The Madisonian Moment

Jack N. Rakove†

No period in the evolution of American political culture exerts a more potent hold over our historical imagination than the era of independence and constitution-writing that is sometimes portentously described as "The Founding." Two explanations immediately suggest why this is the case. The first (and more obvious) emphasizes the partly symbolic yet highly functional role that the Revolutionary era has always played in providing Americans with both a political vocabulary and shared notions of national identity. The deliberations of that era provide the one set of consensually accepted reference points to whose authority we can appeal even as we mangle the nuances and complexities of what the Founders thought and did or criticize the consequences of the decisions they imposed on posterity. The various ways in which later generations have recalled The Founding have thus themselves become so essential an element of American political culture that one can legitimately ask why a society not known for its deference to patriarchal authority feels a continuing need to invoke the wisdom of the constitutional Fathers.1 But at another level, the appeal of the Founders must rest, more subtly, on some authentic and substantive quality of their thought and experience. To the historian, perhaps the most engaging aspect of that experience is the extraordinary self-consciousness with which the Revolutionaries—in 1776 and in 1787—grasped the novelty of the opportunity that independence had forced upon them. As Hannah Arendt once observed, it was the participants' "ever-repeated insistence that nothing comparable in grandeur and significance had ever happened in the whole recorded history of mankind" that accounts for "the enormous pathos which we find in both the American and the French revolutions." One finds it in the note of exultation with which John Adams concluded his 1776 pamphlet, Thoughts on

† A.B. 1968, Haverford College; Ph.D. 1975, Harvard University; Associate Professor of History, Stanford University.

Government—"You and I, my dear friend, have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live"—and again a decade later in the oft-quoted introductory paragraph of the first Federalist essay, when Alexander Hamilton observed that "It has been frequently remarked that it seems to have been reserved to the people of this country . . . to decide the truly important question, whether societies of men are really capable of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."²

None of the Founders better illustrates the dual dimensions of this appeal—the symbolic and the experiential—than James Madison. Although his reputation long languished in the shadow of his friend, Thomas Jefferson, Madison is now regarded "as the most profound, original, and far-seeing among all his peers."³ His essays in The Federalist mark the principal point of entry for all scholarly inquiries into the general theory of the Constitution, overshadowing not only Alexander Hamilton's influential but more pointed discussions of executive and judicial power in the later numbers of Publius, but also the debates at the Federal Convention itself. The famous 10th and 51st essays, in particular, enjoy the status of proof-texts. At the same time, the symbolic importance and real influence his writings have attained in the contemporary interpretation of the Constitution accurately reflect Madison's own conviction that his ideas clearly marked a radical break with the received wisdom of his age. No one better exemplified his own boast in Federalist 14 that it was the "glory of the people of America" not to have allowed "a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience."⁴

Two considerations help to justify the enormous critical attention that Madison's writings as Publius have commanded. First, as public texts available to the American political nation of 1787-88, the essays may plausibly be said to have reflected either some gen-

⁴ Robert A. Rutland, Charles F. Hobson, William E. Rachal, and Frederika Teute, eds., 10 The Papers of James Madison 288 (1977). For facility of citation, all references to Madison's contributions to The Federalist will be made to this work.
eral understanding of the Constitution prevailing at the moment of its adoption—or at least the understanding that one of its major framers hoped its adoption would inculcate among the American political nation. Second, because many of the objections against the Constitution that The Federalist set out to answer were drawn from the received authorities of the day, its arguments can be located within the great tradition of liberal political theory to which it made the new republic's most significant contributions. That tradition defines the proper context within which the essays are to be read.6

These dual considerations certainly serve the needs of students of political theory, who can read sources selectively; and they may even satisfy that criterion of “originalism”—itself Madisonian—which holds that the only extrinsic sources that can be legitimately applied to fix the original meaning of the Constitution must be public documents available to those whose acts of ratification gave the Constitution its force as supreme law. If our principal interest in The Founding is merely to extract from its voluminous records certain seminal statements to serve as fictive symbols of a pristine original meaning, then endless exegeses of such sacred texts as The Federalist and the Declaration of Independence may still be in order. But if our purpose is to understand how Madisonian thought arose in the first place, we cannot presume that a text is authoritative merely because it is public, but must ask instead how well particular expressions of that thought reflected the purposes of its author. From the perspective of the historian, the common tendency to reduce Madison's ongoing efforts to resolve problems of republicanism to his writings as Publius is to rob the experience of “the founding” of much of its meaning. A more serious error still is to treat as writ arguments that Madison himself regarded as problematic. The quest for the historical Madison thus requires relating the familiar arguments of The Federalist to the more complex body of ideas and concerns from which they emerged and of which they were only a partial expression.

Arguably it is all the more important to do so at a time when glib calls to return to a “jurisprudence of original intention” have

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6 Under this heading, I would include especially the various essays of the late Martin Diamond, who deserves equal credit with Adair (his colleague at Claremont) for the modern interpretative interest in the arguments of Publius. See especially his essays, The Federalist, 1787-1788, in Leo Strauss and Joseph Cropsey, eds., The History of Political Philosophy 631 (1972); and Democracy and The Federalist: A Reconsideration of the Framers' Intent, 53 Am.Pol.Sci.Rev. 52 (1959).
again been heard in the land. Whenever such calls are allowed to rest on crude and fragmentary caricatures of a complex historical reality, we should recognize that it is our own political culture, more than that of "The Founders," which is being exposed.

The classic statements of Madisonian theory are found, of course, in his best known contributions to *The Federalist*: the discussion of the advantages of an extended republic in *Federalist* 10, and the sustained analysis of the theory of separation of powers in essays 47-51. The central arguments of these essays are familiar and can be restated succinctly. In *Federalist* 10, Madison sought to explain why an extended national republic would better secure both "the public good and private rights" against the dangers of majority misrule than could the existing states of the American union. Madison offered two solutions—or rather, hypotheses—to justify the superiority of large over small republics. First, "extend[ing] the sphere" of the polity and thereby multiplying "the distinct parties and interests" which it contains will reduce the risk that factious majorities will be able to unite among the population and act on their impulses. Second, the mechanisms of election and representation will somehow work to bring into the national legislature men "whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice." Through these two means—one, in effect, negative, the other positive—Madison professed to find "a republican remedy for the diseases most incident to republican government."

In his discussion of the separation of powers in *Federalist* 47-51, Madison further sought to defend the Constitution against the charge that it had improperly distributed legislative, executive, and judicial powers. The mere constitutional declaration of "the boundaries of these departments" erected only "parchment barriers" against the abuse of power—especially abuse emanating from the legislature, which experience demonstrated was "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." Madison dismissed the idea that periodic reviews of the Constitution or appeals to the people could provide adequate correctives. Instead, in the brilliantly drawn defense of the Constitution's checks and balances in essay 51, he concluded that the "auxiliary precautions" of a divided legislature elected by different constituencies for different terms, reinforced by an executive wielding a veto and also enjoying a special relation with the

* 10 Papers of Madison at 263-270 (cited in note 4).
Senate, would best preserve the constitutional allocation of power by encouraging "ambition . . . to counteract ambition." Further security against usurpation could be found in the division of public power "between two distinct governments," state and national. Notably, however, Madison concluded the entire discussion by evoking the argument of Federalist 10, reminding his readers that the most effective cure for the danger of legislative aggrandizement lay in extending the sphere of the republic in order to prevent the "reiterated oppressions of factious majorities."7

