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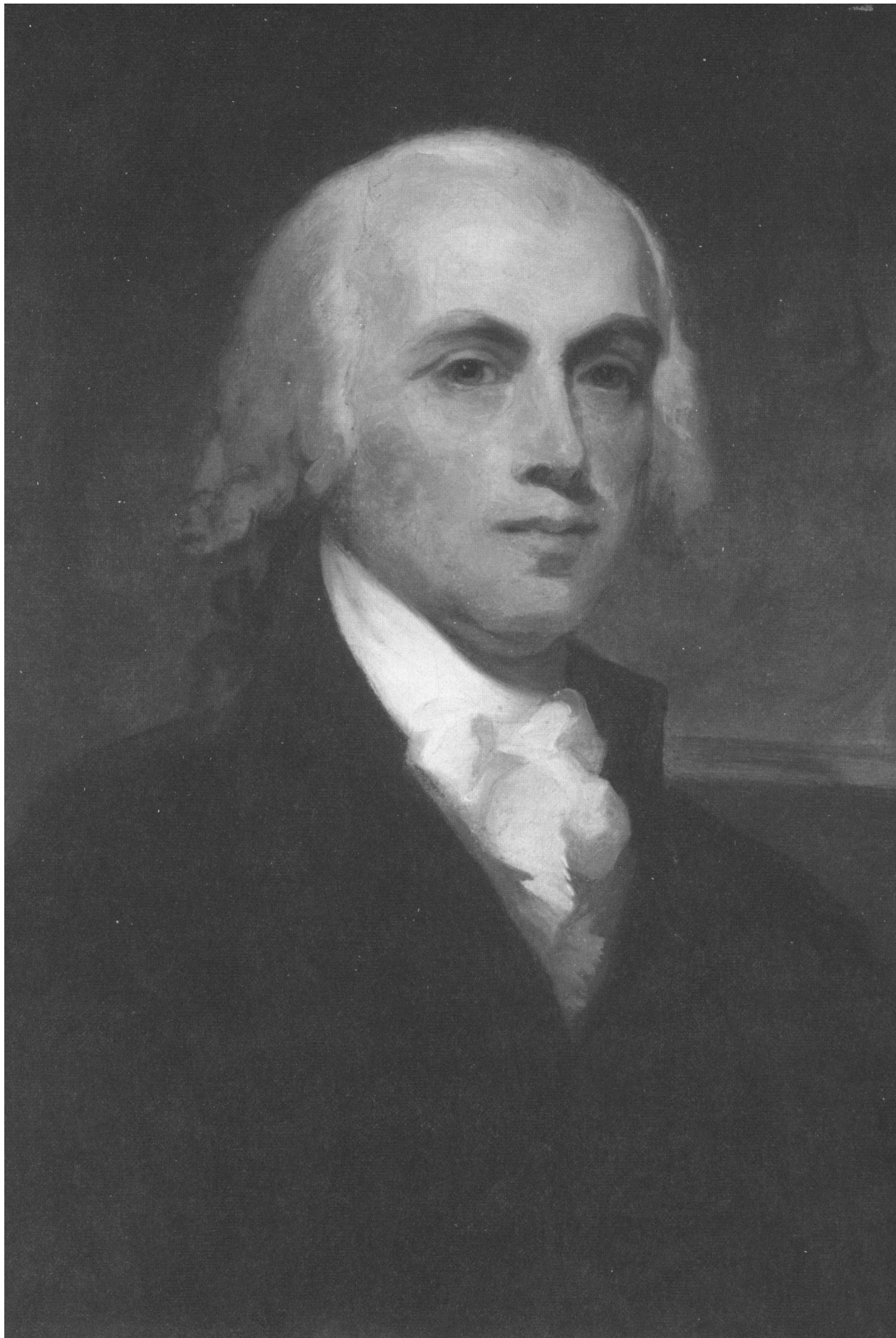
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JEFF BROADWATER

James Madison and the Constitution

Reassessing the “Madison Problem”

Students of the career of James Madison have long faced a “Madison problem”: how to explain his apparent inconsistencies. An advocate of national power in the 1780s, Madison championed states’ rights and a strict construction of the Constitution in the 1790s. Later in his career he seemed to reverse course again, signing legislation as president in 1816 creating a federally chartered central bank. It might easily be argued that his twists and turns doom any effort to discern, in the speeches and writings of “the Father of the Constitution,” a meaningful original intent behind the American founding. In retirement, Madison admitted he had changed his position on the constitutionality of the Bank of the United States, and he confessed that he might have been too eager in the mid-1780s to give the new national government “as much energy as would insure the requisite stability and efficacy.” At the same time, Madison believed he had been fundamentally consistent. He wrote Nicholas Trist in December 1831 that he “had indulged the belief that there were few, if any of my contemporaries thro’ the long period & varied services of my political life, to whom a mutability of opinion on great Constitutional questions was less applicable.”¹

For years, historians tended to disagree with Madison, often attributing his opposition to Alexander Hamilton’s fiscal policies to political pressure from his conservative Virginia constituents. More sympathetic scholars acknowledged Madison’s shifting positions but found principled reasons for them. Irving Brant argued that he became an advocate of more limited government after becoming convinced the ruling Federalist Party was abusing its power. Gordon Wood has claimed that, although Madison initially hoped

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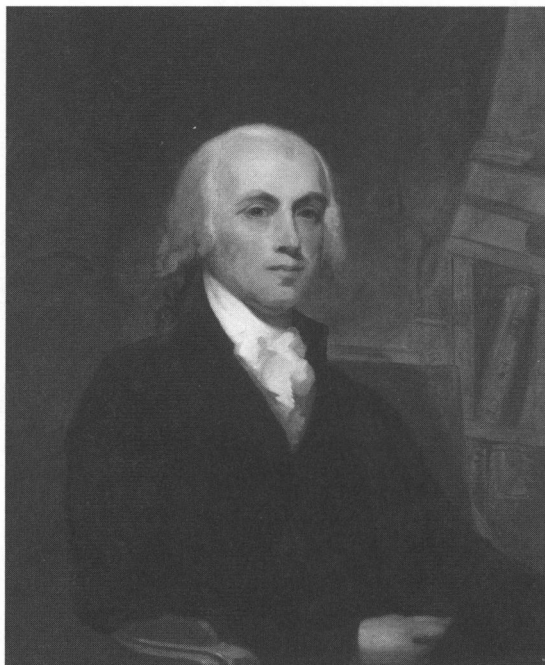
the national government could restrain the excesses of populist state legislatures, he never intended to create a powerful nation-state on the European model. Some historians have minimized his nationalism in the 1780s, thus making his later embrace of states' rights something less than a dramatic conversion.²

In recent years, Madison scholars have tended to defend the intellectual coherence of his political thought with increasing vigor. Stuart Leibiger has aptly summarized the trend: "Once Madison's core beliefs are isolated and understood, his course of action appears remarkably steady. These fundamental beliefs include preserving majority rule, minority rights, and the balance of power between the branches and levels of government."³ Most historians today place Madison on an ideological spectrum between Hamilton, the prototypical nationalist, and Thomas Jefferson, supposedly the quintessential republican.⁴

Nevertheless, historians continue to argue about important details. Was Madison's primary commitment to civil liberties, to majority rule, to the rule of enlightened public opinion, or to the separation of powers itself? These are just a few possibilities suggested by recent works.⁵ While such Madison scholars as Ralph Ketcham, Lance Banning, and Drew McCoy have focused on his republicanism, with its preoccupation with the link between civic virtue and the public interest, Richard Matthews and Gary Rosen have written compelling books stressing his natural-rights liberalism and his commitment to protecting individual rights at the expense of popular political participation.⁶ To Martin Meyers, Madison was a "working statesman" who, as power shifted between national and local authorities, adjusted his views in an effort to maintain a proper equilibrium between the two spheres of governments.⁷

Madison's lengthy career, the times in which he lived, and the subtlety of his mind make generalizations treacherous. Madison said and wrote and did so much over so long a period of time—his adult life spanned the beginning of the American Revolution to the nullification crisis during the presidency of Andrew Jackson—that an enterprising historian should be able to find at least one exception to any conclusion about his political philosophy. To complicate matters, Madison, always guarded in his public statements, wrote in nuances and usually in response to pressing and often unprecedented polit-

Over the course of a long political career, James Madison (1751–1836) frequently appeared to change his mind about the proper scope of federal authority, creating for historians “the Madison problem”: what, if anything, was consistent in his political thought? (*Virginia Historical Society, 1856.2*)



ical problems. His position papers did not always reveal a broader philosophy. As a contemporary, the French diplomat Louis Otto put it, “[h]e is a man one must study for a long time in order to make a fair appraisal of him.”⁸

One solution to the “Madison problem” is to approach it as a problem in constitutional law, or, in other words, law that establishes a framework of government, protects basic rights, and cannot be altered by a simple legislative majority. Constitution-making did not end with the signing of the Constitution in September 1787, and American constitutional law encompassed more than the original text of the Constitution. The debates over the ratification of the Constitution added an interpretive gloss to the document. Later the first Congress to meet under the Constitution adopted the set of amendments that became known as the Bill of Rights. From 1787 to 1789, Americans wrote and rewrote their constitutional law, often in ways Madison disliked but felt obliged to accept. He wrote late in life that the stability and legitimacy of the Constitution depended on interpreting it in “the

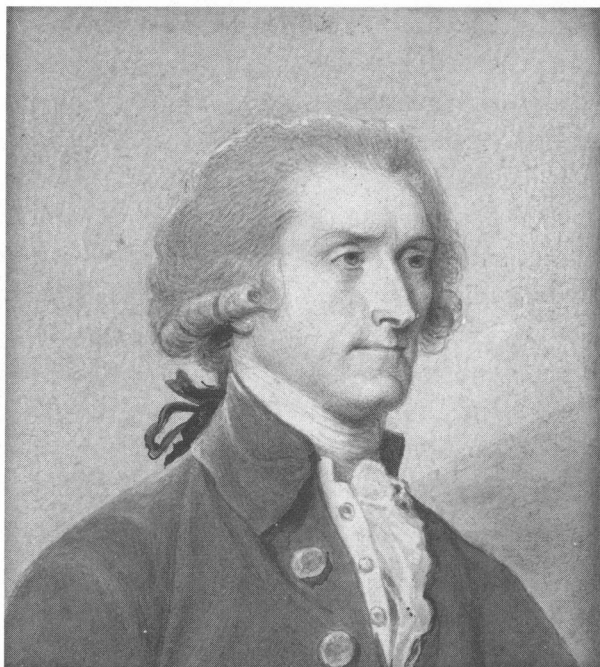
sense in which the Constitution was accepted and ratified by the nation.”⁹ Madison’s thinking about the Constitution changed as the new republic’s constitutional law took shape, but for the rest of his career, he would try to adhere to the understanding of the Constitution forged during the ratification debate.

