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JUDICIAL POWER IN THE CONSTITUTIONAL THEORY OF JAMES MADISON

JACK N. RAKOVE*

One might have thought that the defendant in the most celebrated case in the canon of American constitutional law would have left history a record of his reaction to the famous decision in *Marbury v. Madison*.¹ After all, the defendant whom William Marbury sued for delivery of his famed commission was none other than Secretary of State James Madison—the same statesman who played so essential a role in the adoption of the Constitution and its first amendments, and who certainly cared deeply about the place of judicial power in the federal republic. Perhaps Madison saw Marshall's opinion not as the exalted judicial decision its modern worshipers and idolaters have adored, but simply as an irritatingly adroit but limited political slap at the administration in which he played second fiddle to Jefferson's violin.² Whatever the explanation, Madison left no comment on the case to ponder (which might itself confirm a skeptic's notion that the decision has been completely overrated).

There were, however, two other periods when Madison did reflect on the nature of judicial power and its particular importance in maintaining the equilibrium of both republican and federal government. One came during the mid-to-late 1780s, the point when he emerged as the leading constitutional theorist of the new republic (not to mention the Atlantic world). The second came a full three decades later, when Madison, only recently retired from the

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1. 5 U.S. (1 Cranch) 137 (1803).

2. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 64-68 (1971). For background to the case, see David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349 (1996).

presidency as well as forty years of political service, was drawn into discussing other decisions of the Marshall Court that loomed far larger in the legal consciousness of the era than *Marbury*. In 1819, Spencer Roane, the leading critic of *McCulloch v. Maryland*³ (and subsequently *Cohens v. Virginia*),⁴ attempted to recruit both Madison and Jefferson into his campaign to demonstrate that the Supreme Court could not be the proper final arbiter of controversies affecting the boundaries of national and state power. Madison was no fan of Marshall's jurisprudence which, especially in *McCulloch*, relied too heavily on the same Hamiltonian arguments that had helped to drive him into political opposition in the early 1790s. But neither was he willing to join Roane in asserting that state and federal courts could be equally competent and authoritative in interpreting the federal structure of the Constitution. Madison's criticism of the reasoning of *McCulloch* and other concurrent decisions has to be weighed against his sympathy for the role that the Marshall Court was contriving to play—or at least should play, if it showed more restraint in framing its opinions. A careful reading of Madison's thoughts about judicial power, both in the late 1780s and again after 1819, casts useful light on his larger constitutional theory.

Three critical concerns drove Madison's approach to the underlying problems of constitutional government in the 1780s. One was his appreciation of the implications of the principle of legislative supremacy that would naturally predominate in a republican form of government. This appreciation covered both the political and the institutional advantages that the legislature would enjoy over the two "weaker" departments of executive and judiciary, in part through its capacity to speak as the immediate voice of the people, but also by exploiting its very rulemaking authority to mask its encroachments on their proper functions. Madison's understanding of the nature of legislative power was extremely precocious and modern; he grasped the key fact that a republican assembly would exist not only to monitor the potential abuses of power by the executive, but also to make law in the positive sense of the term.⁵

3. 17 U.S. (4 Wheat.) 316 (1819).

4. 19 U.S. (6 Wheat.) 264 (1821).

5. For further discussion, see Jack N. Rakove, *The Origins of Judicial Review: A Plea for*

That perception was closely related to his second preeminent concern. The legislature might be politically and institutionally supreme, but its actions, Madison feared, would finally be driven by the interests and passions of its constituents, mustering as popular majorities or coalitions that would seek to use government instrumentally to pursue their own advantages. It was this danger of popular faction, manifesting itself through the enactment of multiple, mutable, and unjust laws, that Madison believed was endangering the cause of republican government. The search for a cure for the resulting "mischiefs of faction"⁶ was partly about the possibility of limiting legislative misbehavior, but its deeper diagnosis was addressed to the nature of popular preferences, passions, and prejudices.

Madison's third concern rested on the realization that these first two problems would in turn complicate the task of establishing a federal government capable of meeting national exigencies. Federalism required drawing lines between the respective realms of policy to be governed by national and state law. But all such line-drawing enterprises were naturally imprecise, and state governments, with the parochial interests of their constituents behind them, would discover incentives to poach on national authority whenever or wherever possible. Because state legislatures could always deploy "an infinitude of legislative expedients" in support of these encroachments, some mechanism was needed to maintain the just authority of the national government and the due subordination of the states—or more neutrally, to police the boundaries separating the two jurisdictions.⁷

On all of these matters, Madison's starting position was the nature of legislative power, and his thoughts on the potential uses of the judiciary as a solution to these problems reflected that overarching preoccupation. Cabining legislative power was the problem; applying judicial power as a potential check was a possible

New Contexts, 49 STAN. L. REV. 1031, 1051-56 (1997).

6. See *infra* note 48 and accompanying text.

7. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in JAMES MADISON: WRITINGS 146-52 (Jack N. Rakove ed., 1999) (defending his proposed negative on state laws); see also THE FEDERALIST NO. 37 (James Madison), reprinted in JAMES MADISON: WRITINGS, at 197-200 (reviewing Madison's epistemological reflections on the inherent difficulties of political line drawing).

solution. But the efficacy of that solution remained to be ascertained. Madison was a legislator (and a lawgiver in the making) but not a lawyer.⁸ He read legal treatises, but never expressed any serious interest in the practice of law. Except for the two years he served on the Virginia council, his political career (until 1801) was spent in the Virginia legislature (including the surrogate legislature of the provincial convention of 1776), the quasi-legislature of the Continental Congress, the deliberative assemblies of the Federal Convention of 1787 and the Virginia ratification convention of 1788, and the first four Congresses under the Constitution. Like any member of the Virginia gentry, he probably knew a great deal about his state's legal system—which is why he was an enthusiastic advocate for its reform—but he was first and foremost a legislator.⁹

Madison's first important discussion of judicial power was a byproduct of his experience in the Virginia legislature in the mid-1780s. The occasion was the request of Caleb Wallace, an old college friend now resettled in Kentucky, for advice as to the nature of the constitution his new residence might draft once it gained its independence from Virginia. Scholars regard his reply to Wallace of August 23, 1785, as the first noteworthy text that illustrates Madison's concern with the defects of the first state constitutions.¹⁰ It is a thoughtful, carefully developed document, which notably begins with a discussion of the want of "*wisdom* and steadiness"¹¹ in the legislative output of the states. At the time, Madison was a dominant figure in the Virginia assembly—though hackles were rising—but he was also learning that his best intentions and preparations could not always sway the minds of less-talented legislators whose votes nevertheless counted the same as his.

The character of the judiciary department was the third item that Madison addressed in this letter, but even before he reached it he offered two revealing comments indicative of his concerns. The first

8. On Madison the lawgiver, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 56 (1996).

9. A. G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810*, at 192-202 (1981).

10. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in JAMES MADISON: *WRITINGS*, *supra* note 7, at 39-47.

11. *Id.* at 40.

was to endorse the idea of a joint executive-judicial council of revision, as found in the New York constitution, "[a]s a further security against fluctuating & indegusted [sic] laws"¹² The second was to observe, *en passant*, that the executive department, "[t]hough it claims the 2d place" of importance in a state government, "is not in my estimation entitled to it,"¹³ thereby implicitly promoting the judiciary from its cellar-dwelling position in the hierarchy of separated powers.

Madison opened the ensuing discussion with a telling reference to Britain, where the judiciary "maintains private Right against all the corruptions of the two other departments & gives a reputation to the whole Government which it is not in itself entitled to"¹⁴ (So much for the "vaunted" British constitution!). But Madison did not discuss judicial power in substantive or purposive terms. Rather, the main points he offered under this heading all addressed issues of judicial tenure. Judges should hold their tenure during good behavior, as had been the case in Britain since the Act of Settlement of 1701;¹⁵ their salaries should either be "fixed" or immune to alteration; and their salaries should also be "liberal."¹⁶ The justification of tenure during good behavior is "obvious."¹⁷ Without fixed salaries, the independence desired would be "Ideal only"; and unless judges were well paid, "the bar will be superior to the bench which destroys all security for a Systematick [sic] administration of Justice."¹⁸ Beyond stating these fundamental guidelines of judicial tenure, however, Madison was reluctant to say too much about the actual composition of the courts, save for the interesting observation that the arguments of Lord Bacon in favor of establishing a court of

12. *Id.* at 41.