These brief summaries of Madison's argument barely hint at the nuances of his thought, which have in fact been elaborately studied, criticized, and sometimes simply regurgitated in a host of scholarly commentaries of greater and lesser degrees of originality.8 Earlier interpretations used Federalist 10 either to attest to the self-interested motives of the propertied class for whom Madison presumably spoke, or else to identify Madison as a founding father of pluralism in his "essentially modern grasp of the group character of politics and of the play of organized groups on political institutions."9 Much recent Madisonian scholarship has instead been dedicated to relating the hypotheses that Madison was proposing to the issues of his own age. One leading theme in the current canon of interpretation stresses the ingenuity with which Madison developed and deployed the insights of David Hume—especially in the essay on "The Idea of a Perfect Commonwealth"—to counter the axioms about republican government that contemporaries associated with "the celebrated Montesquieu." What Madison clearly sought to refute was the conviction that stable republics could endure only in small, relatively homogeneous societies whose citizens possessed similar interests and the self-denying civic virtue required to preserve their form of government against its inherent

7 Id. at 448-454, 456-464, 470-472, 476-480. It is rarely noticed that the argument that "The interest of the man must be connected with the constitutional rights of the place" works best for the federal judiciary, whose life tenure presumably fosters the deepest personal attachment to upholding the authority of their office against the competing claims of the other branches.


tendency to decay toward strife and anarchy. By locating "the latent causes of faction" not merely in the diversity of economic interests within any modern society but also in the fallible reason, passions, and opinions of the species, Madison was insisting that a candid recognition of popular vice—as opposed to a naive faith in enduring popular virtue—could be converted into a persuasive defense of the enduring stability of an extended republican regime. In all of this, a far from modest Madison was consciously challenging the errors of the recognized authorities of his age.10

As soon as the quest for the historical Madison moves beyond the philosopher-advocate of The Federalist, two complementary sets of problems define the major issues in Madisonian scholarship. The first is to trace the evolution of the concerns and ideas that guided Madison during the three-year period (1786-89) in which he led the political movement that brought about the adoption of the Constitution and its first ten amendments. Here the central problem is to reconcile divergences between his public and private positions—or to put the point another way, to set the public defense of the Constitution in The Federalist in the context of Madison's prior and private analyses of what he called the "vices of the political system of the United States" and the specific remedies he sought, and often failed, to convince the Federal Convention to adopt.11 The second set of problems looks beyond the constitutional politics of the late 1780s to the intense partisan conflicts of


the 1790s, when the Madison who had written of "curing the mischiefs of faction" in Federalist 10 and who had hoped to vest the national government with an absolute veto over all state laws organized the nation's first opposition party and wrote the Virginia Resolutions of 1798.12

Madison's arguments about the superiority of large over small republics are perhaps best characterized as predictions or hypotheses remaining to be verified. But his analysis of the problem of faction within the states was decidedly empirical and experiential, in the dual sense of lessons drawn from both the evidence of recorded history and the experience of republican government in America since 1776. In his preparations for the Convention, Madison had read widely in the history of ancient and modern confederacies,13 but the conclusions he drew from that research tended to reinforce lessons derived more directly from his service in the Continental Congress (1780-83) and the Virginia legislature (1784-86). His analysis was predicated on the inability of either the citizens or the legislators of the states to pursue measures that would respect the general interests of the union, the true public good of their own communities, or the rights of minorities and individuals. In the political context of the mid-1780s, when the amendment of the Articles of Confederation and the reform of the state constitutions written at the time of independence were regarded as two separate projects, his great achievement was to explain the failings at both levels of government in terms of the shortcomings of state legislators and their constituents. On the one hand, their parochial attitudes and interests demonstrated that "a unanimous and punctual obedience of 13 independent bodies, to the acts of the federal government, ought not to be calculated on." But equally important was Madison's indictment of the character of lawmaking within the states. The "multiplicity," "mutability," and "injustice" of the "vicious legislation" the states had enacted since independence, he concluded, called "into question the fundamental principle of republican Government, that the majority who rule in such Governments are the safest Guardians both of public Good and of private rights." Part of the evil he attributed to the character (or lack of it) of the lawmakers themselves, who typically

12 On this point, which is discussed only peripherally in this essay, see John Zvesper, The Madisonian Systems, 37 West.Pol.Q. 236 (1984).
13 His notes on his readings are reprinted in Robert A. Rutland, William M.E. Rachal, et. al., eds., 9 Papers of Madison 3-24 (1975); additional notes can be found in 10 Papers of Madison at 273-281 (cited in note 4).
sought office from motives of "ambition" and "personal interest," and only rarely from genuine considerations of "public good." But in Madison's view, "a still more fatal if not more frequent cause" of unjust legislation "lies among the people themselves." Madison's theory of faction sought to explain why this was the case by demonstrating that neither considerations of "public good" nor "respect for character" nor even "religion" could restrain an interested or impassioned majority from improper acts.¹⁴

This acute diagnosis of the parochial allegiances of state legislators and citizens formed the foundation for the program that Madison hoped to persuade the Federal Convention to adopt. His first and perhaps most important conclusion was that the national government could no longer rely on the voluntary compliance of the states, but had to be empowered to enact, execute, and adjudicate its own laws. In the Convention, this simple yet momentous conclusion was seriously challenged, if at all, only during the brief debate over the New Jersey Plan. But the heart of the Madisonian program lay not in this discovery per se, but in the way in which his observations about the "vices" of state politics influenced his thinking on four major issues: the nature of representation in the extended republic; the demand, closely related to the representation issue, for the apportionment of seats in both houses of a bicameral Congress; the need to enhance the authority of the weaker branches of government, the executive and judiciary, against an overreaching legislature; and most difficult of all, the basis and extent of the supremacy that he clearly hoped the union would henceforth enjoy over the states in the "compound republic" of a federal system. It is under this last heading that Madison's notion of the protection of individual and minority rights is best considered.

Madison's positions on each of these general issues merit separate examination. While a short summary cannot do justice to the many nuances of his thinking, it can at least identify those aspects of his program that appear most problematic not from the perspective of modern theory but rather within the historical context of The Founding itself.

1. Representation. The Madisonian image of society was rec-

¹⁴ His conclusions were summarized in a memorandum on "The Vices of the Political System of the United States," (from which the quotations in this paragraph are taken) and in three letters written respectively in March-April 1787 to Thomas Jefferson, Edmund Randolph, and George Washington. 9 Papers of Madison at 345-357, 317-322, 368-371, 382-387.
ognizably modern in its acceptance of the multiple and mutable sources of faction; but in his theory of representation, Madison clung to traditional ideals of legislative responsibility that seemingly echo the classic statements of Edmund Burke. While abandoning the insistence that popular virtue was the mortar from which the republic had to be built, Madison still hoped that national legislators would transcend the parochial interests and passions of their electors in order to frame laws and policies embodying a public good representing more than the aggregated preferences of the general population. Madison's aspirations for congressmen thus marked the opposite side of his animus against state legislators, and in this respect, his position can be used—to follow the influential formulation of Gordon S. Wood—to illustrate the social character of the Federalist movement that supported adoption of the Constitution. Out of their aversion to the petty demagogues who controlled the state assemblies, Wood argues, the Federalists of 1787-1788 hoped "to restore a proper share of political influence to those who through their social attributes commanded the respect of the people and who through their enlightenment and education knew the true policy of government." Madison's ideal Congress thus resembled the legislature Burke had envisioned when, in his famous speech to the Bristol electors, he declared that Parliament was not "a congress of ambassadors from different and hostile interests" but described it instead as "a deliberative assembly of one nation, with one interest, that of the whole."15

In Georgian Britain, the theory of virtual representation was closely tied to the defense of the malapportionment and limited suffrage that the colonists and their sympathizers in the mother country had denounced before the Revolution. Far from relying on the "corrupt" practices that Americans regarded as the great rot of eighteenth-century British parliamentary politics, Madison's optimal hopes for the inculcation of virtuous representation presupposed the existence of large and equitably apportioned electoral units. He hoped to institute electoral procedures for both houses of

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15 Gordon S. Wood, The Creation of the American Republic, 1776-1787, 506-518 (quotation at 508) (1989); the famous passage from Burke's 1774 Speech to the Electors of Bristol is quoted in id. at 175; and see Wood's recent restatement of this theme in Interests and Disinterestedness in the Making of the Constitution, in Beeman et al., eds., Beyond Confederation at 69-109 (cited in note 11). A particularly valuable treatment of Madison's ideas can be found in Robert J. Morgan, Madison's Theory of Representation in the Tenth Federalist, 36 J.Pol. 852-885 (1974), which, title notwithstanding, is not confined to that single essay alone.
Congress that would work to bring men of "enlightened views and virtuous sentiments" into office. In the case of the House of Representatives, Madison and his allies at the Federal Convention argued that the establishment of large constituencies would effectively nullify the improper electoral tactics that localist politicians could exploit. Local demagogues would somehow neutralize each other, while candidates of established reputation and merit would alone be able to fashion district-wide majorities. The larger the electoral unit, the better. Madison was not committed to the idea that representatives should be chosen by electors residing only within individual districts, but was instead willing to experiment with statewide election of delegations or statewide voting for members from particular districts.

