal actions (e.g., “oppressing the minority within themselves”) and their external actions (e.g., “thwarting and molesting each other,” “invad[ing] the national jurisdiction,” and “violat[ing] treaties and the law of nations”).

76. For example, the Holy Roman Empire, a loose confederation in Madison’s own time, exercised authority over imperial legislation, treaties, and declarations of war; see “Notes on Ancient and Modern Confederacies,” PJM, 9:19. Several decades previously, John Locke had listed such powers among the “federative powers” of the commonwealth, which he defined as relating to “the management of the security and interest of the public without” (John Locke, Second Treatise of Government [1690; reprint, with an introduction by C. B. Macpherson, Indianapolis, Ind.: Hackett, 1980], 77).
79. See Madison to Jefferson, March 19, 1787, PJM, 9:318 (“oppressing” and “thwarting and molesting”); Madison to Washington, April 16, 1787, PJM 9:384 (“invad[ing]” and “violat[ing]”). Here I differ markedly from Banning, who argues that “Madison’s reference to a ‘dispassionate umpire’ over contending interests applies specifically and solely to a federal referee over contentions within individual states,” and that therefore “he does not envision a federal legislature capable of dispassionately supervising national conflicts of interest.”
Outside the confines of Madison’s study, however, the negative looked to some contemporaries like little more than a rehash of imperial procedure. Upon hearing rumors of Madison’s scheme in April 1787, one month before the assembling of the Philadelphia convention, Virginia representative William Grayson wrote to William Short, Jefferson’s secretary in Paris: “Some of the gentlemen of the convention are here and I have conversed freely with them as to the reform; they are for going in a great way: some of them are for placing Congress in loco of the King of G.B.—besides their present powers: for giving them a perpetual duty on imports and exports. Figure to yourself how the States will relish the idea of a negative on their laws.”

Grayson’s meaning was clear—with its combination of increased central power over states’ actions and an imperial lineage, Madison’s negative immediately raised suspicions among some of his fellow statesmen.

The Virginia delegation to the Philadelphia convention, however, embraced the federal negative. Between May 14 and May 25, prior to the first meeting of the Convention, the Virginia delegates met informally and began to hammer out a blueprint for governmental reform. Presented to the Convention by Virginia governor Edmund Randolph on May 29, the scheme became known as the Virginia Plan. Although the authorship of the plan cannot be determined, the provisions closely tracked Madison’s proposals as outlined in his letters to Jefferson, Randolph, and Washington in March and April. The assembled Convention quickly accepted the Virginia Plan as the initial template for reform and basis for debate. Most notable for our purposes was paragraph 6:

Resolved that each branch [of the national legislature] ought to possess the right of originating Acts; that the national Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover 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; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.82

---

81. See Editorial Note, "The Virginia Plan," PJM, 10:16 (emphasis added). Interestingly, the scope of the negative as set forth in the Virginia Plan was narrower than Madison’s earlier formulations.
When discussion of the plan began on May 31, one provision of paragraph 6 sparked debate: the grant of lawmaking power to Congress in all cases with regard to which the states lacked competence. Several delegates took issue with the vagueness of the provision and argued that it threatened to strip the states of jurisdiction. Yet the subsequent clause, which set forth the federal negative, elicited no debate at all. Madison’s notes, considered “the standard authority for the proceedings of the Convention,” have this to say: “The other clauses giving powers necessary to preserve harmony among the States to negative all State laws contravening in the opinion of the Nat Leg the articles of Union down to the last clause … were agreed to [without] debate or dissent.” Madison’s federal negative had cleared its first hurdle. Over the course of the next two weeks, however, as the delegates debated the Virginia Plan in depth, the negative would face much more rigorous challenge.

Paragraph 6 was not the only provision of the Virginia Plan that contemplated ex ante review of legislation. Paragraph 8 proposed “that the Executive and a Convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final.” As had been the case under the empire, a quasi-executive, quasi-judicial body would assess a new act before it became operable to determine whether the law conformed to a more general, overarching body of law. In contrast to the Privy Council’s legislative review and Madison’s federal negative, the council of revision would function both horizontally (national authorities evaluating national laws) and vertically (national authorities evaluating state laws), passing judgment on the actions of states (the “particular legislatures”) as a supplement to the congressional negativing power. Yet the purpose of the council of revision and the negative was similar: to import imperial practice to the United States as a means of checking wayward
majorities that, like the colonial assemblies, might be prone to an excess of
democracy or self-interest.\textsuperscript{85}

Jack Rakove finds a link between paragraph 6 and paragraph 8 based on
their shared suspicion of legislatures \textit{qua} legislatures, arguing that
"Madison thought that unchecked legislatures posed the greatest threats
to the constitution of any republic."\textsuperscript{86} While Madison certainly feared
that a legislature citing a popular mandate might overrun the other branches
of government, the sixth and eighth paragraphs shared another common
theme: both offered procedural, institutional solutions to the problem of
mediating among multiple levels of authority. Taken together, these key
elements of the Virginia Plan sought to grant Congress ongoing supervi-
sory power over the state legislatures, and to create in the council of revi-
sion a supralegalistic body with immense power, not merely over specific
parties or cases but over the lawmaking process itself. In so doing,
Madison—the architect of the Virginia Plan—again borrowed from
British imperial precedents in constructing the new government. As had
been the case under British rule, a hybrid council would measure new leg-
islative acts against a preexisting set of general principles, and the remedy
for acts repugnant to those principles would be to void them ab initio.\textsuperscript{87}
Rather than relying on a body of substantive, supreme national law,
then, the Virginia Plan attempted to solve the problem of central authority

\textsuperscript{85} The Philadelphia convention was not the first instance in which a council of revision
was considered. The New York constitution of 1777 featured such a council, and the
Virginia legislature had contemplated adopting a similar measure in 1782–83; see
"Virginia Plan," \textit{PJM}, 10:17n3; see also Alfred B. Street, \textit{The Council of Revision of the
State of New York} (Albany, N.Y.: William Gould, 1859); Wood, \textit{Creation of the

\textsuperscript{86} Rakove, \textit{James Madison and the Creation of the American Republic}, 73. Madison’s
uneasy attitude toward legislative power manifested itself most strongly in his \textit{Federalist}
essays; see \textit{Federalist} 48 (Cooke), 334: "Where the legislative power is exercised by an
assembly, which is inspired by a supposed influence over the people with an intrepid confi-
dence for its own strength . . . it is against the enterprising ambition of this department, that
the people ought to indulge all their jealousy and exhaust all their precautions."

\textsuperscript{87} Richard Henry Lee had made a similar point in a May 1787 letter to George Mason:
"Do you not think, sir, that it ought to be declared, by the new system, that any state act of
legislation that shall contravene, or oppose, the authorized acts of Congress, or interfere with
the expressed rights of that body, shall be ipso facto void, and of no force whatsoever" (Lee
[New York: Da Capo, 1970], 2:422). Lee’s belief that unconstitutional state laws were
void ab initio seems to have led him to a different conclusion from Madison’s, however.
Both Lee and Mason ultimately opposed the Constitution on the ground that it granted
too much power to the central government. From this result, it is possible to interpolate
that Lee thought that unconstitutional state laws were by definition void and therefore that
no decree of invalidity was necessary from Congress.
478 Law and History Review, May 2010

through structural mechanisms dictating the relationship among different legislative powers.\textsuperscript{88}

Following the relatively warm reception that it received on May 31, the federal negative remained in the background of the Convention’s discussions until June 8. On that day, the negative dominated debate. South Carolinian Charles Pinckney opened the proceedings with a motion expanding the scope of the negative to encompass any state law that Congress judged “improper.” According to Madison’s notes, Pinckney argued “that under the British Govt. the negative of the Crown had been found beneficial, and the States are more one nation now, than the Colonies were then.”\textsuperscript{89} The Virginia Plan, in contrast, had limited the negative to state laws that in Congress’s judgment contravened the articles of union—in other words, laws that were unconstitutional. Madison, whom some scholars suspect of colluding with Pinckney (his fellow lodger at Mary House’s rooms at the corner of Fifth and Market streets), seconded the motion.\textsuperscript{90}

Despite his considerable influence on the drafting of the Virginia Plan, Madison soon made it clear that he advocated a much broader negative than the one outlined in the proposal.\textsuperscript{91} Only two days after making his first major speech in the Convention, Madison cataloged the benefits of the negative for his fellow delegates, which he now believed ought to be “lodged in the senate alone.”\textsuperscript{92} According to his notes of the debates, in which he consistently referred to himself in the third person, Madison issued the following opening salvo: “He could not but regard an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system. Experience had evinced a constant tendency in the States to

\textsuperscript{88} This distinction between structural and substantive approaches to authority is conceptually similar to Daniel Hulsebosch’s distinction between “jurisdictional” and “jurisprudential” visions of law. According to the former, as articulated by Sir Edward Coke, “the common law was inseparable from the institutions that applied, practiced, and taught the common law.” A jurisprudential notion of law, in contrast, “refers to a rationally organized body of rules and principles defined primarily in reference to each other, not to the remedies and personnel enforcing them” (Daniel J. Hulsebosch, “The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence,” Law and History Review 21 [2003]: 445-46).

