

## ***Madison and the Constitution: A Reply to Sanford Levinson***

In his [contribution to this symposium](#), Sanford Levinson joins a list of scholars denying James Madison the title “Father of the Constitution” and challenging, in their estimation, exaggerated claims about his influence in the constitutional moment of 1786 to 1789. For his part, Professor Levinson emphasizes the radical character of Madison’s universal veto of state laws, his admirable but ultimately failed attempts to defend proportional representation in the Senate, and his ignoble but successful effort to bolster Southern (read: slaveholding) power in the election of the President through the Electoral College. Never mind that Madison championed the Bill of Rights. Madison, Levinson observes, first opposed the addition of a bill of rights before championing it. Credit for what we now celebrate as the Bill of Rights should be given to Madison’s constituents who forced him to follow through with the campaign pledge of ratification.

Never mind also that Madison wrote the most remembered and memorable *Federalist* Papers. Levinson is unimpressed. The *Federalist*, Levinson rightly observes, was not widely circulated during the ratification process. Similarly, twenty-first century Americans have little noted and long forgotten what Madison said in *The Federalist*. We are no worse for that neglect because, as contemporary students of American government observe, Madison’s contributions as Publius tell us little about how our system operates today.

To his credit, Levinson would not altogether cancel Madison. Instead, he suggests that we place him among the many Framers “who, in their own ways, and for good and ill, contributed to the making of the American Constitution in 1787” and then again in the “second creation” of the first meetings of Congress. Still, the counterfactual that Madison never existed leaves Levinson unruffled. To prove that Madison - not Hamilton, Washington, or James Wilson - was the “Father of the Constitution,” we must support a strong causal claim. We must establish that Madison mattered. We must find his DNA in the Constitution. Good luck, Levinson suggests.

What’s a Madison scholar to do? Get in line for tickets to *Hamilton*? It seems that every contribution about the formation of the Constitution once attributed to Madison has now been dismissed. Can Madison be rescued from this thunderstorm of criticism? Can he be restored as “Father of the Constitution? Should he be?

First, Madison should not be defended where he is indefensible. Levinson mentions Madison’s enslavement of Black Americans. To his credit, Madison did not pronounce anything like Jefferson’s venomous scientific racism. Nevertheless, his role as an enslaver of Black families, his failure to free those families at his death, and his support for neo-colonization and diffusion can never be condoned. Madison’s role in constitutionalizing slavery is a more complex matter, but he ultimately supported provisions, especially the Three-fifths Clause, that supplied a federal bonus of political power to Southern states by amplifying their numbers in the House of Representatives and providing men who enslaved others with an easier road to the Presidency than they would have had if only “free inhabitants” had been counted for purposes of

apportionment. In constitutionalizing slavery, Madison joined most other Founders in prolonging its eradication and almost certainly guaranteed that only war could achieve its abolition.

Furthermore, I have no intention of arguing that Madison was the “Father of the Constitution” or insisting upon that label – but not because he was not the most important Framers at the Convention and in the broader constitutional moment of 1786 to 1789. The problem, as Levinson suggests when he is not entertaining the contradictory claim that some other Founder is properly “the Father of the Constitution,” is with this patriarchal label itself. It is hardly unimportant, I might add, that Madison never claimed this title for himself. We can do better. Madison, in a letter to William Cogswell, pointed the way by suggesting that we think of the drafting of the Constitution as “the work of many heads & many hands.”

Instead of either piling on Madison or trying to reestablish his legitimate claim to a misconstrued title by making erroneous or exaggerated claims, I propose the following: James Madison played an indispensable role in the drafting of the Constitution, in the ratification contest, and at the first sessions of Congress. When Madison’s role as the unofficial record keeper of the debates at the Convention and the numerous activities he undertook on behalf of the Constitution during his retirement years are thrown into the mix, he ends up being the most important commentator on and steward of the Constitution of his generation. His contributions as Publius, especially *Federalist 10* and *51*, are important historically for understanding the character of the Founding moment. Moreover, they offer not simply profound, but profoundly instructive lessons about the American political system. Patriarchal labels and exaggerated hagiographic claims aside, Madison was not one among many Framers. He was uniquely important in the constitutional moment of 1786-1789.