It was, however, to the Senate that Madison looked most ardently for the recruitment of a suitably broad-minded and disinterested corps of legislators capable of discerning the true public good. At least as early as 1785, he had seen in the proper composition of the upper house the first and most potent line of defense against the excesses of majoritarian misrule and "vicious legislation." His ideal Senate was to be elected either indirectly or by constituencies so large as to erase any substantive degree of electoral accountability; his ideal senator would serve an extended term of nine years and hopefully not take up office until he reached so mature an age that completion of a single term would exhaust his ambition. Madison's notion of senatorial independence was so radical that it risked ceasing to be a scheme of representation in any meaningful sense of the term.

This image of the Senate thus presupposes serious doubts about how well popularly elected congressmen would withstand the factious popular pressures to which he had found state legislators vulnerable. In a notable speech on June 26, Madison spoke as if he

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16 Federalist 10, in 10 Papers of Madison at 269 (cited in note 4).
17 Rakove, Structure of Politics 269-270 (cited in note 11); on the advantages of large electoral districts, see especially the remarks of James Wilson, George Mason and Madison during the debate of June 6, in Max Farrand, ed., 1 The Records of the Federal Convention of 1787 132-136, 143 (2d rev.ed. 1987).
19 Speech of June 26 at the Federal Convention, in 10 Papers of Madison at 76-78 (cited in note 4).
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did expect the House to succumb, even going so far as to identify the conditions under which a factious majority might eventually coalesce made up of “those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings”—i.e., property.20 At some future point in the nation’s development, a majority of the enfranchised population might no longer find themselves “placed above the feelings of indigence.” Then a well constructed Senate would prove especially important to halting redistributive attacks on existing rights of property—such as the landed estates of the great planter class to which Madison’s own family belonged. Here as on other occasions in 1787 and 1788, there can be no doubt that concern with the protection of property lay at the very center of Madison’s anxieties about republican government. At the same time, Madison’s image of the House of Representatives often seems to leave it resembling the state legislatures he so much despised. In The Federalist, it is true, the need to counter Antifederalist accusations that an exalted Congress would be effectively insulated from the concerns of the population naturally led Madison to emphasize the genuinely representative qualities of the lower house. Yet when he depicted the likely character of the House as “an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country,” he explicitly conceded that at least one chamber might prove vulnerable to the same mutability of policy he had condemned in the states.21

To reconstruct Madison’s original thinking about the problem of representation in this way thus suggests that he recognized from the start that his hopes and expectations were not easily reconciled. There can be no doubt, on the one hand, of his strong attraction to a Burkean ideal of representative responsibility—to the vision of a legislature composed of disinterested men who could speak intelligently for the needs and views of their constituents but then vote on the basis of some larger notion of public good. But to make this ideal the core of the Madisonian system—as sev-

20 Id. 21 From Federalist 62, in id. at 538-539. The authorship of this particular essay has in the past been a subject of dispute, but the consensus of recent Federalist scholarship has supported the conclusion that authorship is properly assigned to Madison. See, e.g., 10 Papers of Madison at 540. Without ignoring the risk of circularity, one might add that this essay’s discussion of the danger of “mutability in the public councils” has a strongly Madisonian ring.
eral recent commentators have been inclined to do—requires ignoring the extent to which it was compromised by the more realistic and pessimistic view of politics that had driven Madison to espouse it in the first place.\(^2\) For beyond the arithmetical assumptions that supported the prediction that more cosmopolitan legislators could emerge triumphant from large electoral districts, Madison's scheme of popular elections remained little more than a statement of faith. His own ideas as to which electoral procedures were most likely to produce the desired results remained indefinite, and he did not develop an adequate theory of ambition to explain what types of candidates would actually compete for office: virtuous patriots, or lawyers tired of debt chasing. In fact, Madison himself appears to have sensed that his optimistic hopes for securing a virtuous representation had been pegged too high. While waiting for the First Federal Congress to muster a quorum, he reflected that the Antifederalists' "predictions of an anti-democratic operation [in the new government] will be confronted with at least a sufficient number of the features which have marked the state governments."\(^3\)

Equally problematic were his expectations for the Senate. In Madison's original view, the great imperative was to prevent the state legislatures from having any direct share in its election. The logic of his analysis of the problems of the state constitutions suggested that the assemblies could rarely be relied upon to appoint senators who would possess either the nationalist orientation he desired or the will to use the proposed national veto on state laws to any useful extent. "If an election by the people, or thro' any other channel than State Legislatures promised as uncorrupt & impartial a preference of merit," he told the delegates, "there could surely be no necessity for an appointment by those Legislatures."\(^4\) But his hopes for the Senate were undermined by the difficulty of providing a credible or practical alternative to the idea of legislative election, which had the further advantage of maintaining the practice for the Continental Congress, and by his colleagues' apparent conviction that both the adoption of the Constitution and the later avoidance of conflict between national and state govern-

\(^2\) For an extreme statement, see Garry Wills, Explaining America: The Federalist (1980).

\(^3\) James Madison to Thomas Jefferson (March 29, 1789), in 12 Papers of Madison at 38. For the potential sources of Madison's discouragement, see Rakove, Structure of Politics at 286-294.

\(^4\) Speech of June 7, 1787 in 10 Papers of Madison at 40 (cited in note 4).
ments required giving the latter some share in the election of the former.

2. Proportionality. This brief sketch of Madison's ideas of representation should suggest why any attempt to describe his scheme of government as "Madisonian democracy" begs more questions than it answers. The actual basis on which Madison expected legislative majorities to form in Congress remains less than clear. But rather than suggest that majorities would result from a process of bargaining among representatives speaking for the plurality of interests within the larger society, it seems more likely that Madison hoped that the diversity of interests would discourage any majorities from forming until a compelling conception of public good could somehow emerge to transcend the interplay of parochial interests.

If there was any democratic element in Madison's scheme, it was his conviction that principles of proportional representation should be followed for both houses of Congress. Before the Convention, he decided that this was the "ground-work" upon which all else depended. It was, in fact, his insistence upon this point that best explains why the conflict between large and small states over voting in the Senate preoccupied the delegates for the first seven weeks of debate.