\textsuperscript{89} Farrand, Records, 1:164.


\textsuperscript{91} Charles Hobson speculates that the limited negative outlined in the Virginia Plan was the work of Randolph and George Mason; see Hobson, “Negative on State Laws,” 266.

\textsuperscript{92} Madison Chronology, PJM, 10:xxv; Farrand, Records, 1:168, Madison’s Notes, June 8, 1787.
encroach on the federal authority; to violate national Treaties, to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischiefs."

If any doubt had existed as to Madison’s position on the proper solution to the problem of authority, this speech shattered it.

Madison’s remarks also invoked several shibboleths of imperial practice that likely would have resonated with his audience. For example, by speaking in the language of “encroachments,” Madison signaled his debt to the Privy Council’s mode of reviewing proposed legislation. His subsequent comments coupled imperial argot with the astronomical vernacular popular among the members of the Founding generation: “This prerogative of the General Govt. is the great pervading principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system.”

Just as the royal prerogative, via the Privy Council, had restrained the centrifugal, heterogeneous tendencies of the colonies by compelling their laws to conform to English norms, the republican prerogative, via Congress, would keep the states from spinning into the turmoil that had characterized the Confederation.

For Madison, then, the term “prerogative” did not inspire immediate horror, as it had for some of his fellow Revolutionaries, for whom the term conjured images of the seventeenth-century struggles with the Stuart monarchs over the extent of kingly power. On the contrary, Madison’s vision of prerogative as the source of the federal negative, and therefore as the cure for confederal chaos, was benign, even salutary. Nor does Madison appear to have been troubled by the distinction between royal and legislative sources of prerogative power for the Privy Council and the negative-wielding Congress, respectively. For Madison, the relevant characteristic of both legislative review by the Privy Council and the federal negative was that each offered an opportunity for one lawmaking body to oversee

93. Farrand, Records, 1:164.
94. Michael Zuckert makes the connection to encroachments explicit, noting that Madison “conceived the Congress of the general government playing the role in the American system that the king played in the British empire through his veto power over the laws of the individual legislatures of the empire. That royal veto could be and in fact was used to prevent encroachments of the sort Madison feared” (Zuckert, “System without Precedent,” 145).
95. Farrand, Records, 1:165, Madison’s Notes, June 8, 1787.
the activities of another. Whether the inferior body was a colonial assembly or a state legislature mattered little. The key element in both the imperial and the Madisonian systems was that lawmaking was at least a two-step process, requiring the assent (even if through inaction) of a superior entity in order to make legislation complete.

Madison’s argument for the broadest possible version of the federal negative galvanized his fellow delegates. Elbridge Gerry of Massachusetts objected, seemingly to the federal negative in any form, saying, “The Natl. Legislature with such a power may enslave the States.” James Wilson of Pennsylvania endorsed the proposal, however, even Pinckney’s broader version. “A definition of the cases in which the Negative should be exercised, is impracticable,” Wilson insisted. “A discretion must be left on one side or the other[. W]ill it not be most safely lodged on the side of the Natl. Govt.?” Invoking the same type of internal strife and external vulnerability that Madison had diagnosed as afflicting the ancient and modern confederacies, Wilson continued:

We must remember the language with wh. we began the Revolution, it was this, Virginia is no more, Massachusetts is no more—we are one in name, let us be one in Truth & Fact—Unless this power is vested in the Genl. Govt. the States will be used by foreign powers as Engines agt the Whole—New States will be soon formed, the Inhabitants may be foreigners and possess foreign affections, unless the Genl. Govt. can check their State laws they may involve the Nation in Tumult and Confusion.

Wilson, a Scot who had emigrated to America in 1765 at the age of twenty-three, placed enormous importance on union and security. The imperial heritage of the federal negative does not appear to have troubled him.

Madison’s remarks at the close of the June 8 debate confirm the broad scope of his plan to reshape the relationship between the states and the general government. The key institutions in this relationship were to be the legislatures, and the node connecting the two levels of legislature was to be the negative. As Madison later explained in his October 24 letter to Jefferson, he concurred with Wilson’s statement in the Convention that “it will be better to prevent the passage of an improper law, than to declare it void when passed.” Indeed, Madison suggested that the very existence of the negative would deter state legislatures from passing questionable acts in the first place. “The existence of such a check would prevent

97. Farrand, Records, 1:165–66, Madison’s Notes, June 8, 1787.
98. Ibid., 1:172, Rufus King’s Notes, June 8, 1787.
99. Ibid., 1:391, Madison’s Notes, August 23, 1787. Madison to Jefferson, October 24, 1787, PJM, 10:211.
The Authority for Federalism

attempts to commit" offenses against either the nation or the other states, he argued. Other delegates were less convinced of the need for ex ante legislative review. "The proposal of it would disgust all the States," Gouverneur Morris argued. "A law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law." Morris, like many of his colleagues, endorsed a vision of state and national governments as interlocking at several points: first, at the moment when an injured party brought a judicial action seeking relief from a state law pursuant to the supremacy clause; and second, at the moment when Congress repealed the offending state law. This interlocking approach contrasted with Madison's vision of two parallel systems that crossed only at the single moment when Congress considered whether to give validity to a state act. Furthermore, Madison's comments suggest that he envisioned the legislatures operating almost as a single system—a compound legislature comprising inferior and superior bodies. Such a system required the approval of the superior body to give effect to any piece of legislation. Thus, in response to criticisms that the negative would create delay and uncertainty while Congress considered a given state law, Madison linked the need for speedy action by the general government with ongoing oversight of state lawmaking processes. "The case of laws of urgent necessity must be provided for by some emanation of the power from the Natl. Govt. into each State so far as to give a temporary assent at least," he stated. "This was the practice in Royal Colonies before the Revolution and would not have been inconvenient; if the supreme power of negativing had been faithful to the American interest, and had possessed the necessary information." The assumption that the assent of the general government was necessary for state laws to be effective and the consequent call for the "emanation" of national power into the states demonstrate that the negative was merely one side of an affirmative congressional power to ratify state legislation. Indeed, Madison appears to have envisioned that congressional approval (which, paradoxically, could be manifested only negatively; that is, by Congress's declining to use its power to veto a state act) would function

100. Farrand, Records, 1:164, Madison's Notes, June 8, 1787.
101. Ibid., 2:28, Madison's Notes, July 17, 1787.
102. Michael Zuckert makes a similar point, noting that according to Madison's view, "for the sake of the separateness and independent operation of the different governments, the governments must occasionally operate on each other" (Zuckert, "System without Precedent," 144).
103. Farrand, Records, 1:168, Madison's Notes, June 8, 1787.
as a necessary final step in the legislative process. "The States [could] of themselves pass no operative act, any more than one branch of a Legislature where there are two branches can proceed without the other," he insisted. The negative, in other words, gave the national government a permanent option to intervene in the state lawmaking process. Absent some form of assent by the general government, state laws would be incomplete and invalid—just as disapproval (or, in the case of colonies with suspending clauses, mere silence) from the Privy Council had annulled provincial legislation.

Madison's comments on June 8 made clear the political and historical precedents that informed his proposal. But for a misalignment of interests between metropolitan authorities and colonial assemblies, he seemed to say, Privy Council review would not have been at all onerous. By the end of the colonial period imperial review might have become corrupt or misguided in reality, but the principle of supremacy on which that review was based, and the mechanism of review itself, survived intact. Therefore, Madison contended, it was an appropriate means of establishing an analogous supremacy in the United States. When the vote came at the end of that day's session, however, Madison's arguments had not prevailed. Pinckney's motion to expand the scope of the proposed negative failed by a vote of seven to three, with one state's delegation divided.