Appreciating Madison’s strong imprint on the design of the Constitution begins by exploring a point that breezily passes in Levinson’s account, namely that Madison’s extensive pre-Convention preparations were integral to the Virginia Plan. The Virginia Plan, in turn, catalyzed and structured the offensive that nationalist delegates took early in the Convention that led the Convention to abandon the Articles of Confederation and provided the template from which the Constitution emerged. Until recently, even the most basic accounts of the drafting of the Constitution acknowledged as much. Today, Madison’s significance in setting the Convention’s agenda and with it the foundational structure of our constitutional system has faded from view and is not fully understood or appreciated.

To elaborate, Madison’s concrete experiences in the Confederation Congress, the Virginia House of Delegates, and his pre-Convention historical research led him to the conclusion that an unprecedented form of federalism was needed to address the “vices” that plagued the American federal system. Most importantly for our purposes, this new form of federalism was Madison’s. It was the product of his political experiences and historical research. He introduced it into the Convention. We cannot presuppose that it would have been there if he had not. Broadly speaking, Madisonian federalism included the adoption of a fundamentally novel federal system in which the national government was supreme in limited but important areas and “would operate without the intervention of the States.” Concretely, this was best achieved in a system in

which federal officials were not elected by state legislatures and federal measures were executed directly on individuals rather than through the medium of the states.

A truly national government restructured along these lines and supplied with the essential attribute of sovereignty – the right to coerce – would give a new-modelled national government, according to Madison, the independence and resources it needed to be viable. As he put the issue, such a government would make and enforce *law*, not provide recommendations (which is what requisitions were). It would thereby become a true “Political Cons[ti]tution” rather than a mere alliance or treaty between independent states. Furthermore, because it would operate directly on individuals rather than through the states and large states would no longer have the ability to ignore federal measures, such a system, Madison argued, would have to be based on proportional representation. It was only fair for the American citizens in Virginia, Massachusetts, and Pennsylvania to have a say in the formation of public policies commensurate with their proportion of the total American population. Only this arrangement was consistent with the “republican principle” of majority rule and the principle of equality underlying it.

Once these transformations were secured, additional powers beyond those exercised in the confederation or “federal system” under the Articles, especially of taxation and commercial regulation, could then - but only then - be fairly and effectively exercised. This point is worth emphasizing because it is so often missed or misunderstood. As Lance Banning observed and Michael Zuckert has repeatedly emphasized over many years, Madison did not believe that the mere addition of powers to a system organized along the lines of the Articles of Confederation would solve the problems Americans were encountering in the 1780s. No matter what you believe about the extent of Madison’s nationalism at this critical moment of constitutional reform, his writings provide dispositive evidence that his first goal in constitutional reform was not to add power to the national government. It was rather to explore a plan of structural reorganization of the union that created a new and unprecedented federal government that could act effectively.

Madison did not enter the Convention, I hastily add, with the institutional implications of this new-fangled *federal government* as an alternative to existing *federal system* fully worked out. His initial letters laying out his preliminary thoughts on constitutional reform still included the possibility of the election of one of the branches of Congress by the state legislatures. Nor did the original Constitution in its final form fully embody Madison’s vision of an independent national government filled with officials who did not answer to the state legislatures and exercised power directly on the people. The selection of Senators by the state legislatures was one of the most obvious deviations from Madisonian federalism. Equal representation of the states in the Senate also, in Madison’s eyes, introduced the states improperly into the operations of the national government. Furthermore, Madison was hardly the only delegate to think in something like these terms. James Wilson traced out the logic of one dimension of this conception of federalism more consistently than Madison by calling for the direct election by the people of all federal officials.

Most importantly, however, a direct line can be drawn from three famous letters that Madison wrote on the eve of the Constitutional Convention that constitute “the first shoot in his thoughts of a plan of Federal Government” to the seeds of this novel form of federalism in the Virginia

Plan to its (imperfect) institutionalization in the Constitution as signed on September 17th. Madisonian federalism constitutes Madison's distinctive and most important contribution to the original design of the Constitution. If Levinson is looking for Madison's DNA in the Constitution, he can find it here.