This commitment to proportional representation in both houses poses two problems. The first involves, again, the elevated function of the Senate. Why was proportional representation in the upper house so crucial if Madison's basic purpose was to convert the Senate into a truly independent chamber of nationally-minded statesmen? If local and state concerns would find their adequate voice in the House, there was no compelling theoretical reason to insist upon proportional voting in the Senate, especially if Madison hoped senators would be chosen by indirect election or through super-districts. Pragmatic calculations were thus probably more important. Madison simply assumed that the large states would approve "the necessary concessions of power" to the union only if proportional voting were instituted in the two houses the new Congress would require because—unlike the existing Continental Con-


27 9 Papers of Madison at 369, 383 (cited in note 13). See the discussion in Rakove, 44 Wm. & Mary Q. at 429-436 (cited in note 11).
The second problem that Madison's commitment to proportionality raises is theoretically more significant because it identifies a fundamental difficulty with his theory of faction. To counter the predictable objection of the small states that any departure from the principle of an equal state vote would leave their constituents at the mercy of the large states, Madison and his allies had to fashion arguments to prove why the small states neither needed nor deserved the privilege of the equal state vote even in one house of Congress. That is exactly what Madison's theory enabled them to do, in two ways. First, by promising to cure the mischiefs of faction, it held out the prospect that all interests would be equally well secured by the virtuous legislators who would henceforth occupy Congress. The small states would admittedly lose influence in the new Congress, but the theory of faction purported to explain why their rights and interests would still be adequately protected. Second, and more important, his analysis of the sources of faction explained why states, as such, did not deserve representation. Implicit in its logic lay the recognition that the states, as political entities, embodied only the fictitious legal personality of all corporations. All states possessed interests (or congeries of interests), but by locating the roots of faction in the attributes of individuals—in their interests, occupations, opinions, passions, and their disparate "faculties"—Madison in effect was arguing that the real constituent elements of the society were people, not corporate entities or territorial units. Moreover, the motives that would lead the small states to cooperate within the Convention would cease to operate once the new government took effect, for their representatives would never vote on the basis of the size of their state but rather to pursue the interests of their constituents. Similarly, one of the most potent arguments that Madison and his allies deployed during the Convention was to defy the spokesmen for the small states to identify a single occasion on which the disparate interests of the three most populous states (Virginia, Pennsylvania, and Massachusetts) could ever lead them to fashion a federal condominium. The small states never effectively countered this argument; the best they could do was to suggest that, after all, the Senate should represent not so much the states as communities but rather the state governments—and all state governments were

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27 Madison simply assumed, in short, that "the smaller states must ultimately yield to the predominant will." 9 Papers of Madison at 371, 383.
equal.  

Madison's approach worked well so long as the choice lay between representing states as aggregates of population or as corporate units. But the concurrent need to define the exact basis for apportionment (even in one house) threatened the entire theory of faction. Here the critical issue was slavery. From Madison's perspective, the Southern demand to count slaves for purposes of representation had one theoretical advantage: by identifying a deeper conflict that was destined to outlast the ephemeral struggle between small and large states, it demonstrated why the claim for an equal state vote was meretricious. As Madison reminded his colleagues on June 30:

the states were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concurred in forming the great division of interest in the U. States. It did not lie between the large & small States: it lay between the Northern & Southern, and if any defensive power were necessary, it ought to be mutually given to these two interests.

The logical solution, he continued, was to base representation in one house on free population alone, and in the other on total population, slaves included. But given his conviction that the Senate should be given greater powers than the House, a "disequilibrium of interests" would result from any effort to impose a solution along these lines, since one section would be particularly advantaged in the upper house.  

Madison's reluctance to convert this suggestion into an actual proposal illustrates the deeper predicament the framers felt when it came to the issue of slavery. Perhaps the best that can be said for Madison's positions on these issues is that they illustrate the difficulty or impossibility of balancing moral embarrassment over the very existence of slavery against the candid recognition that the social systems (and thus arguably the political cultures) of at least five states demanded its preservation. There can be no doubt that Madison abhorred slavery on moral grounds. Early in the Convention, before any question explicitly implicating slavery had

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28 These points are discussed far more extensively in Rakove, 44 Wm. & Mary Q. at 424-457 (cited in note 11).
29 10 Papers of Madison at 90 (cited in note 4).
yet been broached, he observed that “the mere distinction of color [had been] made . . . a ground of the most oppressive dominion ever exercised by man over man”; near the close of debate, and again in Federalist 42, he opposed the continuation of the slave trade until 1808 as “dishonorable to the national character.” But moral embarrassment did not prevent Madison from attempting to weave specific protections for sectional interests into the political fabric of the Constitution. He concluded his final speech opposing the Great Compromise by reminding the Convention that “the real difference of interests lay, not between the large & small but between the N. and Southn. States. The institution of slavery & its consequences formed the line of discrimination.” Similarly, while agreeing with James Wilson that an election by the “people at large” would provide the “fittest” mode for the appointment of the executive, the fact “that the right of suffrage was much more diffusive in the Northern than the Southern States” led him instead to support the scheme of an electoral college presumably because it would enhance the prospects for the election of Southern candidates. And again, on July 21 he opposed an exclusive Senatorial power over the selection of the judiciary in part because it would “throw the appointments entirely into the hands of the Northern States,” thus creating “a perpetual ground of jealousy & discontent” among the Southern states. Finally, Madison explicitly understood that the “republican guarantee” clause would enable the union to assist individual states in the suppression of slave rebellions.

As it happened, of course, the three-fifths rule the Convention adopted to protect Southern interests in the lower house proved less important than the Great Compromise giving each state an equal vote in the Senate, which provided a handier mechanism for preserving the sectional “equilibrium.” But in his candid avowal of the gross reality of sectional differences, Madison identified a critical—not to say fatal—flaw in his general theory of faction. Perhaps states did not constitute objective interests deserving representation. But the stark recognition that regional social systems based

30 Id. at 33, 157, 405.
31 Id. at 102.
32 Id. at 107-108.
33 Id. at 111.
34 See the respective references to this point in the memorandum on the vices of the political system, 9 Papers of Madison at 350-351 (cited in note 13); his speech to the Convention of June 19, in 10 Papers of Madison at 58; and Federalist 43, in 10 Papers of Madison at 415 (cited in note 4).
on slave and free labor had already established great, permanent, and dichotomous sources of conflicting interests in the extended republic could not be readily reconciled with the pluralist imagery of the theory of faction. For what did one see when the United States was described in these terms: a society embracing a "multiplicity of interests," or a nation divided into two great and potentially antagonistic regions whose cultures rested on fundamentally opposed values? And what notion of legislation was more compatible with this image: one that promised protection to all interests, defined principally in terms of the attributes of individuals, yet that would also allow duly constituted majorities to govern? Or one that implied, as the small states had long insisted, that the first task in constructing the new government was to erect specific constitutional defenses for certain broad groupings of states? And what Southern state could possibly allow the national government to exercise a veto "in all cases whatsoever" over its laws, if doing so might yield control over the vital institution of slavery to a potentially hostile majority?

For Madison, then, the institution of slavery served as both an extreme example of the extent to which interested majorities could be driven to deprive fellow men (though not citizens) of their rights, and as a vital minority interest and right that the new Constitution would have to protect not only for it to have any chance of adoption, but also to preserve the union it was meant to embody. In this sense, the theory of faction worked quite well when it came to identifying the specific sources of the distinctive interests, opinions, and passions of the South; by implication, it also explained why the protection of minority rights (of slaveholders) against a potential factious majority (of non-slaveholders) was essential to the aggregate public good (the survival of the union) he hoped the reconstituted government would pursue. Where the theory of faction broke down was in failing to anticipate—or perhaps in anticipating all too well—how the mischiefs of faction could be cured should the question of slavery eventually lead to the coalescence of factious majorities within each of the nation's two gross regional divisions.

3. Separation of powers. Nothing better illustrates the pragmatic cast of Madison's mind than his efforts to modify the strict theory of the separation of powers that so many Americans had seemingly imbibed from their reading of "the celebrated Montes-
Privately Madison may have wondered whether there was much to learn from this great French sage; in 1793, he dismissed appeals to both Montesquieu and Locke as "a field of research which is more likely to perplex than to decide." But in 1788, with Antifederalists insisting that the Constitution violated "the political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct," it was impossible to avoid confronting the axiom head on. This Madison first sought to do (in Federalist 47) by using the evidence of practices under the British constitution and the American state constitutions to demonstrate both that Montesquieu could not have meant what his popular interpreters claimed he meant, and also that the Americans had already departed from a strict separation of powers, even while espousing a ritualized allegiance to the principle.