13. *Id.* Madison's justification for the relegation of the executive behind the judiciary, however, is tied to the idea of "all the great powers which are properly executive being transferred to the Federal Government." *Id.* By great powers, Madison meant powers over war and foreign affairs, sometimes classed with executive power because of the royal prerogative over the same subjects.

14. *Id.*

15. An Act for preventing any Inconvenience that may Happen by Privilege of Parliament (The Act of Settlement), 1701, 12 & 13 Will. III, ch. 3 (Eng.).

16. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in JAMES MADISON: WRITINGS, *supra* note 7, at 42.

17. *Id.*

18. *Id.*

chancery "outweigh in my Judgment those of Lord Kaims [Kames] on the other side."¹⁹

One other passage in this letter bears, indirectly or one could even say negatively, on Madison's conception of judicial power. Madison answered Wallace's query, "Should there be a periodical review of the Constitution?"²⁰ with two possible solutions. One (only alluded to) was the council of censors instituted in Pennsylvania, where the polity remained "much divided" over the radical constitution of 1776; Madison did not seem to think that this expedient was relished "even by those who are fondest of their Constitution."²¹ The second was to enable any two departments "to call a plenipotentiary convention whenever they may think their constitutional powers have been Violated by the other Department or that any material part of the Constitution needs amendment."²² Here Madison drew, without acknowledgment, on the similar proposal that Jefferson had advanced in his *Notes on the State of Virginia*.²³ Madison was not quite so explicit as to suggest that the most likely scenario for such a convention would involve a joint executive and judicial *demarche* against legislative encroachment, but the thought could not have been distant. But these observations are more noteworthy for implying that fundamental violations of a constitutional scheme would not be amenable to judicial correction in the ordinary course of things. Or to put the point more directly, the judiciary had no special duty or capacity to maintain constitutional norms, beyond seeing to the orderly and conscientious administration of justice.

As much as Madison valued the ideal of an independent judiciary, that was not a great concern during the year and a half that separated this letter from his final preparations for the Federal Convention that assembled at Philadelphia in May 1787.²⁴ During this period, questions surrounding the reform of the Articles of

19. *Id.*

20. *Id.* at 45.

21. *Id.*

22. *Id.*

23. *Id.* For the relevant passage from Jefferson, see Thomas Jefferson, *Notes on The State of Virginia*, in THOMAS JEFFERSON: WRITINGS 123, 190 (Merrill D. Peterson ed., 1984).

24. This is not to ignore, however, his interest in the reform of the Virginia court system. Cf. *supra* notes 16-19 and accompanying text.

Confederation preoccupied him. Yet as Madison compiled his agenda for Philadelphia, he was more and more inclined to look beyond the problems of federalism among the states to include, as well, the character of republican government within them. He was increasingly concerned with the problem of republican lawmaking in the states; with the character of legislators, the legislative process, and the legislative output; and ultimately, with the tenor of popular politics itself and the factious pressures it generated. The results of these reflections were initially recorded in his key pre-Convention writings: letters to Jefferson, Edmund Randolph, and Washington written between mid-March and mid-April, and the memorandum on the Vices of the Political System of the United States, probably completed by early April.²⁵ Madison's dissatisfaction with the "multiplicity," "mutability," and "injustice" of state lawmaking led him to the conclusion that vesting the national legislature with "a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative" was "the least possible encroachment on the State jurisdictions" requiring adoption.²⁶ Prior to the drafting of the Virginia Plan, however, his discussion of judicial power was limited to a single intriguing paragraph in the letter to Washington.

Madison argued that "[t]he national supremacy" should "be extended ... to the Judiciary departments."²⁷ As Madison used the term "supremacy" throughout this letter, his meaning seems to emphasize the supremacy of national law more than the creation of specifically national institutions. In his original formulation, he was seeking to discover "some middle ground" between the "consolidation" of the states "into one simple republic" and the maintenance of their "individual independence."²⁸ The goal was to

25. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in JAMES MADISON: WRITINGS, *supra* note 7, at 63-68; Vices of the Political System of the United States (Apr. 1787), in JAMES MADISON: WRITINGS, *supra* note 7, at 69-80; Letter from James Madison to George Washington (Apr. 16, 1787), in JAMES MADISON: WRITINGS, *supra* note 7, at 80-85 (omitting letter to Randolph of April 8, which is essentially identical to the one to Washington).

26. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in JAMES MADISON: WRITINGS, *supra* note 7, at 74-75, 81.

27. Letter from James Madison to George Washington (Apr. 16, 1787), in JAMES MADISON: WRITINGS, *supra* note 7, at 82.

28. *Id.* at 80

"support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful."²⁹ In the case of the judiciary, Madison seems to have assumed that judges would primarily remain state officials who would somehow have to be made to accept the supremacy of national law.

If those who are to expound & apply the laws, are connected by their interests & their oaths with the particular States wholly, and not with the Union, the participation of the Union in the making of the laws may be possibly rendered unavailing. It seems at least necessary that the oaths of the Judges should include a fidelity to the general as well as local constitution, and that an appeal should lie to some national tribunals in all cases to which foreigners or inhabitants of other States may be parties. The admiralty jurisdiction seems to fall entirely within the purview of the national Government.³⁰

Implicit in the final remark is the likelihood that trial courts in other areas of the law would be state-based institutions, which is precisely why judges would need to swear oaths to the national as well as state constitutions. The supremacy of national law would thus depend, in the first instance, on fostering national loyalties in state officials.³¹

Madison's thinking about this fundamental issue apparently evolved significantly over the next month, especially if the Virginia Plan, as is customarily believed, is an expression of his thoughts. Article 9 of the plan which Governor Randolph presented to the Convention on May 29, 1787 called for "a National Judiciary [to] be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature."³² Consistent with his 1785 letter to Caleb Wallace, this article also proposed tenure during good behavior and "fixed compensation"

29. *Id.*

30. *Id.* at 82.

31. This supposition is echoed in Madison's immediately ensuing comments on the executive: "The national supremacy in the Executive departments is liable to some difficulty, unless the officers administering them could be made appointable by the supreme Government." *Id.*

32. EDMOND RANDOLPH, THE VIRGINIA PLAN (May 29, 1787), reprinted in JAMES MADISON: WRITINGS, *supra* note 7, at 90.

immune to either "increase or diminution" of incumbents.³³ The jurisdiction of national courts was stated in more expansive terms than the sole reference to admiralty a month earlier; it would extend to "questions which may involve the national peace and harmony"³⁴ a subject matter that presumably covered disagreements with states over the boundary of authority. The provision binding state officials (including judges) "to support the articles of Union"³⁵ was now relegated to a separate article. Finally, and perhaps most important, article 8 of the Virginia Plan proposed the creation of a joint executive-judicial council of revision, armed with a limited negative over congressional acts, including congressional exercise of its power to negative state laws.³⁶ Madison had mentioned the New York model of such an institution in his letter to Wallace, but only in passing; now it occupied a major place in his larger constitutional scheme.

The Convention's debates over the council of revision offer critical insight into the framers' understanding of judicial power, for it was in opposition to this proposal that the delegates made their most revealing comments about judicial review. The Convention discussed the proposal on three separate occasions: June 4 and 6, and again on July 21.³⁷ Madison delivered his main remarks on the subject on the latter two days. His analysis began with the problems he detected in the alternative idea of vesting a negative on legislation in the executive alone. Such an official would need to be "controuled [sic] as well as supported."³⁸ Madison assumed that the executive would operate from a position of relative political weakness vis-a-vis Congress, and that the addition of the judiciary would have the dual benefit of fortifying the executive in the exercise of the negative while making sure that the power was wielded on appropriate rather than capricious grounds. Madison conceded that the objections against judicial involvement were legitimate but not conclusive. One objection was that judges who

33. *Id.*

34. *Id.* at 91.