Like other scholars, Levinson points to Madison's specific losses at the Convention and his angst afterwards as evidence of his lack of enthusiasm for the Constitution he is said to have fathered. Nevertheless, this disappointment can only be accurately assessed in light of his initial, substantial *success*. Madison was influential early, when it mattered most, when the foundation of our constitutional system was being laid. Nor is it either historically accurate or fair to say that the Convention would have come to this understanding of federalism if Madison had not been there. However familiar this conception of federalism seems to scholars today; it was not inevitable that it would be adopted early in the Convention and set the contours of the proceedings. It is at least as likely that without Madison the Convention would have grafted additional powers onto the national government while nevertheless leaving it tethered to the states along the lines proposed in the Patterson Plan.

What would the history of the United States have been under a political system fashioned along the lines of the Patterson Plan? Madison and several other Framers feared that the states would continue to refuse to comply with federal actions, to encroach on national prerogatives, and to violate the rights of individuals within their borders. Madison saw this as a recipe for civil war, the dissolution of the union into separate confederacies, increased foreign intervention in North America, attempts to establish an American monarchy, or some combination of these catastrophic events. We don't know if Madison and his allies at the Convention were correct. We do know what happened. I prefer what happened to the chance that a more traditional form of federalism would have created a better history for the United States.

If we return to the Convention proceedings, Madison won on proportional representation in the House of Representatives but lost on three of the other key proposals for constitutional reform that he favored. These included his pet proposal for a universal veto, proportional representation in the Senate, and a joint executive-judicial revisionary council to review federal legislation before it took effect. Madison's universal veto was vulnerable to the criticisms that Jefferson, his fellow delegates, and subsequent scholars have lodged against it. The universal negative was an excessive means of preventing encroachments by the state governments. It was, as Jefferson put it, a patch incommensurate with the hole that needed covering. It would also have been, as Madison eventually admitted, impractical to implement. Madison's "political ear failed him," as Calvin Johnson, in his book *Righteous Anger at the Wicked States*, put it, in proposing this reform in the first place. But the residue, even of this outlier proposal, found its way into the Constitution. This happened first when the Convention whittled the negative down to the prohibitions of the states listed in Article I, Section 10, the national supremacy clause, and judicial review of state laws. More dramatically, Madison's universal veto was revitalized and incorporated into the Constitution when the Reconstruction Congress passed the 14<sup>th</sup> Amendment, effectively completing the Madisonian Constitution by employing the national government as a protector of rights and an umpire of injustices within the states.

The counterrevolution begun by small state delegates with the presentation of the New Jersey Plan resulted in what Madison thought of as a “Great Extortion,” not a “Great Compromise.” To be sure, this *sine qua non* of constitutional reform also had a profound impact in shaping the final constitutional scheme. Here, Madison’s opponents, not Madison, won the day. Equal representation in the Senate introduced the states as states into the constitutional scheme on the (erroneous - according to Madison) premise that this was necessary to protect their interests from coalitions by the large states. As Levinson observes, Madison did not offer a principled defense of this feature of the Constitution. The election of Senators by the state legislatures (not undone until the passage of the 17<sup>th</sup> Amendment in 1913) made them responsible to those bodies, further flawing the unvarnished understanding of federalism that Madison fully grasped only over the course of the Convention proceedings.

Nevertheless, I must admit, Levinson’s criticism of Madison here left me a bit baffled. Certainly, Madison cannot be held to be the architect of the Constitution based on the parts of it that he vehemently opposed. Point taken. Nevertheless, as Levinson himself has observed following the important scholarship of Frances Lee and Bruce Oppenheimer, equal representation of states in the Senate has given the small states numerous perks while obstructing the goals of a majority of the American people. That this would be the result of what we now call the “Great Compromise” was yet another Madison prediction. Instead of praising Madison for his insight, however, Levinson criticizes him for not being the “Father of the Constitution” even when he tried to be the father of a constitution Levinson would prefer.

At any rate, by the end of the Convention, multiple loses, especially the loss of the universal veto, taught Madison that most of his fellow delegates (Hamilton and Wilson were the exceptions) had failed to grasp, let alone support, his understanding of a complete and coherently designed federal republic capable of addressing the problems Americans had experienced in the 1780s. Even before the Convention had closed its doors, an exasperated Madison predicted that the government formed under the constitution they were about to propose would “neither effectually *answer its national object* nor prevent the local *mischiefs* which every where *excite disgusts* ag[ain]st the *state governments*.”