After the June 8 debate, the tide seems to have turned decidedly against Madison. Eight days later, when the delegates took up the original, limited negative as set forth in the Virginia Plan and endorsed in the June 13 report of the committee of the whole, John Lansing of New York and Luther Martin of Maryland spoke against the proposal. Although Wilson parried their criticisms, the tenor of the debate had shifted. To be sure, the report of the committee of the whole had largely adopted the Virginia Plan, ostensibly a triumph for Madison. But the defeat of the broader version of the negative, combined with the introduction of William Paterson's decentralizing New Jersey Plan on June 15, halted the momentum that had been propelling the Virginia Plan—and with it the federal negative—forward. Madison believed that the limited negative was

104. Ibid., 1:165, Madison's Notes, June 8, 1787.
105. Ibid., 1:168: The seven states whose delegations voted against the motion were Connecticut, New York, New Jersey, Maryland, North Carolina, South Carolina, and Georgia. Voting in favor were Virginia, Pennsylvania, and Massachusetts. The Delaware delegation was split.
107. The editors of the Papers of James Madison refer to June 13 as the "high point" of Madison's influence at the Convention (Editorial Note, PJM, 10:3).
The Authority for Federalism

insufficient to stave off the evils that had dogged the ancient and modern confederations, including the American Confederation. Nevertheless, he kept fighting. Even a limited negative was preferable to the New Jersey Plan’s proposed return to a loose confederation of minimally connected states.

The defeat of the broader negative on June 8, however, portended the provision’s ultimate fate. Despite Randolph’s last-ditch effort to give states a right of appeal to the federal judiciary following an adverse exercise of the negative—a naked attempt to bridge the large state-small state rift that the New Jersey Plan had highlighted—the negative was doomed. On July 17, in a vote of 7 to 3, the delegates voted to reject the negative. Aside from a short-lived attempt by Pinckney to revive the measure on August 23, this spelled the end of Madison’s proposal.

How had Madison lost what he viewed as a crucial battle? What accounts for the shift in opinion that transformed the success of May 31 into the rout of July 17? Although it is impossible to identify with certainty the cause of the negative’s downfall, one potential explanation stems from the rhetoric that Madison employed when he discussed the proposal in the Convention. With his speech of June 8, which tied the negative closely to imperial practice, Madison may have planted the seed of opposition in his colleagues’ minds. By explicitly noting that a mechanism very similar to the negative “was the practice in Royal Colonies before the Revolution,” Madison invited his fellow delegates to put themselves back in the place of colonists seeking the approval of their imperial masters. Although some observers may have agreed with Virginia congressional representative Edward Carrington’s conviction that “the negative which the King of England had upon our Laws was never found to be materially inconvenient,” others such as John Lansing viewed the plan to imitate the Privy Council more critically: “Such a Negative would be more injurious than that of Great Britain heretofore was.” Delegates who already feared what they viewed as the centralizing tendency of the Convention could not have been comforted by the prospect of the national government’s

109. Farrand, Records, 2:28, Madison’s Notes, July 17, 1787. The votes broke down slightly differently from those cast on June 8. Voting in favor of the negative were Massachusetts, Virginia, and North Carolina; voting against were Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, and Georgia. The New York delegation had collapsed shortly before, when Robert Yates and John Lansing had walked out, leaving only Hamilton.
111. Farrand, Records, 3:39, Carrington to Jefferson, June 9, 1787; Farrand, Records, 1:337, Madison’s Notes, June 20, 1787.
having a veto over state laws. Madison's overt references to the negative's origins in British imperial practice might have seemed a harbinger of, as Martin put it, "the destruction of the State governments, and the introduction of monarchy."  

To be sure, other factors contributed to the defeat of the federal negative. For example, in the June 8 vote on the Pinckney proposal to broaden the scope of the negative, the three states whose delegations favored expansion were also the three largest states: Virginia, Pennsylvania, and Massachusetts. At that point in the Convention, the mode of representation in Congress was still very much an open question. Proportional representation based on population appeared likely to win the day; the New Jersey Plan, with its small-state-friendly proposal for equal representation, had not yet been introduced. Did the delegates from the three largest states believe that their large populations would allow them to dominate Congress and control the deployment of the federal negative, thereby insulating their own states' acts from review and veto? Perhaps; after all, as Martin pointed out, as of mid-June, the Convention appeared to have reached consensus on a plan that would have given this trio a lock on the Senate: "Upon this plan, the three large States, Virginia, Pennsylvania, and Massachusetts, would have thirteen senators out of twenty-eight, almost one half of the whole number." Spinning out his dire scenario, Martin predicted that the powerful troika "would make what laws they pleased, however injurious or disagreeable to the other States; and that they would always prevent the other States from making any laws, however necessary and proper, if not agreeable to the views of those three States."  

Yet this hypothesis cannot explain the July 17 vote, which found the North Carolina delegation joining Virginia and Massachusetts in approving the limited negative, while Pennsylvania moved to the opposition camp. By that point, the New Jersey plan had played out its brief role as a rallying point for the smaller states, and Roger Sherman's "Connecticut Compromise," establishing a bicameral Congress with a lower house based on proportional representation and an upper house based on equal representation, had won the majority's support. The vote approving the compromise plan took place on July 16, the day before the federal negative was defeated. Had the acrimonious debate over representation cost so much energy and conflict that the delegates from Massachusetts and Virginia could no longer hope to muster support for the negative? If this was the case, why had they now gained the backing of North Carolina?

112. Farrand, Records, 3:180, Luther Martin, "Genuine Information."
113. Ibid., 3:177. The italics are all Martin's own.
Support for the negative had clearly been eroding since at least June 8. Prior to that date, the assembled delegates had thought well enough of the provision to incorporate it in the June 13 report of the committee of the whole, which had become the blueprint for the first weeks of debate. By mid-July, the delegates would have had the opportunity to mull over Madison's comments linking the negative to imperial practices of review. Had the references to the negative's British parentage ultimately poisoned the delegates against the negative? At a minimum, judging from the comments of Lansing and Martin, emphasizing the family relationship had not helped Madison's cause.

For many delegates, the prospect of a sweeping congressional power to veto state laws—a power enunciated in language resembling that of the reviled Declaratory Act, no less—threatened the integrity of the states themselves. The breadth of the negative was particularly offensive to these delegates. "The Natl. Legislature with such a power may enslave the States," argued Elbridge Gerry. Specifically, Gerry and others contended, granting Congress the negative would permit the general government to regulate areas of activity traditionally left to the states, effectively usurping powers the states had claimed ever since they were colonies chafing against parliamentary oversight. Hugh Williamson of North Carolina, for example, based his opposition to the negative on his belief that "the State Legislatures ought to possess independent powers in cases purely local, and applying to their internal policy." Even as they drafted a new constitution, some delegates resisted the notion that the general government ought to enjoy an ongoing, structurally guaranteed power to intervene in states' lawmaking processes.

Opponents of the negative thus used similar language of enslavement and encroachment to that their forbears in the 1760s and 1770s had employed against broad metropolitan oversight. Moreover, critics of the negative articulated similar fears of a central power bent on sowing discord among the component polities and stifling their efforts at self-protection. The negative, Gerry argued, "may enable the Genl. Govt. to depress a part for the benefit of another part—it may prevent the encouragements which particular States may be disposed to give to particular manufactures, it may prevent the States from train[ing] their militia, and thereby establish a military Force & finally a Despotism." In Gerry's view, the chief danger of the negative lay in its potentially chilling effect on the states'
autonomy, creativity, and prosperity. Gunning Bedford of Delaware, meanwhile, offered a more practical critique. "How can it be thought that the proposed negative can be exercised?" he inquired of his fellow delegates. "Are the laws of the States to be suspended in the most urgent cases until they can be sent seven or eight hundred miles, and undergo the deliberations of a body who may be incapable of Judging of them?" On the contrary, Madison responded. State laws would receive timely consideration by "some emanation of the power from the Natl. Govt. into each State so far as to give a temporary assent at least," for which he cited "the practice in Royal Colonies before the Revolution."

Gerry’s vision of the states as possessing a discrete, spatially defined sphere of exclusive authority echoed colonial assemblies’ claims of independent regulatory power in the face of metropolitan assertions of Parliament’s supremacy. Arguments such as Bedford’s, meanwhile, resembled Revolutionary-era complaints that the king and Council neglected colonial legislation, leaving acts to languish without approving them or declaring them void. The Declaration of Independence had included just such a charge against George III: “He has refused his Assent to Laws, the most wholesome and necessary for the public good. 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.”

