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THE FRAMERS' MUSE ON REPUBLICANISM, THE SUPREME COURT, AND PRAGMATIC CONSTITUTIONAL INTERPRETIVISM

David M. O'Brien *

The Supreme Court is currently in retreat from libertarian constructions of the rights of individuals and minorities. Ironically, this retreat coincides with the bicentenary of the bill of Rights, drafted and debated in 1789 and ratified in 1791. No less ironic, political opposition to the Court's previously broad construction of those guarantees has been inspired by what is called the "Madisonian dilemma."¹ Simply put, the dilemma is one of allowing majorities to govern while also safeguarding the rights of minorities. The Court's critics argued that majoritarianism was central to the "Madisonian system," and therefore judicial review ought to be sharply limited in deference to legislative majorities. The Warren and the Burger Courts' rulings striking down state laws in defense of individual rights were thus attacked for being counter-majoritarian.² Opposition to their rulings is now internalized within the Court itself, due to changes in its composition and the emergence of a solid conservative bloc on the Rehnquist Court.³

The problem of the Court's institutional role is not new. But, the "Madisonian dilemma" gave it a new twist and "set the terms

* Professor, Woodrow Wilson Department of Government and Foreign Affairs. Copyrighted 1990, David M. O'Brien. This article was originally prepared for delivery at the "James Madison Symposium" in Madisonville, Kentucky, September 27, 1990, and appears in a slightly different version in *The Review of Politics* (1991). The author is grateful for the support of the National Endowment for the Humanities, the Kentucky Humanities Council, and his former colleague, Robert J. Morgan, as well as for the assistance of Steve Bragaw. While absolving them of responsibility for any of the interpretative arguments here, the author benefited from the reading of and comments on an early draft by Professors Lance Banning, Kermit Hall, and Leonard Levy.

1. R. BORK, *THE TEMPTING OF AMERICA* 239 (1990).

2. For further discussion, see O'Brien, *The Supreme Court: From Warren to Burger to Rehnquist*, *PS: POLITICAL SCIENCE AND POLITICS* 12 (1987).

3. See, O'Brien, *The Rehnquist Court Comes of Age*, *UPDATE ON LAW-RELATED EDUCATION* 3 (Fall 1989); and Chemerinsky, *Foreword: The Vanishing Constitution*, 103 *HARV. L. REV.* 44 (1989).

for the contemporary debate over judicial review."⁴ "The root difficulty," argued Alexander Bickel, "is that judicial review is a counter-majoritarian force in our system . . . [because] it thwarts the will of representatives of the actual people of here and now, and therefore is a 'deviant institution in the American democracy.'"⁵ Judicial review "must achieve some measure of consonance," Bickel contended, with "the idea, central to the process of gaining the consent of the governed, that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy."⁶ Robert Bork and Justice Antonin Scalia, among others, champion this interpretation of constitutional politics as well.⁷ Justice Scalia, for instance, defends a "jurisprudence of original intentions" on the following ground:

The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes. . . . Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and its determination that a statute is compatible with the Constitution should, *as in England*, prevail.⁸

*Employment Division, Department of Human Resources of Oregon v. Smith*⁹ is illustrative of how Justice Scalia's understanding of the Court's limited role undergirds his interpretation of the Constitution. The discussion is also, I argue later, sharply at odds with James Madison's vision of constitutional politics. *Smith* involved two Native-American Indians denied unemployment compensation. They had been discharged for taking peyote for sacramental purposes during religious ceremonies of the Native American Church. Citing *Sherbert v. Verner*¹⁰ the Oregon Supreme Court interpreted the free exercise clause to require the state to demonstrate a compelling interest. In a sweeping opinion for the Court, however, Justice Scalia rejected *Sherbert*'s balancing test. In spite of *Sherbert* and other prior rulings, Justice Scalia held that the first amendment guarantee for religious freedom does not require exemptions from generally applicable laws. Moreover, he observed that, "[v]alues that are protected against government interference through en-

4. Chemerinsky, *supra* note 3, at 71.

5. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-18 (1962).

6. *Id.* at 27.

7. BORK, *supra* note 1, at 139.

8. Scalia, *Originalism: The Lesser Evil*, 57 CINN. L. REV. 849, 854 (1989) (emphasis added).

9. *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595 (1990).

10. *Sherbert v. Verner*, 374 U.S. 398 (1963).

shrinement in the Bill of Rights are not thereby banished from the political process."¹¹ Except when the government is literally forbidden by the Constitution from legislating on specific matters, in Justice Scalia's view, the meaning of the guarantees in the Bill of Rights should be determined not by the Court but by the forces of majoritarian democracy in state legislatures.¹² In Justice Scalia's words:¹³

It may fairly be said that leaving accommodation to the political process will place at relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Although not drawing the same conclusions as Justice Scalia, even defenders of libertarian rulings of the Warren Courts, including Jesse Choper,¹⁴ John Ely,¹⁵ and Michael Perry,¹⁶ have taken the "Madisonian dilemma" for granted in their ill-fated attempts to reconcile judicial review and majoritarian democracy.¹⁷ Not everyone, to be sure, has been deceived by that formation of the Court's problem. Justice William J. Brennan, Jr., for one, countered that, "Faith in democracy is one thing, blind faith quite another. Those who drafted our Constitution understood the difference. One cannot read the text without admitting that it embodies substantive choices; it places certain values beyond the power of any legislature."¹⁸ No less eloquently, Justice Robert Jackson observed that,

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁹

Still, the "Madisonian dilemma" has dominated contemporary de-

11. *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595, at 1606.

12. *See also*, Justice Scalia's opinion in *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989).

13. *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595, at 1606.

14. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL DEMOCRATIC PROCESS* 4-6 (1980).

15. J. ELY, *DEMOCRACY AND DISTRUST* 7-9 (1980).

16. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 9 (1982). But, *see and compare*, M. PERRY, *MORALITY, POLITICS, AND LAW* 164 (1984).

17. *See* O'Brien, *Judicial Review and Constitutional Politics: Theory and Practice*, 48 U. CHI. L. REV. 1052 (1981).

18. Address by Justice W. Brennan, Jr., at Georgetown University (Oct. 12, 1985) (entitled "The Constitution of the United States: Contemporary Ratification.")

19. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

bate and suggested a "majoritarian paradigm"²⁰ for the Rehnquist Court's construction of constitutional law.

The "Madisonian dilemma" has been misleading in many ways, not only in debates over the Court but also in writing about the Framers' Muse, James Madison. Whether or not the "republican revival"²¹ in constitutional scholarship contributes to reorienting debate over the Court, Madison's theory of republicanism merits re-examination. My aim here, however, goes beyond simply showing that the "Madisonian dilemma" as constructed by Bickel and Bork is unfaithful to Madison's political vision. As a genuinely original political thinker and one of the chief architects of the Constitution, Madison developed a unique theory of republicanism and a novel theory of constitutional interpretation. Contrary to Bickel and Bork, republican liberty, not majoritarianism, lies at the heart of the Madisonian system. Indeed, Madison was convinced that republican liberty was primarily threatened by popular majorities and legislative majorities in both Congress and the states. For that reason, he redefined republicanism, endeavoring to combine the institutions of representative government with auxiliary precautions for the rights of individuals and minorities. Far from rendering the Court a "deviant institution," Madison laid a basis for the Court's role in defending republican liberty. Madison anticipated and rejected a "jurisprudence of original intentions," and articulated instead a theory of pragmatic constitutional interpretivism.

I. MADISON'S REPUBLIC

"Who are the Best keepers of the People's Liberties?"²² No less than today, that question was widely debated during the Founding. Madison posed it in a dialogue between a Republican and an Anti-republican, published anonymously a year after the ratification of the Bill of Rights. The short answer for the Republican was:²³

The people themselves. The sacred trust can be no where so safe as in the hands most interested in preserving it.

20. Chemerinsky, *supra* note 3, at 61.

21. See *id.* at 74-95; M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 71 (1988); Fallon, *What Is Republicanism, And Is it Worth Reviving*, 102 HARV. L. REV. 1695 (1989); Horowitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. (1986); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); and Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

22. Madison, *Who are the Best Keepers of the People's Liberties*, National Gazette, Dec. 20, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 426 (1983).