35. *Id.*

36. *See id.* at 90-91.

37. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97-98, 139 (Max Farrand ed., 1937); 2 *id.* at 73-80.

38. James Madison, Speech of June 6, 1787, in 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 37, at 138.

were involved in an advisory capacity in the enactment of legislation would be compromised later, when the same law was presented for their review in a proper judicial capacity. Madison answered this objection in two ways: First by suggesting that the number of occasions on which this would occur would be few, and second, and more importantly, by emphasizing "[h]ow much good on the other hand w[oul]d proceed from the perspicuity, the conciseness, and the systematic character w[hil]ch the Code of laws w[oul]d receive from the Judiciary talents."³⁹ There was, in short, a trade-off: the risk of compromising the proper exercise of the judicial function in hearing cases would be offset by the greater benefit to be derived at the lawmaking phase by judicial involvement.⁴⁰

A second objection against judicial involvement was derived from the fundamental maxim or principle of separation of powers that seemingly called for rigid distinctions between the departments and the forms of authority they exercised. Madison answered this objection with the same argument he would expound at greater length in *The Federalist Papers*. The threat to the preservation of the proper separation of powers was not equally distributed. "Experience in all the States had evinced a powerful tendency in the Legislature to absorb all powers into its vortex,"⁴¹ he observed on July 21, and it was naive to think that the desired separation could be preserved by laying down paper maxims proclaiming the principle without simultaneously giving "a defensive power to each [department] which should maintain the Theory in practice."⁴² In his view, the advantages to be gained by allying the two weaker departments of executive and judiciary against an overbearing legislature outweighed any damage inflicted on an abstract principle. It was no more objectionable to give the judiciary a role in lawmaking than to allow the executive to exercise a negative, effectively making that office legislative as well as executive.⁴³

If the council of revision represented Madison's favored solution to the problem of maintaining equilibrium among the branches of

39. *Id.* at 139.

40. *See id.* at 138-39.

41. James Madison, Speech of July 21, 1787, in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 37, at 74.

42. *Id.* at 77.

43. *Id.* at 74.

the national government, his pet proposal for maintaining the "due supremacy" of the Union over the states took the form of the congressional negative on state laws.⁴⁴ Rather than count upon judges to police the boundaries of federalism, Madison assumed that only Congress itself would have the requisite political stature to repel the challenges to national authority that he fully expected state legislatures to mount. Like the council of revision, this proposal was vulnerable to powerful objections. Would states ever freely consent to have their sovereign powers of legislation supervised and circumscribed in this way? How could Congress possibly exercise such a power, given the voluminous legislation that the member states of a large and expanding union would predictably produce? Madison's proposal, as expressed in article 6 of the Virginia Plan, survived early votes in the committee of the whole, but not the key vote of July 16 giving each state an equal vote in the Senate.⁴⁵ In the aftermath of that rebuff to his plans, the negative was eliminated, and the Convention instead began the process of making the judiciary, acting under the Supremacy Clause, the institution responsible for weighing the legislative acts of the states against the dictates of the Constitution. Quietly but powerfully, the Supremacy Clause evolved from a weak provision of the New Jersey Plan into a major bulwark of the superiority of the Federal Constitution and laws over the corresponding constitutions and laws of the states.⁴⁶ Its eventual explicit binding of *state judges* to enforce federal norms recognizably echoed Madison's pre-Convention musings about extending the "national supremacy" to "the judiciary department," where "department" could be understood to embrace both national and state judges.⁴⁷

Madison recorded his doubts about the adequacy of this development in his important letter to Jefferson of October 24, 1787—a key text in the interpretation of both his political thinking and his initial assessment of the Constitution. In a prior letter of September 6, written eleven days before the Convention adjourned,

44. Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215 (1979).

45. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 37, at 14.

46. RAKOVE, *supra* note 8, at 81-82, 171-77.

47. Letter from James Madison to George Washington (Apr. 16, 1787), in JAMES MADISON: WRITINGS, *supra* note 7, at 62; see also *supra* text accompanying note 27.

Madison signaled his discontent by "hazard[ing] an opinion ... that the *plan should* it be *adopted* will neither effectually *answer* its *national object* nor prevent the local *mischiefs* which every where *excite disgusts* agst [sic] the *state governments*. The grounds of this opinion," he added, "will be the subject of a future letter."⁴⁸ The October 24 letter fulfilled that promise. Its ostensible subject was a review of the Convention and Constitution, but its central and (by far) longest section was devoted to an elaborate defense of Madison's proposed negative on state laws, divided in turn into a defense of the uses such a power would have, first in protecting the national government from the interfering legislation of the states, and second, in allowing it to intervene within the states individually on behalf of individual and minority rights that Madison feared would remain vulnerable to infringement by state legislation. It is difficult to explain the lengths to which Madison went in defending this discarded proposal without recognizing that it suggests his persisting conviction that a national government lacking this power would be both vulnerable and inadequate.

Within the context of Madison's notions of judicial power, the key passage in this letter comes at the end of his discussion of the uses of the negative against the "dangerous encroachments"⁴⁹ of the states, and serves as a tacit transition to the ensuing discussion of its value in protecting individual rights. "It may be said that the Judicial authority under our new system will keep the States within their proper limits, and supply the place of a negative on their laws," Madison observed.⁵⁰

The answer is, that it is more convenient to prevent the passage of a law, than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal agst. [sic] a State to the supreme Judiciary; that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which in the event of disobedience would be necessary, is

48. Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in JAMES MADISON: WRITINGS, *supra* note 7, at 136.

49. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in JAMES MADISON: WRITINGS, *supra* note 7, at 147.

50. *Id.* at 148.

an evil which the new Constitution meant to exclude as far as possible.⁵¹

This account of the defects of relying upon judicial enforcement of federalism and rights rests not on a strict construction of the proper role of the judiciary but rather a political assessment of the consequences and the capacities of the judiciary. Like so many other elements of Madison's thinking in the late 1780s—including his reservations about the utility of bills of rights—it offers a hard-headed and even result-oriented appraisal of the real political forces at play. Judicial power offers a frail reed, Madison argued, because it is always necessarily reactive; because its benefits are not universally available; and most importantly, because the political will and resources available to the states will overmatch the comparable authority deployed by the judiciary—unless, that is, the other branches of the national government prove willing to enforce the decrees of the judiciary. Nothing in this assessment can be read as evidence that Madison opposed the vigorous exertion of judicial power in principle. His reservations were pragmatic. Judicial power simply will be too weak to provide a satisfactory solution to the challenges to national supremacy that he still expected the states to mount.

But this was a private letter designed for his closest political confidant, not a public commentary meant as an authoritative exposition on the Constitution. Thus when Madison wrote *The Federalist No. 10* four weeks later, he had no occasion to explain why he privately doubted that the proposed national government would not provide the comprehensive solution to the problem of rights and factions he had envisioned back in the spring. Instead he contented himself with inverting the conventional wisdom, which held that liberty would be more secure within the smaller compass of a state-based republic than the extended national republic the Constitution would create.