For Madison, three overriding ends, which predated the debate over the Constitution, allowed him to be flexible on means and other, lesser points. First, measures would have to be adopted to protect individual rights. Discrimination against religious dissenters in Virginia in the 1770s convinced him that the majority’s will could not always be trusted. Second, despite his attachment to individual liberties, Madison assumed that the legitimacy of any government ultimately depended on the consent of the governed. And third, he believed the Union must be preserved. Disunion foreshadowed innumerable difficulties, including a commercial war between North and South.¹⁰

MADISON SERVED IN CONGRESS from March 1780 until November 1783, and he was elected to the Virginia House of Delegates the following spring. The impotence of Congress under the Articles of Confederation and the irresponsibility of the Virginia assembly convinced him of the need for reform. Virginia lawmakers found various reasons to close state courts, in violation of the spirit of the Treaty of Paris ending the American Revolution, to British creditors. They also considered different schemes to avoid taxes, which impaired the state’s ability to satisfy congressional requisitions. “Congress has kept the vessel from sinking,” Madison wrote Thomas Jefferson in October 1785, “but it has been by standing constantly at the pump, not by stopping the leaks which have endangered her.”¹¹

Madison had a few successes in the House of Delegates in the 1780s, most notably in winning passage of Jefferson’s famous Bill for Religious Freedom, but the end of the fall 1785 session left him frustrated. Widespread agreement existed in favor of giving Congress the power to regulate commerce, but the states could not agree on the details. Madison believed in free trade, but he also believed Congress needed the power to regulate trade so that the United States could retaliate against nations that discriminated against American goods and shippers. Discrimination, he rea-

Thomas Jefferson (1743–1826) was Madison's closest political ally, but even he complained that the Constitution did too little to protect civil liberties. Writing from a diplomatic post in Paris, Jefferson initially recommended a few states withhold ratification until a bill of rights was added. (*Virginia Historical Society*, 1978.22)



soned, created an unfavorable balance of trade that drained specie out of the country and generated political pressure for paper money and laws to stay the collection of debts and to postpone the payment of taxes. Those remedies only made matters worse. Paper money fueled the fires of inflation, drove sound money out of circulation, and threatened interstate harmony; one state might well refuse to accept another's currency as legal tender. Frustrating the collection of British debts gave Great Britain an excuse to ignore its obligations under the Treaty of Paris. Money collected in taxes, Madison reasoned, would be put back into circulation by the state while in private hands it went to buy even more from foreign merchants, exacerbating the specie shortage.¹²

Corroborating his own experience, Madison's readings in ancient and European history convinced him that confederacies typically performed badly because their central governments lacked sufficient power. "Men too jealous to confide their liberty to their representatives who are their equals," he wrote, "abandoned it to a Prince who might more easily abuse it."¹³

Meanwhile, an acrimonious debate over a proposal from John Jay, Congress's secretary for foreign affairs, to allow Spain to close the Mississippi River to American traffic in exchange for commercial concessions; the failure of the Annapolis Convention to produce agreement on an amendment giving Congress the power to adopt commercial regulations; and the first stirrings of Shays's Rebellion, a tax revolt by cash-strapped Massachusetts farmers, further shook Madison's faith in the new republic.¹⁴

Fearful of the prospects for success, he had hesitated to support wholesale revisions to the Articles of Confederation, but as piecemeal reforms failed, Madison decided the time was ripe for more radical change. In November 1786, the Virginia assembly passed without dissent a resolution Madison had drafted calling for a constitutional convention. "The unanimous sanction given by the Assembly," he wrote Jefferson, "marks sufficiently the revolution of sentiment which the experience of one year has affected in this Country." Congress and the other states, except Rhode Island, passed similar measures.¹⁵

Madison was a virtually inevitable choice to serve in the Virginia delegation to the convention, which would meet in Philadelphia in May 1787. His convention preparations included the production of a memorandum he titled, "Vices of the Political System of the United States." Always methodical, Madison wanted to identify the problem before he tried to solve it, and as he worked in the spring of 1787, he concluded the greatest threat to a republican political order came from the state assemblies.¹⁶ The "Vices" memorandum leveled a twelve-count indictment against the existing political order, with most of Madison's complaints lodged against the states. They had failed to comply with congressional requisitions, they had violated the Treaty of Paris, and their legislatures had tried to do too much, replacing one ill-conceived law with another before the ink on the first had dried. Some of Madison's "vices" suggested tasks he had in mind for a new national government. The states had not been able to agree on rules for the naturalization of immigrants or the protection of literary property. They had failed to make provisions for the creation of a "national seminary," by which he meant a university, or for the creation of other national corporations.¹⁷ At the same time, Madison seems not to have envisioned the creation of a great fiscal-military state or a modern regulatory-welfare state; he hoped instead for a

central government that could collect taxes, regulate foreign and interstate trade, and preempt arbitrary state laws.

The failings of the states led Madison to conclude that Congress should be given a veto over state legislation “in all cases whatsoever.” He began to develop an argument that a national legislature, because of the beneficial effect of a multitude of factions in what came to be called “an extended republic,” would behave more responsibly than had the state assemblies. In a larger sphere, “a common interest or passion is less apt to be felt and the requisite combination less easy to be formed by a great than a small number. . . . a greater variety of interests . . . [may] check each other.” A national assembly enjoyed an additional advantage—Madison called it “an auxiliary desideratum.” National elections in a new system for a congress that enjoyed real power “will most certainly extract from the mass of society the purest and noblest characters which it contains.”¹⁸

The “Vices” essay concluded that Congress must be given a veto over state legislation “in all cases whatsoever” to prevent states from oppressing local minorities and undermining federal authority, and Congress’s one-state, one-vote rule would have to be replaced with a system of representation based on population. Otherwise the larger states would not agree to surrender power to Congress.¹⁹

In addition to a veto over state laws, Congress needed “positive & complete authority in all cases where uniform measures are necessary.” Madison assumed the new government “would operate in many essential respects without the intervention of the State legislatures.” He seemed to think that if the states could be made generally irrelevant to congressional lawmaking, state boundaries would be ignored, and a “vote in the national Councils from Delaware, would then have the same effect as one from the largest state in the Union.”²⁰

The Philadelphia convention forced Madison to confront political reality. In the days before a quorum assembled, the Virginia delegates drafted an outline of a constitution that became the basis of debate in the early days of the convention. The so-called Virginia Plan gave Madison much of what he wanted, but not everything. It provided for a congressional veto over state laws, but not, as he had earlier proposed, “in all cases whatsoever.” Now the veto was limited to “laws passed by the several states, contravening in the

opinion of the National Legislature the articles of Union.”²¹ The maturing of Madison’s constitutionalism was about to begin.

In the convention itself, Madison defended the congressional veto as “absolutely necessary.” The other delegates disagreed and replaced it with the more modest Supremacy Clause, obligating state judges to abide by federal law. The convention also chipped away at the power of the national government in other areas. Under the Virginia Plan, the new national legislature would “enjoy the Legislative Rights vested in Congress by the Confederation” and could “legislate in all cases in which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.” Madison appeared to accept the convention’s decision to enumerate those powers more specifically, but he wanted a longer list of enumerated powers, including one to charter corporations.²²

Madison suffered what historian Lance Banning called “a devastating blow” when the convention adopted the Great Compromise, basing representation in the House of Representatives on population while providing for state equality in the Senate. Madison had argued desperately that the large states would never agree to strengthen the national government in a meaningful way without proportional representation in Congress, and in his mind a fairly apportioned national assembly provided much of the philosophical justification for shifting power from the states. After the Great Compromise was adopted in July, Madison may have briefly considered leaving the convention. As he would so often do, he decided instead to accept the inevitable and make the best of it.²³

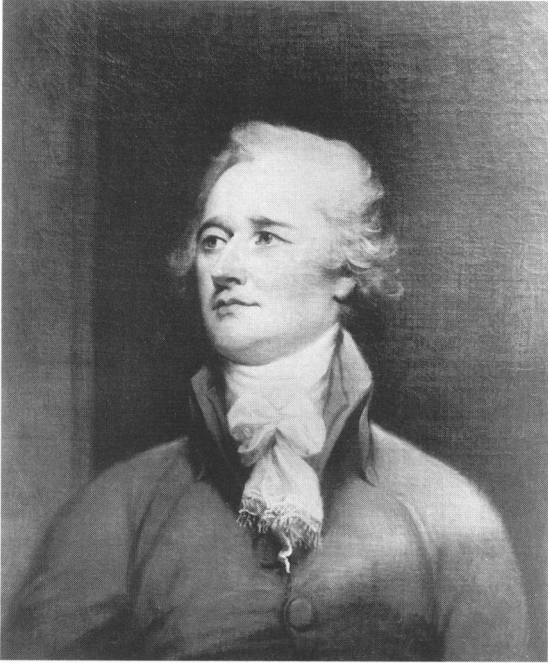
Nevertheless, as the convention drew to a close, Madison feared the new Constitution “should it be adopted will neither effectively answer its national object nor prevent the local mischiefs which every where excite disgusts ag[ain]st the state governments.” As late as 24 October 1787, Madison continued to complain about the defeat of the congressional negative; he remained unconvinced by the argument that the new federal court system authorized by the Constitution “will keep the states within their proper limits.” He had come to see the need to corral the state legislatures as the most compelling reason for constitutional reform; “the evils issuing from these sources contributed more to the uneasiness which produced the

Convention, and prepared the public mind for a general reform, than those which accrued to our national charter and interest from the inadequacy of the Confederation.” He feared that the Constitution he had helped write envisioned a national government too weak to overcome those evils.²⁴