23. *Id.*

By contrast, the Anti-republican responded:

The people are stupid, suspicious, licentious. They cannot safely trust themselves. When they have established government they should think of nothing but obedience, leaving the care of their liberties to their wise rulers.

At that, the Republican countered:

Although all men are born free . . . yet too true it is, that slavery has been the general lot of the human race. Ignorant—they have been cheated; asleep—they have been surprised: divided—the yoke has been forced upon them. but what is the lesson?

The lesson Madison drew was that republicanism presumed a "people [who were] enlightened . . . awakened . . . [and] united" in watching over the watchmen. Republican liberty ultimately depended on a people who cared about *res publica*, the public thing. Yet, according to Madison, the people themselves posed the greatest threat to republicanism. And that created a real dilemma for Madison, because he championed republican liberty, popular self-government, first and foremost. "What a perversion of the natural order of things," as he observed through the words of the Republican, "to make *power* the primary and central object of the social system, and *Liberty* but its satellite."²⁴ Madison's republicanism took a distinctively American form, based on a faith in reason and a libertarian dedication to safeguarding the rights of individuals and minorities from the oppressive forces of majoritarianism.

"Republicanism" was the watchword of the Founding period.²⁵ It stood for popular sovereignty, in Montesquieu's words, for a government in which "the body or only a part of the people is possessed of supreme power."²⁶ Still, there was wide disagreement over what it entailed. Like "federalism," "state sovereignty" and much else, the meaning of "republicanism" was if anything less clear and more divisive than today.²⁷ During the Founding, political discourse was ambiguous and in flux. Madison's contribution to the conceptual change in the understanding of "republicanism" was unique. His republicanism presumed that nature—that is, individuals' self-interests and the conditions of American life—could be improved by political architecture.

24. *Id.*

25. See, Hanson, 'Commons' and 'Commonwealth' at the American Founding, *Democratic Republicanism as the New American Hybrid*, in CONCEPTUAL CHANGE AND THE CONSTITUTION 165 (T. Ball & J.G.A. Pocock eds. 1988).

26. MONTESQUIEU, THE SPIRIT OF THE LAWS, Bk. 1, at 107 (D. Carrithers ed. 1977).

27. See, F. McDONALD, NOVUS ORDO SECLORUM 4-5 (1985); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 485, 513, 562 (1972); and O'Brien, *Federalism as a Metaphor in the Constitutional Politics of Public Administration*, 49 PUB. ADMIN. REV. 411 (1989).

Before the Constitutional Convention convened in May of 1787, Madison undertook a study of confederations and the problems besieging the Continental Congress in order to form "in his own mind *some* outlines of a new system."²⁸ One result was a series of notes on *Ancient & Modern Confederacies*, prepared in the spring of 1786.²⁹ Another, prepared the following spring, was a memorandum on the *Vices of the Political System of the United States*.³⁰ The latter contains one of his clearest statements of the problems of securing republican liberty. Surprisingly, it neither begins nor ends with a catalogue of the structural and practical problems of the Articles of Confederation. Instead, Madison focuses on state encroachments on federal authority and denial of the rights of individuals and minorities. The "multiplicity," "mutability," and "injustice" of state laws were "more alarming," because they brought "into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."³¹ According to Madison, the denial of individual rights by legislative majorities was at the root of the crisis in republicanism in the 1780s.

In *Vices*, and throughout his career, Madison was preoccupied with safeguarding "the rights and interests of the minority, or of individuals" against oppression by popular majorities, whether operating through the legislative process in Congress or the states.³² Unrestricted rule by popular majorities struck "at the very heart of republicanism"³³ by denying the possibility of governance by a "constitutional majority."³⁴

Republican liberty, including the rights and interests of individuals and minorities, was endangered by the influence that popular majorities had, "1. in the Representative bodies, 2. in the people themselves."³⁵ In *Vices* and elsewhere, he complained that representatives in Congress and state legislatures failed to pay "fidelity to

28. Letter from James Madison to George Washington (April 16, 1787), reprinted in 9 THE PAPERS OF JAMES MADISON 382-83 (1975).

29. Madison, *Ancient & Modern Confederacies*, reprinted in 9 THE PAPERS OF JAMES MADISON 3 (1975).

30. Madison, *Vices of the Political System of the United States*, reprinted in 9 THE PAPERS OF JAMES MADISON 348 (1975).

31. *Id.* at 354.

32. *Id.* at 355.

33. Letter from James Madison (1833), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 326 (1884).

34. See, *id.* at 333 and the discussion in the text at *infra* note 60, as well as R. MORGAN, JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS 197-99 (1988).

35. Madison, *supra* note 30, at 354.

the collective interests of the whole."³⁶ That in turn, he worried, would erode public confidence in and the stability of republican government. Madison lamented that elected representatives could not be completely trusted, that they often acted as "advocates for the respective interests of their constituents"³⁷ and as "dupe[s] of a favorite leader." As a result, legislative majorities were prone to enact "base and selfish measures, masked by pretexts of public good and apparent expediency."³⁸ Popular majorities outside of legislative halls were "still more fatal."³⁹

Even without acceptable alternatives, republicanism was problematic for Madison. He agreed that, "[i]n republican Government the majority . . . ultimately g[a]ve the law." But, more importantly, he pondered, "what is to restrain [the majority] from unjust violations of the rights and interests of the minority, or of individuals?"⁴⁰

Madison's solution to the problem of republicanism was neither simple nor entirely shared by his contemporaries. It sprang in part from deconstructing the traditional understanding of republicanism. First, Madison doubted that elected representatives and popular majorities could be reliably restrained by considerations of either the civic "good of the Community" or personal character and reputation; appeals to religion were even more problematic.⁴¹ Second, he rejected Montesquieu's teaching that republican forms of government were possible only in small territories. In his *Vices*, during the convention, and later in the *Federalist*, he advanced his well-known argument for republicanism based on a large extended republic.⁴²

When introducing in *Vices* the idea that "the enlargement of the sphere is found to lessen the insecurity of private rights,"⁴³ Madison aims to show how oppression by popular majorities might be minimized. In an extended and populous territory, "common interests or passion is less apt to be felt and the requisite combina-

36. Madison, *Notes on Debates* (Jan. 28, 1783), reprinted in 6 THE PAPERS OF JAMES MADISON 141, 147 (1969).

37. Letter from James Madison to Thomas Jefferson (Oct. 3, 1785), reprinted in 8 THE PAPERS OF JAMES MADISON 373-74 (1973).

38. Madison, *supra* note 30, at 354.

39. *Id.* at 355.

40. *Id.* at 355-56.

41. *Id.* at 356. See also the discussion in the text at *infra* note 139.

42. See, THE FEDERALIST NOS. 10, 14, and 63, at 77, 99, and 382 (J. Madison) (C. Rossiter ed. 1961).

43. Madison, *supra* note 30, at 357. This is Madison's "naturalist" argument for republicanism. It rests on the recognition that (1) perceived self-interests of individuals incline them to band together in common interests and passions, and (2) a vast and plentiful land makes their doing so difficult. Time, territory and other difficulties of concerted action over great distances within each state constitute barriers that must be overcome.

tions less easy to be formed by a great than by a small number."⁴⁴ The heterogeneity of growing populations brings "a greater variety of interests, of pursuits, of passions, which check each other."⁴⁵ These sociological and geographical factors weigh as well in the political process. If properly designed, governmental institutions would encourage the "refinement of [public] opinion" and make possible governance by a moderate "constitutional majority."⁴⁶ Madisonian republicanism thus placed a premium on the inevitability and desirability of a kind of liberal toleration that accompanies the cultural pluralism of large populous territories.