That celebrated essay was the first of the twenty-nine that Madison contributed to the collective writings of "Publius." In the allocation of labor with his principal co-author, Alexander Hamilton, Madison's duties were dedicated to general discussions of federalism

51. *Id.* at 148-49.

and separation of powers, the legislative powers of Congress, and the leading attributes of its two chambers. He had, therefore, no formal occasion to discuss the judiciary in any sustained way; that topic fell instead to Hamilton, in essays that appeared only in the spring of 1788, and then in the second volume of the McLean edition. In his essays, Madison's references to judicial power are few and fleeting—though still intriguing. In *The Federalist No. 10*, for example, the paragraph following his famous description of the multiple and ineradicable sources of faction offered a striking analysis suggesting that “the most important acts” of economic legislation could really be regarded as “so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens”⁵² In this view, every decision relating to matters of property was likely to have differential impacts, and in that way have varied effects on the *rights* of different classes of property holders—and in that sense, legislative determinations might be said to have judicial attributes.⁵³ Or again, in his account of the “impetuous vortex” of legislative power in *The Federalist No. 48*, Madison explained, again in passing, why “projects of usurpation” that might threaten the separation of powers were not to be expected from a judiciary whose authority was well confined within “land marks, still less uncertain” than those of the other two branches.⁵⁴

Madison's most important allusion to judicial power as Publius, however, is found in *The Federalist No. 39*. Madison devoted the fifth of its five-pronged analysis of the “federal” and “national” dimensions of the Constitution to the question of “the *extent* of [the] powers” to be vested in the national government.⁵⁵ Here, again, he posed the problem in terms of “supremacy,” arguing that the division of specific powers of governance between the Union and the states meant that both possessed “distinct and independent portions

52. *Id.*

53. THE FEDERALIST NO. 10 (James Madison), reprinted in JAMES MADISON: WRITINGS, *supra* note 7, at 162.

54. THE FEDERALIST NO. 48 (James Madison), reprinted in JAMES MADISON: WRITINGS, *supra* note 7, at 283. The thought anticipates Hamilton's better known discussion of the judiciary as “the least dangerous branch” in *The Federalist No. 78*.

55. THE FEDERALIST NO. 30 (James Madison), reprinted in JAMES MADISON: WRITINGS, *supra* note 7, at 216.

of the supremacy.”⁵⁶ The new government of the Constitution therefore “cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only.”⁵⁷ Madison then offered an important concession:

It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local governments; or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.⁵⁸

This passage contains a remarkable commentary on Madison’s original understanding of judicial power—remarkable for its breadth, its simplicity, and even its naivete.

It establishes, first, that Madison recognized that the Supreme Court (“the tribunal” of the first sentence), exercising the power we know as judicial review, would police the boundaries of federalism separating the legislative jurisdictions of the Union and the states. In this public tract he had no reason to betray the private doubts expressed on this very head to Jefferson the previous October; he merely had to state that this was the solution the Constitution contemplated. Second, Madison’s bland assurance about “the effectual precautions” made to assure that these decisions would be “impartially made, according to the rules of the constitution,” could hardly have satisfied Anti-Federalists who worried that the federal judiciary would have a natural incentive to enlarge national powers, much less explain what the “rules” of interpretation in question were.⁵⁹ Tenure during good behavior might provide a necessary but

56. *Id.*

57. *Id.*

58. *Id.*

59. The most important statements of Anti-Federalist views are found in the writings of “Brutus.” See Brutus, *Essay XI*, reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 417 (H.

hardly sufficient foundation of judicial independence; whether it would provide the right incentives to exercise that independence "impartially" could not be known. Third, Madison's insistence that such a tribunal could only be established under national authority faithfully reflected his deep concern that the parochial loyalties of state-based officials posed a far greater danger than the aggrandizing ambitions of their national counterparts. These were exactly the positions that Spencer Roane challenged three decades later, and that Madison increasingly felt compelled to defend.

Madison did have another occasion to discuss the proposed federal judiciary at some length during the extensive discussion of Article III at the Virginia ratification convention. In a lengthy speech that began on June 19, 1788, and continued the next day, Madison offered a slew of comments on various aspects of Article III, focusing primarily on the jurisdiction of federal courts detailed in Section 2.⁶⁰ Madison defended each of the relevant grants of jurisdiction in predictable terms, but not so expansively as to provide noteworthy insight into his deeper conception of judicial power or the prospects for judicial review.⁶¹

To track Madison's continuing reflections on the place of the judiciary in the constitutional scheme, we have to turn instead to the memorandum he penned in the fall of 1788, assessing the speculative draft of a new constitution for Virginia that Jefferson had privately prepared in 1783 and then published as an appendix to his *Notes on the State of Virginia*.⁶² In his remarks on Jefferson's version of a "*Council of Revision*," Madison first noted that the creation of a "check to precipitate, to unjust, and to unconstitutional laws" would "be more effectually secured . . . by requiring bills to be separately communicated to the Exec: & Judicy. depts."⁶³ An objection by one of these branches would require a two-thirds override by both legislative chambers; by both, a three-fourths vote. A protest against a purportedly unconstitutional act would require

Storing ed., 1987).

60. See Madison, Speech of June 19-20, 1788, reprinted in 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1409, 1412-19 (John Kaminski & Gaspare Saladino eds., 1993).

61. See *id.*

62. For the draft, see 6 THE PAPERS OF THOMAS JEFFERSON 294-308 (Julian Boyd ed., 1952).

63. *Id.*

a further test. Such a measure should be "suspended"⁶⁴ pending a fresh election of the lower house and reenactment by either the two-thirds or three-fourths margins. In that case, neither the executive nor the judges would be enabled "to pronounce a law thus enacted, unconstitu[tiona]l & invalid."⁶⁵

Madison's position here is consistent with what Larry Kramer has recently called "popular constitutionalism": the idea that the people, not the judiciary, should be the final resort for the resolution of constitutional disputes.⁶⁶ And the animus against the judiciary as final arbiter of constitutional meaning is made more explicit in the next paragraph of these observations:

In the State Constitutions & indeed in the Fedl. one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making their decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended, and can never be proper.⁶⁷

Here, again, the tantalizingly elliptical quality of Madison's remarks packs significant meaning. On the one hand, he seems to concede that the final resolution of the constitutional meanings of statutes will fall to the judiciary. But this is a matter not of principle or correct theory but rather of the chronology of action. The legislature enacts a statute; the executive may then oversee its enforcement; and when controversies arise over its meaning (as arise they often will, and sometimes must), judges, by being the last to act, "stamp it with its final character,"⁶⁸ including its constitutionality. Madison

64. *Id.*

65. James Madison, Observations on the "Draught of a Constitution for Virginia," (Oct. 15, 1788), in JAMES MADISON: WRITINGS, *supra* note 7, at 417. It should be noted that this preference for a popular role in the resolution of constitutional disputes does not comport with the argument of *The Federalist No. 49* and *50*, where Madison goes to some lengths to explain why "periodic" or "occasional" appeals to the authority of the people in constitutional matters should not be allowed.

66. Larry D. Kramer, *The Supreme Court 2000 Term: Forward: We the Court*, 115 HARV. L. REV. 4 (2001).

67. James Madison, Observations on the "Draught of a Constitution for Virginia," (Oct. 15, 1788), in JAMES MADISON: WRITINGS, *supra* note 7, at 417.

68. *Id.*

suggests that this result is unintended, improper, and essentially inadvertent; yet somehow, absent other explicit arrangements, it reflects a logic of constitutional government.

In assessing the import of these remarks, it is essential to distinguish the discrete functions that judicial review serves as a mechanism of federalism and separation of powers, taken individually. Part of the tension between *The Federalist No. 39* and these observations may dissolve if we recognize that judicial review was indeed the mechanism the Framers had fastened upon to decide conflicts between national and state legislation. That conclusion flows readily from both the logic of the Supremacy Clause, which explicitly bound the state judiciaries to enforce the Constitution while implicitly recognizing the capacity of the federal judiciary to do so, and the course of decision making at Philadelphia, which first replaced Madison's negative on state laws with the thin version of that clause contained in the New Jersey Plan and then enlarged that clause in quiet but potent stages. But when Madison discussed judicial power in his observations on Jefferson's proposed constitution, the context was separation of powers, which might be described as presenting the problem of judicial review in its pure form, unsullied by the obscure and murky details of federalism. Without the problem of federalism to muddy the issue, Madison could compare the three forms of power directly, and conclude that, as a matter of principle, inadvertent final decision making by the judiciary was inferior to some form of "popular constitutionalism" in which the peoples' representatives, with a fresh vote of confidence from their electors, would be the final arbiters of constitutional meaning.