Once one moves past Madison's ingenious effort to undermine the Antifederalist appeal, three points deserve mention in any survey of his substantive ideas about the separation of powers. First, those ideas were generated primarily within the context of his critique of state politics, and as such cannot be divorced from his concern with popular faction, even if certain familiar passages in The Federalist imply that the central purpose of the separation of powers is to "oblige [the government] to control itself." Second, Madison's own preferred solutions to the problem of protecting the executive and judicial branches from legislative encroachments involved more radical departures from the idea of strict separation than the Constitution itself proposed. Third, while Madison be-

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Federalist 47, in 10 Papers of Madison at 448-454.
Federalist 51, in 10 Papers of Madison at 477. The argument that Madison's theory of separation of powers was rooted in the counter-majoritarian component of his thought is an important part of the modern liberal critique of Madison associated notably with the political scientists Robert Dahl and James MacGregor Burns. Without going as far as they do in stressing the anti-democratic animus of Madison's thought, I agree (as the analysis below suggests) that for Madison the greatest dangers to which the wholesale violation of the separation of powers would lead were to be found not in legislative tyranny per se but in legislative instrumentality in factious majoritarian violations of private rights. The modern liberal critique can be traced in many ways to Charles Beard, who made Federalist 10 a central source for his great work, An Economic Interpretation of the Constitution (1913). On Beard's use of Madison, see Shlomo Slonim, Beard's Historiography and the Constitutional Convention, 3 Persp.in Am.Hist. 173 (1986), which, however, presents a view of the separation of powers issue at variance with that offered here. An important criticism of the liberal critique of Madison is George W. Carey, Separation of Powers and the Madisonian Model: A Reply to the Critics, 72 Am.Pol.Sci.Rev. 151 (1978), which is, however, marred by its apparent reliance on The Federalist to the exclusion of other sources.
lieved that there were core functions of government that could be
denominated as legislative, executive, and judicial in nature, he
doubted the practicability of erecting landmarks that could distin-
guish these functions in a clear and noncontrovertible manner.

Much of the novelty of Madison's analysis lies in his efforts to
suggest that, in a republic, "legislative usurpations" are in reality
more dangerous than the "executive usurpations" that good repub-
licans traditionally feared. Looking backward to colonial grievances
under the ancien regime, the constitution-writers of 1776 had evis-
cerated the executive branch while ignoring the potential risks of
legislative supremacy. Annual elections, they assumed, would en-
able the electorate to control the legislature should it overstep its
constitutional bounds to interfere with the legitimate operations of
the other branches. But the experience of state politics since inde-
pendence demonstrated that electoral remedies alone were not
enough: the "interested views" of legislators could often lead them
to "join in a perfidious sacrifice" of the "interest, and views, of
their Constituents," and then to contrive to have their "base and
selfish measures, masked by pretexts of public good and apparent
expediency."³⁹

It was this incapacity of the electorate to check its own repre-
sentatives that first led Madison (in his pre-Convention analysis of
the "Vices of the Political System of the United States") to ques-
tion the fundamental republican principle that popular majorities
were "the safest Guardians both of public Good and of private
Rights."⁴⁰ But in explaining why this was the case, Madison
pushed republican theory even further. For as the concluding sec-
tion of his memorandum makes clear, the greater danger to repub-
lican principles and the protection of liberty would come from the
population itself. Electoral mechanisms of protection were cer-
tainly imperfect and subject to manipulation, but Madison
doubted whether a supine people would acquiesce in their own en-
slavement. He was thus far less concerned with the prospect that a
legislative oligarchy would subvert the independence of the weaker
branches in order to pursue its own evil purposes than with the
dangers that would arise from representatives acting as instru-

³⁹ Federalist 48, in 10 Papers of Madison at 456-457. The disparaging comments on
state legislators appear in the pre-Convention memorandum on the "Vices of the Political
System," in 9 Papers of Madison at 354. Madison had twice evoked the image of the legisla-
tive "vortex" in the Convention; see his speeches of July 17 and 21, in 10 Papers of Madison
at 104, 109. On the weakening of executive power under the first state constitutions, see
Wood, Creation of the American Republic at 127-161 (cited in note 15).
⁴⁰ 9 Papers of Madison at 354 (cited in note 13).
ments of their electors. Ambitious and demagogic rulers would always remain a problem, but the crucial factor was the relation between the people and their representatives. “In our Governments the real power lies in the majority of the Community,” Madison reminded Jefferson after the Constitution was ratified, “and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.”

For Madison, then, the idea of separated powers could never be sharply distinguished from the general problem of majority misrule. At the Convention, his defense of the Senate, the executive veto, and his proposed executive-judicial Council of Revision all presumed a “twofold” purpose for establishing checks on the lawmaking authority of Congress (and again, especially, the lower house): to defend the rights of the weaker branches, and “to prevent popular or factious injustice.”

The two functions were intimately linked because the worst consequences of legislative manipulation of the weaker branches would be the facilitation of the violations of private rights that legislators responsive to factious majoritarian interests would be intent on pursuing. For in Madison’s analysis, since most wrongful legislation could be traced not to legislative irresponsibility but, on the contrary, to the very fidelity with which lawmakers were obeying the wishes of interested majorities, it was naive to expect the community to mobilize itself against the excesses of its duly elected representatives. Further, in any contest between the legislature and the weaker branches, the opinions and passions that also gave rise to partisan behavior would generally tend to work in favor of the representatives. They would command a popular confidence that the executive and judiciary could rarely if ever hope to attain, even when legislative “usurpations” were “so flagrant and so sudden, as to admit of no specious coloring.” The public could thus never be counted upon to decide a dispute on “the true merits of the question,” because public opinion would “inevitably be connected with the spirit of preexisting parties, or of parties springing out of the question itself.”

From this presumption of the inherent and persistent political

42 Speeches of June 4, June 26, July 21, Sept. 12, in 10 Papers of Madison at 25, 76-77, 109, 166 (cited in note 4).
43 Federalist 49, in 10 Papers of Madison at 462-463.
weakness of the executive and judiciary, Madison struggled to modify the theory of separation of powers in a particularly ingenious if impractical way. When in the mid-1780s he had first considered the evils of "fluctuating & indigested laws," he had sought relief, first, in the traditional idea of a well constituted senate as an immediate check on an impetuous lower house, and second, in the appointment of "a standing committee composed of a few select and skilful individuals" who would have the responsibility of drafting all bills in a technically competent manner. By 1787 his dual concerns with improving the quality of lawmaking and protecting the executive and judiciary against legislative interference had fused to produce a more radical proposal: to combine the executive and judiciary into a Council of Revision armed with a limited veto over national laws and empowered to serve, in effect, as an advisory council to Congress.

Madison’s rationale for this proposal and his disappointment over its rejection are noteworthy in several respects. They again reveal his doubts whether even a refined system of elections would produce the ideal corps of legislators his more optimistic pronouncements envisioned. Instead, Madison consciously preferred to bring the judiciary directly into the lawmaking process itself, and in doing so "to restrain the legislature from encroaching on the other co-ordinate departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form." He thus hoped to improve the quality of law at its source, giving American law codes "the perspicuity, the conciseness, and the systematic character" they otherwise lacked. More important, the proposal for uniting the executive and judiciary rested on the fear of the popular majorities lurking behind the legislature. Alone, neither the executive nor the judiciary could resist the legislature, speaking as it would for the political will of the community; united in the Council of Revision, they might gain sufficient stature to provide an effective check against legislative excess. The presence of the judges on the Council would have the added advantage of bracing the political will of an otherwise timorous executive while assuring that the veto would be exercised on appropriate rather than arbitrary grounds.