From Madison's perspective, Montesquieu's teaching that republicanism was feasible only in small territories was not just wrong; it was wholly inapplicable to the American experience. By Montesquieu's standards, Madison's beloved state of Virginia (with its estimated 125,525 square miles⁴⁷) was too large to sustain republicanism. But, on Madison's reconstructed republicanism, the opposite appeared closer to the truth. Even the individual states could enjoy the benefits of being expanded republics. Indeed, Virginia needed to grow in population in order to guard against oppression, especially in the name of religion, by state legislative majorities.⁴⁸ Madison wondered whether "the inconveniences of popular States contrary to the prevailing Theory [that is, Montesquieu's theory], are in proportion not to the extent, but to the narrowness of their [territorial] limits."⁴⁹ For these reasons, he consistently encouraged immigration into the United States, the country's territorial expansion, and the creation of new states.

For strategic reasons, Madison did not touch upon the idea that the states might themselves be "extended republics" in the *Federalist*. When differentiating republicanism from "a pure democracy"⁵⁰ in *Federalist Number 10*, Madison does so in language reminiscent of that in *Vices* and equally applicable to curbing popular majorities within each state as well as the nation. "The two great points of difference between a democracy and a republic are," in his words, "first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which

44. *Id.*

45. *Id.*

46. Madison, *supra* note 33, at 333.

47. See, 1 THE FOUNDERS' CONSTITUTION 96 (P. Kurland & R. Lerner eds. 1987).

48. See, e.g., Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in 8 THE PAPERS OF JAMES MADISON 295 (1973).

49. Madison, *supra* note 30, at 357.

50. THE FEDERALIST NO. 10, *supra* note 42, at 81.

the latter may be extended.”⁵¹ Both were crucial and interdependent. The first, one of political design, bears on the Constitution’s creation of a representative form of government and system of institutional checks and balances. The second, Madison’s “naturalist” argument, is the one stressed in *Federalist Number 10*. Referring to the utility of an economy of scale in terms of population and territory, Madison observes:⁵²

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

This “advantage which a republic has over a democracy,” he notes, “is enjoyed by a large over a small republic—is enjoyed by the Union over the States composing it.”⁵³ Although not pressing the point here, Madison recognized that this advantage was also one that republican governments in large states had over those in small states. Instead, Madison concludes *Federalist Number 10* with the hope that though “factious leaders may kindle a flame within their particular States . . . [they] will be unable to spread a general conflagration throughout the other States.”⁵⁴

One of Madison’s distinctive contributions to republicanism was his “naturalist” argument. No less critical, though, was his thought about the architectural design of governmental institutions. Representative government required additional institutional checks and balances or, as he referred to them elsewhere in the *Federalist*, “auxiliary precautions.”⁵⁵ In a well-known passage in *Federalist Number 51*, Madison highlights their importance when asking “what is government itself but the greatest of all reflections on human nature?”⁵⁶

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing government, which is to be administered by men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Again, in *Federalist Number 63*, he emphasizes that the “advantage

51. *Id.* at 82.

52. *Id.* at 83.

53. *Id.*

54. *Id.* at 84.

55. See, THE FEDERALIST NOS. 51 and 63 (J. Madison), *supra* note 42, at 317 and 382.

56. THE FEDERALIST NO. 51 (J. Madison), *supra* note 42, at 322.

[of a large and populous republic] ought not to be considered as superseding the use of auxiliary precautions."⁵⁷

How far Madison distanced the institutions of republican government from majoritarianism is underscored in *Federalist Number 39*. There, he again distinguishes the Constitution's creation from democratic and other kinds of regimes. In a republican form of government, "[i]t is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it."⁵⁸ This feature of republicanism distinguishes the Constitution from "mixed regimes," such as that in England, and from aristocratic and monarchic regimes. It was even further removed from majoritarian democracy by Madison's observation that

It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified [that is, popularly elected representatives, who hold "their offices during pleasure for a limited behavior"].⁵⁹

Distinguishing between republicanism and majoritarian democracy in this way points towards Madison's resolution of the problem with republicanism. The Constitution created a system of representative government in which the "political and constitutional majority [governs] in contradistinction to a numerical majority of the people."⁶⁰ In the Madisonian system, the governing constitutional majority is necessarily a numerical minority when compared with the more numerous and popular majority within the states. Still, in large and populous territories, government by a constitutional majority, subject to the auxiliary precautions of institutional checks and balances, was the only way Madison deemed republican liberty might be secured against majoritarianism in the states and the nation.

While defending the Constitution in the *Federalist*, Madison concealed deep disappointment with the document. The Constitutional Convention failed to embrace all of the auxiliary precautions demanded by his vision of republicanism. The "excesses of democracy"⁶¹ were insufficiently curbed to ensure the "genius of republican liberty."⁶² Although the Convention agreed to the supremacy

57. THE FEDERALIST NO. 63 (J. Madison), *supra* note 42, at 385.

58. THE FEDERALIST NO. 39 (J. Madison), *supra* note 42, at 241.

59. *Id.*

60. Madison, *supra* note 33, at 333.

61. E. Gerry in 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 48 (M. Farrand ed. 1914); and THE FEDERALIST NO. 39 (J. Madison), *supra* note 42, at 244.

62. THE FEDERALIST NO. 37 (J. Madison), *supra* note 42, at 224, and 227.

of the Constitution and congressional legislation over state laws,⁶³ it rejected one "great desideratum:"⁶⁴ a national sanction, or veto, over state laws.

Shortly before the convention, Madison wrote George Washington that "a negative *in all cases what-so-ever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary." "The great desideratum," he explained, was "some disinterested & dispassionate umpire in disputes between different passions & interests in the State." Without that, the national government's powers could be "evaded & defeated" by the states. "Another happy effect of this prerogative," he added, "would be its control on the internal vicissitudes of State policy; and the aggressions of interested majorities on the rights of minorities and individuals."⁶⁵

Though failing to indicate to Washington how a national veto would be exercised, Madison immediately turned to the necessity of establishing the "national supremacy" of the judiciary and executive branch. Later, he stood behind, and probably wrote,⁶⁶ the so-called "Virginia Plan."⁶⁷ Submitted for consideration at the Constitutional Convention by Edmund Randolph, that plan would have empowered Congress to veto state legislation and to enact legislation overriding state laws deemed defective or disruptive of national harmony. Moreover, it called for the creation of a council of revision (composed of members of the judiciary and the executive branch) which would have the power to veto congressional legislation.⁶⁸ Both proposals registered Madison's distrust of legislative majorities. When defending a council of revision on three separate occasions at the convention, he returned to the analysis originally contained in *Vices*:⁶⁹

It would be useful to the Judiciary departm[en]t by giving it an additional opportunity of defending itself ag[ain]st: Legislature encroachments. . . . It would moreover be useful to the Community at large as an additional check ag[ain]st a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities [under the Articles of Confederation]. . . . Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the

63. U.S. CONST. art. VI.

64. Madison, *supra* note 28, at 384.

65. *Id.* at 383-84.

66. See, I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 23-54 (1950).

67. See, Farrand, *supra* note 61, at 28.

68. The idea of a council of revision was not new. The New York state constitution provided for such a council and there was pressure in other states to adopt such provisions due to growing distrust of legislative majorities. See, Wood, *supra* note 27, at 435-36 and 455-56.

69. Madison, in Farrand, *supra* note 61, Vol. 2, at 74.

necessity of giving every defensive authority to the other departments that was consistent with republican principles.

Unfortunately, from Madison's perspective, the Constitutional Convention rejected both proposals for checking legislative majorities in Congress and the states.

Less than two weeks before the Constitutional Convention adjourned, Madison complained to Thomas Jefferson that the Constitution would "neither effectively *answer* its *national object* nor prevent the local *mischiefs* which everywhere *excite disgusts* against the *state governments*."⁷⁰ In another letter to Jefferson the following year, he renewed the complaint that "parchment barriers" inadequately dealt with the underlying threat to republican liberty. That threat arises from the people, "not from acts of the Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents . . . This is a truth of great importance," which, Madison lamented, was "not yet sufficiently attended to."⁷¹

Madison's republicanism is richer and more complex than Bickel and Bork contend. Popular majorities, legislative majorities, and majoritarian democracy were far more troubling for Madison than they concede. At the heart of the Madisonian system was republican liberty, not majoritarianism. Madison reconstructed republican theory in light of the American experience and demand for popular and representative government. He did so in ways that retained republicanism's association with ultimate popular sovereignty, while disassociating it from majoritarianism in the normal operation of government. His "naturalist" argument for how large and populous territories might augment the benefits of representative government made republicanism more agreeable. Still unsatisfied, Madison sought auxiliary institutional precautions against the oppressive majoritarianism in Congress and in the states. At virtually every turn, he limited majoritarianism in defense of republican liberty. That is why Madison despaired at the Constitutional Convention's refusal to grant a national veto over state laws and to provide an additional check on legislative majorities within Congress. "It seems to be forgotten," Madison reflected in his twilight years, "that the abuses committed within the individual States . . . by interested or misguided majorities were among the prominent causes of the [the Constitution's] adoptions, and particularly led to the

70. Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), *reprinted in* 10 THE PAPERS OF JAMES MADISON 163 (1977).

71. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 295, 298 (1977).

provision . . . which gives an appellate supremacy to the judicial department of the United States."⁷²

II. MADISON AND "PARCHMENT BARRIERS"

Though drafting and introducing in the First Congress the amendments that eventually became the Bill of Rights, Madison was at best a reluctant supporter of what he considered "the nauseous project of amendments."⁷³ He resisted the project for several reasons. First, the Constitutional Convention's objective was strengthening, not weakening, the national government. And at the convention he had unsuccessfully pressed for additional institutional safeguards for republican liberty. Second, he tended to agree with James Wilson⁷⁴ and Alexander Hamilton⁷⁵ that since the national government was limited to exercising expressly delegated powers, it had no power to legislate on such matters as religion and the press. In addition, as late as 1788 he opposed Anti-federalists' demands because he worried that amendments would only complicate the ratification battle. Finally, he doubted that "declarations on paper" would be "an effective restraint."⁷⁶ "[I]n a Government of opinion like ours," the most effective safeguard was the "soundness and stability of the general opinion on the subject."⁷⁷ Madison shared the view expressed by John Mercer toward the end of the convention that, "[i]t is a great mistake to suppose that the paper we are to propose will govern the United States. It is the men whom it will bring into the government and interest in maintaining it that is to govern time. The paper will only mark out the mode and form. Men are the substance and must do the business."⁷⁸

Madison's initial position, however, did not disparage republican liberty or a declaration of rights in favor of legislative majorities. Quite the contrary. At the Constitutional Convention, as noted, he pressed for a national veto over state laws and a council of revision in order to guard against the denial of individual rights by

72. Madison, *supra* note 33, at 328.

73. Letter from James Madison to Richard Peters (Aug. 19, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 346 (1979).

74. See, J. Wilson, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA IN 1787, 434-37 (J. Elliot ed. 2d. ed. 1888) [hereafter cited as *Elliot's Debates*].

75. See, THE FEDERALIST NO. 81 (A. Hamilton), *supra* note 42, at 481.

76. Madison, *supra* note 73, at 347.

77. Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 273, 275 (1884).

78. Quoted by J. Madison in NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 455-56 (A. Kock ed. 1966).

the states and Congress. In 1785, when offering advice on a constitution for Kentucky, he likewise endorsed the creation of a council of revision and the incorporation of provisions expressly restraining the state legislature from "meddling with religion—from abolishing Juries, from taking away the Habeas corpus—from forcing a citizen to give evidence against himself, from controuling the press."⁷⁹

"Experience and reflection"⁸⁰ led Madison to reconstruct republicanism. So too, he was later led to embrace parchment guarantees for republican liberty. In December 1787, Jefferson wrote him complaining about "the omission of a bill of rights."⁸¹ That was the first of several letters contributing to his change in thinking. But, Madison's own political fate in 1788 was important as well. The Anti-federalists' opposition to the Constitution over the omission of a declaration of rights became increasingly worrisome. By June of 1788, the Anti-federalists were campaigning for a second constitutional convention. That prospect disturbed Madison, as did two votes that June in Virginia's state ratifying convention. The Anti-federalists' call for conditional amendments was defeated by a vote of 88 to 80, and the Constitution ratified by an 89-to-79 vote. Yet, the closeness of those votes moved Madison to publicly endorse a declaration of rights. Then, the Virginia legislature refused to elect him to a seat in the United States Senate. He was outmaneuvered by Patrick Henry's attack on the sincerity of his promise to push for amendments in Congress.⁸² With his subsequent election to the House of Representatives, Madison was fully converted to the adoption of amendments. Still fearing the possibility of a second constitutional convention, he vowed to introduce amendments because that was "the most expeditious mode . . . [and] the safest mode."⁸³

In July 1788, Jefferson again wrote Madison about the urgency of adopting a declaration of rights, but the letter failed to arrive until October 15.⁸⁴ Two days later he responded with an extraordinary one of his own, explaining he had "always been in favor of a bill of rights" and yet "never thought the omission a material de-

79. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 35 (1973).

80. Madison, *supra* note 33, at 327.

81. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (1955).

82. *See, generally*, R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, 194-98 (1969).

83. Letter from James Madison to George Eve (Jan. 2, 1789), *reprinted in* 11 THE PAPERS OF JAMES MADISON 404-05 (1977).

84. Letter from Thomas Jefferson to James Madison (July 31, 1788), *reprinted in* 13 THE PAPERS OF THOMAS JEFFERSON 440, 442 (1956).

fect.”⁸⁵ Madison gave four reasons for his ambivalence. First, he accepted the Federalists’ argument that “the rights in question are reserved by the manner in which the federal powers are granted.” Second, he feared “that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude.” In particular, “the rights of Conscience” might be narrowed by any formal-legal definition. Third, republican liberty was guarded against Congress by its constitutionally “limited power” and “the jealousy” of the states. Finally, he maintained that “experience proves the inefficacy of a bill of rights on those occasions when its control is most needed.”⁸⁶

Madison did not view a declaration of rights in a more “important light” primarily because of his theory of republicanism. In a monarchy, such guarantees might have “great effect, as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community.”⁸⁷ But, republicanism rested on popular sovereignty; in the end political power resided with the majority of the people. What use then, he rhetorically asked, would a declaration of rights have in a republic?

His answer was two-fold and indicated a further refinement of his theory of republicanism. Republican liberty, he reiterated, “is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.”⁸⁸ A declaration of rights might educate and unite the people in support of republican liberty. “The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”⁸⁹ Moreover, Madison now conceded that, in the event of an abusive government, a declaration of rights might serve “as a good ground for an appeal to the sense of the community.”⁹⁰

Basically, Madison came to favor a declaration of rights because of the wide-spread demand for it and because of its potential “to impress some degree of respect for [its guarantees and] to establish public opinion in their favor.”⁹¹ He had yet to connect a decla-

85. Madison, *supra* note 71, at 297.

86. *Id.*

87. *Id.*

88. *Id.* at 298.

89. *Id.*

90. *Id.* at 299.

91. Madison, *Amendments to the Constitution* (June 8, 1789), reprinted in 12 THE PAPERS OF JAMES MADISON, at 196, 205. See also, Madison, *The Bank Bill* (Feb. 2, 1791), reprinted in 13 THE PAPERS OF JAMES MADISON 372, 375 (1981).

ration of rights and the kinds of institutional checks and balances he pushed for during the Constitutional Convention. On receiving his letter, however, Jefferson immediately responded by pointing out the omitted argument, "which has great weight with me, the legal check which it puts into the hands of the judiciary."⁹² Persuaded, Madison finally made a connection between a declaration of rights and the role of the Court. Three months later he relied on that argument in the House of Representatives when introducing his proposed amendments:⁹³

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

Still, in spite of that grand oration and instead of expanding on the Court's role, Madison concentrated on turning the four principal arguments against such additions into good republican arguments for their adoption.

Madison's main arguments in the House of Representatives, again, registered his commitment to republican liberty and distrust of majoritarianism. It had been argued that a declaration of rights was unnecessary because no such declaration existed in England. Never an Anglophile, Madison objected to the comparison (one that Justice Scalia now finds so attractive).⁹⁴ England was not "wholly republican." Parliament's legislative power was "indefinite," and thus a constant threat to republican liberty. The Magna Carta, moreover, stood as a barrier only against the Crown and contained no guarantee for "[t]he freedom of the press and rights of conscience, those choicest privileges of the people."⁹⁵ Conceding that parchment barriers were weak, Madison observed that "they may have, to a certain degree, a salutary effect against the abuse of power"⁹⁶ by inspiring public opinion and the support of the judiciary.