These theoretical issues should not obscure a more important point about Madison's original understanding of judicial power. In the late 1780s, he remained deeply convinced that public opinion, as it exerted its power on representative assemblies, was the dominant force in republican politics. "In our Governments the real power lies in the majority of the Community,"⁶⁹ he wrote Jefferson in October 1788, and many, perhaps of the key positions he took in this period can be explained as responses to this conviction: his reservations

69. Letter from James Madison to Thomas Jefferson (Oct. 24, 1788), in JAMES MADISON: WRITINGS, *supra* note 7, at 421.

about the utility of bills of rights (the subject of this letter);⁷⁰ his interest in establishing genuinely senatorial senates as a check on the impetuosity of the lower houses;⁷¹ his willingness to link the two weaker branches of executive and judiciary in a council of revision, or the federal Senate and presidency under the new Constitution.⁷² For Madison in the 1780s, the political superiority of the legislature—and especially the lower house—was the dominant fact of republican government, and all calculations about the capacity of other institutions were the dependent variables of this fact. Had Madison been more confident (or prescient) about the authority an independent judiciary might come to command, his conception of judicial review might have been expressed in more rounded, less elliptical terms. But given the novelty of the concept itself, and the difficulty of imagining how judges would acquire such authority, or the confidence to wield it, it is not surprising that his thoughts on the subject were not more fully developed.

In the course of their famous correspondence on the value of a bill of rights, Jefferson attempted to push Madison's thinking in just this direction. In responding to the crucial letter of October 17, 1788, in which Madison laid out his deepest reservations about a bill of rights, Jefferson noted that his friend had omitted one argument "which has great weight with me, the legal check which it puts into the hands of the judiciary."⁷³ That Madison could in fact omit an argument that modern commentators would place high if not indeed atop their accounts of the functions of a bill of rights is, of course, the key point in itself, for it confirms how little faith Madison placed in the efficacy of judicial power. Madison dutifully incorporated Jefferson's reminder in his speech of June 8, 1789, introducing his proposed amendments to the House of

70. *Id.* at 420.

71. RAKOVE, *supra* note 8, at 53 (1996).

72. That is the point of the intriguing sentence in *The Federalist No. 51* which suggests that the problems and risks incurred in vesting the president with an "absolute negative" over legislation may be corrected "by some qualified connection between this weaker department, and the weaker branch of the stronger department," which in this context can only be the Senate, which is weaker not because it has less authority than the House of Representatives—in fact it has more—but rather because it lacks the political advantages that the latter enjoys by virtue of its popular election. *THE FEDERALIST NO. 51* (James Madison), reprinted in JAMES MADISON: WRITINGS, *supra* note 7, at 296.

73. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in *THE PORTABLE THOMAS JEFFERSON*, 438 (Merrill D. Peterson, ed., 1975).

Representatives.⁷⁴ If rights-protecting articles "are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights," Madison observed.⁷⁵ But the idea that Madison viewed this prospective development with much optimism seems unlikely. In the concurrent House debates on the removal power of the executive, he took pains to suggest that it would be unwise to allow the question to be resolved judicially when an aggrieved officeholder removed by the president without the consent of the Senate sued to retain his office.⁷⁶ It was doubtful, Madison argued, that judges would muster the fortitude to intervene in a highly charged dispute that might pit the politically more potent institutions of the president and Senate against each other.⁷⁷ Although here the question in dispute was a matter of separation of powers—rather than federalism or rights—Madison's cautious assessment of the limits of judicial power remains suggestive of his deeper doubts.⁷⁸

Thirty years later there were new data aplenty to assimilate, new problems to be faced, and new theories to be considered. Some had begun to arise as soon as the Constitution took effect; others occurred at irregular intervals, as new issues of politics created opportunities, necessities, and incentives to articulate constitutional views. In the period immediately following ratification of the Constitution, Madison expected that a necessary initial phase of precedent setting would be required to "liquidate" the meaning of obscure constitutional provisions and to fill in inevitable lacuna and silences in the original text.⁷⁹ But once that initial phase had passed, it was plausible to hope that the residual ambiguities and uncertainties would diminish with each passing year. Instead, new issues intervened to make the evolving process of constitutional interpretation a continuation of politics by other means. After 1793, Madison's original obsession with the "impetuous vortex" of the

74. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON: WRITINGS, *supra* note 7, at 449.

75. *Id.*

76. James Madison, Speech in Congress on Presidential Removal Power (June 16, 1789), in JAMES MADISON: WRITINGS, *supra* note 7, at 456.

77. *Id.* at 465.

78. RAKOVE, *supra* note 8, at 347-49.

79. THE FEDERALIST NO. 37 (James Madison), reprinted in JAMES MADISON: WRITINGS, *supra* note 7, at 187-98.

legislature gave way to a new and unexpected appreciation of the advantages the executive enjoyed in time of external crisis, advantages that could be used to mount "encroachments" on the proper powers of Congress.⁸⁰ After 1796, he also had to come to grips with the realization that a faction could indeed gain control of all three branches of the national government, making the Union far more dangerous to the preservation of rights than the analysis of the advantages of an extended republic in *The Federalist No. 10* and other related documents had ever conceived possible. The fact that the federal judiciary and the Bill of Rights proved as frail as Madison had feared was scant consolation. The boundary between the realms of the political and the constitutional proved remarkably permeable, as disagreements over policy repeatedly escalated into disputes over which institution or level of government was properly authorized to undertake the action in question.

The occasion for Madison's mature reflections on judicial power was the mounting criticism directed against the Marshall Court in the period following Madison's retirement from the presidency in 1817. The most important source of that criticism was the group of Virginia Republicans, led by John Taylor of Caroline and Spencer Roane, who built upon the somewhat ambiguous legacy of the Virginia and Kentucky Resolutions of 1798 to develop a more systematic and militant exposition of the doctrine of states' rights.⁸¹ Roane was the son-in-law of the old Anti-Federalist giant, Patrick Henry, the leading jurist on the Virginia Court of Appeals and Marshall's sharpest critic. By 1814, as Gerald Gunther has observed, Roane had "concluded that the United States Supreme Court could not constitutionally review state court decisions on questions of federal law."⁸² In his view, the Supreme Court could never act as the impartial tribunal to which Madison had alluded in *The Federalist No. 39*—the Court did not occupy an independent position between the national government and the states; it was in fact an agency of the former. Moreover, because the Union was itself the creation of sovereign states which had only delegated particular powers without alienating or forfeiting their inherent sovereignty,

80. *Id.* at 364.

81. GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND* 8-11 (1969).

82. *Id.* at 10.

its judiciary could not claim supremacy over the corresponding judiciaries of the states.⁸³

The initial source of Roane's judicial displeasure was the Supreme Court's rulings in the long-running case that finally became known as *Martin v. Hunter's Lessee*,⁸⁴ but the subsequent decisions in *McCulloch v. Maryland* and *Cohens v. Virginia* greatly exacerbated his concern.⁸⁵ Roane's opposition took the form of a spirited newspaper debate with his Richmond neighbor, Chief Justice Marshall himself,⁸⁶ but it also included an effort to recruit the two former presidents, Jefferson and Madison, to his banner.⁸⁷ Writing to Madison on August 22, 1819, Roane enclosed a copy of the "Hampden" essays he had published in the *Richmond Enquirer* in June in direct response to the decision in *McCulloch*. "They relate to a subject as cardinal, in my judgment, as that which involved our Independence," Roane wrote, and then went on to observe that "[n]o man in our Country has done so much as you, in Establishing our present happy system of Government, or can feel a greater interest in preserving it."⁸⁸

Madison responded a week later, with the first of the three lengthy and carefully thought out letters he would exchange with Roane over the next two years.⁸⁹ Madison opened his response with two intriguing comments, interesting in themselves, that he stated quickly without elaborating fully. Anticipating by many decades Professor Sunstein's theory of the advantages of "incompletely theorized agreements,"⁹⁰ Madison first noted that the matter at hand did not demand the pronouncement of "the general and abstract doctrine interwoven with the decision of the particular case."⁹¹ The meaning of either a law or the Constitution itself,

83. See especially Roane's fourth essay as *Hampden* (June 22, 1819), reprinted in GUNTHER, *supra* note 81, at 138-54; see also F. THORNTON MILLER, *JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828*, at 114-20 (1994).