Taken together, the arguments of the negative’s opponents convey a deep-seated fear of a specific array of solutions to the problem of multi-layered authority. That array of solutions included prerogative-based, ex ante review of legislation, of the type that the Privy Council had used to invalidate colonial statutes, and more formal arrangements of hierarchical legislatures, akin to parliamentary supremacists’ account of the relationship between Parliament and the colonial assemblies. The common element uniting these solutions in the eyes of the negative’s opponents was their shared heritage as tools of British imperial governance. To be clear: Gerry, Bedford, and others did not base their objections on simple animus toward all things British. Certainly, Luther Martin did lament after the Convention, “We were eternally troubled with arguments and precedents from the British government.” But that complaint came in the context of a discussion of the presidential veto—a vestige of British practice that

119. Ibid., 1:167-68, Madison’s Notes, June 8, 1787.
120. Ibid., 1:168, Madison’s Notes, June 8, 1787.
121. Declaration of Independence (1776).
did find its way into the Constitution, and that operated at a single, horizontal level of government. Criticism of the negative, in contrast, sounded a variety of themes but tended to focus on the same issue that had motivated the colonists' attacks on metropolitan oversight, whether by the Privy Council or Parliament: a multitiered governmental system built around the superior level's sweeping power to intervene in the inferior level's legislative process. For the negative's opponents as well as the colonists, then, the problem of multiple authorities—the central problem of the era's protofederal systems—could not be solved by merging two levels of government power into one compound legislature.

The Supremacy Clause and Judicial Review

Despite the outcome of the July 17 vote, Madison persisted in his belief that without the federal negative, the new government risked repeating the mistakes of the Confederation. His exchange of letters with Jefferson spanning the period from June to October of 1787 reveals that Madison continued to develop his theory of the negative even after it had faded from discussion in the Convention. Barred by Convention rules from discussing the proceedings with outsiders, Madison did not introduce the negative into his correspondence with his friend and mentor; rather, it was Jefferson who broached the subject. Clearly, word of Madison's proposal had already reached Paris. In a letter dated June 20, which appears not to have reached Madison until late August or

123. Although the Constitution borrowed the executive veto from the English constitution, it must be noted that the last instance of a royal veto was Anne's negative of the Scottish Militia Bill in 1707.

124. Madison's August 28 comments in the Convention made clear that he had not dropped the subject of the federal negative. During debate on a provision prohibiting the states from issuing bills of credit in order to ensure the nation's financial stability, Madison added this coda to his statement supporting the ban: "He conceived however that a negative on the State laws could alone secure the effect. Evasions might and would be devised by the ingenuity of the Legislatures" (Farrand, Records, 2:440, Madison's Notes, August 28, 1787). The records are silent as to his fellow delegates' reactions to this reference to the defeated negative.

125. A few days before the Convention adjourned on September 17, Madison did break his silence concerning the proceedings in a letter to Jefferson. After sketching the outlines of the proposed constitution, he concluded, "I hazard an opinion nevertheless that the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts agst the state governments" (Madison to Jefferson, September 6, 1787, PJM, 10:163–64).

126. One vector that brought this news was William Grayson's April 16 letter to Jefferson's secretary William Short; see above text accompanying note 76.
early September, Jefferson offered his views on the proposal.\textsuperscript{127} "The negative proposed to be given [Congress] on all acts of the several legislatures is now for the first time suggested to my mind," Jefferson wrote. "Prima facie I do not like it." Jefferson’s opposition to the negative stemmed from what he viewed as the unnecessarily broad power it gave to Congress to insert itself into every piece of state legislation:

It fails in an essential character, that the hole & the patch should be commensurate. But this 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 them 1. degree of power which they ought to have, gives them 99. more which they ought not to have, upon a presumption that they will not exercise the 99. But upon every act there will be a preliminary question [:] Does this act concern the confederacy? And was there ever a proposition so plain as to pass Congress without a debate? Their decisions are almost always wise; they are like pure metal. But you know of how much dross this is the result.\textsuperscript{128}

Rather than vesting Congress with this sweeping power of legislative review, Jefferson proposed a judicial alternative: "An appeal from the state judicature to a federal court, in all cases where the act of Confederation controled the question.” Would this judicial solution not, he asked, “be as effectual a remedy, & exactly commensurate to the defect”?\textsuperscript{129} In contrast to the legislature-centered proposal put forth by Madison the student of political science, Jefferson the lawyer proposed that the Constitution adopt the other prong of the Privy Council’s practice: judicial review of the laws of an inferior jurisdiction by a superior court.

By early September, Madison seems to have realized that the new charter would not include the negative—“the one ingredient that in his view was essential for establishing the supremacy of the central government and for protecting the private rights of individuals.”\textsuperscript{130} In response to both this defeat and Jefferson’s comments, on October 24 Madison drafted a seventeen-page letter to Jefferson that laid out his theory of the federal negative with great vigor and conviction. Despite the failure of such

\begin{itemize}
\item \textsuperscript{127} Madison to Jefferson, September 6, 1787, \textit{PJM}, 10:163.
\item \textsuperscript{128} Jefferson to Madison, June 20, 1787, \textit{PJM}, 10:64.
\item \textsuperscript{129} Ibid.
\item \textsuperscript{130} Editorial Note, \textit{PJM}, 10:205. At least one observer of the Convention, however, held out hope until the final days that the delegates would see the wisdom of the negative. On August 22, James McClurg, who had recently left the Virginia delegation, wrote to Madison, "I still have some hope that I shall hear from you of the reinstatement of the Negative—as it is certainly the only means by which the several Legislatures can be restrained from disturbing the order & harmony of the whole; & the Govermnt. render’d properly national, & one" (McClurg to Madison, August 22, 1787, \textit{PJM}, 10:154).
\end{itemize}
arguments to win converts in the Convention, Madison continued to insist that the imperial analogy, combined with the experience of life under the Confederation, confirmed the value of the negative. "If the supremacy of the British Parliament is not necessary as has been contended, for the harmony of that Empire; it is evident I think that without the royal negative or some equivalent controul, the unity of the system would be destroyed," he argued. "The want of some such provision seems to have been mortal to the antient Confederacies, and to be the disease of the modern." And now, Madison feared, the national government's want of a power to negative harmful state legislation might prove mortal to the Republic.

Madison's letter demonstrated the continued influence of European and American history on his political thought. Even after the defeat of the federal negative, he could not help revisiting the precedents that he believed bolstered his case. Incorporating large segments of his "Notes on Ancient and Modern Confederacies," the letter delineated the failings of the United Netherlands and the Holy Roman Empire, among others, as Madison strove to convince Jefferson that the negative was necessary to prevent both "encroachments on the General authority" and "instability and injustice in the legislation of the States." Absent this power, he feared that the national government would splinter into a collection of grasping, inferior political entities. Only the negative could save the American federation from the fate of its confederal European cousins. Without the negative, the United States would be nothing more than another example of a failed attempt at stitching multiple political entities together under a single overarching authority. In short, absent the negative, the novel American project was doomed to the Old World fate of becoming "a feudal system of republics" rather than "a Confederacy of independent States." Absence for Madison, however, few of his colleagues shared his benign view of such a plan. In response to Madison's October 24 excursus, Jefferson's next missive made no mention of the

133. Cf. Kramer, "Madison's Audience," 649–53 (positing the delegates' "insensibility to the theory and agenda" of Madison's negative, especially the vital role that it played in his vision of the extended republic).
federal negative. Apparently unmoved by Madison's arguments, Jefferson's most relevant statement on the subject of national authority over the states echoed the concerns about overweening centralized power that his earlier letter had raised: "I own I am not a friend to very energetic government... It is always oppressive."  

Although Jefferson questioned whether the federal negative would create a too-energetic central government, the majority of Convention delegates shared Madison's desire to shore up national authority. As Charles Warren put it, "Nearly all the delegates agreed that a curb on State legislation must be provided in the new Constitution, but the difficult question was: how shall it be applied? By the Legislature, in the shape of preventive action or corrective statutes; by the Executive, in the shape of force; or by the Judiciary, in the shape of Court decisions, in cases involving State laws?" Writing to Nicholas Trist (Jefferson's grandson-in-law) in 1831, Madison provided a similar characterization of the array of options that had faced the Convention. "The obvious necessity of a controul on the laws of the States, so far as they might violate the Constitution and laws of the U.S. left no option but as to the mode," he wrote. "The modes presenting themselves were 1. A Veto on the passage of the State Laws. 2. A Congressional repeal of them. 3. A Judicial annulment of them." Having eliminated the negative from consideration, the delegates turned their attention to other mechanisms that would mediate between state and national authority.