FEW OF THE CONSTITUTION’S critics shared Madison’s reservations. Fear of overarching federal power became the leitmotif of the Constitution’s antifederalist opponents not Madison’s concern about the weakness of the central government.²⁵ Madison could not ignore the mounting opposition. Edmund Randolph wrote him in September suggesting that the Virginia assembly circulate proposed amendments among the other states. From the College of William and Mary, his cousin, the Rev. James Madison, complained that the Constitution did not adequately separate executive, legislative, and judicial powers. In New York, where he had rejoined Congress, Madison could read for himself newspaper essays by the anonymous “Brutus” who “with considerable address & plausibility, strikes at the foundation” of the new government. John Dawson reported to him from Fredericksburg, “[a]ltho there are many warm friends to the plan, be assured that the opposition will be powerful.”²⁶

Madison doubted any of the proposed remedies for the alleged defects of the Constitution, whether a second national convention or amendments to be approved by individual states, could succeed. He did not believe the antifederalists could ever agree among themselves. Only the Constitution, as it came from the Philadelphia convention, represented a likely alternative to the Articles of Confederation, and the Union, Madison feared, could not survive under the Articles. As he explained to Edmund Pendleton, “the question on which the proposed Constitution must turn, is the simple one whether the Union shall or shall not be continued. There is in my opinion no middle ground to be taken.” The specter of disunion gave Madison a powerful incentive to put his lingering reservations about the Constitution aside and to work for its ratification.²⁷

Madison remained confident in the fall of 1787 that at least nine states, the minimum required for the Constitution to take effect, would ratify it. At the same time, he received multiple reports that support for ratification in Virginia was actually declining, especially after the fall session of the assem-



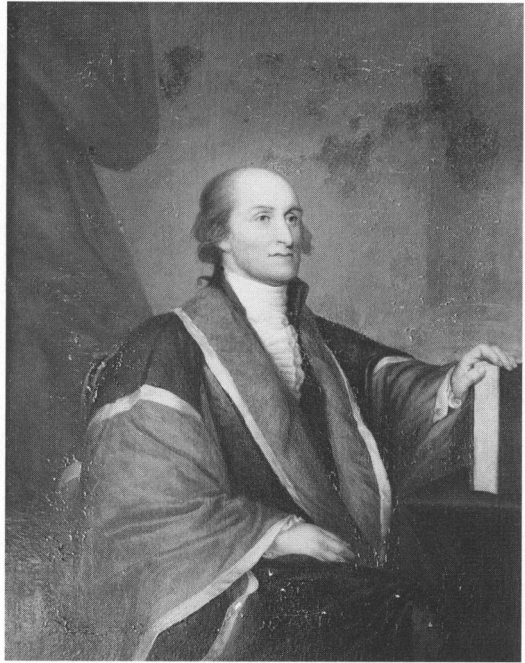
Madison and Alexander Hamilton (1755–1804) served together in the Constitutional Convention and collaborated on *The Federalist*, but after Hamilton became secretary of the treasury, Madison opposed his fiscal policies. Ironically, Madison had supported Hamilton's appointment to George Washington's Cabinet. (*Library of Congress*)

bly convened. Dawson told him that if the Constitution came to a vote in November, it would lose. The Virginia assembly had agreed to call a convention to consider ratification, but lawmakers also made provisions to pay delegates to attend a second federal convention, if antifederalists could arrange one.²⁸

Even Thomas Jefferson, Madison's closest ally, deplored the omission of a bill of rights and "greatly" disliked the lack of term limits for federal officeholders. From Mount Vernon, George Washington offered reassurance, but Madison knew that, among Virginia legislators, opposition to the Constitution was growing. Many Virginians complained about the broad appellate jurisdiction of the federal courts and, most often, that there was no bill of rights. Virtually no one complained that the new federal government would be too weak.²⁹

After Madison returned to New York to resume his congressional duties, Alexander Hamilton recruited him to help write, along with John Jay, a series of newspaper articles intended to promote ratification of the

John Jay's (1745–1829) controversial proposal, as secretary for foreign affairs under the Articles of Confederation, to trade access to the Mississippi River for commercial concessions from Spain contributed to a widespread sense of crisis in the mid-1780s. Jay would later write several essays for *The Federalist* and eventually serve as the nation's first chief justice. (*Library of Congress*)



Constitution. Between November 1787 and February 1788, Madison wrote twenty-nine *Federalist* essays. Madison's work on *The Federalist* led him to revise his thinking, to temper his enthusiasm for a more robust central government, and to reconcile himself to what he saw as the defects of the Constitution. His essays, in the words of Isaac Kramnick, reflect "an individualistic and competitive America, preoccupied with private rights and personal autonomy." To Max Edling, "Madison's main question, how to limit government, is the central concern of the Antifederalists rather than the Federalists."³⁰ Michael Zuckert has observed that Madison wrote none of the *Federalist* essays justifying "the need for an energetic government."³¹ As Madison wrote most famously in *Federalist No. 51* on the need for the separation of powers: "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself."³²

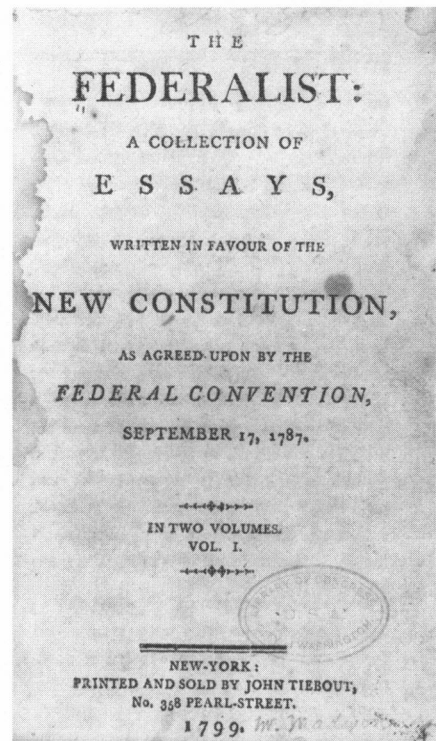
Delaware and New Jersey ratified the Constitution unanimously in December, and Pennsylvania approved it by a 2-to-1 margin. Georgia and Connecticut followed suit in January. But Madison knew the Constitution faced stiff opposition in the critical states of New York, Massachusetts, and Virginia and uncertain prospects elsewhere. What Madison would call “men of intelligence, patriotism, property, and independent circumstances,” at least in New England and the mid-Atlantic states, generally favored ratification, but that did not ensure success. On the issue of the Constitution, ordinary voters seemed to be thinking more independently than ever, and as Rufus King warned Madison from Massachusetts, elite support for the Constitution had created among the laboring class “an Opinion, that is immovable, that some injury is plotted against them, that the System is the production of the Rich.”³³

So, Madison’s first entry in the *Federalist* series, the celebrated No. 10, laid out his theory of the “extended republic”: power could safely be transferred to a new national government because it would encompass a multitude of factions that would check each other. He emphasized the limits on federal authority and not the need to expand it. Another early essay, No. 14, sought to reassure voters that local affairs would be left to the “subordinate governments,” and in later writings, Madison found himself defending the right of the national government to exercise the most basic of functions of sovereignty—the right to tax or to maintain a standing army.³⁴

The appearance of the first *Federalist* papers, and less memorable writings by the Constitution’s other advocates, by no means appeased its critics. Massachusetts voted to ratify, but only after recommending amendments to the new Congress. In New Hampshire, the state convention delayed a decision, adjourning without voting on ratification. Madison thought prospects for ratification in Virginia were improving, but his father warned him that Baptists, jealous for their religious liberty, “are now generally opposed to it.” Benjamin Hawkins reported from North Carolina that “[p]eople in debt, and of dishonesty and cunning in their transactions are against it.”³⁵

In *Federalist No. 39*, published on 16 January 1788, Madison, who had originally hoped largely to circumvent the state governments in the new political order, now found himself arguing for their relevance. The Constitution was to be ratified “by the people, not as individuals composing

Shown here is an early bound edition of *The Federalist*, which Madison coauthored with Alexander Hamilton and John Jay. In an attempt to reassure wary voters, many of Madison's twenty-nine essays emphasized the various checks the Constitution would impose on the new federal government. (*Library of Congress*)



one entire nation; but as composing the distinct and independent states to which they respectively belong.” The jurisdiction of the national government, moreover, “extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.” His next paper, appearing in print two days later, minimized the difference between the Articles of Confederation and the Constitution; both documents assumed “the states should be regarded as distinct and independent sovereigns.”³⁶

Madison did not wholly abandon his earlier criticisms of feckless state governments, and he repeated the argument from his “Vices” memorandum that confederacies had historically failed because their central governments were too weak, but his *Federalist* essays found a new use for the states: as a counterweight to national authority. Explaining “the necessary and proper” clause from Section 8 of Article One of the Constitution, potentially a grant

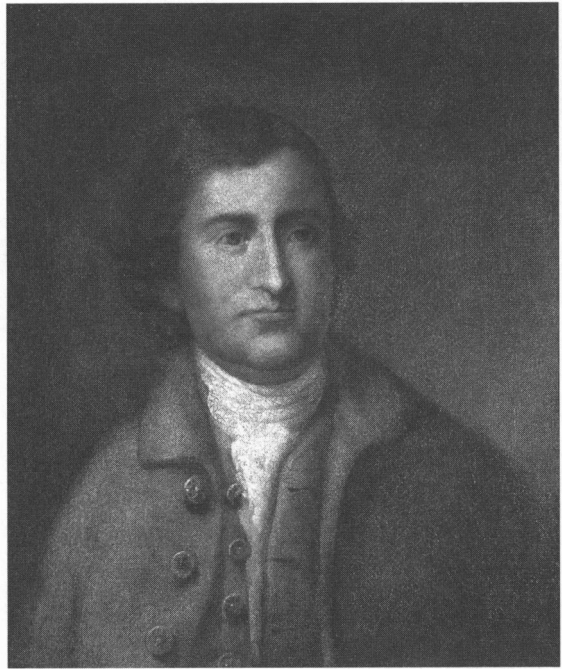
of broad discretion to Congress, put Madison on the defensive. The phrase stated only what might reasonably be inferred, and he argued that a congressional “usurpation” of power could succeed only if the courts, the president, and the voters accepted it. If all else failed, however, state legislatures “will be ever ready . . . to sound the alarm.”³⁷