44 8 Papers of Madison at 351-352 (cited in note 18).
45 8 See point 8 of the Virginia Plan, in 10 Papers of Madison at 16.
46 8 Speeches of June 4, June 6, July 21, in 10 Papers of Madison at 25, 35-36, 109-110. After the rejection of the Council of Revision, Madison subsequently moved (August 15) to have acts of Congress submitted separately to the executive and judiciary. 2 Records of the
Indeed, at times Madison seemed to expect more from the judiciary than the executive. In 1785, he had suggested that the executive was actually the least important branch of government, and while in 1787, he consistently worked to enhance presidential independence from Congress, his notions of executive power were the least developed facet of his thought.47 By contrast, the idea of giving the judiciary political powers illuminated, by its very novelty, the crucial considerations that led him to contemplate so deep an inroad on the theory of strict separation of powers. The proposal is explicable only in terms of his fundamental concern with the protection of the private rights of individuals and minorities against majority misrule. If an active advisory role for the judiciary would deter the adoption of laws that would adversely affect such rights, any damage done to the axiomatic interpretation of separation of powers would be a trivial price to pay.

Madison was thus prepared to sacrifice the theoretical purity and symmetry of the strict theory of separation of powers to attain the practical benefits he believed would ensue. But at a more abstract level, his criticisms of republican lawmaking worked to undermine the supposed distinctions upon which the theory of separation of powers ultimately rested. While Madison recognized that the framing, execution, and adjudication of laws were to some extent distinguishable activities, his image of the plasticity and reach of legislative authority led him to doubt whether any logically rigorous division of powers would ever prove efficacious. "If it were possible it would be well to define the extent of legislative power," he observed in 1785, "but the nature of it seems in many respects to be indefinite."48 He returned to this basic problem repeatedly in 1787-88: within the Convention, in his correspondence with Jefferson, and finally in The Federalist. In Federalist 10, for example, it appeared in his reflection on the way in which "the regulation of these various and interfering [economic] interests forms the principal task of modern legislation." But "what are many of the most important acts of legislation," he then asked, "but so many judicial determinations, not indeed concerning the rights of single persons,

Federal Convention at 298 (cited in note 17). His continued attachment to the idea of a revisionary power for the judiciary is also attested to in his October 1788 comments on Jefferson's draft of a constitution for Virginia. 11 Papers of Madison at 292-293.

47 8 Papers of Madison at 352-353 (cited in note 18); 9 Papers of Madison at 370, 385 (cited in note 13); and see his first remarks at the Convention on executive power, 10 Papers of Madison at 22-23 (cited in note 4).

48 8 Papers of Madison at 351.
but concerning the rights of large bodies of citizens"? The thought recurred in essay 48, where Madison justified his emphasis on legislative usurpations by noting that the legislature can "mask under complicated and indirect measures, the encroachments which it makes, on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere." Presumably, the very act of lawmaking allows the legislature to determine many of the rules by which the weaker branches will enforce its will. And in the brilliant meditation of Federalist 37, where Madison sought to explain why reasoning about politics was more difficult than reasoning about the natural world, he generalized the point in this way:

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzles the greatest adepts in political science.

Lest one think that this sceptical view of either the theoretical or practical basis for separating powers was dictated by an expedient need to justify the Constitution's violation of a "sacred maxim," it is notable that Madison made the same point in his private writings. "Even the boundaries between the Executive, Legislative & Judiciary Powers," he wrote Jefferson some months earlier, "though in general so strongly marked in themselves, consist in many instances of mere shades of difference."

What thus seems most significant about Madison's approach to issues of separation of powers was his refusal to offer dogmatic solutions for a complex reality. His pragmatic efforts to enhance the independence of the weaker branches must be set against his reasons for fearing that all such attempts must ever remain problematic: the flexible power of the dominant branch of government, which could always deploy "an infinitude of legislative expedients"

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49 10 Papers of Madison at 265-266. The other aspects of the argument of Federalist 10 have commanded so much attention that this insight has often been neglected; but see Epstein, Political Theory of The Federalist at 82-86 (cited in note 8).

50 Federalist 48, in 10 Papers of Madison at 457.

51 Federalist 37, in 10 Papers of Madison at 362.

52 James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 Papers of Madison at 211.
to pursue its ends; the force of popular will within a republican polity; and the logical difficulties of defining and distinguishing the very powers the doctrine itself sought to protect.\textsuperscript{53}

4. Federalism and the Problem of Rights. Of all the issues that engaged Madison in the great moment of the Founding, the one he regarded as "the most nice and difficult" was certainly the problem of establishing "the due partition of power, between the General & local Governments."\textsuperscript{54} Conceding from the outset that his goal was to find some "middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful," Madison and his colleagues faced the unenviable task of solving the same problem on which the British empire had foundered a decade earlier.\textsuperscript{55} But for reasons both theoretical and practical, he doubted whether any line between state and national jurisdictions could ever be accurately drawn. The same strictures that weakened any rigid classification of the separated powers applied with even greater force to the task of delineating the separate spheres of state and national law. Drawing upon his ever unflattering portrait of state legislators, Madison assumed that state officials "will be continually sensible of the abridgment of their power [by the Constitution], and be stimulated by ambition to resume the surrendered portion of it." In this effort they would be aided, in part, by the political support they would draw from their immediate constituents, but also by the "impossibility of dividing powers of legislation, in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial."\textsuperscript{56}

Just as Madison assumed that the parochialism of state lawmakers would not magically disappear with the adoption of the Constitution, so he also believed that individual and minority rights within the states would remain vulnerable to repeated violations. Indeed, the arithmetical logic of his analysis of the sources and mechanics of faction could support no other conclusion. Factious majorities would continue to form within the smaller compass of the states, and they could be counted upon not only to resist national laws and policies whenever interest dictated, but also to enact those unjust laws that Madison found so offensive. The mere

\textsuperscript{53} 10 Papers of Madison at 212.
\textsuperscript{54} 10 Papers of Madison at 209.
\textsuperscript{55} 9 Papers of Madison at 383 (cited in note 13).
\textsuperscript{56} 10 Papers of Madison at 211.
enlargement of national authority would not cure the vices of the American political system unless the union could somehow be empowered to act to protect private rights against state legislation. Accordingly, his preferred solution to the dual problems of federalism and the protection of rights was to give the national government “a negative in all cases whatsoever on the legislative acts of the states, as heretofore exercised by the Kingly prerogative.” Such a power would be vested in Congress (or possibly in the Senate alone) and would ideally be exercised with the advice of the proposed Council of Revision. Armed with this veto, the union could protect itself against the interfering laws that the states could be expected to enact, however messy the actual division of legislative power between the two spheres of government might remain. But more important, the negative would further enable the national government to act as a “dispassionate and disinterested umpire in disputes” arising within each of the states, and thus to curb “the aggressions of interested majorities on the rights of minorities and of individuals.”

This pet proposal was, of course, far too radical to secure the acceptance of the delegates at Philadelphia—much less the approval of the state ratification conventions. Although James Wilson and Charles Pinckney supported it vigorously, its defects were hard to ignore. How, for example, could Congress possibly survey the entire output of state legislation and still attend to its own business? Conversely, once Madison and Wilson failed to persuade the Convention of the dangers of allowing the state legislatures to elect the Senate, even they found it difficult to imagine how Congress would ever muster the political will to overturn state legislation.

The significance of this proposal rests, however, on its logic rather than its obvious impracticality. Madison left Philadelphia convinced that the Constitution “will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts against the state governments.” The principal ba-

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67 9 Papers of Madison at 383-384. A comparison of this passage from the letter to Washington of April 16, 1787 with the somewhat murky language in the penultimate paragraph of the concurrently written memorandum on “Vices of the Political System” strongly suggests that Madison’s image of the national government as umpire was designed to describe its role in mediating disputes within individual states, and not to characterize national legislation.