In the aftermath of the negative's defeat, the discussion at the Convention turned toward an altogether different institutional approach. Following the demise of the federal negative, with its legislative solution to the problem of establishing a hierarchy of authorities, the delegates began to consider seriously the possibility of a judicial approach. As Larry D. Kramer and other scholars have pointed out, the supremacy clause must be seen as following from, and causally related to, the defeat of the negative. When they adopted it in late August, the delegates intended the supremacy clause to do what Madison had intended the negative to do.

134. Jefferson to Madison, December 20, 1787, *PJM*, 10:338. Jefferson was evidently similarly unmoved by the arguments that another of his correspondents, James Monroe, offered in favor of the negative. The negative, Monroe wrote, "will if [Congress] is well organiz'd, be the best way of introducing uniformity in their proceedings that can be devis'd" (Farrand, *Records*, 3:65, Monroe to Jefferson, July 27, 1787).


As Jefferson’s June 20 letter suggests, the idea of a judicial approach to harmonizing state and national law had been circulating at least since the delegates convened. Most notably, the New Jersey Plan contained a provision specifying that all treaties and acts of Congress “shall be the supreme law of the respective States” and directing that state courts would therefore be bound by them. In a somewhat different vein, an anonymous pamphlet published in May 1787 and attributed to John Dickinson advocated the establishment of an “Equalizing Court” that would provide a forum in which states could challenge congressional acts (and, in what Dickinson implied was a secondary function, Congress could challenge state acts). Dickinson’s proposal envisioned the Equalizing Court as “an umpire between Congress and the States” to which “an aggrieved or accused State may resort for complaint, defence, or protection.” Like the New Jersey Plan, Dickinson’s scheme focused on creating the proper forum in which disputes between state and federal legislatures would be decided. Both plans also shared an emphasis on adjudicative proceedings, albeit with individuals as parties in the case of the New Jersey Plan and states as parties in the Dickinson plan. And, unlike Madison’s negative, these approaches rejected the Privy Council’s practice of ex ante legislative review, instead placing the burden to challenge a particular state law on the aggrieved parties.

Madison, however, argued throughout the debates that judicial review alone could not stave off all state legislation that encroached on the national authority or that interfered with other states’ laws. With


139. [John Dickinson], Fragments on the Confederation of the American States (Philadelphia: Dobson, 1787), 18, 20. The essay was reprinted in the Pennsylvania Gazette on June 6, 1787. For the attribution to Dickinson, see the headnotes to Early American Imprints, Series I (Evans), doc. no. 20367.

140. [Dickinson], Fragments on the Confederation, 17.

Wilson, he objected to the New Jersey Plan’s proposal to vest state courts with the power to decide cases involving national laws. As he wrote in his October 24 letter to Jefferson, “it is more convenient to prevent the passage of a law, than to declare it void after it is passed.” Madison thus clearly still conceived of the negative’s effect as rendering state legislation void ab initio, preventing it from becoming a law in the first instance, rather than nullifying it after the fact. As for placing the burden to challenge an act on aggrieved individuals, Madison was dismissive: “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.” The result of such intransigence on the part of a state would, he feared, ultimately lead to a violent confrontation between state and national power—precisely the catastrophe that his proposal had aimed to prevent. Such 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.”

The prospect of building force into the Constitution as a last resort dismayed Madison, who had considered but ultimately rejected coercion as a tactic as early as the first meeting of the Convention.

142. See Rakove, *Original Meanings*, 173. Madison and Wilson also argued that by its own terms, the New Jersey Plan did not adequately provide a means by which the new charter would be established as the supreme law of the land. This was because the plan required not ratification in convention but ratification by the Confederation Congress alone (ibid).


144. Paragraph 6 of the Virginia Plan had included a grant of power to Congress “to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.” By May 31, however, Madison had reconsidered the coercion provision and concluded that it was not the best way to proceed. “A Union of the States containing such an ingredient seemed to provide for its own destruction,” he told the Convention. “The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound.” Apparently agreeing with Madison, the convention then voted to postpone the coercion measure (Farrand, *Records*, 1:54, Madison’s Notes, May 31, 1787).

Martin Diamond notes that by incorporating a coercion provision, the New Jersey Plan arguably went farther toward consolidation than the Virginia Plan, a point that the Virginia Plan’s advocates did not fail to trumpet when they critiqued the New Jersey Plan. The Virginia Plan’s supporters “exulted that the pure federalists now admitted, in the New Jersey Plan, how broad the governing powers must be to achieve the blessings of union, and that legislative, executive, and judicial organs of government were needed for their application,” Diamond observes. Madison and others thus “pointed out that the attempt to achieve these things by purely federal means led to Patterson’s [sic] ludicrous reliance upon military coercion, upon civil war as the means to secure the blessings of union” (Martin Diamond, “What the Framers Meant by Federalism,” in *A Nation of States: Essays on the American Federal System*, ed. Robert A. Goldwin [Chicago: Rand McNally, 1963], 38).
By sounding the death knell for the federal negative, the July 17 vote raised the possibility of a judicial, rather than legislative, remedy to the problem of competing state and national authorities. According to Madison’s notes, immediately following the vote on the negative, Luther Martin introduced a resolution containing language based on the New Jersey Plan. Martin’s resolution provided

that the Legislative acts of the U. S. made by virtue & in pursuance of the articles of Union, and all treaties made and ratified under the authority of the U. S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants—& that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.¹⁴⁵

The resolution passed unanimously. Despite the defeat of the New Jersey Plan, its approach to the issue of national authority had triumphed. With the approval on August 23 of John Rutledge’s proposal to replace the phrase “the Articles of Union” with the words “this Constitution” and to relocate this reference to the national charter to the beginning of the paragraph, the provision that would become the supremacy clause passed into the document that would become the Constitution.¹⁴⁶

Significantly, many delegates seem to have been willing to consider judicial review by this point in the Convention. As Lawrence Sager has highlighted, on August 27—four days after the delegates had agreed on the final language of the supremacy clause—they revisited and retooled the description of the Supreme Court’s powers in what would become

¹⁴⁵. Farrand, Records, 2:28–29, Madison’s Notes, July 17, 1787. Larry Kramer suggests that this proposal by Martin, an avowed foe of centralized power, was a gambit to move the debate away from what Martin likely viewed as the worst-case scenario of a congressional veto power and to adopt instead a weaker method of national oversight over state law. “From this point on, then,” Kramer argues, “the delegates assumed the existence of judicial review over state laws in their deliberation” (Kramer, People Themselves, 75).

¹⁴⁶. Farrand, Records, 2:389, Madison’s Notes, August 23, 1787. In its final form, the supremacy clause reads as follows: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding” (U.S. Constitution, art. 6). Madison’s final reference to the negative during the Convention is almost touching. As the delegates discussed giving the national government the power to police state export duties, Madison’s notes record that he said, “The jurisdiction of the supreme Court must be the source of redress... His own opinion was, that this was insufficient,— A negative on the State laws alone could meet all the shapes which these [duties] could assume. But this had been overruled” (Farrand, Records, 2:589, Madison’s Notes, September 12, 1787).
Article III of the Constitution.\textsuperscript{147} The jurisdictional language of the judiciary article was edited to conform to the language of the supremacy clause. For example, the delegates added the phrase “under this Constitution” to expand the Supreme Court’s “arising under” jurisdiction to include cases that were based on constitutional claims.\textsuperscript{148} In this way, the judiciary article was “tailored to facilitate Supreme Court enforcement” of the supremacy clause.\textsuperscript{149} The supremacy clause, therefore, defined the final language of Article III.

Moreover, the clause’s significance for vertical judicial review was clear to the delegates. In the words of Pierce Butler of South Carolina, the Constitution established a “Judiciary to be Supreme in all matters relating to the General Government, and Appellate in State Controversies.”\textsuperscript{150} The clause thus created formal authority in the central government as well as giving that authority an institutional home in the judiciary.

The supremacy clause, then, represented a shift in the delegates’ attitude toward the problem of multilayered authorities. With the negative, Madison had offered a mechanism that adapted British imperial practice to the decidedly unimperial project of embracing multiplicity. By adopting the supremacy clause instead of the negative, the delegates turned instead toward a vision of federal authority that relied not on legislatures, but on judges and courts to mediate among disparate sources of law.