In his *Federalist* essays, the states became potential bulwarks of popular liberty, and the limits of federal prerogatives became Madison’s answer to antifederalist complaints about the Constitution’s departures from republican orthodoxy. Two-year terms for members of the House drew criticism. Orthodoxy held that “where annual elections end, tyranny begins.” Congress, Madison responded, was different. Unlike Parliament, it would be bound by a written constitution, and it could always be checked by the state legislatures, which would command greater public esteem. State governments would employ more officers than would the national government, enjoy broader powers, and have more peacetime responsibilities. Antifederalists claimed Congress was too small to be truly representative. The Senate and the federal House of Representatives could be relatively small, Madison replied, because Congress would have fewer powers than state assemblies, would not regulate local matters, and would operate under more restraints.³⁸

Urged by supporters in Virginia to come home and campaign for a seat in the state convention called to consider ratification, Madison wrapped up his work in New York that March and reluctantly headed south, leaving behind, in his *Federalist* essays, what would become a landmark in American political thought.³⁹

Did he believe what he had written? He was not by habit disingenuous, and he was too sincere a republican to believe a popular government built on false premises could long endure. He had not wholly reversed course; he strove always to balance majority rule with minority and individual rights. Yet the means to those ends had changed over the winter of 1787–88. Whatever his innermost thoughts, he had created a written record that could be read to justify a more narrow view of federal power than the one he had envisioned in the Virginia Plan and in his earlier writings. The pride he took in his work suggests sincerity. “*The Federalist*,” he wrote in 1825, “may fairly enough be regarded as the most authentic exposition of the text of the

Edmund Randolph's (1753–1813) ambivalence about the Constitution mirrored the fluid state of public opinion in Virginia. He attended the Philadelphia convention faithfully, but refused to sign the Constitution. He later supported ratification, but he remained open to the idea of a second convention. (*Virginia Historical Society, 1858.5*)



Federal Constitution, as understood by the Body which prepared and the authority which accepted it.”⁴⁰

MADISON’S BRIEF CAMPAIGN SUCCEEDED. Orange County voted overwhelmingly to send him to Richmond.⁴¹ Statewide, the vote was closer. Madison privately reconciled himself almost immediately to a Massachusetts-style compromise in which the convention would approve the Constitution and then recommend amendments to be considered under Article V of the new charter.⁴² A handful of moderate or undecided delegates, mainly from four counties between the Alleghenies and Kentucky, would decide the fate of the Constitution.⁴³

More than numbers worried Madison. He had won over Edmund Randolph, who had refused to sign the Constitution in Philadelphia, before the state convention met, but the governor was not a reliable ally. After a majority of states voted to ratify, the cautious Randolph saw too much risk in remaining outside the Union, but he continued to toy with the idea of a

second constitutional convention. Madison also worried that if the ratification convention went long, antifederalist sentiment in Richmond would be reinforced by lawmakers arriving for the General Assembly's fall session. Meanwhile, Madison got reports from federalist allies elsewhere that the Constitution's success in New Hampshire, New York, and North Carolina might depend on its ratification in Virginia.⁴⁴

The most substantive objections to the Constitution tended to be narrow and fairly specific. Antifederalists and the few undecided delegates feared the new federal court system would compel payment of debts held by British creditors and uphold out-of-state claims to western lands. Kentucky delegates especially wanted to secure American access to the Mississippi River. Passions inflamed by Jay's negotiations with Spain resurfaced as suspicions that the new Constitution would somehow make it easier for Congress to swap navigation rights for commercial concessions from the Spanish, thereby benefiting eastern merchants at the expense of western farmers.⁴⁵

Access to the Mississippi, Madison tried to reassure westerners, would be more secure under the Constitution than under the Articles; a more energetic national government could better protect American interests. A treaty surrendering navigation rights, he argued, would require a two-thirds vote in the Senate and the acquiescence of the president, an unlikely occurrence. The House, he added, "will have a material influence," thus providing another safeguard.⁴⁶

Antifederalist delegates hit hard on the issues of taxes and federal court jurisdiction. On 20 June, Madison made a long speech responding to George Mason's attack on the federal judiciary. Madison predicted Congress would show restraint in creating new courts, and he claimed, wrongly it would turn out, that a citizen would not be able to sue a state in federal court. Ultimately, the antifederalist attack on federal jurisdiction proved to be less effective than he had expected, but as the convention neared its end, Madison still feared that any federalist advantage in the convention had dwindled to three or four votes.⁴⁷

There were other issues. Madison found himself repeatedly defending the Constitution's grant to Congress of the right to impose direct taxes—the most basic of sovereign functions.⁴⁸ "Out of doors," the lack of a bill of rights, especially the absence of a clause protecting religious freedom, was the

The primary author of Virginia's first state constitution and its landmark Declaration of Rights, George Mason (1725–1792) had supported Madison's efforts to separate church and state in Virginia, but he opposed ratification of the U.S. Constitution. Mason worried about, among other things, the growth of federal judicial power, and on that point, he proved to be a better prophet than Madison. (*Virginia Historical Society, 1858.2*)



Constitution's Achilles' heel. Madison's responses typically minimized the scope of federal power. "There is not a shadow of right in the general government," he said, "to intermeddle with religion." Early in the convention, Madison described the Constitution as forming a government that was both federal and "consolidated." The ratification process suggested the balance of state and national power it created: "Who are the parties to it? The people—but not the people composing one great body—but the people as composing thirteen sovereigns. . . . no state is bound by it . . . without its consent."⁴⁹

In the end, federalist delegates did what Madison had suspected all along they would have to do to cobble together a majority: they ratified the Constitution but agreed to recommend the new federal Congress consider some forty amendments. Half of the amendments constituted a bill of rights; the rest made structural changes to the proposed new government. Madison considered "several of them to be highly objectionable." Two of the more substantive required a two-thirds majority in Congress to adopt laws regulating foreign commerce and prohibited Congress from imposing a

direct tax in a state if the state could provide the federal treasury with a comparable sum from other sources. As troublesome as he found them, Madison had at least avoided a decision in favor of amendments being adopted by the states before the Constitution could be ratified. That course, he warned, was “pregnant with dreadful dangers” because he doubted the states could agree on amendments.⁵⁰

The convention also approved a formal instrument of ratification that expressed its intent to create a central government of limited powers. The powers granted by the Constitution were derived from the people, and the people could revoke and reclaim them whenever the government abused their rights. Every power not granted remained with the people, and no right could be abridged by Congress, the president, or any federal official “except in those instances in which power is given by the Constitution for those purposes.” Read literally, the ordinance challenged nothing in the Constitution, but it reflected widespread unease about an overreaching central government.⁵¹

As the convention came to an end, many antifederalist leaders remained hostile to the Constitution. Madison continued to receive discouraging reports from Hamilton in New York, and when, in late July, New York finally ratified the Constitution, it was with so many conditions that Madison feared it “will prove more injurious than a rejection would have done.” In the old Congress, the ongoing debate over a site for the capital displayed a venom and provincialism that gave credibility to southern antifederalists who opposed too close a union with New York and New England. The prospect of federal taxes also rankled skeptics. “The conspiracy ag[ain]st, direct taxes,” Madison wrote Tench Coxe, “is more extensive & formidable than some gentlemen suspect.”⁵² The ratification debates, in short, revolved around fairly narrow views of federal power—the national government’s authority to tax and manage foreign affairs—and limits on the states, specifically their power to issue paper money and to modify contracts, and not on broad grants of affirmative powers to Congress.⁵³

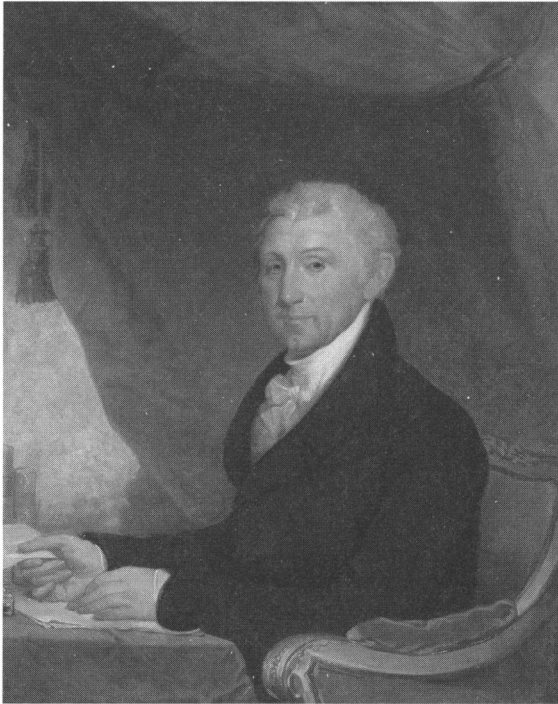
EVEN AFTER VIRGINIA HAD ratified the Constitution, Madison’s wobbly ally, Edmund Randolph, continued to talk about the possibility of another national convention. Madison also had to worry about a circular letter from

New York calling for a second constitutional convention. It had, he wrote George Washington, “a most pestilent tendency.”⁵⁴ Antifederalists, he told Washington, will try to “get a Congress appointed in the first instance that will commit suicide on their own Authority.” Reports from New York indicated antifederalists there were lying low but planning a “violent attack” on the Constitution in the fall. Ratification remained stalled in Rhode Island and North Carolina.⁵⁵

How enthusiastically Madison would support any of the amendments recommended by the Richmond convention remained in doubt until autumn. Then, in October, he wrote Edmund Pendleton that Congress should propose amendments to the states “to quiet the fears of many by supplying those further guards for private rights which can do no harm to the system.” He repeated his support for some amendments in a letter to George Lee Turberville early in November.⁵⁶

Madison’s reluctant embrace of amendments to protect individual rights did not, at the time, appease the antifederalists who controlled the Virginia assembly. In November, when the assembly made appointments to the new U.S. Senate, Madison lost to antifederalists Richard Henry Lee and William Grayson. To keep him out of the House, antifederalists introduced a bill to impose a residency requirement for congressional candidates so that Madison could not shop about for a friendly district. Meanwhile, they gerrymandered Orange County to put Montpelier in a district composed of counties, as Turberville told him, “most tainted with antifederalism.” Madison’s opponents made mainly two charges against him: that he would oppose all amendments and that he supported direct federal taxation of Virginians.⁵⁷