Madison also now found inconclusive the Federalist argument that a declaration was unnecessary because the national government was limited to only enumerated powers. He countered that Congress had vast uncertain powers under the Necessary and Proper

92. Letter from Thomas Jefferson to James Madison (March 15, 1789), *reprinted in* 14 THE PAPERS OF THOMAS JEFFERSON 659 (1958).

93. Madison, *Amendments to the Constitution*, *supra* note 91, at 206-07.

94. See Scalia, *supra* note 8.

95. Madison, *Amendments to the Constitution*, *supra* note 91, at 203.

96. *Id.* at 206.

Clause,⁹⁷ and recalled the abuses of legislative majorities in the states. As in *Vices*, he argued that legislative power tends to expand to an "indefinite extent."⁹⁸ Legislative majorities, whether in Congress or the states, were often moved to deny the rights of individuals and minorities. "If there was reason for restraining state governments," reasoned Madison, "there is like reason for restraining the federal government."⁹⁹ No more persuasive was the contention that a declaration of rights was unnecessary because state constitutions contained such provisions. Besides the fact that some states had no such guarantees, others contained "defective" and "absolutely improper" provisions.

Finally, Madison took up the argument advanced by Alexander Hamilton in *Federalist No. 84*. A declaration of rights, claimed Hamilton, was "not only unnecessary . . . but would even be dangerous" in defining exceptions to powers not granted and leaving "the utmost latitude of evasion."¹⁰⁰ Admitting that was "one of the most plausible arguments" against amendments, Madison responded by directing attention to his proposal which later became embodied in the ninth amendment.¹⁰¹ It provided that, "[t]he exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people."¹⁰²

Madison's defense of what became the ninth amendment reflected Jefferson's influence. Madison had once feared "that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude."¹⁰³ But, Jefferson reassured him that, "[h]alf of a loaf is better than no bread. If we cannot secure all our rights, let's secure what we can." Jefferson moved Madison to view a declaration of rights as another auxiliary measure, which put into "the hands of the judiciary" an additional check on the coercive power of legislative majorities. "This is a body," Jefferson had observed, "which is rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity."¹⁰⁴

Though converted to defending a declaration of rights,

97. U.S. CONST. art. I, § 8, cl. 18.

98. Madison, *supra* note 91, at 205.

99. *Id.* at 206.

100. THE FEDERALIST NO. 84 (A. Hamilton), *supra* note 42, at 513-14.

101. The ninth amendment provides that, "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST., amend. IX.

102. Madison, *Amendments to the Constitution*, *supra* note 91, at 202.

103. Madison, *supra* note 71, at 297.

104. Jefferson, *supra* note 92, at 659-60.

Madison by no means held it in the same light as Jefferson. Like the Anti-federalists, Jefferson was primarily concerned with "guard[ing] the people against the federal government, as they are already guarded against their state governments in most instances."¹⁰⁵ For Madison the principal threat to republican liberty came not from the national government, but from the influence of popular and legislative majorities in Congress *and* the states. He never abandoned his preoccupation with the darker side of majoritarian rule. As a consequence, whatever "legal check" the amendments might give the judiciary, in the 1780s Madison considered them little more than another precautionary measure.¹⁰⁶

Madison's republicanism guided and structured the amendments introduced in the House. Notably, his first proposal reinforced the bedrock of republicanism as a prefix to the Constitution:¹⁰⁷

That all power is originally vested in, and consequently derived from the people.

That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purpose of its institution.

The people are sovereign and ultimately "the best keepers"¹⁰⁸ of republican liberty. Rather than embracing majoritarianism in the normal operation of government, Madison thereby aimed to reaffirm that, in the event of an oppressive government, the people might undertake constitutional reforms, either through the amendment process¹⁰⁹ or subversion of the government. Yet, so long as the Constitution remained in place, the "constitutional majority" it created governed. Republican liberty, Madison remained convinced, was more likely to be secured through representative government, as constrained by auxiliary precautions and as augmented by the benefits of large and populous territories. Still, if this experiment in constitutional government failed, he never doubted the ultimate power of the people to revise or abandon the Constitution.

How deeply Madison's libertarianism was woven into his theory of republicanism stands out not only in the amendments that eventually comprised the Bill of Rights. Even more noteworthy

105. Jefferson, *supra* note 84, at 443.

106. See, Madison, *supra* note 71, at 299.

107. Madison, *Amendments to the Constitution*, *supra* note 91, at 200.

108. Madison, *supra* note 22.

109. See, U.S. CONST. art. V.

were his ill-fated proposals to bar Congress *and* the states from denying the "full and equal rights of conscience."¹¹⁰ Because in the 1780s Madison held state legislative majorities to constitute a greater danger than Congress, he considered his proposal denying states the power to "infringe on the equal rights of conscience" to be "the most important amendment on the whole list."¹¹¹ Later in the 1790s, when opposing the national government's censorship of the Democratic Societies and enactment of the Alien and Sedition Acts of 1798, Madison deemed Congress a more serious threat.¹¹² Although wavering on whether the major threat to republican liberty came at the national or state level, Madison remained steadfastly convinced that the threat originated with the people, "*not* from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the *mere instrument* of the major number of the constituents."¹¹³

What finally emerged from the First Congress and was ratified as the Bill of Rights disappointed Madison, once again. Congress rejected his plan for inserting the amendments into the document itself; he feared that those declarations of republican liberty might be dismissed as less important than the Constitution itself. In addition, like the Constitutional Convention, Congress rejected his proposal for sharply checking the powers of the states. As historian Jack Rakove puts it, "the most Madisonian element of the Constitution is arguably the fourteenth amendment, which was, of course, adopted a full three decades after his death."¹¹⁴

III. MADISON ON THE SUPREME COURT AND PRAGMATIC INTERPRETIVISM

Madison's appreciation for the Court's role in protecting republican liberty at times fell short of what his theory of republicanism could encompass. During the Constitutional Convention, his concern with securing a "disinterested and dispassionate umpire in disputes between different passions and interests in the State"¹¹⁵ led him to focus on a national veto over the states. Yet, he favored a national veto by Congress, not the Court. Madison failed to foresee

110. Madison, *Amendments to the Constitution*, *supra* note 91, at 201-02.

111. Madison, *Amendments to the Constitution* (Aug. 17, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 344 (1979).

112. See, Letters from James Madison to Jefferson and Monroe (1794), *reprinted in* 15 THE PAPERS OF JAMES MADISON, 397-98, 406-07, and 419-20 (1985); and Madison, *Report on the Virginia Resolution*, *reprinted in Elliot's Debates*, *supra* note 74, at 549.

113. Madison, *supra* note 71, at 297 (emphasis added).

114. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 247 (1990).

115. Madison, *supra* note 28, at 384.

the major role that the Court could play in defending national supremacy and the rights of individuals and minorities. Besides underestimating the Court's power, he worried that states might refuse to comply with its rulings. Moreover, he looked to *preventing* "injustice" from occurring in the states and Congress. Only after the security of republican liberty has been ruptured, after legislation is challenged through the adjudicatory process, does the Court come into play. In the 1780s, he thus favored alternatives to relying on the Court. It was "more convenient to prevent the passage of law, than to declare it void after it is passed."¹¹⁶ Also, he noted, individuals might not be financially able to appeal to the courts.

Madison's republicanism, nevertheless, laid a foundation for the Court's protection of the rights of individuals and minorities. His advocacy of a national veto led directly to the adoption of the Supremacy Clause. The original jurisdiction granted in article III,¹¹⁷ and the appellate jurisdiction given in Section 25 of the Judiciary Act of 1789,¹¹⁸ expressly recognize the Court's role in defending national supremacy and republican liberty against the states.