If the story ended here, Madison would be rightly remembered as one of the most important men at the Convention. But the story doesn’t end here. Boisterous, sometimes rancorous, public debate about the Constitution began before the ink had dried. Anti-federalist writings quickly jarred Madison into the reality that the proposed Constitution was likely the best one he could expect. He then turned on a dime, buried the considerable disappointments he still harbored, and went to work in defense of the incomplete, compromised Constitution. That work included taking up his quill as Publius, fighting for ratification in his home state of Virginia (a contribution Levinson ignores), and eventually steering the Bill of Rights through the First Congress.

If we consider these contributions based on their actual historical impact rather than chronologically, we begin with Madison’s successful effort to promote ratification in Virginia. New Hampshire, it will be remembered, became the ninth state to ratify the Constitution while

the Virginia Ratifying Convention was still in its final days, thus ensuring that the requirement stipulated in Article VII for enacting the Constitution was met. Everyone knew, however, that Virginia (and New York – which also had yet to ratify) had to ratify if the Constitution was to be given a trial and union along the lines envisioned in it secured. Not only was Virginia the home of George Washington and by far the most populous state in the union in 1787, Virginians had also exercised tremendous influence in the decision to declare independence and in the calling of the Constitutional Convention. Moreover, going in, the contest in the commonwealth was, by all estimates, exceedingly close and featured several of the nation's leading Anti-Federalists, including William Grayson, Richard Henry Lee, George Mason, and most importantly, Patrick Henry.

Second only to Washington in reputation in Virginia at that moment, Henry was an uncommonly talented and effective orator. The duel between Madison and Henry at the Virginia Ratifying Convention pitted the most informed man at the Philadelphia Convention against possibly the most electrifying public speaker in the republic. Ratification in Virginia was a complex affair. Accounts suggesting that Madison deflated Henry's "hypothetical horrors" about the consequences of ratification with reasoned responses to ensure ratification in Virginia underestimate Henry's intelligence and unfairly suggest that his appeal was entirely to the passions. They also ignore numerous other factors that led Virginia to approve the Constitution. Still, Madison's leadership and cerebral defense of the Constitution was an important factor in securing ratification in his home state.

As for the Bill of Rights, to be sure, as Levinson suggests, Madison did not initially support "amendments" to the Constitution, especially if they were made conditions of ratification. Still, Madison was the most enthusiastic and consistent supporter of the protection of civil liberties, especially religious liberty, among the Framers. Why then didn't he initially support a bill of rights in 1787? The answer is complex, but discernible. Big hint: follow the changing context of the ratification process.

Throughout the ratification process, Madison repeated standard Federalist claims that the protection of some rights would endanger others ignored. He also added the less common observation that enumeration might even pose a threat to the rights spelled out if the constitutional language affording them protection was not sufficiently broad. Unlike most Antifederalists and many Federalists, Madison saw majority factions, not acts of government independent of the majority, as the greatest threat to civil liberties. Written protections for rights, he warned, would snap when subjected to the will of the majority. This threat was best remedied by the extended republic, federalism, and the system of checks and balances in the Constitution. Other threats to rights posed by, for example, the suspension of the writ of habeas corpus following an insurrection were best addressed by "removing the pretext" for such an event in the first place.

As the ratification process played out, the call for a bill of rights became inseparably linked to Anti-federalist efforts to stipulate ratification only upon the condition of prior amendments. Madison considered conditional ratification no better than rejection of the Constitution altogether, smelled, and then smelled out an Anti-federalist plot. During this complex moment in

which “amendments” to the Constitution had one meaning for the Anti-federalists and another for Federalists and in which the call for a bill of rights was inseparably bound up in the effort to torpedo ratification, Madison’s withheld his support.

When the Constitution was safely ratified, he once again turned on a dime, pledged his commitment to his constituents (especially members of dissenting religious groups) to pursue a bill of rights in the First Congress, and began pestering and prodding his colleagues in the First Congress into passing one. The problem with Levinson’s contention that Madison’s constituents are the real champions of the Bill of Rights, then, is that Madison’s constituents were not in the First Congress. Had they been, they would have been hard-pressed to convince Madison’s complacent New England colleagues of the importance of a bill of rights. Madison could easily have mirrored their complacency. He understood and sympathized with their reluctance to act on a matter that, at that moment at least, seemed less pressing than others such as raising revenue for the national government to address the nation’s many debts. Like several of his colleagues, Madison found the grinding process of debating the wording of each individual amendment a “nauseous project.”