Nervous admirers at home persuaded Madison to leave New York and come back to Virginia to campaign for a House seat. He faced a formidable antifederalist opponent, James Monroe. Madison’s campaign included a long letter from the candidate, to be circulated among as many people as possible no doubt, defending direct taxation. A federal right to tax would reduce the inevitable tensions among the states when one state or the other refused to comply with voluntary requisitions. Only a federal taxing power, Madison argued, could ensure a strong national defense, and the South’s extensive river system made it vulnerable to foreign attack. Import duties, the popular



Antifederalist James Monroe (1758–1831) offered voters a credible alternative to Madison in the first congressional elections held under the new Constitution. Feeling the political pressure, Madison promised Baptist minister George Eve he would support a federal bill of rights if elected. (*Virginia Historical Society, 1880.1*)

alternative to direct taxes, would fall most heavily on the South, dependent as it was on foreign manufactured goods. Direct taxation would also guarantee the federal government's ability to borrow money from European lenders.⁵⁸

Perhaps more critical to the district's many Baptist voters was the question of a bill of rights with a provision to protect freedom of religion. To placate them, Madison wrote George Eve, pastor of Bull Run Baptist Church in Orange County, to reaffirm his commitment to some amendments. He had opposed them before ratification for fear they would produce "dangerous contentions," but "Circumstances are now changed." He continued to oppose a second constitutional convention—it would be slow and unpredictable—but he promised to support in Congress additional safeguards for individual liberties, including "the rights of Conscience in the fullest latitude." That commitment, plus a record of defending religious liberty that went back to the struggle to disestablish the Anglican Church,

satisfied most Baptists. On Election Day, 2 February 1789, Madison defeated Monroe in the eight-county district by a vote of 1,308 to 972.⁵⁹

Madison hoped a package of modest amendments would reconcile moderate antifederalists to the new government and ensure the broad support on which its survival would depend. In addition to a bill of rights, Madison thought that language should be added to the Constitution to provide for a periodic increase in the size of the House of Representatives, and apparently chastised by complaints about the broad jurisdiction of the federal appellate courts, he endorsed an amendment eliminating “superfluous appeals.” Tench Coxe suggested to Madison in March that amendments might include a provision protecting religious freedom from state action. Madison had originally taken up the cause of constitutional reform in large part to overrule oppressive state legislation. Amendments would give him a second bite at that apple.⁶⁰

Neither federalists nor antifederalists showed much interest in a bill of rights when the first Congress met. Madison, nevertheless, managed to keep the issue alive.⁶¹ On 4 May 1789, he announced plans to introduce a package of amendments, hoping to preempt Theodorick Bland of Virginia and John Laurance of New York, who presented petitions from their states calling for a second constitutional convention.⁶² Other matters, and apathy among Madison’s colleagues, delayed debate on his amendments, but even the prospect of action reassured many antifederalists.⁶³

Madison was finally able to introduce his amendments, nineteen culled from some two hundred submitted by the states, on 8 June 1789. Amendments, he told the House, would eliminate much of the remaining opposition to the Constitution, expedite ratification in Rhode Island and North Carolina, and help prevent the abuse of power. He did not propose to reconsider “the whole structure of government” but to offer amendments that would win the support of two-thirds of both houses of Congress and three-fourths of the states. His amendments included familiar and predictable safeguards for freedom of speech, press, religion, and other civil liberties, but Madison began with statements of fundamental republican principles: that all power was derived from the people; that they enjoyed the broad rights of life, liberty, property, and the pursuit of happiness; that they

had the “right to reform or change their government”; and that the separation of legislative, executive, and judicial power should be maintained.⁶⁴

Madison added two amendments that had not been requested by any state. One read, “No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in a criminal case.” It was the only substantive amendment not aimed at the abuse of federal power. The other amendment essentially original to Madison prohibited the federal government from taking private property without just compensation. Madison introduced one amendment that came close to the essence of antifederalists’ complaints about the new government: powers not delegated to the federal government or denied to the states were retained by them. It was the only change proposed by all eight states that had drafted amendments. Another amendment, responding to an argument Madison had made against a bill of rights, provided that the enumeration of certain rights did not imply that others were denied to the people. To rebut another argument he had once made—that a bill of rights was unnecessary in a government of delegated powers—Madison now conceded that Congress did possess some discretionary powers that could be abused. He mentioned specifically the necessary and proper clause.⁶⁵

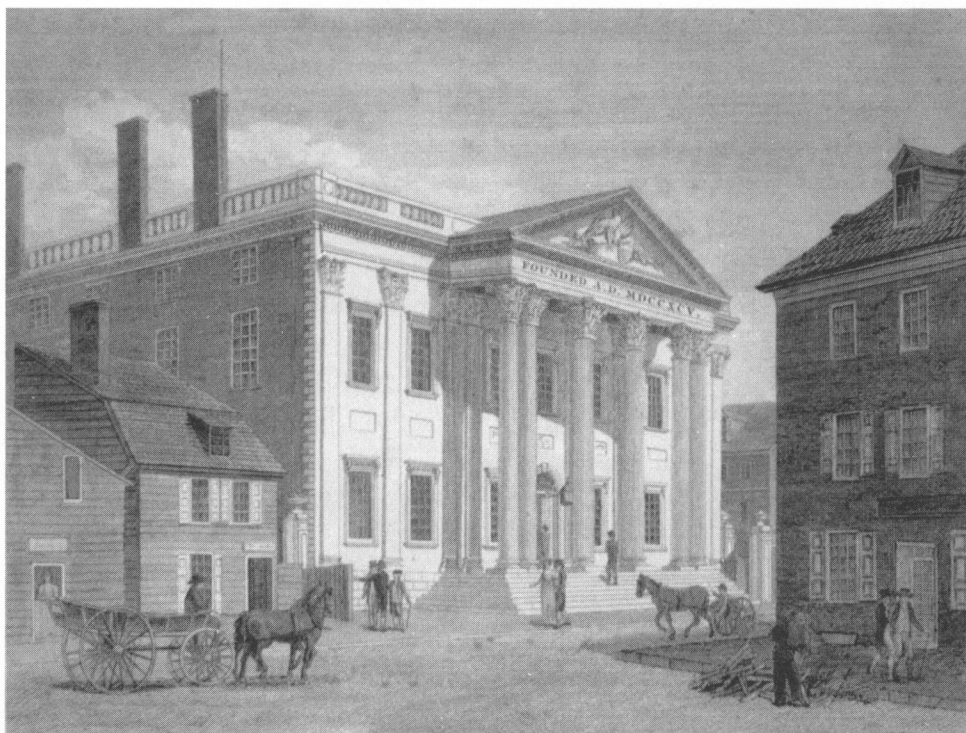
Out-of-doors, to the extent they were noticed, Madison’s amendments received a mainly favorable reaction.⁶⁶ Some of his correspondents, beyond question, hoped for amendments that went further.⁶⁷ Antifederalists in Congress offered limited opposition. Thomas Tudor Tucker of South Carolina, for example, moved unsuccessfully to add a right of voters to instruct their representatives to the rights of petition, speech, and assembly. He also proposed adding the word “expressly” to the clause reserving to the states those powers not delegated to Congress. Madison deflected the motion, pointing out that even the Virginia ratifying convention had ultimately decided against confining Congress to “express powers.” That was literally true, although George Nicholas, the federalist delegate and Madison’s ally, had told the Virginia ratifying convention that Congress could “exercise no power that is not expressly granted” to it.⁶⁸

As revised by the House, Madison’s proposal to protect existing rights not guaranteed by the Constitution read, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage

others retained by the people.” It would become the Ninth Amendment. The Senate added “or the people” to Madison’s amendment reserving certain powers to the states: what would be the Tenth Amendment finally provided, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Although Madison managed to avoid amendments that substantially limited the powers of the new government, the successful amendments reflected continuing fears of the abuse of federal authority. At the same time, the Senate rejected his proposal to protect religious liberty, freedom of the press, or the jury trial from state action. He called it “the most valuable amendment on the whole list,” but in 1789 no consensus existed in favor of any reforms further expanding federal power or limiting the rights of the states.⁶⁹

The debate over what would become the Bill of Rights brought the first phase of constitution-making to an end. Now Madison would have to live with the constitutional law the ratification struggle, and its immediate aftermath, had produced. In 1790, when Tench Coxe suggested to him that Congress provide bounties to inventors in order to encourage innovation, Madison liked the idea; he had made a similar proposal at the Constitutional Convention, but it had been rejected. He had to tell Coxe that Congress could only support inventions by granting patents for limited periods of time. A year later, during the debate over Hamilton’s proposal to incorporate a Bank of the United States, Madison challenged the treasury secretary on constitutional grounds. The Philadelphia convention, he said, had considered and rejected giving Congress the power to charter corporations.⁷⁰

When, as a member of Congress, Madison argued that the House of Representatives could block implementation of the controversial Jay Treaty, he took a position consistent with his statement at the Virginia ratifying convention that the House would have “a material influence” over the treaty-making process. Later in the decade, Madison argued that the Alien and Sedition Acts, which granted the federal government broad powers to suppress dissent, violated the Constitution, as it was understood when it was adopted. In 1798, Madison wrote the Virginia Resolutions for the Virginia assembly, asserting the acts were unconstitutional. To critics the resolutions seemed to suggest a state could nullify a federal law, which might well lead



Opposing the creation of the Bank of the United States in 1791, Madison could argue that the Philadelphia convention had never intended to give Congress the authority to charter corporations. Yielding years later to public opinion, he eventually came to accept the existence of a federally chartered central bank. (Library of Congress)

to civil war. Madison denied any such intentions, and he pointed to the 10th Amendment and to the ratification debates to justify Virginia's stance. He had written in his *Federalist* essays that if the federal government threatened the people's rights, "they"—the states—"would sound the alarm to the public." In the Virginia Resolutions, the Virginia legislature had done what Madison had said ten years earlier a state ought to do: it had spoken up when Congress had infringed on the rights of the people.⁷¹

Why did Madison allow himself to be hemmed in by history? In the 1780s, consulting the legislative record was not a normal part of the common law approach to determining the intent behind a statute. Legislative

histories were often unavailable. Common law judges focused on the text of the law, often discerning an intent that was more constructive than actual. Madison, who was not a lawyer, may not have felt constrained by common law norms, and a constitution differed considerably from ordinary legislation. Many in Madison's generation, Gordon Wood has written, "thought that fundamental law, even when expressed in a written constitution, was so fundamental, so different in kind from ordinary law, that its invocation had to be essentially an exceptional and delicate political exercise and not a part of routine judicial business."⁷² The drafting and ratification of the Constitution, moreover, had created a legislative history, fragmentary and ambiguous though it was. It had also involved the people in an unprecedented process of negotiation, expressing their concerns and receiving assurances from political leaders about what the new federal government could do.