In *Federalist* 39, Madison alluded to the Court's role as "the tribunal which is ultimately to decide controversies relating to the boundary between the two jurisdictions"¹¹⁹ of the national and state governments. Later in life, his appreciation grew for that role of the Court. Writing to Jefferson in 1823, he recalled that the Constitutional Convention "intended the Authority vested in the Judicial Department as a final resort in relation to the States."¹²⁰ This position resonates throughout his correspondence.¹²¹ In a letter published in the influential *North American Review* in 1830, for example, Madison took pride in his consistency by recalling his observation in *Federalist* 39. "Those who had denied or doubted the supremacy of the judicial power of the U.S.," he added, "seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition & execution of the law."¹²²

116. Madison, *supra* note 71, at 211.

117. U.S. CONST. art. III.

118. The Judiciary Act of 1789, Sec. 25.

119. THE FEDERALIST NO. 39 (J. Madison) reprinted in 11 THE PAPERS OF JAMES MADISON 381 (1977).

120. Letter from James Madison to Thomas Jefferson (June 27, 1823), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 322, 326 (1884).

121. See Letter from James Madison to Joseph Cabell (Sept. 7, 1829), reprinted in 9 THE WRITINGS OF JAMES MADISON 346-51 (1910); Letter from James Madison to N.P. Trist (Dec. 1831), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 204-05 (1884) and Letter from James Madison to Edward Everett (Aug. 28, 1830), reprinted in 9 THE WRITINGS OF JAMES MADISON 383 (1910).

122. Letter from James Madison to Edward Everett, *supra* note 121, at 397-98.

Central to understanding the role the Court came to play in Madison's theory of republicanism is the distinction he drew between, on the one hand, the "extreme cases"¹²³ that arise in a constitutional crisis and, on the other hand, "cases not of that extreme character" which frequently arise in the course of constitutional government.

In the "extreme cases," the vast majority of people hold the ultimate political power. Nor could it be otherwise, since popular sovereignty is the bedrock of republicanism. But, in such cases and in keeping with John Locke's teaching on the right to revolution,¹²⁴ Madison cautioned that there could be "no regular Arbiter or Umpire" justifying a "resort to the original rights of the parties to the system."¹²⁵ With such appeals to simple majoritarianism, to the "extra & ultra constitutional right" of the people, would come the dissolution of the Constitution. Consequently, Madison lamented popular appeals to the majoritarianism.¹²⁶ He insistently urged recourse to "the final resort, within the purview" of the Constitution, namely, amending the Constitution through the prescribed method in article V. In the event that the amendment process failed to satisfy, Madison allowed that a final appeal might be made directly to the people "from the cancelled obligations of the constitutional compact, to original rights & the law of self-preservation."¹²⁷

By contrast, in the routine controversies arising out of the normal operation of government, Madison considered the Court the "surest expositor of the Constitution."¹²⁸ As he explained in a letter in 1829, "there is & must be an Arbiter or Umpire in the constitutional authority provided for deciding questions concerning the boundaries of right & power. The particular provision, in the Constitution of the U.S. is the authority of the Supreme Court, as stated in the 'Federalist,' No. 39."¹²⁹

In the 1830s, Madison often dwelt on the distinction between the Court and the people as the ultimate arbiter of republican liberty and government. He did so for two reasons. First, growing sectional conflict between the North and the South revived interest in state nullification and his authorship of the *Report on the Virginia*

123. Letter from James Madison to Joseph Cabell, *supra* note 122, at 346, 351.

124. See, J. LOCKE, TWO TREATISES OF GOVERNMENT, Ch. 19, 454-77 (P. Laslett ed. 1965).

125. Letter from James Madison to Joseph Cabell, *supra* note 121, at 351.

126. Madison, *supra* note 120, at 140, 143.

127. Letter from James Madison to Edward Everett, *supra* note 121, at 398.

128. Letter from James Madison (1834), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 349, 350 (1884).

129. Letter from James Madison to Joseph Cabell, *supra* note 121, at 351.

Resolutions.¹³⁰ Second, his support of the national bank, and his opposition to Jackson's veto of legislation recharting the bank, also brought charges that he was inconsistent in his view of the Constitution. In response to controversies over state nullification and the bank, Madison elaborated his views on the Court and developed his unique theory of constitutional interpretation.

Sectional conflict revived interest in the doctrine of state nullification (that is, that states could nullify federal laws they deemed unconstitutional). The Virginia and Kentucky Resolutions of 1798 and 1799 had been drafted, respectively, by Madison and Jefferson in protest of the Alien and Sedition Acts, passed by a Federalist dominated Congress and aimed at silencing Jeffersonian Republicans. Along with contending that the acts ran afoul of the first amendment, Jefferson went so far as to assert that states could nullify federal laws. The "sovereign and independent" states, asserted the *Kentucky Resolutions of 1799*, "have the unquestionable right to judge . . . and, that a nullification [by] those sovereignties, of all authorized acts done under color of that instrument is the rightful remedy."¹³¹

In his *Report on the Virginia Resolutions*, however, Madison broke with Jefferson. Although masterfully defending civil liberties, Madison's report declined to endorse state nullification of federal laws.¹³² Three decades later, amid renewed controversy over state nullification, Madison objected to attempts to stamp his "political career with discrediting inconsistencies," such as that he "on some occasions, represented the Supreme Court of the United States as the judge, in the last resort . . . and on other occasions ha[d] assigned this last resort to the parties to the Constitution."¹³³ This "extraordinary" charge rested on a distortion, he claimed, rather than any inconsistency. "[T]he obvious explanation [was] that the last resort means, in one case, the last within the purview and forms of the Constitution, and in the other, the last resort of all, from the Constitution itself to the parties who made it."¹³⁴ Indeed, in his *Report on the Virginia Resolutions*, he had emphasized that though the Court was the political form of the last resort, "this resort must necessarily be deemed the last in relation to the authorities of the

130. Madison, *supra* note 112.

131. Kentucky Resolutions of 1798 and 1799, reprinted in *Elliot's Debates*, *supra* note 74, at 540-44.

132. See, Koch & Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY L. REV. 145 (1948).

133. Letter from James Madison to N.P. Trist, *supra* note 121, at 205.

134. *Id.* See also, Letter from James Madison to Daniel Webster (March 15, 1833), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 293 (1884).

other departments of the government; not in the relation to the rights of the parties to the constitutional compact, from which the judicial, as well as the other departments hold their delegated trusts."¹³⁵

Even more than with the Court's assumption of a role in exercising a national veto over state laws, Madison's views matured and sharpened with regard to the Court's role in disputes over the separation of powers. Prior to the Constitution's ratification, Madison argued in the *Federalist* that "[t]he several departments being perfectly co-ordinate by terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."¹³⁶ While not doubting that the Court would "ultimately decide"¹³⁷ disputes over the constitutional boundaries between the national government and the states, the Court's position relative to Congress and the President appeared more problematic. In a debate during the First Congress, for instance, Madison conceded that "in the ordinary course of Government, . . . the exposition of the laws and Constitution devolves upon the Judiciary."¹³⁸ Yet, he asked "to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments."¹³⁹ "Nothing," he insisted, "has yet been offered to invalidate the doctrine, that the meaning of the Constitution may as well be ascertained by the legislative as by the judicial authority."¹⁴⁰

In the 1830s, the controversy over the national bank renewed debate over the authoritativeness of rival interpretations of the Constitution. Madison's contemporaries again questioned his consistency. In December 1790, Hamilton had proposed that Congress charter a national bank. The ensuing debate pitted Hamilton and the Federalists against Madison and Jefferson over fundamental principles of constitutional interpretation and politics. Hamilton persuasively argued that Congress had broad constitutional authority to establish such a corporation.¹⁴¹ The Senate, half of whose members had been delegates to the Constitutional Convention, unanimously gave its endorsement. But, in the House of Represent-

135. Madison, *supra* note 112, at 549.

136. THE FEDERALIST NO. 49 (J. Madison), *supra* note 42, at 314.

137. *Id.* at 245.

138. Address by James Madison to the House of Representatives, *reprinted in* 1 ANNALS OF CONG. 520 (Gales & Seaton eds. 1834).

139. *Id.*

140. *Id.* at 568.