As for the larger issue of the relationship between American federalism and British imperial organization, another August 27 amendment to the draft constitution is striking. Following the approval of the changes that brought the judiciary article into line with the supremacy clause, Madison and Gouverneur Morris proposed replacing the phrase “the jurisdiction of the Supreme Court” with the phrase “the judicial power” in the article’s description of the scope of the Supreme Court’s power.\textsuperscript{151} Thus, instead of reading, “The Jurisdiction of the Supreme (National) Court shall extend to all Cases arising under Laws passed by the legislature of the United States” (as had an early draft), the language of the judiciary article as approved in late August read, “The judicial power shall extend

\textsuperscript{147} Sager, “Supreme Court,” 49 (noting that on August 27—the Monday following the Thursday on which the delegates unanimously adopted amendments to the supremacy clause that made the Constitution, as well as acts of Congress and treaties, the “supreme law of the several States”—“the Convention spent an intense day addressing the judiciary article”).
\textsuperscript{148} Ibid.; accord Farrand, \textit{Records}, 2:430–31, Madison’s Notes, August 27, 1787.
\textsuperscript{149} Ibid.
\textsuperscript{150} Farrand, \textit{Records}, 3:103, Pierce Butler to Weedon Butler, October 8, 1787; see also Kramer, \textit{People Themselves}, 280n1 (listing statements by delegates acknowledging judicial review as the most viable alternative to the federal negative).
\textsuperscript{151} See Farrand, \textit{Records}, 2:430–31, Madison’s Notes, August 27, 1787.
to all cases . . . arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.”¹⁵² The proposal passed immediately, without opposition.¹⁵³ As Julius Goebel Jr. noted with respect to this change, “To speak of jurisdiction in terms of national power and not of a court was a noteworthy extension of the base of judicial authority.”¹⁵⁴ Thus extended, judicial authority in the new republic would be qualitatively different from the judicial authority that had underpinned Britain’s American empire.

Although the contours of judicial review remained uncertain and controversial for much of the early republican period, its ascendance in the aftermath of the negative’s defeat suggests that many delegates viewed it as an explicit tool to mediate among levels of government. This was a decided change from the more ad hoc species of judicial review that the Privy Council exercised. The Privy Council’s power of judicial review followed from the council’s role as an agent of royal prerogative, but the American mode of review was premised on a more fundamental relationship between judicial review and the nation itself. Federal judicial review depended on a court, to be sure, but a court that stood for—while also creating—the judicial power of the nation itself. Imperial review, whether legislative or judicial, thought fairly small: send the law in question to the Privy Council, and the Privy Council will say whether or not it is repugnant to the laws of England. Federal review under the supremacy clause, in contrast, would send the state law in question not to a mere court, but to an entirely separate and distinct level of government, which would be embodied in—but not confined to—the Supreme Court. The power of this court would originate in the power of the nation itself, from which the court would derive authority to police the states.

The supremacy clause was thus an explicit statement about the nature of the relationship between state and national levels of government. Rather than depending on formal legal structure (the Privy Council’s power to nullify colonial acts, Congress’s power to negative state laws), the federal Union would be kept in balance by a constitutional provision that actually invoked a new category of law—namely, the “supreme law of the land.” Rather than looking to a single institution to enforce this balance, the Framers envisioned an independent, national judicial power that would be the source of both substantive content and jurisdictional requirements. Whereas the British Empire had relied on the familiar institution of

---

¹⁵² Compare Farrand, Records, 2:172 (version of July 24–26), with 2:600 (final version of September 12).
¹⁵³ Farrand, Records, 2:431, Madison’s Notes, August 27, 1787.
¹⁵⁴ Goebel, Antecedents and Beginnings, 241.
legislative power to monitor the boundaries between layers of power, the American republic would look to a novel conception of judicial authority itself that contained both substantive and procedural, jurisprudential and jurisdictional, components.

Madison's Defense of His Negative—and His Name

Forty-four years after the Philadelphia convention had adjourned, Madison continued to ponder the events that had led to the defeat of his prized negative. In an 1831 letter to Trist, the former president found himself again compelled to take up his pen in defense of the proposal. The catalyst for this renewal of the debate was the publication in 1821 of Robert Yates's *Secret Proceedings and Debates of the Convention Assembled . . . for the Purpose of Forming the Constitution of the United States*. Prior to walking out of the Convention in early July along with fellow New Yorker and Hamilton foe John Lansing Jr., Yates had kept notes of the debates. Yates died in 1801, but in 1821 the notes were published thanks to the efforts of Lansing and Edmond Genet. Genet, already infamous for his exploits as the French minister to the United States during the 1790s, had in 1808 seen fit to break the silence that had governed the delegates since the Convention adjourned and published portions of Yates's notes in pamphlet form.\(^5\) Genet's motivation was hardly a charitable desire to inform the public as to the goings-on at Philadelphia; rather, he hoped to aid the fortunes of his father-in-law, New York Democratic kingpin George Clinton, as Clinton campaigned against Madison for the presidency. Most scholars agree that as part of this project, Genet altered Yates's notes to paint Madison as an extreme nationalist.\(^6\)

Madison objected strongly to the *Secret Proceedings*, which he regarded as a deliberate attempt to smear his contributions to the Convention and, consequently, to the formation of the Constitution. He seemed to take greatest umbrage—as demonstrated by the amount of space he devoted to the subject in this and other letters—at the charge that he was a consolidationist bent on giving the national government the same oppressive power that the British government had wielded over the colonies. One can almost hear Madison sighing from his study at Montpelier as, yet

again, he rehearsed the logic that had led him to embrace the federal negative. The Secret Proceedings, he wrote, “import ‘that I was disposed to give Congress a power to repeal State laws,’ and ‘that the States ought to be placed under the control of the Genl Govt at least as much as they were formerly when under the British King & Parliament.'” He offered the following rebuttal:

“The opinion that the States ought to be placed not less under the Govt of the U. S. than they were under that of G. B., can provoke no censure from those who approve the Constitution as it stands with powers exceeding those ever allowed by the colonies to G. B. particularly the vital power of taxation, which is so indefinitely vested in Congs and to the claim of which by G. B. a bloody war, and final separation was preferred.”157

In other words, Madison argued that the Constitution as ratified gave far greater power to the general government than the British government had wielded over the colonies, especially with regard to the thorny issue of taxation.158 The structure of national power with the negative might have been the same as the structure of imperial power, he contended, but the scope of that power was different. In any event, he seemed to say, the Constitution had rejected this structure in favor of an entirely new governmental architecture. And that federal architecture bore little resemblance to the imperial approach to the problem of establishing central authority.

Madison therefore conceded that he had modeled his federal negative on imperial practice, but he denied that he had done so as part of a larger project of consolidating national power. His debate with Clinton’s cronies demonstrates that as late as the 1830s, U.S. political debate continued to swirl around the influence that the Privy Council’s practices had had on Madison’s thoughts on government. Freely admitting that “a negative on

158. Anti-Federalists and, later, Republicans made a similar point during and after the ratification debates, arguing that the federal negative would have been preferable to the more robust centralization embodied in the supremacy clause and promoted by the Supreme Court under the leadership of Chief Justice John Marshall. Writing in 1828, John Taylor of Caroline lauded the rejection of the Virginia Plan but noted that “the negative power over state laws with which it was invested, was much less objectionable than that now constructively contended for on behalf of the federal government” (John Taylor, New Views of the Constitution of the United States [Washington, D.C.: Way and Gideon, 1823], 18). In an 1833 letter in which he defended the negative, Madison cited Taylor’s comments as “not unworthy of notice” and reiterated his own oft-repeated argument for “the necessity of some adequate mode preventing the States, in their individual characters, from defeating the constitutional authority of the States in their united character, and from collisions among themselves” (Madison to Rives, October 21, 1833, in Letters and Other Writings of James Madison, Fourth President of the United States [Philadelphia: J. B. Lippincott, 1865], 4:313).
the laws of the States, was suggested by the negative in the head of the British Empire, which prevented collisions between the parts & the whole, and between the parts themselves," Madison agreed with his critics' assertion that the federal negative traced its origin to imperial practice. But he rejected the charge that his proposal for the negative stemmed from a desire to reproduce the imperial-colonial hierarchy in the form of the new federal republic. Moreover, he scoffed at the notion that despite its defeat, the negative had somehow infected the Constitution with the germ of unidirectional, top-down political power. Nevertheless, as the controversy over Yates's Secret Proceedings demonstrates, nearly a half-century after the Philadelphia convention—even as the mounting sectional crisis gave new urgency to balancing national and state power—some Americans continued to associate Madison with the British Empire based on his theory of the federal negative.