Madison's Federalist critics believed he was too sensitive to the conservative political tides in Virginia.⁷³ Yet, he could argue that in a republic, the government's legitimacy rested on popular consent. Informed and consistent public opinion could both constrict and expand federal power. After Congress chartered a second Bank of the United States, for example, Madison abandoned his objections to the institution. But he never abandoned all his constitutional scruples. One of his last acts as president was to veto a bill providing federal support for internal improvements; it exceeded Congress's enumerated powers and could not be justified under the Constitution's necessary and proper clause. By contrast, the bank was a case, he wrote Nicholas Trist after leaving the White House, where there existed "an evidence of the Public Judgment, necessarily superseding individual opinions." As a general rule, however, Madison believed that "whatever might have been the opinions entertained in forming the Constitution, it was the duty of all to support it in its true meaning as understood by the nation at the time of its ratification."⁷⁴

In summary, Madison's view of federal power in the 1790s and later—derived from his understanding of the Philadelphia convention, the ratification debates, and the Bill of Rights—tended to temper, but not eradicate, his earlier nationalism. If we accept the premise that American constitutionalism evolved from 1787 to 1789 and that James Madison took seriously what

was written and said about the Constitution during those pivotal years, the Madison problem is not so difficult a problem after all.



NOTES

1. James Madison (cited hereafter as JM) to John G. Jackson, 27 Dec. 1821, in Gaillard Hunt, ed., *The Writings of James Madison* (9 vols.; New York, 1900–1910), 9: 70–77 (first quotation); JM to Nicholas P. Trist, Dec. 1831, in *ibid.*, 9:471–77 (second quotation). See, Gordon S. Wood, “Is There a ‘James Madison Problem?’” in Wood, *Revolutionary Characters: What Made the Founders Different* (New York, 2006), 141–72. For recent surveys of Madison’s career, see Jeff Broadwater, *James Madison: A Son of Virginia and a Founder of the Nation* (Chapel Hill, 2012); Kevin R. C. Gutzman, *James Madison and the Making of America* (New York, 2012); and Richard Brookhiser, *James Madison* (New York, 2011). Two older studies remain useful, in part for their depth of detail: Ralph Ketcham, *James Madison: A Biography* (1971, rev. ed.; Charlottesville, 1990) and Irving Brant, *James Madison* (6 vols.; Indianapolis, 1941–61). Three one-volume editions of Madison’s papers have collected many of his most important writings: Ralph Ketcham, ed., *Selected Writings of James Madison* (Indianapolis, 2006); Jack N. Rakove, ed., *James Madison, Writings* (New York, 1999); and Martin Meyers, ed., *The Mind of the Founder: Sources of the Political Thought of James Madison* (1970, rev. ed.; Hanover, N.H., 1981).
2. For introductions to the historiography, see Peter Daniel Haworth, “James Madison and James Monroe Historiography: A Tale of Two Divergent Bodies of Scholarship,” in Stuart Leibiger, ed., *A Companion to James Madison and James Monroe* (Malden, Mass., 2013), 521–39; Wood, “Is There a ‘James Madison Problem?’”; and Alan Gibson, “The Madisonian Madison and the Question of Consistency: The Significance and Challenge of Recent Research,” *Review of Politics* 64 (2002): 311–39. On a particularly critical phase of Madison’s career, see Adam Tate, “James Madison, 1780–1787: Nationalism and Political Reform,” in Leibiger, ed., *Companion to Madison and Monroe*, 39–43.
3. Stuart Leibiger, “Introduction,” in Leibiger, ed., *Companion to Madison and Monroe*, 2.
4. See, Wood, “Is There a ‘James Madison Problem?’” 154–55; Andrew S. Trees, *The Founding Fathers and the Politics of Character* (Princeton, 2004), 107–11; Gary Rosen, *American Compact: James Madison and the Problem of Founding* (Lawrence, Kans., 1999), 126–28, 158–59. For an early view that Madison supported a less energetic government than did Hamilton but had less faith in the people than did Jefferson, see Adrienne Koch, *Jefferson and Madison: The Great Collaboration* (New York, 1950), 43–44, 53–54.

5. James H. Read, *Power versus Liberty: Madison, Hamilton, Wilson, and Jefferson* (Charlottesville, 2000); Greg Weiner, *Madison's Metronome: The Constitution, Majority Rule, and the Tempo of American Politics* (Lawrence, Kans., 2012); Colleen A. Sheehan, *James Madison and the Spirit of Republican Self-Government* (New York, 2009); George Thomas, *The Madisonian Constitution* (Baltimore, 2008).
6. Rosen, *American Compact*; Richard K. Matthews, *If Men Were Angels: James Madison and the Heartless Empire of Reason* (Lawrence, Kans., 1995). Despite their similarities, Rosen gives a considerably more sanguine interpretation to Madison's views, which he sees as a fusion of liberal and republican principles and of popular consent and elite rule. See also, Ketcham, *James Madison*; Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca, N.Y., 1995); Drew McCoy, *The Last of the Founders: James Madison and the Republican Legacy* (New York, 1989); and Drew McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (New York, 1980). A consistent Madison, it might be noted, is not necessarily an attractive Madison. For an argument that he was consistently motivated by an irrational hostility to Great Britain, see Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic* (New York, 1993), 79–91.
7. Meyers, ed., *Mind of the Founder*, xiv. See also, Jack N. Rakove, "James Madison's Political Thought: The Ideas of an Acting Politician," in Leibiger, ed., *Companion to Madison and Monroe*, 6; Rakove, *James Madison and the Creation of the American Republic* (1990, 2d ed.; New York, 2002), 225–33; John P. Kaminski, *James Madison: Champion of Liberty and Justice* (Madison, Wisc., 2006), 8; Broadwater, *James Madison*, xiv–xv.
8. Otto quoted in Brant, *James Madison*, 2:14. According to a modern historian, Madison was "so carefully contrived and controlled that in comparison to him Hamilton, Jefferson, and even [Aaron] Burr were open books" (Trees, *The Politics of Character*, 120, n. 20). See generally, Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York, 1997), 199.
9. JM to Henry Lee, 25 June 1824, in Rakove, ed., *Madison Writings*, 803–4.
10. On Madison's early views on religious freedom, see Broadwater, *James Madison*, 6–9. On his early views on constitution-making, see JM to Caleb Wallace, 23 Aug. 1785, in Rakove, ed., *Madison Writings*, 39–47. On his fears of commercial warfare, see JM to Edmund Pendleton, 27 Nov. 1781, in William T. Hutchinson and William M. E. Rachal et al., eds., *The Papers of James Madison* (17 vols.; Chicago and Charlottesville, 1962–91), 3:317–19 (cited hereafter as *Papers of Madison*); JM to Edmund Randolph, 26 Nov. 1782, *Papers of Madison*, 5:328–34; and JM to Edmund Randolph, 25 Feb. 1783, *Papers of Madison*, 6:265–88.
11. JM to Thomas Jefferson (cited hereafter as TJ), 3 Oct. 1785, *Papers of Madison*, 8:373–76; Norman K. Risjord, *Chesapeake Politics, 1781–1800* (New York, 1978), 111–16; Ketcham, *James Madison*, 171–73.
12. JM to James Monroe, 7 Aug. 1785, *Papers of Madison*, 8:333–36; JM to James Monroe, 22 Jan. 1786, *ibid.*, 8:482–84; JM to TJ, 18 Mar. 1786, *ibid.*, 8:500–504; Richard B. Morris, *The Forging of the Union, 1781–1789* (New York, 1987), 151–57. Rhode Island printed paper money most promiscuously, and there Madison observed in the summer of 1786, "[s]upplies were withheld from the market, the shops were shut, popular meetings issued, and the state remains in a sort of convulsion" (JM to TJ, 12 Aug. 1786, *Papers of Madison*, 9:93–100).