84. 14 U.S. (1 Wheat.) 304 (1816).

85. See GUNTHER, *supra* note 81, at 108-09.

86. See generally *id.* at 107-54.

87. *Id.*

88. Letter from Spencer Roane to James Madison (Aug. 22, 1819) (on file with James Madison Papers, Library of Congress).

89. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in JAMES MADISON: WRITINGS, *supra* note 7, at 733.

90. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35 (1996).

91. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in JAMES MADISON:

Madison added, should “result from a course of particular decisions, and not these from a particular and abstract comment on the subject.”⁹² He then went on to express his wish “that the Judges had delivered their opinions *seriatim*,”⁹³ which would have the alternative advantages either of demonstrating how the judges had individually reached a common decision or of undermining the precedential force of the *McCulloch* decision by illustrating their “discordance.”⁹⁴

With these intriguing yet passing observations out of the way, Madison proceeded to his main criticism of the decision. That criticism was essentially consistent with the fundamental criticism of legislative power that had played a key role in the formulation of his constitutional theory in the 1780s. If legislative power was inherently plastic in nature, or if representative assemblies could always deploy “an infinitude of legislative expedients”⁹⁵ to disguise their ulterior purposes and encroaching tendencies, then it followed as a matter of course that the broad reading of the Necessary and Proper Clause that the Court endorsed in *McCulloch* would establish “a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress.”⁹⁶ Read in this way, “Necessary and Proper” was a euphemism for unbridled legislative discretion, and the acceptance of that reading would make it impossible for the Court ever to say when the legislature was exceeding its just authority. The Court could still insist, in theory, the right to judge whether such a violation had occurred, but that principle could be evaded easily or rarely enforced.

Madison then linked this criticism of the danger of unconstrained legislation with the mode of originalist interpretation of the Constitution he had begun to develop in the 1790s. The adopters of the Constitution had foreseen “that it might require a regular course of practice”—including a chain of case-by-case adjudications

WRITINGS, *supra* note 7, at 733.

92. *Id.*

93. *Id.*

94. *Id.* at 734.

95. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in JAMES MADISON: WRITINGS, *supra* note 7, at 149.

96. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in JAMES MADISON: WRITINGS, *supra* note 7, at 734.

—“to liquidate & settle the meaning” of ambiguous clauses, especially where the line between the legislative powers of the national and state governments was uncertain.⁹⁷ But had the state ratification conventions believed or been told that Congress would be able to exploit the Necessary and Proper Clause in just this way, Madison argued, “the avowal of such a rule” could well have “prevented its ratification.”⁹⁸ Rather than allow so latitudinarian a reading of Article I to arise by judicial fiat, Madison concluded, it would be better to use the Article V mechanism of amendment to identify those powers that had been identified “by experience” as useful additions to the original charter.⁹⁹

Nowhere in this letter did Madison address that part of Roane’s criticism of *McCulloch* which made the ultimate interpretative authority of the Court, rather than the merits of its particular reading of the Constitution, the key point in contention. If Madison had a political strategy in this letter, it was to avoid the former question while essentially concurring with Roane on the substance of the latter. Madison sought to fault the Court for its jurisprudence, in other words, without challenging its jurisdiction. Indeed, the implicit logic of this first letter is to suggest that by acceding to a broad reading of the legislative authority of Congress, without “liquidating” the true scope of Article I through “a course of particular decisions,” the Court was likely to reduce its authority to oversee Congress.¹⁰⁰

Not quite two years later, Roane wrote Madison again in the aftermath of the Court’s decision in *Cohens v. Virginia*.¹⁰¹ The prosecution of the Cohen brothers for selling District of Columbia lottery tickets in Virginia had been appealed to the Supreme Court under the famous Section 25 of the Judiciary Act of 1789,¹⁰² and over the vociferous protests of the state legislature, which invoked the sovereign immunity principles of the Eleventh Amendment to deny federal jurisdiction.¹⁰³ Marshall’s opinion represented nothing new

97. *Id.* at 735.

98. *Id.*

99. *Id.* at 737.

100. *Id.* at 733.

101. 19 U.S. (6 Wheat.) 264 (1821).

102. Act of Sept. 24, 1789, ch. 20, § 25, 1 stat. 73, 85-87 (1789).

103. *See id.*

in the way of doctrine, but expounded at great length and with formidable logic the nationalist case for treating the Supreme Court as the ultimate arbiter of federalism questions, rather than allowing the law of the nation to be set (as the Virginia position supposed) by each state court. Writing to Madison in mid-April 1821, Roane apologized for intruding on Madison's privacy, but observed that the decision in *Cohens* "has sapped the foundations of our Constitution"¹⁰⁴ as well as the proper construction of its meaning established by what Roane alluded to as "the Glorious revolution of 1799."¹⁰⁵ In this crisis, Roane went on, the eyes of all sound Republicans were "turned upon you, as one of our most virtuous, most distinguished, and most efficient citizens We cannot therefore avoid indulging a glimmering of hope, that your aid will not be entirely withheld, on this last and greatest occasion."¹⁰⁶

Madison's less than glimmering response of May 6, 1821, produced a somewhat more labored document than his prior letter discussing *McCulloch*.¹⁰⁷ As in the previous letter, Madison began by briefly lamenting the Court's tendency to offer "comments & reasonings of a scope" that went beyond the actual "judgments pronounced," and then proceeded to address the underlying substantive issue the decision posed: the "indispensable obligation, that the constitutional boundary" between the Union and the states "be impartially maintained."¹⁰⁸ The question of whether a "just equilibrium" could be preserved, or whether the states or the Union would acquire a "preponderance" over the other, remained to be ascertained; and the history of the federal system already suggested that oscillations in either direction were possible.¹⁰⁹

For Madison there was, again, nothing novel about this concern. The difficulty of drawing visible and precise boundaries between the Union and the states was a problem he had wrestled with in the 1780s, when he initially favored a congressional negative on state laws, and again a decade later, when the Virginia Resolutions of

104. Letter from Spencer Roane to James Madison (Apr. 17, 1821) (on file with James Madison Papers, Library of Congress).

105. *Id.*

106. *Id.*

107. See Letter from James Madison to Spencer Roane (May 6, 1821), in JAMES MADISON: WRITINGS, *supra* note 7, at 772-77.

108. *Id.* at 773.

109. *Id.*

1798 had called upon the states to play a vigilant role in monitoring the abuse of national power. His first response to Roane on this count was to note the benefits to federalism of multiplying the number of states, but Madison quickly moved on to weigh the respective advantages of Congress and the Court.¹¹⁰ In his view, the real danger "to the reserved sovereignty of the States" was still to be found not in the federal judiciary but in Congress, acting not to aggrandize its own institutional authority but rather in response to "impulses given to it by a majority of the States seduced by expected advantages."¹¹¹ This, of course, was nothing more than an evocation of Madison's fear of popular factious majorities, now colored by the recent sectional controversy over Missouri and the mounting clamor for internal improvements, which Madison found constitutionally suspect in the absence of an Article V amendment. But for the time being, Madison professed to believe that the checks of the constitutional system were still efficacious. If any true danger did lie in the Court, as Roane believed, "the plastic faculty of Legislation" which Congress always enjoyed, reinforced by the power of impeachment, should suffice to constrain the abuse of judicial power.¹¹² And should Congress somehow collude with the judiciary or acquiesce in its improper exercise of authority, the political checks of election still erected "an adequate barrier" against the possibility of "*durable* violations of the rights & authorities of the States."¹¹³

A very close and perhaps imaginative reading of this document might reveal at least a latent warning to the emerging and distinctly Southern school of states-rights thinking for whom Roane can be said to have been speaking. Not only was it essential to ask whether judicial authority was really as dangerous as Roane alleged, Madison implied; it might also be important to note that factious congressional majorities, should they form and endure, were far more likely to favor the preferences and prejudices of the North than the South. By the 1820s, one could no longer suppose, as had been possible back in the 1780s, that the long-term vectors of migration and demography would favor the agrarian, slave-holding

110. *Id.* at 773-74.