Federal in Theory and Practice

The problem of authority was the central issue for both the British Empire and the early American republic. Madison’s negative attempted to bridge these two systems, proposing a relationship between national and state authority that applied one of the empire’s chief mechanisms to the new federal government. He had selected one strand of the Privy Council’s centuries-old practice of reviewing colonial laws, a practice that offered no substantive rules of decision but rather process and structure alone, as a means of bringing wayward peripheries into line with the central authority. (Indeed, even the Privy Council’s protojudicial review created little new substantive law, insofar as it purported merely to measure colonial acts against the existing laws of England.) In proposing the federal negative, Madison followed this procedural approach, emphasizing the negative as a mechanism rather than any rules of deciding whether a state law conflicted with the Constitution. In this respect the negative shared important features with Dickinson’s Equalizing Court and the Virginia Plan’s council of revision, both of which sought refuge from state-national conflict by attempting—ultimately in vain—to create an ideal forum rather than a body of legal principles according to which cases would be decided.

Of the two components of Privy Council practice, Madison had chosen to emphasize legislative review rather than judicial review. The Constitution, however, ultimately pointed toward the opposite choice, albeit with profound changes to give judicial review more substance than it had ever possessed under the empire. The supremacy clause offered neither an architecture nor a forum for decisions but rather an affirmative statement about the fundamental rules of the game and the power from which those rules derived: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” Taken together, the supremacy clause and Article III communicated that U.S. federalism would emanate from a national judicial power and be based on a body of substantive “law of the land”; indeed, the very body of substantive law that contained the supremacy clause. The defeat of the negative thus marked an important transition from a system in which multiple levels of government existed in uneasy tension with a theoretical commitment to unitary

160. Madison did contemplate a degree of judicial review according to which courts would be bound by the laws of the United States, but he seems quite clearly to have envisioned this as subordinate to the federal negative. “Let this national supremacy be extended also to the Judiciary department,” he wrote to Randolph. “If the judges in the last resort depend on the States & are bound by their oaths to them and not to the Union, the intention of the law and the interests of the nation may be defeated by the obsequiousness of the Tribunals to the policy or prejudices of the States” (Madison to Randolph, April 8, 1787, PJM, 9:370). As his comments regarding the limitations of ex post review show, however, he clearly considered judicial review to be at best a supplement to the federal negative.

161. Following the ratification of the Constitution, the phrase “legislative review” referred on at least one occasion to the process by which a legislature reviewed the decision of a court in a particular case, in contrast to the earlier sense of a legislature reviewing a piece of legislation before it came into effect. This post-1787 legislative review bore little resemblance to the Privy Council’s practices or to the federal negative, since it concerned a prior judicial decision rather than a potential act of legislation. The seminal case involving this variant of legislative review was *Calder v. Bull* (1798), in which the Supreme Court permitted the Connecticut legislature to set aside the verdict of a Connecticut probate court. As the Supreme Court noted in a 1995 decision, *Calder* involved “ad hoc legislative review of individual trial court judgments”—a far cry from the programmatic review of pending legislation that Madison’s federal negative had contemplated; see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 260 (1995) (citing *Calder v. Bull*, 3 U.S. 386 (1798)).

162. U.S. Constitution, art. 6, para. 2.

163. As Richard B. Bernstein notes, “by bringing the Constitution into the sphere of judicially enforceable law, the Supremacy Clause ensure[d] that controversies over the meaning of the Constitution [would] resolve themselves, sooner or later, into judicial questions coming before the federal judiciary and eventually the Supreme Court” (Richard B. Bernstein, *Are We to Be a Nation? The Making of the Constitution* [Cambridge, Mass.: Harvard University Press, 1987], 174).
sovereignty, to a system expressly designed to mediate among multiple bases of authority.

In the federal republic, the principal institution responsible for this mediation was to be the judiciary. Immediately following the definition of “the supreme Law of the Land,” the supremacy clause states that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

The federal negative offered a legislative solution to the problem of coordinating conflicts between the levels of government, but the supremacy clause offered a judicial solution. This judicial approach subsequently became the basis of U.S. federalism, as federal judicial review was confirmed in the Judiciary Act of 1789 and deployed by the Supreme Court in cases such as *Fletcher v. Peck* (1810) and *Martin v. Hunter’s Lessee* (1816). Although the nature and scope of the federal judiciary’s

164. U.S. Constitution, art. 6, para. 2.

The Judiciary Act of 1789 established the statutory basis for implementing the supremacy clause by providing, in relevant part,

that a final judgment or decree in any suit, in the highest court ... of a State ... where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn into question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error. (Judiciary Act of 1789, sec. 25, chap. 20, 1 Stat. 73)

*Fletcher v. Peck* was one of the first cases in which the Supreme Court held a state law unconstitutional. The Court under Chief Justice John Marshall held invalid a 1796 act of the Georgia legislature revoking earlier land grants in the Yazoo River region. The Court based its decision on the impairment to contractual obligations—in the form of subsequent sales of the land to bona fide purchasers—that the Georgia law would have worked (*Fletcher*, 10 U.S. at 135).

*Martin v. Hunter’s Lessee* established the Supreme Court’s appellate review over state court decisions in civil cases. Like *Fletcher*, the *Martin* case involved real estate: in this case, competing land claims between the nephew of Lord Fairfax, whose lands the Virginia legislature had confiscated during the Revolution, and Hunter, the subsequent recipient of those lands. Writing for the Court, Justice Story held that the Supreme Court alone had power to decide questions concerning federal law and, more relevant for this case, federal treaties, even if those questions arose in state court (*Martin*, 14 U.S. at 333–35).
role remained controversial into the nineteenth century, the fiery debates of that later period proceeded from the assumption that the judiciary was the crucial fulcrum on which the federal-state balance pivoted.\textsuperscript{166}

The defeat of the negative and the adoption of the supremacy clause heralded the arrival of an explicitly judiciary-based approach to the problem of multiple authorities. This shift in the 1780s was profoundly connected to ideological and institutional changes dating to the proto-Revolutionary debates of the 1760s. As colonists and royal governors confronted each other over the legitimacy of the Stamp Act, and as provincial assemblies and Parliament stood in altercation over the respective powers of colonial and metropolitan legislatures, a new conception of authority was emerging in British North America. At the core of many colonists' arguments lay the radical assumption that multiplicity was not evidence of a defective system of government, but rather a basis on which to build an entirely new vision of government. Massachusetts governor Thomas Hutchinson insisted in 1773 that "it is impossible there should be two independent Legislatures in one and the same State, for ... the two Legislative Bodies will make two Governments as distinct as the Kingdoms of England and Scotland before the Union."\textsuperscript{167} The Scots-American jurist James Wilson, in contrast, argued that "all the different members of the British empire are distinct states, independent of each other, but connected together under the same sovereign in right of the same crown."\textsuperscript{168} As these diverging views suggest, the Revolutionary period witnessed a profound conflict regarding the possibility that more than one source of authority might legitimately

Prior to the Supreme Court's holdings in \textit{Fletcher} and \textit{Martin}, the principle of judicial review of state legislation by lower federal courts was established in \textit{Champion & Dickason v. Casey}, a 1792 case in which the federal circuit court for Rhode Island (comprising the aptly named U.S. district judge Henry Marchant as well as Chief Justice John Jay and Associate Justice William Cushing) invalidated on contracts clause grounds a Rhode Island law that extended the period for merchant Casey to settle his debts with London merchants Champion and Dickason (see Bilder, \textit{Transatlantic Constitution}, 193).

\textsuperscript{166} On the debates in the 1790s and 1800s concerning the organization of the federal judiciary, see Alison L. LaCroix, "The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic," \textit{Supreme Court Review} (2008): 345-94.

\textsuperscript{167} \textit{The Speeches of His Excellency Governor Hutchinson, to the General Assembly of the Massachusetts-Bay ... With the Answers of His Majesty's Council and the House of Representatives ...} (Boston: Edes and Gill, 1773), 11.

\textsuperscript{168} "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," in \textit{The Works of James Wilson}, ed. Robert Green McCloskey (Cambridge: Harvard University Press, 1967), 2:745. The advertisement that announced the publication of this work noted that Wilson had originally written this pamphlet in 1768, during the non-importation controversy that followed the passage of the Townshend Acts, but it was not published until 1774.
exist within a single government. By 1777, when the Articles of
Confederation established a union comprising fourteen separate legisla-
tures, multiplicity had itself become a central value for many members
of the Founding generation. The ideology of early U.S. constitutionalism,
in other words, was multiplicity.