68 See the debates of June 8 and July 17, 1 Records of the Federal Convention at 164-168; 2 Records of the Federal Convention at 25-36 (cited in note 17).

69 James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 Papers of Madison at 163-
sis for this pessimistic assessment was the rejection of the national negative on state laws, whose justification within the context of his general theory of faction Madison made the central subject of a lengthy letter he wrote to Jefferson five weeks after the Convention adjourned. The logic of this remarkable letter belies the optimism of Federalist 10, which was published a month later. Here, as in his ensuing exchanges with Jefferson on the question of a bill of rights, Madison revealed, by restating the dual purposes the absolute veto was meant to serve, how little the debates at Philadelphia had shaken his analysis of the vices of American republicanism. Madison recognized that these tasks had devolved instead on the judiciary, but he doubted whether judicial remedies would prove effective, in part because the political weakness of the judiciary would likely prove unavailing against a defiant state, and in part because the limited protection that the Constitution extended to particular rights fell “short of the mark. Injustice may be effected by such an infinitude of legislative expedients, that where the disposition exists it can only be controuled by some provision which reaches all cases whatsoever.”

Clearly, Madison erred in underestimating the authority of the judiciary and the import of the supremacy clause. In a brief but well known passage in Federalist 39, he did allude to the Supreme Court as “the tribunal which is ultimately to decide controversies relating to the boundary between the two jurisdictions” of national and state government. But in his letter to Jefferson, he reaffirmed his doubts whether a politically weak judiciary, which could only respond to state actions that had already taken place, would serve as an effective line of defense against a recalcitrant state without requiring the “recurrence to force” that the framers hoped to avoid. Whatever its drawbacks, Madison still regarded the national veto as the best assurance against the great “evil of imperia in imperio.” With it, the national government would possess a decisive means of asserting its supremacy, no matter how ragged or imprecise the boundaries between national and state authority would necessarily remain. Without it, Madison foresaw continued dangers of conflict between the union and the states, among states, and within states. Moreover, the limitation of national legislative authority to the powers enumerated in article I, § 8 would leave the states free to act precisely in those areas where they had already

164 (cited in note 4).
60 10 Papers of Madison at 209-214.
61 Federalist 39, in 10 Papers of Madison at 381.
evinced their propensity for injustice. As Madison further observed in *Federalist* 45: "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."62

Thus when Madison set out to describe the compound republic of the United States in *The Federalist*, his efforts led to conclusions that were typically nuanced but also uncharacteristically ironic. Take, for example, *Federalist* 39's familiar description of a regime combining both "federal" and "national" features. Consistent with Madison's sensitivity to the epistemological difficulty of fitting political phenomena into neat categories, *Federalist* 39 emphasized the novel and hybrid features of the proposed system, substituting a detailed balancing of its national and federal aspects for the axiomatic view that detected no middle ground between state sovereignty or national consolidation. But at the same time, Madison now converted arguments he had skewered at Philadelphia into reassurances proffered to the opponents of the Constitution. The image of a union "partly national, partly federal" had originally been used by Oliver Ellsworth to defend the claim for an equal state vote in the Senate.63 In his final remarks before the so-called Great Compromise, Madison had dismissed that formulation out of hand on the simple grounds that the new government would always "operate on the people individually" and never on "the States as Political bodies."64 But in *Federalist* 39, he revived Ellsworth's image to epitomize the mixed features of the new system.

Even more revealing, however, was the way in which he sought to allay Antifederalist objections that the Constitution would reduce the states to impotence. At Philadelphia, Madison and other nationally minded delegates had decried the centrifugal tendencies inherent in treating the states as quasi-sovereign entities. In weighing the respective dangers that the union and the states posed to each other, they had consistently argued, as Madison noted on June 21, that "the examples of other confederacies" and "our own experience" demonstrated "the greater tendency in such systems to anarchy than to tyranny; to a disobedience of the members than to usurpations of the federal head."65 Now all the considerations that had been adduced as threatening the possibility of effective national government could at least be turned to the purpose of ex-

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62 *Federalist* 45, in 10 Papers of Madison at 431.
63 1 Records of the Federal Convention at 468-469 (cited in note 17).
64 10 Papers of Madison at 101.
65 10 Papers of Madison at 67-68.
plaining why fears of national tyranny were unfounded. As Madison observed in *Federalist 45*,

The state governments will have the advantage of the federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.66

When viewed within the comprehensive framework of Madison's thought, all of these factors—including, most strikingly, the prediction that "the members of the federal legislature will be likely to attach themselves too much to local objects"67—went to prove not only that the states had little to fear, but also that the new national government would likely turn out to be ineffective if not incompetent. Madison's argument was entirely sincere but less than candid. The solutions he described would prove effective enough, but the problems they were proposed to meet were unlikely to occur.

So, at least, Madison still thought in 1788, but within a decade, he understood that these points had more merit than he had realized at the time. For there is a second irony in Madison's use of arguments whose validity he had to accept because he had struggled to overcome the consequences to which he thought they ineluctably led. To the opposition leader of the 1790s, the existence of independent state jurisdictions and an electoral system responsive to public opinion and constituent interests offered crucial political advantages. Once his quarrel with Federalist financial and foreign policies sapped the hopes and expectations for national governance that had moved the Constitutional Father of the 1780s—once events confirmed the prediction of *Federalist 10* that indeed "enlightened statesmen will not always be at the helm"—the reassurances of *The Federalist* provided plausible justification for building a majority coalition based on interest and opinion to restore the national government to its proper course. Not all majorities, it turned out, were factious.68 Public opinion, which Madison had

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66 *Federalist 45*, 10 Papers of Madison at 430.
67 *Federalist 46*, in 10 Papers of Madison at 440-441.
68 The literature on the development both of political parties and of the ideological adjustments necessary to legitimate their existence is extensive. Perhaps the best introduction to the subject remains Richard Hofstadter, *The Idea of a Party System* (1970).
Once dismissed as an ineffective check against the abuse of public power, now appeared as a vital support of the complex “partitions and internal checks of power” that were the distinctive features of the American republic.⁶⁹

In a similar vein, the developments of the 1790s encouraged Madison to reassess his earlier views on the utility of bills of rights, which in the 1780s he had also dismissed as so many “parchment barriers” against the real threat of majority tyranny. Political calculations, not a fundamental change of opinion, were what led him by late 1788 to accede to the idea that a bill of rights could be safely added to the Constitution so long as no door was thereby opened for more substantive or structural amendments. As the qualifications in both his letters to Jefferson and his June 1789 speech proposing the amendments make clear, Madison still believed that the political checks predicted by his theory of the extended republic afforded the strongest protections for individual and minority rights. The greater danger by far would arise from majorities acting through government and swayed by desires and opinions that the mere existence of a bill of rights could never counteract. Bills of rights were useful, he grudgingly conceded for two purposes only: first, if they gradually assumed “the character of fundamental maxims” that could serve an educative function for the general population and thus “counteract the impulses of interest and passion;” and second, if they provided a “good ground for an appeal to the sense of the community” against a government seeking to establish its own tyrannical rule over the rights of the citizenry. But when Madison wrote this in October 1788, he clearly thought that by far the greater and more immediate dangers to liberty would arise not from self-aggrandizing rulers but from among the mass of the population.⁷⁰ It would take the political ex-


⁷⁰ The key document (from which the quotations in this paragraph are taken) is Madison’s letter to Jefferson of October 17, 1788; 11 Papers of Madison at 297-300 (cited in note 18). It reveals how little of his deeper analysis of the problem of rights had been shaken by a year’s debate over the ratification of the Constitution, just as the letter he had written Jefferson almost exactly a year earlier defending the unlimited national veto indicates how little Madison had been persuaded by contrary arguments at the Convention. Nevertheless, in the difficult campaign election he waged against his friend James Monroe for election to the first House of Representatives, Madison let it be known that he would support amendments. See his letter to George Eve (Jan. 2, 1789), in 11 Papers of Madison at 404-405. Were it not for the depth of Madison’s commitment to this promise, reinforced by his analysis of the political advantages of amendments, it is quite possible that the First Congress would have ignored the entire subject. Madison’s speech in the House of Repre-
perience of the 1790s, and especially the Adams administration’s use of the Sedition Act to punish the opposition Republican press, to convince Madison that these two potential functions of a bill of rights were not matters of idle speculation.