111. *Id.* at 774.

112. *Id.*

113. *Id.*

South, bringing it closer to parity with the North.¹¹⁴ Now it seemed likely that the South would be a permanent minority. The apportionment of House seats under the three-fifths clause, the admission of states on the quid pro quo formula of the Missouri compromise, and the inter-sectional politics of presidential elections all offered mechanisms that would enable the South to defend essential interests. But thinking strategically, the South might find advantages in learning to regard the national judiciary as another line of defense against the possibility that a factious Northern majority might one day control the political branches of the national government, and be tempted into using its legislative power to violate the landmarks of federalism. In the wake of the Missouri Crisis, which weighed far more seriously on Madison's thinking than its passing mention here indicates, the specter of a Northern-dominated Congress was not a mere phantasm.

In the remainder of this letter, however, Madison attempted to hold out hope that time and superior reasoning would point out the errors in the Court's opinion in *Cohens*. Madison's strategy in dealing with Roane, at least in this letter, was to appear reasonable on the details of the case in controversy while avoiding confrontation on the main point about federal jurisdiction, all the while suggesting that the far-reaching consequences that Roane ascribed to the decision could yet be avoided. Even for Madison, who was intellectually inclined to multiply distinctions and qualifications, this is a strikingly labored letter.

In the third and concluding letter in this series, however, Madison dropped the distinctions to address the main point.¹¹⁵ "The Gordian Knot of the Constitution seems to lie in the problem of collision between the federal & State powers, especially as eventually exercised by their respective Tribunals,"¹¹⁶ he began. Two criteria should govern the resolution of potential disputes.¹¹⁷ One was to favor textually warranted modes of construction that would

114. On this point, see especially Drew R. McCoy, *James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 226-58 (Richard Beeman et al. eds., 1987).

115. See Letter from James Madison to Spencer Roane (June 29, 1821), in *JAMES MADISON: WRITINGS*, *supra* note 7, at 777-79.

116. *Id.* at 777.

117. See *id.*

"obviate the dilemma of a Judicial rencounter or a mutual paralysis"; that is, to prefer interpretations that would avoid posing the problem in starkly binary, confrontational terms.¹¹⁸ The second, and arguably more revealing, was to recognize that "the sounder policy" would allow the decisions of the national judiciary "to prevail."¹¹⁹ In forming the federal compact, the states had mutually agreed to "a surrender of certain portions, of their respective authorities."¹²⁰ They had not retained, that is, the full measure of residuary sovereignty to which Roane and his coadjutors professed devotion. The framers of the Constitution had in fact anticipated that "disagreements concerning the line of division" between the Union and the states would arise.¹²¹ The alternative solution of allowing the state judiciaries to act as final arbiters of constitutional meaning surely would produce a constitution that meant different things in different states, with the result that the residuum of sovereignty retained by the states would vary, thereby sapping the "vital principle of equality, which cements their Union."¹²² That danger would not arise if the principle of federal superiority was recognized. Moreover, the political processes that governed the appointment of federal judges would leave the federal judiciary "controulable [sic] by the States," whereas no such federal control would operate over state judges should they exercise the full constitutional authority Roane sought.¹²³

Rather than close on this note of decided disagreement, Madison ended the exchange with one further conciliatory (and even flattering) suggestion. Instead of projecting a deepening chasm between state and federal jurisprudence, Madison professed to hope that the passage of time would operate to accommodate the two levels of constitutional jurisprudence to each other.¹²⁴ Back in the Founding era proper, he observed, there had been great "distrust" of the quality of the state judiciaries.¹²⁵ That had abated significantly since, however, and should these institutions continue to

118. *Id.* at 778.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 778-79.

125. *Id.* at 778.

gain stature—in the process becoming more like the Virginia court that Roane himself led—and popular support, their “united interpretations of constitutional points, could scarcely fail to frustrate an assumption of unconstitutional powers by the federal tribunals.”¹²⁶ And as both judiciaries became more professional, independent, and therefore impartial, they

will vary less & less also in their reasonings & opinions on all Judicial subjects; and thereby mutually contribute to the clearer & firmer establishment of the true boundaries of power, on which must depend the success & permanency of the federal republic, the best Guardian, as we believe, of the liberty, the safety, and the happiness of men.¹²⁷

In one sense, Madison’s responses to Roane seem fundamentally consistent with the mature reflections on the problems of constitutionalism that Madison continued to evolve during his two-decade retirement. He had always understood that the line-drawing dimensions of the constitutional project would produce untidy results where national and state jurisdictions overlapped; and he had long feared that state-based politicians, particularly legislative demagogues (“Courtiers of popularity,” he had called them back in 1787) would discover ambitious incentives to criticize federal measures.¹²⁸ The inherent messiness of federalism imposed particular burdens that a unitary system of government—a consolidation—did not. It required a sustained and ongoing effort to puzzle out, on a case-by-case basis, and in good faith, the constitutional proprieties of any particular realm of law and policy. The truths of federalism lay in its details, because the federal system itself was a novelty under the political sun for which other regimes in other countries and other periods yielded no useful precedents. A political and legal rhetoric that emphasized antagonisms and fostered suspicions between the different levels of government would conduce to exactly the wrong result (assuming one wanted to make the federal system work, as Madison assuredly

126. *Id.* at 779.

127. *Id.*

128. James Madison, Vices of the Political System of the United States (Apr. 1787), in JAMES MADISON: WRITINGS, *supra* note 7, at 69, 73.

did, rather than assume the primacy of provincial loyalties over the national project). The challenge, rather, was to promote an attitude toward federalism that was tolerant of its ambiguities and willing to sort out the ensuing problems pragmatically. From this perspective, the problem with the bold declarations of the Marshall Court, in both *McCulloch* and *Cohens*, was that their defensive overstatement of the logic of national supremacy could only lead to just the reactive posture in which Roane and his allies were situating Virginia. From Madison's perspective, the error of the Marshall Court was not the assertion of the principle of its interpretive superiority per se, but the expansive terms in which that assertion was couched.

In each of these three letters, Madison sought to adopt as conciliatory a posture as he could without enlisting as an accomplice in Roane's fundamental challenge to the Supreme Court. Wherever possible, Madison indicated his displeasure with the substance of the opinions in *McCulloch* and *Cohens*. But on the basic matter of jurisdiction, he did not retreat. Roane's denial of the Supreme Court's authority to decide properly presented cases involving the boundaries of federalism was simply untenable.

Madison stated the critical point much more directly two years later, with his most valued correspondent, Jefferson. The senior statesman at Monticello had proved far more receptive to Roane's entreaties than his political successor at nearby Montpelier. Where Roane was willing to concede that the federal judiciary "is the last resort in relation to the other departments of the [federal] government" but not to the states, Jefferson replied that he would "go further than you do" by denying the Supreme Court that advantage over the other two branches.¹²⁹ To accept the contrary, Jefferson famously remarked, would make the Constitution "a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."¹³⁰

Jefferson took another of his many potshots at Marshall in a letter to Justice William Johnson (whom he had appointed to the Court in 1804). While initially declining "to examine the question,

129. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in THE PORTABLE THOMAS JEFFERSON, *supra* note 73, at 561, 562.