The debate over Madison’s negative was the moment in which the the-
ories that had underpinned the Revolutionary-era debates came together
with the affirmative need to build a government that took into account
the reality of postcolonial America’s numerous jurisdictions. The ideology
of authority in British North America had changed dramatically in the
1760s and 1770s; the debate over the negative showed that the structure
of that authority—the form it took on the ground—was equally unsettled.
One of the most pressing questions facing the delegates in Philadelphia
was thus how to translate a broad commitment to multiplicity into a func-
tioning government. Given a more or less shared conviction that a single
government might contain more than one level of authority, what insti-
tutions would best allow these authorities to remain distinct while also pro-
viding for occasional interactions between them?

For Madison, the solution was to borrow the Privy Council’s power to
review colonial statutes, putting Congress in the place of the Council as
the final arbiter and enactor of state law. As with the Privy Council’s pro-
cess, Congress’s review would operate prospectively; its approval would
be necessary to complete the legislation in question, as had been the
case when the council reviewed legislation from a colony with a suspend-
ing clause in its charter. Moreover, had Madison succeeded in securing the
broadest possible form of the negative, granting Congress the ability to
intervene “in all cases whatsoever,” Congress could have blocked any
state law with which it disagreed, exercising a preemptive reach far greater
than the contours of the powers that were eventually allocated to Congress
under Article I of the Constitution.169 In addition to the finished
Constitution’s requirements of bicameralism and presentment to make con-
gressional legislation effective, Madison’s proposal would have made con-
gressional approval—in the form of silence—a prerequisite to make state
legislation effective. This broadest possible negative would have

169. The connection between the negative and Congress’s affirmative lawmaking power is
evident throughout the records of the Convention. For example, the July 17 vote that
defeated the negative followed immediately on a vote approving a motion to give
Congress the power “to legislate in all cases for the general interests of the Union, and
also in those to which the States are separately incompetent or in which the harmony of
the U. States may be interrupted by the exercise of individual Legislation” (Farrand,
Records, 2:26, Madison’s Notes, July 17, 1787).
inextricably bound the two levels of lawmaking power together, eliminating any meaningful distinction between the scope of congressional power on one hand and state legislative power on the other.

Despite Madison’s efforts, his fellow delegates ultimately decided not to adopt the compound legislative structure that the negative offered. Instead, blending the Virginia Plan’s concern with national power to the New Jersey Plan’s preference for courts as mediating institutions, they cobbled together a structure that in turn refined the ideology of multiplicity. This structure centered on the supremacy clause, which bound state court judges to follow congressional statutes, treaties, and the Constitution itself. In contrast to the negative, courts and judges would be the mediating agents between the national and state governments, ensuring the supremacy of the general government in its particular areas of competence while minimizing the size of the shadow that national oversight cast onto the states.

Moreover, in conjunction with the enumerated powers of Article I, Section 8, the supremacy clause-plus-judicial review solution maintained an important degree of separation between national and state lawmaking processes. The negative implied concurrence: every matter that the states could reach and regulate could also be reached and regulated by Congress by virtue of its power to negate state laws. Reading the supremacy clause in conjunction with the rest of the Constitution, meanwhile, told a different, more complicated story. The supremacy clause identified and created a body of supreme law of the land that was, according to Article I, circumscribed along subject-specific lines such that there was no concurrence with the substantive areas of state law.

To be sure, the clause also looked to judges in the states to enforce this supreme law of the land, setting up a procedural overlap between the two levels of government. For this reason, Bernard Bailyn describes the supremacy clause as “linking the states’ officers, no less than the nation’s officers, to the enforcement of federal law,” resulting in “a functional merger of—not conflict between—the two levels of authority.” But Bailyn’s point overlooks the change that the supremacy clause represented from the nearly total merger that Madison’s negative entailed, with its compound state-law-making process. Furthermore, the conflict-merger dichotomy misses the distinction that the supremacy clause offered between the two levels of authority as a matter of substantive law, despite the procedural overlap that followed from the involvement of the state judges. The judges might be nodes of connection between the functional levels of government, but their more significant role was as nodes of separation between the

supreme (national, enumerated) law of the land and the ordinary (state) law that operated in all other contexts.171

The rejection of the negative and the turn toward a judiciary-centered solution to the problem of authority thus signaled a transformation in U.S. constitutional thought. The radical concept of multiplicity that undergirded Revolutionary challenges to unitary authority had demanded robust new structures to replace the tentative efforts of the Articles of Confederation. In this way, the new ideology of multiplicity had both created and required new institutions, setting the scene for the Convention’s confrontation between the negative and the supremacy clause. With the culmination of those debates in the adoption of the supremacy clause and a notion (albeit sketchy) of judicial review, the idea of multiplicity found an institutional mooring in the judiciary. This coupling of multiplicity as an idea with courts as a mode of mediating among multiple levels of government in turn created a new ideology: federalism.

The central constitutional question of the late eighteenth-century Anglo-American world was whether more than one source of governmental authority could legitimately exist within a single state—the imperium in imperio question. Bailyn identifies the issue as crucial to the debates surrounding the ratification of the Constitution. “The key doctrine of federalism could survive criticism only to the extent that it could somehow be distinguished from the ancient belief that imperium in imperio was an illogical and unresolvable solecism,” Bailyn argues. “So [the federalists] reexamined that old formula, took it apart, and showed not its falsity, but its irrelevance in the American situation.”172

Although Bailyn’s is a plausible functional account of the federalists’ arguments, it does not answer the question of how the ideas that underlay those arguments were changing, thereby allowing the arguments to be made. On Bailyn’s view, a doctrine called “federalism” emerged from the Convention debates and immediately entered the fray of political discourse, and it was only the need to defend the doctrine that led its proponents to fill in its theoretical basis after the fact. Thus, according to Bailyn, federalism came into existence first, followed by its ideological underpinnings, which were largely the product of the instrumental concerns of the Constitution’s advocates, such as the authors of The Federalist.

171. Ibid., 358: Bailyn associates this desire to merge levels of authority with the Federalist proponents of the Constitution. But it is worth noting that in the debates of the 1790s and 1800s concerning the scope of federal jurisdiction, Federalists (the label by then standing for the political party) tended to advocate federal courts with broad, and in some cases exclusive, powers of jurisdiction—that is, for more, not less, separation between the procedural levels of government; see LaCroix, “New Wheel in the Federal Machine.”
172. Bailyn, Ideological Origins, 358
But this sequence misses the long development of federal ideas prior to the ratification campaign, from the colonists' assertions of the possibility of legislative multiplicity, to the Convention delegates' struggles to assemble an institutional framework that could support multilayered government, to the Constitution's normative vision of multiterritory authority mediated through a newly potent judiciary. Jack Greene, Mary Sarah Bilder, and other scholars argue that the British Empire was an essentially federal entity, with federal-ness a kind of de facto condition, contested at the time by metropolitan authorities but defined in retrospect by factors such as institutions and practices. Even if one accepts such experiential factors as the relevant criteria, however, the shift in institutional focus that took place in the late 1780s offers a counterpoint to these scholars' overarching story of imperial-to-federal continuity.

Instead of stacked legislatures generating several varieties of positive law, the combined efforts of the delegates at Philadelphia produced a judicial mode of organizing federalism that was altogether different from previous approaches to the problem of multiple authorities. The rejection of the negative and adoption of the supremacy clause gave state judges the power to interpret the law of the federal polity while, at the same stroke, bringing those judges under the occasional control of that polity. This judicially driven federalism was an altogether new species of government, embracing multiplicity and giving it an institutional home in the judicial branches of both levels of government.173 The negative's demise heralded the emergence of not just an idea, but an ideology, of multilayered authority. After more than two decades of controversy and experimentation, multiplicity was no longer an embarrassment, a pathological or dysfunctional "solecism" that had infected U.S. government. Nor was it an uncomfortable reality at variance from political theory. On the contrary: The replacement of the mechanical negative with the spare, elliptical phrases of the supremacy clause signaled that multiplicity had become the defining concept of the new republic, a new normative vision distinct from past Anglo-American practice and ideology.

173. By "judicially driven federalism," I mean something different from the "judicially enforced federalism" that Larry Kramer has discussed. Kramer uses the phrase in the context of what has been called the "new federalism" of the Rehnquist Court, referring to the problem of restraining Congress and maintaining limits on federal power (Larry D. Kramer, "But When Exactly Was Judicially-Enforced Federalism 'Born' in the First Place?" Harvard Journal of Law & Public Policy 22 [1998]: 123–38, 127).