He did, however, gain some confidence in the efficacy of written declarations to protect rights from his famous exchange with Jefferson on the necessity of a bill of rights and from reflecting upon Anti-federalist writings and observations he had made earlier in *The Federalist 49*. For his part, Jefferson observed that the judiciary might become the peculiar guardians of the rights in the bill of rights. Madison then repeated this observation to his fellow Congressmen in urging them to pass a bill of rights. Reflecting upon Anti-federalist writings in favor of a bill of rights and upon his defense of constitutional veneration in *The Federalist 49*, he also now suggested that rights such as those identified in bills of rights would be protected against the threat of majority factions if they were incorporated with the public sentiment. Enmeshed in public opinion, written guarantees for rights, Madison told a colleague, would have “some influence” in their protection.

Despite the lukewarm support he had for a bill of rights, Madison persisted because he gauged public opinion better than many of his colleagues, knew that Federalists controlled Congress and thus now controlled what amendments would be proposed, and knew that supporting a bill of rights could now be used to separate the “well-meaning” from the “designing” opponents of the Constitution. Achieving that goal and thwarting a coordinated Antifederalists effort to call a second constitutional convention under Article V involved passing moderate amendments that, for the most part, protected individual rights and blocking the passage of controversial amendments that would have altered the structure of the government or the principles and substance of the powers given to the national government in the Constitution. Madison’s plan worked. Passage of the ten amendments that were only later called the Bill of Rights proved to be the death knell of opposition to the Constitution.

Levinson chides Madison for introducing his own preferred amendments into the discussions over a bill of rights. Some of this incredulity is warranted. Madison’s prohibition against pursuing controversial amendments did not prevent him from proposing his own. His proposals included not only the amendment that would have prohibited violations of the rights of

conscience, freedom of speech and the press, and trial by jury in criminal cases by the *state* governments that Levinson mentions. Madison's preferred amendments also included one proposal that would have implemented structured increases in the number of representatives apiece population increases, and another that would have prohibited Congressmen from voting themselves pay raises before an intervening election. The first of these, a residue of the universal veto and a product of Madison's continuing concern about the potency of majority factions within the small sphere of the state governments, was killed in the Senate. Protection against state violations for the civil liberties included in the Bill of Rights would only take place after passage of the 14<sup>th</sup> Amendment through the painfully slow process of selective incorporation. The second proposal, itself a genuine effort to address the ubiquitous Anti-federalist claim that the Constitution did not include a sufficient number of representatives, passed out of Congress but failed ratification in the states. The final one – the “Rip Van Winkle Amendment” - was ratified as the 27<sup>th</sup> Amendment in 1992.

Considered whole, Madison's role in the formation of the Bill of Rights is a strange and complicated story that is difficult to convey to contemporary Americans. It is strange and complicated because it involves explaining how the most committed civil libertarian of his generation at first genuinely opposed the addition of a bill of rights as unnecessary and perhaps dangerous, but then (without much change in his mind about the necessity or effectiveness of one) became its most enthusiastic supporter. This story is difficult to convey to contemporary Americans because we are accustomed to believing that rights are protected through judicial enforcement of written guarantees. It is worth conveying in its complexity because it can lead us to think more carefully about this premise and what factors are necessary for the protection of rights. Still, considered within its historical context, the story of Madison's role in the formation of the Bill of Rights suggests that, if we have to use patriarchal metaphors, it would be better to call Madison the “Father of the Bill of Rights” than “the Father of the Constitution.” As Gordon Wood put it, “[Without Him, No Bill of Rights.](#)”

If we turn finally to Madison's contributions to *The Federalist*, two issues are brought into play by Levinson's comments: first, the initial reception and historical impact of the signature ideas that Madison set forth as Publius and secondly, the continuing relevance of his analysis of the logic and workings of the American political system. First, despite their relatively narrow circulation and the odd unimpressed reader, *The Federalist* essays were generally viewed by their limited readership in 1787-1788 as a brilliant projection of the political system created by the Constitution. Jefferson spoke for many in his generation in 1788 when he called them “the best commentary on the principles of government which ever was written” shortly after ratification. Being recognized as authoritative by select elites is different than persuading or influencing many, but it is hardly unimportant.