130. *Id.* at 563. For a broader discussion of Jefferson's judicial philosophy, see DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 257-94 (1994).

whether the Supreme Court has advanced beyond its constitutional limits," Jefferson could not refrain from subjecting the Court, its Chief Justice, and the decision in *Cohens* to a host of criticisms, culminating in a challenge to Marshall's claim that "there must be an ultimate arbiter somewhere," with the Court being the designated candidate. Invoking a higher authority still, Jefferson suggested that a dispute between a state and the federal government over the proper exercise of a power claimed by both was best resolved by an appeal to the "ultimate arbiter [of] the people of the Union, assembled by their deputies in convention, at the call of Congress, or of two-thirds of the States."¹³¹

Jefferson sent a copy of this letter to Madison, whose reply contained a more forthright and direct statement of his mature ideas of the constitutional authority than he had offered in the earlier letters to Roane. Not for the first time in their correspondence, Madison offered a measured response to Jefferson's rhetorical enthusiasm—and in terms that echoed his critique in *The Federalist* Nos. 49-50 of Jefferson's proposal to refer constitutional disputes between the departments of a government to popularly elected conventions.¹³² That would require "a process too tardy, too troublesome, & too expensive" to be useful, Madison warned, "besides its tendency to lessen a salutary veneration for an instrument so often calling for such explanatory interpositions."¹³³ Neither would it do to allow the disputes between federal and state judiciaries to be somehow settled by a "trial of strength" between them, the more so since each judiciary presumably would be able to mobilize the strength of the other branches of its own government, thereby escalating the dispute to a point where there would be "no other *dernier* resort than physical force."¹³⁴ There was thus no

131. Letter from Thomas Jefferson to Justice William Johnson (Mar. 4, 1823), in THOMAS JEFFERSON: WRITINGS, *supra* note 23, at 1472-77.

132. See generally Letter from James Madison to Thomas Jefferson (June 27, 1823), in JAMES MADISON: WRITINGS, *supra* note 7, at 798-802.

133. *Id.* at 800. Compare this with the well known passage in *The Federalist* No. 49, where Madison similarly warns that "as every appeal to the people would carry an implication of some defect in the government, frequent appeals would in a great measure deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability." THE FEDERALIST No. 49 (James Madison), *reprinted in id.* at 287.

134. Letter from James Madison to Thomas Jefferson (June 27, 1823), in JAMES MADISON: WRITINGS, *supra* note 7, at 801.

alternative, Madison concluded, to the conclusion that the Federal Convention had designed the Supremacy Clause and Article III to assure that the federal judiciary would be responsible for resolving all federalism questions properly presented to it "in the exercise of its functions," secure in the knowledge that the role of the Senate in appointing judges, the independent tenure of the judges, and "the surveillance of public Opinion" would all operate to "guarant[ee] their impartiality."¹³⁵ Impartiality was, of course, the attitude that Madison had promised back in *The Federalist No. 39*, to which he now recurred.

Believing moreover that this was the prevailing view of the subject when the Constitution was adopted & put into execution; that it has so continued thro[ugh] the long period which has elapsed; and that even at this time an appeal to a national decision would prove that no general change has taken place: thus believing I have never yielded my original opinion indicated in the "Federalist" No. 39 to the ingenious reasonings of Col: Taylor agst. this construction of the Constitution.¹³⁶

That judgment was not altered, Madison added, by the fact "that the Judiciary career has not corresponded with what was anticipated," especially given the Marshall Court's "propensity to enlarge the general authority in derogation of the local, and to amplify its own jurisdiction," as evidenced by the same "extrajudicial reasonings & dicta" that Jefferson so despised.¹³⁷ "But the abuse of a trust does not disprove its existence," Madison argued.¹³⁸ Should some further remedy prove necessary, he concluded, "I should prefer a resort to the Nation for an amendment of the Tribunal itself, to continual appeals from its controverted decisions to that Ultimate Arbiter."¹³⁹ That is, better to recast the jurisdiction of the Court by constitutional amendment, than encourage ongoing or episodic disputes in which rival judiciaries would jockey for a popular support at the cost of undermining popular attachment to the constitutional and federal systems.

135. *Id.*

136. *Id.* at 801-02.

137. *Id.* at 802.

138. *Id.*

139. *Id.*

Within the larger matrix of constitutional problems that Madison continued to revolve almost to the moment of his death in 1836, the place of the judiciary was not the most urgent. The argument for state judicial parity with the Supreme Court advanced by Roane and John Taylor of Carolina was only one application of the emerging doctrine of states' rights that so alarmed Madison in his retirement—not least because its advocates harked back, over his objections, to the Doctrine of 1798 to whose formation he had contributed, inadvertently if fatefully. In reply to the numerous correspondents who solicited his commentary on matters constitutional, Madison repeatedly felt compelled to repudiate the heresies of state sovereignty while emphasizing the need to avoid exaggeration and oversimplification in the effort to puzzle out the contours of the federal system. From this perspective, it might be said that John Marshall's obiter dicta and Roane's and Taylor's brief for the states were equally troubling, though in somewhat different and ultimately asymmetrical terms. By relying too much on the broad reading of the Necessary and Proper Clause that Madison had resisted since 1791, the Marshall Court ran the dual risk of reducing its own capacity to gauge the reach of federal legislative power on a discrete, case-by-case basis, while simultaneously provoking its critics to mount a fundamental challenge to the jurisdiction of the Court itself. If the Court hoped to preserve the mediating role in maintaining federalism that Madison ascribed to it, greater discretion would be more effective than rhetorical valor. But on the critical jurisdictional issue—that is, the obligation of the Court to play the role that it was performing, if a bit too dramatically—Madison was finally unambiguous. The position staked out by Roane and his allies was fundamentally inimical to the Union whose preservation was Madison's greatest ambition.

In reaching this conclusion, Madison's sophisticated sense of political arithmetic must have calculated that the acceptance of the Court's federalism jurisdiction might well serve the protection of the essential regional interests of the South, which over time could only be threatened by the growing demographic advantage of the North. Since 1787, he had understood that there was at least one issue—slavery—that could overwhelm the great security that the existence of a multiplicity of factions within the extended national

republic would otherwise provide.¹⁴⁰ By the 1820s, if not earlier, he also understood that legislators could not reliably be expected to resist the temptation to politicize the interpretation of the Constitution in pursuit of partisan or interested advantage. When controversy began over the constitutional validity of the Tariff of 1828 (the so-called Tariff of Abominations), Madison wrote a lengthy letter to Joseph Cabell, warning of the danger of allowing constitutional objections to the concept of a protective tariff to be suddenly mounted after four decades of precedents and acquiescence had supported its validity.¹⁴¹ Was it not better to rely on the evidence of a "uniform interpretation" over this period, Madison asked, than to trust to "the opinion of every new Legislature heated as it may be by the strife of parties, or warped as often happens by the eager pursuit of some favourite object"?¹⁴² If not, "every new Legislative opinion might make a new Constitution"—hardly an encouraging prospect for a statesman who favored stability and equilibrium in the maintenance of constitutional governments.¹⁴³

Although Madison did not develop the point, it seems likely that he would have understood that the prospects for constitutional consistency were higher in the judicial realm than in any other branch of government. The weak allusion to the role of the federal judiciary in *The Federalist No. 39* had evolved into the recognition that it potentially embodied the most important constitutional mechanism to moderate the inherent ambiguities in the constitutional text. It was the one institution that was best qualified to pursue the steady course of "liquidating" the meaning of constitutional provisions, and thereby lay down the precedents and set the example that other institutions could hopefully be induced to follow and emulate. But that could only happen if the respective

140. Compare James Madison, Speech in the Federal Convention on Divisions Between the States (June 30, 1787) (arguing that the real difference of interest within the United States lay between Northern and Southern states, not the more and less populous states), in JAMES MADISON: WRITINGS, *supra* note 7, at 117, 118, with Letter from James Madison to Robert Walsh (Nov. 27, 1819) (warning of the danger of "a State of parties ... founded on geographical boundaries and other Physical & permanent distinctions which happen to coincide with them"), in *id.* at 744.

141. See generally Letter from James Madison to Joseph Cabell (Sept. 18, 1828), in *id.* at 813-23.

142. *Id.* at 819.

143. *Id.*

courts led by those two distinguished Virginia jurists, John Marshall and Spencer Roane, could temper their own impulses to escalate the conflict between them. Whether the judiciary would succeed in this respect or fall short was not yet known when Madison reviewed the subject after *McCulloch* and *Cohens*.