13. "Notes on Ancient & Modern Confederacies," *Papers of Madison*, 9:3–24; Ketcham, *James Madison*, 183–87.
14. JM to Ambrose Madison, 7 Aug. 1786, *Papers of Madison*, 9:89–90; JM to James Madison, Sr., 1 Nov. 1786, *ibid.*, 9:153–55; Joseph J. Ellis, *American Creation: Triumphs and Tragedies at the Founding of the Republic* (New York, 2007), 95–98.
15. "Bill Providing for Delegates to the Convention of 1787," 6 Nov. 1786, *Papers of Madison*, 9:163–64; JM to TJ, 4 Dec. 1786, *ibid.*, 9:189–92.
16. "Vices of the Political System of the United States," c. Feb.–Apr. 1787, *ibid.*, 9:348–57.
17. *Ibid.*
18. *Ibid.*
19. Madison assumed that northern and southern states would support proportional representation because the North enjoyed a current advantage in numbers while the South expected to grow, and he added, "the fewer and smaller States must finally bend" (JM to TJ, 19 Mar. 1787, *ibid.*, 9:317–22).
20. JM to Edmund Randolph, 8 Apr. 1787, *ibid.*, 9:368–71 (first quotation); JM to George Washington (cited hereafter as GW), 16 Apr. 1787, *ibid.*, 9:382–87 (second and third quotations).
21. "Virginia Plan," 29 May 1787, *ibid.*, 10:12–18.
22. *Ibid.*; Speech, 4 June 1787, *ibid.*, 10: 25–26; Speech, 6 June 1787, *ibid.*, 10:35–36; Speech, 8 June 1787, *ibid.*, 10:41–42; Rakove, *James Madison and the Creation of the American Republic*, 65–78; Ketcham, *James Madison*, 216–30.
23. Speech, 5 July 1787, *Papers of Madison*, 10:92–94; Speech, 7 July 1787, *ibid.*, 10:96; Speech, 21 July 1787, *ibid.*, 10:110–11; Speech, 26 July 1787, *ibid.*, 10:115–17; Banning, *Sacred Fire of Liberty*, 158; Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York, 2010), 38; Rakove, *James Madison and the Creation of the American Republic*, 61–79.
24. JM to TJ, 6 Sept. 1787, *Papers of Madison*, 10:163–65 (first quotation); JM to TJ, 24 Oct. 1787, in Rakove, ed., *Madison Writings*, 148–49 (second and third quotations).
25. JM to GW, 30 Sept. 1787, *Papers of Madison*, 10:178–81. See, for example, George Mason, "Objections to this Constitution of Gov't," c. 16 Sept. 1787, in Robert A. Rutland, ed., *The Papers of George Mason, 1725–1792* (3 vols.; Chapel Hill, 1970), 3:991. For attempts to amend the Constitution in Congress, see Worthington C. Ford, ed., *Journals of the Continental Congress, 1776–1789* (34 vols.; Washington, D.C., 1931–34), 33:540–44.
26. Edward Carrington to JM, 23 Sept. 1787, *Papers of Madison*, 10:172–73; John Dawson to JM, 25 Sept. 1787, *ibid.*, 10:173–74; Edmund Randolph to JM, 30 Sept. 1787, *ibid.*, 10:181–82; Rev. James Madison to JM, 1 Oct. 1787, *ibid.*, 10:183–85; JM to Edmund Randolph, 21 Oct. 1787, *ibid.*, 10:199–200.
27. JM to Archibald Stuart, 14 Dec. 1787, *ibid.*, 10:325–27; JM to Edmund Randolph, 10 Jan. 1788, *ibid.*, 10:354–57; Edward Carrington to JM, 10 Feb. 1788, *ibid.*, 10:493–95; JM to Edmund Pendleton, 21 Feb. 1788, *ibid.*, 10:532–34; Robert A. Rutland, *James Madison, the Founding Father* (New York, 1987), 18–21. Madison repeated his argument that the antifederalists could never agree among themselves in *Federalist No. 38* (see, Rakove, ed., *Madison Writings*, 202–10).

28. JM to GW, 28 Oct. 1787, *Papers of Madison*, 10:225–26; Edmund Randolph to JM, 29 Oct. 1787, *ibid.*, 10:229–31; James McClurg to JM, 31 Oct. 1787, *ibid.*, 10:233–34; John Dawson to JM, c. 10 Nov. 1787, *ibid.*, 10:247–49; Archibald Stuart to JM, 2 Dec. 1787, *ibid.*, 10:290–93; Edmund Randolph to JM, 27 Dec. 1787, *ibid.*, 10:346–47.

29. TJ to JM, 20 Dec. 1787, *ibid.*, 10:335–40; JM to GW, 14 Dec. 1787, *ibid.*, 10:327; GW to JM, 10 Jan. 1788, *ibid.*, 10:357–58; Joseph Jones to JM, 29 October 1787, *ibid.*, 10:227–29. Jones worried that federal appellate courts could decide questions of both law and fact. He very likely saw the federal courts as a threat to states' rights, as did George Mason and others, and appellate review of matters of fact could be seen as undermining the right to a jury trial. The question of federal jurisdiction was a nagging one during the ratification debate and a neglected one since, perhaps because of its recondite nature, but Madison struggled with it from the beginning (see, George Lee Turberville to JM, 11 Dec. 1787, *ibid.*, 10:315–18). Madison tried, for example, to reassure Washington early in the debate that Mason's complaints on that point were overwrought because most litigation was between private citizens, did not raise a federal question, and would not be decided in the federal courts (JM to GW, 18 Oct. 1787, in Rakove, ed., *Madison Writings*, 140–42).

30. Rakove, *James Madison and the Creation of the American Republic*, 81–86; Banning, *Sacred Fire of Liberty*, 232; Isaac Kramnick, ed., *The Federalist* (New York, 1987), 54; Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York, 2003), 6. *Federalist No. 62*, in which Madison defended the Great Compromise, starkly illustrates his change of mind, or at least of his rhetoric. The compromise on representation, he wrote, was not unreasonable “in a compound republic partaking both of the national and federal character,” but, he added, it was “superfluous” to test by theory a clear product of compromise (Rakove, ed., *Madison Writings*, 338–44).

31. Michael Zuckert, “James Madison in *The Federalist*: Elucidating ‘The Particular Structure of this Government,’” in Leibiger, ed., *Companion to Madison and Monroe*, 91–92. Zuckert believes Madison's views changed over time but that he was not transformed from a Hamiltonian to a Jeffersonian. He was and remained more moderate than either of them (*ibid.*, 101).

32. *Federalist No. 51*, in Rakove, *Madison Writings*, 294–98.

33. JM to Edmund Randolph, 2 Dec. 1787, *Papers of Madison*, 10:289–90; JM to TJ, 9 Dec. 1787, *ibid.*, 10:310–15 (first quotation); Nathaniel Gorham to JM, 27 Jan. 1788, *ibid.*, 10:435–36; Rufus King to JM, 27 Jan. 1788, *ibid.*, 10:436–37 (second quotation); JM to GW, 28 Jan. 1788, *ibid.*, 10:437–38; Kramnick, *The Federalist*, 37–38. Madison's sources of information about the prospects for ratification were not entirely reliable. He expected, for example, “a federal result” in North Carolina when that state was actually an antifederalist stronghold (see JM to GW, 8 Feb. 1788, *Papers of Madison*, 10:481–82).

34. *Federalist No. 10*, in Rakove, ed., *Madison Writings*, 160–67; *Federalist No. 14*, *ibid.*, 168–73; *Federalist No. 41*, *ibid.*, 226–34.

35. JM to Tench Coxe, 30 Jan. 1788, *Papers of Madison*, 10:444–45; James Madison, Sr., to JM, 30 Jan. 1788, *ibid.*, 10:446–48 (first quotation); William Moore to JM, 31 Jan. 1788, *ibid.*, 10:454–55; Benjamin Hawkins to JM, 14 Feb. 1788, *ibid.*, 10:508–9 (second quotation); JM to TJ, 15 Feb. 1788, *ibid.*, 10:510–11; JM to TJ, 19 Feb. 1788, *ibid.*, 10:518–21; JM to Edmund Pendleton, 3 Mar. 1788, *ibid.*, 10:554.

36. *Federalist No. 39*, in Rakove, ed., *Madison Writings*, 211–17; *Federalist No. 40*, *ibid.*, 218–25.
37. *Federalist No. 44*, *ibid.*, 252–59.
38. *Federalist No. 45*, *ibid.*, 260–65; *Federalist No. 46*, *ibid.*, 266–72; *Federalist No. 52*, *ibid.*, 299–303; *Federalist No. 53*, *ibid.*, 304–9; *Federalist No. 55*, *ibid.*, 315–20; *Federalist No. 56*, *ibid.*, 321–25.
39. James Gordon, Jr. to JM, 17 Feb. 1788, *Papers of Madison*, 10:515–16; John Dawson to JM, 18 Feb. 1788, *ibid.*, 10:517–18; JM to GW, 20 Feb. 1788, *ibid.*, 10:526–27; Joseph Spencer to JM, 28 Feb. 1788, *ibid.*, 10:540–42; Cyrus Griffin to JM, 24 Mar. 1788, *ibid.*, 11:4–5.
40. JM quoted in Kramnick, *Federalist Papers*, 81.
41. JM to Eliza House Trist, 25 Mar. 1788, *Papers of Madison*, 11: 5–7.
42. George Nicholas to JM, 5 Apr. 1788, *ibid.*, 11:8–10; JM to George Nicholas to JM, 8 Apr. 1788, *ibid.*, 11:11–15; Maier, *Ratification*, 241.
43. Delegates from the Kentucky district tended to be antifederalists, as were those from Virginia's Southside. A few delegates probably won seats based on personal prestige and not by taking a definite position on ratification (see, JM to GW, 10 Apr. 1788, *Papers of Madison*, 11:20–21; John Brown to JM, 12 May 1788, *ibid.*, 11:42–44; JM to John Brown, 27 May 1788, *ibid.*, 11:59–60; Editorial Note, *ibid.*, 11:72–76; JM to Alexander Hamilton, 16 June 1788, *ibid.*, 11:144; and Robert A. Rutland, *The Ordeal of the Constitution: Antifederalists and the Ratification of the Constitution* [Boston, 1983], 189, 230–50).
44. JM to TJ, 22 Apr. 1788, *Papers of Madison*, 11:27–29; Tench Coxe to JM, 19 May 1788, *ibid.*, 11:51–52; Alexander Hamilton to JM, 19 May 1788, *ibid.*, 11:53–54; Rutland, *James Madison*, 15, 29; Brant, *James Madison*, 3:191–96; Richard Lubinski, *James Madison and the Struggle for the Bill of Rights* (New York, 2006), 73.
45. Ketcham, *James Madison*, 260–61; JM to GW, 13 June 1788, *Papers of Madison*, 11:134.
46. Martin Oster to Comte de la Luzerne, 20 June 1788, in Merrill Jensen et al., eds., *The Documentary History of the Ratification of the Constitution* (26 vols.; Madison, 1976–), 10:1689–91; Speech, 6 June 1788, *Papers of Madison*, 11:78–88; JM to Tench Coxe, 11 June 1788, *Papers of Madison*, 11:101–2; Speech, 13 June 1788, *Papers of Madison*, 11:129–33; Speech, 13 June 1788, *Papers of Madison*, 11:135–39.
47. JM to Rufus King, 13 June 1788, *Papers of Madison*, 11:133–34; JM to Alexander Hamilton, 20 June 1788, *ibid.*, 11:157; Speech, 20 June 1788, *ibid.*, 11:158–65; JM to Rufus King, 22 June 1788, *ibid.*, 11:167; F. Thornton Miller, *Juries and Judges versus the Law: Virginia's Provincial Legal Perspective, 1783–1828* (Charlottesville, 1994), 18–21. Replying to complaints about the inconvenience of traveling to a national capital for sessions of the Supreme Court, Madison predicted, also incorrectly, that the court would meet in different locations to accommodate litigants (see, Maier, *Ratification*, 289).
48. Speech, 7 June 1788, *Papers of Madison*, 11:90–98; Speech, 12 June 1788, *ibid.*, 11:121; JM to Alexander Hamilton, 16 June 1788, *ibid.*, 11:144. Antifederalists objected to the use of an electoral college to choose the president, to the president's power to issue pardons, and even to the provision in Article I, Section 8, empowering Congress to create what became the District of Columbia. They also complained about Congress' authority to regulate the state militia. Mason

objected that the Constitution did too little to protect slavery but allowed the slave trade, a greater evil, to continue for another twenty years (see, Speech, 6 June 1788, *ibid.*, 11:78–88; Speech, 14 June 1788, *ibid.*, 11:142–44; Speech, 17 June 1788, *ibid.*, 11:150–51; Speech, 18 June 1788, *ibid.*, 11:153–55).