There are, of course, many good reasons why these and other nuances of Madison’s thought can be safely ignored by everyone but historians. The very fact that, at the Convention, Madison lost so many of the points he regarded as most important suggests, after all, that his role in the making of the Constitution may be overrated. Or again, under his own canon of constitutional interpretation, only those of his statements that can be thought to have influenced the public campaign for ratification or to have reflected the public mind deserve privileged status. The great texts of The Federalist may plausibly be said to enjoy that character, but reflections recorded only in personal papers, or even speeches given at Philadelphia, do not.

Yet in at least one crucial respect, the problematic aspects of Madison’s political thinking remain relevant to the constitutional discourse of a political culture—our own—which is still enjoined to defer to the original meanings, intentions, or understandings of the Constitution. The logic of originalism, when probed to its ultimate legalistic foundation, rests on the conviction that determinate meanings were attached to the provisions of the Constitution at the moment of its adoption, and that these meanings express the voice of popular sovereignty to a degree that later judicial exegeses cannot pretend to attain. It is not an idle question whether such assumptions can ever amount to anything more than the useful fictions that the conventions of constitutional adjudication seem to require. In truth, we have no verifiable way of knowing how the Constitution was understood by the nation at the time of its ratification; and the relevance to particular acts of interpretation of a ratification process that allowed the state conventions only to accept or reject the document in toto remains equally elusive. The simple existence of significant constitutional controversies that are coeval with the organization of the new government in 1789 demonstrates how artificial the search for some pristine moment of original understanding must become. Rather than search for one set of fixed meanings, it may make more sense to attempt simply to recover the terms of debate, and then, perhaps, it may prove possible to identify original meanings of greater and lesser degrees

of probability.\footnote{As Gordon S. Wood has recently observed: "It may be a necessary fiction for lawyers and jurists to believe in a ‘correct’ or ‘true’ interpretation of the Constitution in order to carry on their business," but historians, by contrast, have the obligation to explain why "contrasting meanings" have been attached to the Constitution throughout its history. Gordon S. Wood, Ideology and the Origins of Liberal America, 44 Wm. & Mary Q. 628, 632-633 (1987). For my own reflections on the role of history in the debate over original intent, see Rakove, Comment, 47 Md.L.Rev. 226 (1988).}

Over time, it is true, Madison himself came to argue that the popular understanding of the Constitution prevailing at the time of ratification should limit the reach of interpretation, and that major changes should be effected by Article V amendments, not judicial fiat.\footnote{For various expressions of this idea, see Madison's speech in the House of Representatives (April 6, 1796), and at a much later date, his letters to Thomas Ritchie (Sept. 15, 1821), J. G. Jackson (Dec. 27, 1821), and Nicholas P. Trist (Dec. 1831); 3 Records of the Federal Convention at 374, 447-450, 516-518 (cited in note 17). For a good short discussion, see Ralph L. Ketcham, James Madison and Judicial Review, 8 Syracuse L.R. 158 (1956-57).} Ironically enough, however, this idea was apparently not part of his own original understanding of the Constitution, but rather a response to political developments of the 1790s. In 1787 and 1788, Madison's disparaging views of the sources and character of public opinion and debate could hardly have led him to conclude that the ratification campaign would erect clear standards for the later interpretation of the Constitution.\footnote{If the ratifiers of the Constitution did not understand that their understanding of what they were adopting would guide later interpretations, does Madison's theory of interpretation fail on its own grounds?} But by 1792, as the leader of a nascent opposition party, Madison was disposed to reassess the general place of public opinion; and explicitly political calculations soon led him to appreciate the value of converting the ratification debates into a standard of constitutionality. Against the latitudinarian definitions of "necessary and proper" or "executive power" that Hamilton used to legitimate his financial and foreign policies, this position had the obvious advantage of implying that the Constitution would never have been ratified had the American people understood that its meaning could be made so malleable. Other developments similarly led Madison to modify his original skepticism about the political weakness of the judiciary and to develop a more profound appreciation of and attachment to the view of the Supreme Court that he had sketched, however tersely, in \textit{Federalist} 39.\footnote{See, for example, his explicit reaffirmation of this principle in his letter to Jefferson (June 27, 1823), in Gaillard Hunt, ed., \textit{9 Writings of James Madison} 140-143 (1910).} In this there was a striking consistency to his thought. In 1787 he had believed that future population movements would bring Northern and Southern states into rough
parity; by the time of his retirement from the presidency thirty years later, he understood that this would never be the case. Accordingly, as he reminded Spencer Roane, the leading Virginia apostle of states'-rights theory, it was in the interest of the Southern states not to challenge the jurisdiction of the Court precisely because the greater danger the South faced would come from the political advantages the North would enjoy in Congress as its population growth outstripped that of the South. He criticized Marshall's opinion in *McCulloch* not because it favored national powers over states' rights, but rather because he feared that its reliance on the necessary and proper clause would henceforth make it more difficult for the Court to limit the legislative reach of Congress. The great danger remained, in other words, that of the factious majority.

It is a mark of the acuity and breadth of Madison's original analysis of the vices of American republicanism that so much of what he wrote and said at the great moment of the founding anticipated the developments to which he would respond, both politically and intellectually, over the next half century. Sometimes these responses took the form of modest shifts of emphasis; sometimes they recognized that arguments once made for rhetorical purposes had been more astute or prescient than he had realized at the time; and occasionally, as in his acceptance of the idea of political party, responses to events led Madison to accept radically new positions. Like any intellectual, he valued his consistency, and he typically sought to emphasize the continuities in his thought. But to the historian, it is the evidence of his continually thinking, more than those continuities, that makes the appeal to a fixed original meaning seem so artificial and false to the historical record. This appeal asks us to freeze a special moment of history—let us call it, with apologies to J. G. A. Pocock, the Madisonian moment—to take, as it were, a snapshot of constitutional history and endow it with a significance that was not recognized at the time. The Madis-

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75 On this point, see Drew McCoy, James Madison and the Visions of American Nationality in the Confederation Period: A Regional Perspective, in Beeman et al., eds., Beyond Confederation at 226-258 (cited in note 11).

76 "W]hatever may be the latitude of Jurisdiction assumed by the Judicial Power of the U.S.," Madison reminded Roane, "it is less formidable to the reserved sovereignty of the States than the latitude of power which it has assigned to the National Legislature; & that encroachments of the latter are more to be apprehended from impulses given to it by a majority of the States seduced by expected advantages, than from the love of Power in the Body itself." Letter (May 6, 1821), in 9 Writings of Madison at 57-59 (cited in note 74).

77 James Madison to Spencer Roane (Sept. 2, 1819), in Gaillard Hunt, ed., 8 Writings of Madison 448-453 (1908).
The Madisonian moment was special not because those participating in "The Founding" thought they had possessed perfect knowledge of what the new Constitution meant, but rather because they understood the remarkable opportunity they were enjoying. They did not think that they would understand the Constitution less well after it went into operation. Madison himself stated the crucial point in *Federalist* 37 when he observed that "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." There is no reason to suppose that the Constitution could be exempted from this general rule.\(^7\)

\(^7\) 10 Papers of Madison at 362 (cited in note 4).