141. Hamilton, *Opinion on the Constitutionality of An Act to Establish A Bank*, *reprinted in* 8 THE PAPERS OF ALEXANDER HAMILTON 97 (H.C. Syrett ed. 1979).

atives Madison countered that the creation of the bank went beyond the scope of Congress's delegated powers.¹⁴² By a vote of 39 to 20, the House nevertheless adopted a bill chartering the bank. In 1791, President George Washington signed the act incorporating, and granting a twenty year charter to, the first Bank of the United States.

When the bank's charter expired in 1811, one vote defeated its renewal in Congress. Notably, as President, Madison supported the bank and deemed its constitutionality settled. Four years later, economic hardships brought about by the War of 1812, and the national government's reliance on state banks for loans led Congress to establish the second Bank of the United States, with another twenty year charter. Opposition in the states remained strong and eventually resulted in the Court's watershed ruling in *McCulloch v. Maryland*.¹⁴³ There, Chief Justice John Marshall upheld the constitutionality of the bank with a broad reading of congressional powers reminiscent of Hamilton's arguments three decades earlier. Still, opposition persisted and support for the bank was waning by 1832, when Congress passed another bill extending the bank's charter.

When President Jackson vetoed the legislation recharting the second national bank, he denied that *McCulloch* was binding and advanced what has been called the "departmental theory" of judicial review, namely that each branch could authoritatively construe its own constitutional powers.¹⁴⁴ In his Veto Message of 1832, Jackson claimed that,

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.¹⁴⁵

Behind Jackson's veto message was a two-pronged theory. First, he expressly denied that the Court's interpretation of the Constitution had finality, or supremacy over that of the other branches. Second, Jackson maintained that in some areas of constitutional politics the Court simply had no authority to render decisions, while suggesting that in other areas it could do pretty much what it wanted to do.

142. Madison, *supra* note 138, Vol. 2, at 1944-54. For a further discussion see Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989).

143. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

144. See, e.g., E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 19-28 (1914).

145. Jackson, *President's Veto Message* (July 10, 1832), reprinted in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 582 (J. Richardson ed. 1917).

The first prong was (and remains) even more controversial than the second.¹⁴⁶

Jackson's veto message underscores how problematic the Court's role remained fifty years after the Constitutional Convention. In part, it is fair to say, that was due to the Framers' failure to think through the power of judicial review. Though they "anticipated some sort of judicial review," as political scientist Edward S. Corwin observed, "it is equally without question that the ideas generally current in 1787 were far from presaging the present role of the Court."¹⁴⁷ In a letter to Corwin, the noted historian Max Farrand agreed and concluded that "[t]he framers of the constitution did not realize it themselves [how markedly different their conceptions of judicial review were]: they were struggling to express an idea and their experience was as yet insufficient."¹⁴⁸

Drawn once again into the controversy over the constitutionality of the national bank in the 1830s, Madison responded to charges of "inconsistency between [his] objection to the constitutionality of such a bank in 1791 and [his] assent in 1817."¹⁴⁹ At stake, he said, was "the question of how far legislative precedents, expounding the Constitution, ought to guide succeeding Legislatures and overrule individual opinions."¹⁵⁰ Simply put, the constitutionality of the national "bank had undergone ample discussions"¹⁵¹ in 1791 and Madison failed to persuade. On the losing side of the controversy in 1791, he later favored the bank and felt obligated as President to sign the recharting legislation into law. From his perspective, "[o]n a simple question of constitutionality there was a decided majority in favor of it."¹⁵² In other words, by 1817 the bank had operated

146. For instance, Senator Daniel Webster thundered in the halls of Congress:

The President is as much bound by the law as any private citizen. . . . He may refuse to obey the law, and so may a private citizen; but both do it at their own peril, and neither of them can settle the question of its validity. The President may say a law is unconstitutional, but he is not the judge. . . . If it were otherwise, there would be no government of laws; but we should all live under the government, the rule, the caprices of individuals. . . .

[President Jackson's] message . . . converts a constitutional limitation of power into mere matters of opinion, and then strikes the judicial department, as an efficient department, out of our system. . . .

[The message] denies first principles. It contradicts truths heretofore received as indisputable. It denies to the judiciary the interpretation of law.

D. WEBSTER, 8 CONG. DEBATES 1232, 1239-40 (1832).

147. E. Corwin, *The Constitution as Instrument and as Symbol*, 30 A.P.S.R. 1078 (1936).

148. Letter from Farrand to Edward Corwin (January 3, 1939), in Edward Samuel Corwin Papers, Box 3, Princeton University Library, Princeton, New Jersey.

149. Letter from James Madison to Mr. Ingersoll (June 25, 1831), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183 (1884).

150. *Id.* at 183-84.

151. *Id.* at 184.

152. *Id.* at 185.

for over "twenty years with annual legislative recognitions . . . and with the entire acquiescence of all the local authorities, as well as of the nation at large."¹⁵³ "[U]nder these circumstances," Madison claimed a veto of the bank bill would have been, as Jackson's veto, in "defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention."¹⁵⁴

Madison's reconciliation of his positions on the constitutionality of the national bank reveals his underlying theory of pragmatic constitutional interpretivism. As other scholars have shown,¹⁵⁵ Madison had no truck with a "jurisprudence of original intentions," as championed by Justice Scalia, Bork, and others. The Constitution, he repeatedly reminded his contemporaries, "was not, like the fabled Goddess of Wisdom, the offspring of a single brain."¹⁵⁶ Madison was keenly attune to interpretative problems intertwining the politics of interpretation and the interpretation of politics.¹⁵⁷ He frequently noted, for example, the temptation to put "glosses"¹⁵⁸ on the text and the historical proceedings of the Constitutional Convention,¹⁵⁹ as well as the limited reliability of such documents as *The Federalist*.¹⁶⁰ "As a guide in expounding and applying the provisions of the Constitution," he stressed, "the debates and incidental decisions of the Convention can have no authoritative character."¹⁶¹ For those reasons, Madison also withheld the publication of his notes on the Constitutional Convention for a half-century, until after his death. Their publication, he explained, was "delayed til the Constitution should be well settled by practice, and till a knowledge of the controversial part of the proceedings of

153. *Id.* at 184.

154. *Id.*

155. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1988); Kurland, *The Constitution: The Framers' Intent, the Present, and the Future*, 32 ST. LOUIS U.L.J. 17 (1987); Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987); and Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

156. Letter from James Madison to William Cogswell (March 10, 1834), reprinted in 9 THE WRITINGS OF JAMES MADISON 533 (1910).

157. See, e.g., Letter from James Madison to Robert S. Garnett (February 11, 1824), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 367 (1884); Letter from James Madison to N.P. Trist (March 2, 1827), reprinted in *id.* at 565; and Letter from James Madison to Joseph C. Cabell (September 18, 1828), reprinted in *id.* at 637.

158. Letter from James Madison to William Cabell Rives (March 12, 1833), reprinted in 9 THE WRITINGS OF JAMES MADISON 511, 514 (1910).

159. See, e.g., Letter from James Madison to Thomas Ritchie (September 15, 1821), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 228 (1884).

160. Letter from James Madison to Edward Livingston (April 17, 1824), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 435 (1884).

161. Madison, *supra* note 159, at 228.

its framers could be turned to no improper account."¹⁶²

Madison took the pragmatic view that constitutional interpretation involves "practical judgment," not "solitary opinions as to the meaning of the law or the Constitution, in opposition to a construction reduced to practice during a reasonable period of time."¹⁶³ Just as he rejected appeals to "original intentions," he held that a "strict" or "literal" interpretation might be "a hard imputation on the Framers and Ratifiers of the Constitution," as well as a "hard rule of construction," potentially injurious to "the text of the Constitution" itself.¹⁶⁴ "[A]mong the obvious and just guides applicable to [interpreting] the Const[itutio]n," Madison listed:¹⁶⁵

1. The evils & defects for curing which the Constitution was called for & introduced.
2. The comments prevailing at the time it was adopted.
3. The early, deliberate and continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies.