49. Speech, 12 June 1788, *ibid.*, 11:129–33 (first quotation); Speech, 6 June 1788, *ibid.*, 11:78–88 (second quotation).

50. JM to Alexander Hamilton, 22 June 1788, *ibid.*, 11:166; JM to GW, 27 June 1788, *ibid.*, 11:181–83 (first quotation); Speech, 24 June 1788, *ibid.*, 11:172–77 (second quotation); Maier, *Ratification*, 293–309; Rakove, *Original Meanings*, 122–25.

51. Virginia Form of Ratification, 26 June 1788, in Jensen et al., eds., *Documentary History of Ratification*, 10:1546.

52. Records of Debates, 23–28 June 1788, *ibid.*, 10:1512–15; JM to Rufus King, 25 June 1788, *Papers of Madison*, 11:178; Alexander Hamilton to JM, 25 June 1788, *Papers of Madison*, 11:179–80; Alexander Hamilton to JM, 8 July 1788, *Papers of Madison*, 11:186–88; Alexander Hamilton to JM, 19 July 1788, *Papers of Madison*, 11:188; JM to Alexander Hamilton, 20 July 1788, *Papers of Madison*, 11:189; JM to GW, 24 Aug. 1788, *Papers of Madison*, 11:240–42 (first quotation); JM to Tench Coxe, 30 July 1788, *Papers of Madison*, 11:210 (second quotation); Maier, *Ratification*, 395–400; Rutland, *Ordeal of the Constitution*, 208–9.

53. JM to TJ, 17 Oct. 1788, *Papers of Madison*, 11:295–300.

54. JM to GW, 11 Aug. 1788, *ibid.*, 11:229–30; Edmund Randolph to JM, 13 Aug. 1788, *ibid.*, 11:231–32; JM to Edmund Randolph, 22 Aug. 1788, *ibid.*, 11:237–38; Rakove, *James Madison and the Creation of the American Republic*, 87–92.

55. JM to GW, 27 June 1788, *Papers of Madison*, 11:182–83; James Gordon, Jr., to JM, 31 Aug. 1788, *ibid.*, 11:245–46.

56. JM to Edmund Pendleton, 20 Oct. 1788, *ibid.*, 11:306–7; JM to George Lee Turberville, 2 Nov. 1788, *ibid.*, 11:330–32. Only a few days before writing Pendleton, Madison had written Jefferson explaining why he thought a bill of rights was unnecessary (JM to TJ, 17 Oct. 1788, *ibid.*, 11:295–300).

57. Madison claimed he preferred to serve in the House of Representatives. He told Edmund Randolph it would be a less expensive office to maintain; he might also have thought he would have more autonomy in Congress because a representative, unlike a senator, would not depend on the state assembly for his seat (see Edward Carrington to JM, 9 Nov. 1788, *ibid.*, 11:336–38; Edmund Randolph to JM, 10 Nov. 1788, *ibid.*, 11:338–39; George Lee Turberville to JM, 13 Nov. 1788, *ibid.*, 11:343–44; Edward Carrington to JM, 15 Nov. 1788, *ibid.*, 11:345–46; George Lee Turberville to JM, 14 Dec. 1788, *ibid.*, 11:396–98).

58. JM to George Thompson, 29 Jan. 1789, *ibid.*, 11:433–37.

59. JM to George Eve, 2 Jan. 1789, *ibid.*, 11:404–6; Benjamin Johnson to JM, 19 Jan. 1789, *ibid.*, 11:423–24; *ibid.*, 11:438, n. 1. On the congressional race generally, see Chris DeRose, *Founding Rivals: Madison vs. Monroe, the Bill of Rights, and the Election that Saved a Nation* (New York, 2011).

60. Shortly after he promised the Baptists he would support a bill of rights, Madison began a scrapbook in which he pasted newspaper clippings about proposed amendments, and he started his own

list of recommended changes to the Constitution (see JM to Thomas Mann Randolph, 13 Jan. 1789, *Papers of Madison*, 11:415–16; Tench Coxe to JM, 18 Mar. 1789, *ibid.*, 12:20–22; JM to TJ, 29 Mar. 1789, *ibid.*, 12:37–40; Rutland, *James Madison*, 59–60).

61. Madison inserted a call for a bill of rights into Washington's inaugural address and a favorable reply into the House's response (see First Inaugural Address, 30 Apr. 1789, *Papers of Madison*, 12:120–24; Address of the House of Representatives to the President, 5 May 1789, *ibid.*, 12:132–34. See also, Rakove, *Original Meanings*, 330–38).

62. Lubunski, *James Madison and the Struggle for the Bill of Rights*, 189–91; Brant, *James Madison*, 3:264. Madison also attempted to forestall action on Bland's petition by arguing there was nothing for Congress to debate until two-thirds of the states had called for a convention, which was the constitutional requirement for a general meeting of the states (see Speech, 5 May 1789, in Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* [Baltimore, 1991], 58, 61).

63. JM to TJ, 27 May 1789, *Papers of Madison*, 12:185–87; William R. Davie to JM, 10 June 1789, *ibid.*, 12:210–12.

64. Speech, 8 June 1789, *ibid.*, 12:197–210. Six state conventions had proposed amendments, as had a committee of the Maryland convention and the antifederalist minority in Pennsylvania (see Bernard Schwartz, ed., *The Bill of Rights: A Documentary History* [2 vols.; New York, 1971], 2:983).

65. Speech, 8 June 1789, *Papers of Madison*, 12:197–210; Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, xiv; Schwartz, *Bill of Rights*, 2:983, 1167. Article 9 of the bill of rights recommended by the Virginia ratifying convention provided no person could be denied life, liberty, or property “but by the law of the land,” but it did not include a provision for just compensation. On Madison's reliance on the Virginia amendments, see Schwartz, *Bill of Rights*, 2:765–66; and Debates in the Virginia Convention, 27 June 1788, in Schwartz, *Bill of Rights*, 2:840–45.

66. Tench Coxe to JM, 18 June 1789, *Papers of Madison*, 12:239–41; Edward Stevens to JM, 25 June 1789, *ibid.*, 12:261; Edmund Randolph to JM, 30 June 1789, *ibid.*, 12:273–74; Benjamin Hawkins to JM, 5 July 1789, *ibid.*, 12:275–76; Archibald Stuart to JM, 31 July 1789, *ibid.*, 12:319–20.

67. John Dawson to JM, 28 June 1789, *ibid.*, 12:263–65; Rev. James Madison to JM, 15 Aug. 1789, *ibid.*, 12:337–38.

68. Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 33, 175, 199–201; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York, 1986), 204; Speech, 15 Aug. 1789, *Papers of Madison*, 12:340–41; Speech, 18 Aug. 1789, *Papers of Madison*, 12:346; Lubunski, *James Madison and the Struggle for the Bill of Rights*, 230–31; Nicholas quoted in Kevin R. C. Gutzman, “James Madison and the Ratification of the Constitution: A Triumph over Adversity,” in Leibiger, ed., *Companion to Madison and Monroe*, 87–88. See also Jensen, ed., *Documentary History of Ratification*, 10:1505–7.

69. House Resolution and Articles of Amendment, 24 Aug. 1789, in Veit, eds., *Creating the Bill of Rights*, 41; Speech, 17 Aug. 1789, *Papers of Madison*, 12:344.

70. JM to Tench Coxe, 28 Mar. 1790, *Papers of Madison*, 13:128–29; Speech, 2 Feb. 1791, *ibid.*, 13:372–82.

71. Garrett Ward Sheldon, “James Madison, the Virginia Resolutions, and the Philosophy of

Modern American Democracy,” in Leibiger, ed., *Companion to Madison and Monroe*, 172–74; Report of 1800, in Rakove, ed., *Madison Writings*, 609–10, 661.

72. Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (New York, 2009), 446. The later assumption by judges that common law rules of statutory construction could be applied to constitutional interpretation greatly enhanced the power of American courts (Wood, *Empire of Liberty*, 448–49; Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* [New York, 2010], 331–40, 354–64; Rakove, *Original Meanings*, 341–42).

73. Brant, *James Madison*, 3:249, 263; Lubinski, *James Madison and the Struggle for the Bill of Rights*, 208–9; Guzman, *James Madison*, 246–47.

74. The Nullification Crisis had prompted Madison to defend himself to Trist. In the late 1820s and early 1830s, opponents of a protective tariff, relying in part on the Virginia Resolutions, claimed a state could nullify a federal law it deemed unconstitutional. Madison disagreed, and, as he had done in his Report of 1800, he gave the resolutions a more narrow reading. More to the point, Madison relied on precedent from the ratification debate, *Federalist No. 41*, to argue “questions. . . concerning the boundary of Jurisdiction between the U.S. & individual States” would have to be resolved by the federal courts (see JM to Nicholas Trist, Dec. 1831, in Hunt, ed., *Writings of Madison*, 9:471–77; Veto Message, 3 Mar. 1817, in Rakove, ed., *Madison Writings*, 718–29; JM to John G. Jackson, 27 Dec. 1821, in Hunt, ed., *Writings of Madison*, 9:70–77).