A still stronger voice can be raised against Levinson's conclusions about the *contemporary* relevance and value of Madison's writings as Publius. *Federalist 10* and the preliminary versions of his theory of an extended republic contain his famous observations about the sources of factions and possible cures for their mischiefs. The observations about the dynamics of collective irrationality and sources of individual diffidence within groups in these same writings amount to



explorations of what psychologists now call “deindividuation” and “the spiral of silence.” *Federalist 49* provides a remarkable examination of the affective foundations of political allegiance. Madison’s analyses of the centralizing tendencies of decision-making in large legislative assemblies in *Federalist 55* and *58* and his corresponding view of the conditions of political “responsibility” amount to a suggestive theory about the conditions necessary to create robust deliberative assemblies.

For its part, *Federalist 37* offers a brilliant analysis of the multiple ends or goals of “good government” - including stability, energy, and fidelity to republican liberty – that he and his co-conspirators sought to mingle in proper proportions into the political system created by the Constitution. This analysis stands as a prophylactic against the many Progressive scholars who charge the Framers with being opponents of democracy without considering that governments do more than respond to citizen demands. Most importantly, *Federalist 37* confronts Progressive scholars with the observation governments should not be judged entirely on the basis of one dimension of good government (responsiveness to public demands) but rather on the basis of several other factors including energy and stability. Most broadly, Madison’s discussions of constitutional architecture throughout *The Federalist* stresses the same foundational premise about the profoundly contextual character of decision-making and behavior and how they can be changed by modifying context evident in contemporary “choice architecture.” Considered collectively, Madison’s analyses as Publius are stunningly prescient.

To be sure, as Levinson suggests, several other of Madison’s predictions later proved to be wrong. Vast changes have taken place since the Founding and insured that what is commonly called the “Madisonian system” does not, in important ways, reflect Madison’s expectations or design. Madison’s most famous contribution to *The Federalist*, essay ten, envisions Congress as a popularly elected but nevertheless impartial arbiter between the nation’s many factions. The strongly normative vision underlying this essay flips upside down the current relationship between interest groups and Congress. From this viewpoint, the capture of Congress and regulatory agencies by the interest groups they are charged with regulating is an egregious violation of the Madisonian axiom that “no man is allowed to be a judge in his own cause” and nothing less than a Madisonian nightmare.

Similarly, however broad its constitutional base of power, the legislative does not, as Madison suggested, “necessarily predominate” in the American republic. Writing before the creation of modern political parties, Madison, Hamilton, and Jay could not have anticipated the comprehensive transformation that the infusion of parties into the political system they designed in Philadelphia would generate. This is especially evident in *Federalist 51*, which is relevant, paradoxically, because separation of powers does *not* follow the logic of its original design. In our moment of extreme polarization and virtually unprecedented party alliance, members of Congress toss constitutional powers reserved to their branch to Presidents of their own party, sanction unconstitutional expansions of the powers of the President and the national government generally when they control the White House, and then reverse themselves when they do not. By comparison with our present reality, Madison’s expectation that federal officers would spring to the defense of their home institution in the face of encroachments from other branches out of a

concern for the preservation of their sphere of constitutional authority seems unrealistic. Whether prescient or nobly quaint, however, Madison's writings as Publius provide the essential starting point for understanding how the original constitutional architecture remains as an independent variable in the vast and complex workings of the American political system.

I could go on. Instead, allow me to propose a conclusion diametrically opposed to Levinson's. There has never been a better time to study Madison than right now, when so many are outraged, hell-bent on dismantling institutions, and certain of their indictment of those who constructed them. There is no better moment than now to take account of this studious Framers, the one who arrived first, did his homework and methodically explained to others what they would know if they had done theirs, who was skeptical of claims for unalloyed goods, willing to accept half a loaf, always learning and often brilliant, and who brought the weaknesses of the policies and proposals he favored to the attention of his colleagues and readers first – and only then explained why what he offered was, despite these weaknesses, still best.

There has also never been a better time to remember that some claims become truisms because they are true. Two of these are that James Madison was at the center of the America's constitutional moment of 1786 to 1789 and that he has a lot to teach us about the Constitution.

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