Beyond those practical guides, Madison counseled that "the true and safe construction" of the Constitution would emerge in the "course of practice" upon receiving "uniform sanction" over "a period of years and under the varied ascendancy of parties."¹⁶⁶

Madison accorded precedents great weight and considered them binding on the President and Congress, no less than on the Court. Were it otherwise, as Jackson claimed in his veto message, "uncertainty and instability [would be introduced] in[to] the Constitution."¹⁶⁷ When arguing that Presidents and legislators were constitutionally obligated to adhere to well-established precedents and practices, Madison drew on an analogy to the "binding influence" of the judicial doctrine of *stare decisis*.¹⁶⁸ In his view, a judge should conform to precedents established "by the matured opinions of the majority of his colleagues" and not "vary the rule of law according to his individual interpretation of it."¹⁶⁹ If not, then every newly reconstituted Court or "every new legislative opinion

162. *Id.*

163. Madison, *supra* note 149, at 185.

164. Madison, *Memorandum on Power of the President to appoint Public Ministers & Consuls in the recess of the Senate*, reprinted in 9 THE WRITINGS OF JAMES MADISON 91, 92-93 (1910).

165. Letter from James Madison to M.L. Hurlbert (May 1830), reprinted in 9 THE WRITINGS OF JAMES MADISON 370, 372 (1910).

166. Madison, *supra* note 149, at 186.

167. *Id.* at 185.

168. *Id.* at 184-85.

169. *Id.* See also, Letter from James Madison to Joseph C. Cabell, *supra* note 157, at 642-43.

might make a new Constitution, as the foot of every new chancellor would make a new standard of measure."¹⁷⁰ Judicial precedents and established legislative practices had "authoritative force in settling the meaning of a law" not only because of Madison's theory of pragmatic interpretativism. He also advanced the utilitarian consideration that "the good of society" required certainty, stability and predictability in the law.¹⁷¹

Two years before his death in 1836 Madison concentrated specifically on the Court's role in constitutional politics. He reaffirmed that since the Congress, the President, and the Court "are co-ordinate, and each equally bound to support the Constitution, it follows that each must . . . be guided by the text of the Constitution according to its own interpretations of it."¹⁷² However, "notwithstanding this abstract view," Madison now emphasized that the Court "most familiarizes itself to the public attention as the expositor, by the *order* of its functions in relation to the other departments." He never abandoned his view that Congress and the President might construe the Constitution. But in light of a half-century's experience with the Constitution and the Court, he fully appreciated that in actual practice the Court decides cases and controversies after and in light of the interpretations advanced by Congress and the President. The "ultimate discussion and operative decision,"¹⁷³ therefore, comes from the Court because it stands as the final forum for appeals within government itself, short of either amending the Constitution or, worse yet, appealing directly to the people, "that Ultimate Arbiter."¹⁷⁴ Madison concluded that the Court was the "last resort" and "surest expositor" of the Constitution in controversies over both federalism *and* the separation of powers within the national government. "[W]hen happily filled," as he put it, the Court was "the surest expositor of the Constitution" in controversies "concerning the boundaries between the several departments of Government as in those between the Union and its members."¹⁷⁵

170. *Id.*

171. *Id.* Madison's views contrast sharply with Scalia's. See, Justice Scalia's concurring opinion in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3064 (1989); and his dissenting opinion in *South Carolina v. Gathers*, 109 S. Ct. 2207, 2218 (1989). For a much more Madisonian view of precedent, see Address by L. Powell, The Leslie H. Arps Lecture before the Association of the Bar of the City of New York (October 17, 1989) ("Stare Decisis and Judicial Restraint") text at 10-13.

172. Madison, *supra* note 128, at 349.

173. *Id.* at 350.

174. Madison, *supra* note 123, at 143.

175. Madison, *supra* note 128, at 350. This letter indicates that Madison's view of the Court's institutional role matured and that he came to accept the Court as the "surest expositor of the Constitution" with regard to both disputes over federalism and the separation of

IV. CONCLUSION

Madison's reconstruction of republicanism was unique and distinctively American. While popular sovereignty remained the bedrock of republicanism, Madison elevated republican liberty above republican government. Because of his concern with the darker side of republicanism (majoritarianism) he worked fundamental changes in the theory and practice of republican government.

Madison's "naturalist" argument was instrumental in making republicanism more acceptable by emphasizing the liberalism that accompanies the cultural pluralism of large and populous territories. He turned to this new grounding for republican government only in part out of rejecting of Montesquieu's teaching about small republics. Madison also discounted the weight that Montesquieu,¹⁷⁶ some Anti-federalists,¹⁷⁷ and later Alexis de Tocqueville,¹⁷⁸ attributed to civic virtue and religion. Such appeals ran against his secularism and abiding faith in reason. Far from being reliable safeguards, they posed serious threats to the security of republican liberty. Indeed, throughout Madison's career a major concern remained securing religious freedom for individuals and minorities against the oppressive forces of popular and legislative majorities.¹⁷⁹

Building on his argument for republicanism in large and populous territories, Madison repeatedly sought to buttress representative government with auxiliary precautions for republican liberty. Although he had preferred additional institutional checks against legislative majorities in Congress and the states, the Constitution even as written did not embrace simple majoritarianism, or legislative majoritarianism. For "the father of the Constitution," there was no mystery in the making of free government: "mysteries belong to religion, not to government; to the ways of the Almighty, not to the works of man. And in religion itself there is nothing mysterious to its author; the mystery lies in the dimness of the human sight. So in the institutions of government let there be no

powers, contrary to suggestion of some scholars. See, L. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 103-06 (1988).

176. See, MONTESQUIEU, *supra* note 26, Vol. 1, Bk. III, Ch. 3, at 117-18; Vol. II, Bk. XXIV, Chs. 14 and 16, at 328 and 330.

177. See, *THE COMPLETE ANTI-FEDERALISTS*, (H. Storing ed. 1981) Vol. 3, Ch. 6, at 76; Vol. 4, Ch. 23, at 242; Vol. 4, Ch. 24, at 246-48; Vol. 5, Ch. 6, at 126-27; Vol. 5, Ch. 18, at 264; Vol. 6, Ch. 14, at 238-40. See also, Wood, *supra* note 27, at 34, 65-69, 92-96, 117-18, 418, 427-28, and 610.

178. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (P. Bradley ed. 1946) Vol. I, at 304-06; Vol. II, at 121-27, and 143-44.

179. See, e.g., Madison, *supra* note 48, and *supra* note 71.

mystery.”¹⁸⁰

Madison refined the insights originally contained in *Vices* and elaborated his theory of republicanism in response to the practical problems of securing republican liberty. While publicly defending and privately confessing disappointment with the Constitution, Madison was moved to accept the “parchment barriers” of the Bill of Rights and the Court’s role in protecting republican liberty. He reluctantly became “the father of the Bill of Rights.” His theory of republicanism accommodated the Bill of Rights and laid a foundation for its defense as a protection of the rights of individuals and minorities.

Madison came to accept a more expansive role for the Court in the 1830s than he anticipated in the 1780s. Admittedly, he did not foresee the full development or potential of the Court. Nor, of course, did he entertain the idea that the Court would be the sole, or even primary, guardian of republican liberty. At times, he also bristled at the Court’s intrusion into the domains of Congress and the President. But Madison also harbored both a distrust of majoritarianism in the normal operation of government and a devotion to republican liberty. His unique theories of republicanism and pragmatic interpretativism offer no support for the originalist philosophy advanced by Justice Scalia, Bork, and others. Madison never entertained the idea of returning to the English system of parliamentary democracy, in which legislative majorities dominate. The Constitution, as he repeatedly emphasized, stood “without a model, as emphatically *sui generis*.”¹⁸¹

In Madison’s view, constitutional controversies found their resolutions in deliberations and adjudications that establish the binding precedents and practices of constitutional government. Because of his pragmatic theory of constitutional interpretation, Madison was convinced that those precedents and practices bound the President, Congress, and the Court, though remaining subject to reversal by formal constitutional amendments. In the end, Madison considered the Court was the “last resort” and “surest expositor of the Constitution” within constitutional government, while still maintaining that the ultimate security for (and ultimate threat to) republican liberty remained with the people.

180. Madison, *supra* note 22, at 427.

181. Madison, *supra* note 160, at 436.