

2019

## Madison's Denials Book Review

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### Recommended Citation

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## MADISON'S DENIAL

**THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT.** By Noah Feldman.<sup>1</sup> Random House. 2017. Pp. xviii + 777. \$35.00 (Cloth).

*Calvin H. Johnson*<sup>2</sup>

Professor Noah Feldman of Harvard Law School has a new biography of Madison, *Three Lives of James Madison: Genius, Partisan, President*, which helpfully condenses some 33,000 pages of Madison's papers into single literate 777-page narrative. Madison had an extraordinarily interesting life, all three of them.

Feldman's biography is short of a full and accurate, *critical* biography because Feldman does not get into the sources beyond Madison's papers. When Madison is wrong in fact or policy, Feldman has no fulcrum from outside sources to evaluate it. When Madison errs, Feldman cannot see the error. Feldman also gives Madison credit for arguments that were in fact well established, without Madison, and before Madison turned and accepted them. On the enumerated power doctrine, for example, Madison is not only not original, but also wrong. From a path that follows Madison's papers, Feldman becomes an apologist for Madison, when we need more skepticism.

The most extraordinary aspect of Madison's life story is his turn from being an advocate, indeed the primary cause, of a strong

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2. John T. Kipp Chair, University of Texas Law School. The author wishes to thank Joey Fishkin and Sandy Levinson for very helpful comments to a prior draft. Many of the conclusions in this review were reached first, in some form or other, in CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* (2005) [hereinafter JOHNSON, *RIGHTEOUS ANGER*]. If an argument is repeated, it is because nothing has happened in the interim to alter its merit and because the point bears repeating.

Letters are cited here by the name of the writer and recipient without repeatedly stating that this is a letter. Speeches at the state ratification convention cite to the ratification convention without mentioning it is a speech. First names of most prominent founders are dropped in footnote citations.

national government, over to a Jeffersonian partisan trying to keep the national government within a newly-created narrow corral. That turn, that denial of his creation, is the focus of this essay. Madison's denial of his magnificent prior creation, a constitution that created a strong national government, where none existed beforehand, is important enough to our history that we need to understand it. A full and accurate *critical* biography of Madison would at least try to help us digest Madison's first and most important turn.

Historical arguments, even those looking quite abstract and philosophical, are best explained in context, as an attempt to accomplish or defeat some specific set of programs.<sup>3</sup> Madison's turn to form an opposition party against Hamilton and the Washington Administration occurred, we can see, over three specific issues, that are, in chronological order, redeeming federal notes at their full promised value rather than their depleted fair market value, national assumption of the state war debts, and creation of bank notes to serve as paper money. On all three issues, Hamilton is clearly right and Madison and Jefferson are wrong.

Feldman treats the Bill of Rights as Madison's first incident of his second, anti-national life. There is no turn or inconsistency there, however. Madison is a consistent member of the Revolutionary generation, which fought a long, hard war for the fundamental rights of Englishmen, even when they ceased to want to be Englishmen. Madison is a consistent defender of individual rights. Madison is not, however, sympathetic to the package of hobbles on the national government that the Anti-Federalists were offering under the label of their "Bill of Rights," nor to Anti-Federalists' use of minor rights as an excuse to defeat the new national government as a whole. It is not the protection of rights that Madison is objecting to, but the impairment of the national power.

It may well be that Feldman might want to push back and defend Madison on some of these controversies. Madison might be more ably defended in his move to his second life than I conclude here. Still, Feldman is by style glib, giving conclusions

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3. See, e.g., QUENTIN SKINNER, *VISIONS OF POLITICS: REGARDING METHOD* 3 (2002) (saying that we need to "situate the texts we study within such intellectual contexts as enable us to make sense of what their authors were doing in writing them").

without weighing evidence, especially evidence from outside Madison's papers. Joseph Story, quoted in Feldman's front piece, stated that "I wish someone who was perfectly fitted for the task, would write a full and accurate biography of Madison." To satisfy Story's call, we need a *critical* review that draws on all the available outside evidence and cares to evaluate the positions.

James Madison is first the efficient cause of the Constitution. The Constitutional movement started in the Virginia legislature arising out of Madison's attempt from 1784–87 to get the national war debt paid and in reaction to the dominance and policies of Patrick Henry.<sup>4</sup> In March of 1787, only Madison thought the confederation mode of government, a friendship league among sovereign states, could and should be replaced with a strong national government able to walk on its own legs.<sup>5</sup> Plausibly only Hamilton joined Madison in thinking that the confederation *should* be replaced.<sup>6</sup> By early May 1787, however, Madison had convinced the Virginia delegation to the Philadelphia convention to adopt the aggressively centralizing Virginia Plan<sup>7</sup> and by the end of May, he had convinced the Philadelphia Convention as a whole<sup>8</sup> to adopt the core of the Virginia plan, a strong three-part

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4. JOHNSON, *RIGHTEOUS ANGER*, *supra* note 2, at 51–60 makes the case, but it depends on NORMAN K. RISJORD, *CHESAPEAKE POLITICS: 1781–1800*, at 126 (1978) (arguing that the merger of the issues of payment of the war debt and British creditors' access to Virginia courts turned Virginia politics from personality-based coalitions to organized parties).

5. *See, e.g.*, Madison to Washington (Apr. 16, 1787), in 9 *PAPERS OF JAMES MADISON* 383 (William J. Hutchinson et al. eds., 1975) [hereinafter JM] (calling for due supremacy of the national authority because the "individual independence of the [s]tates is utterly irreconcilable [sic] with their aggregate sovereignty"); *cf.* Washington to Madison, Mar. 31, 1787, in JM, *supra* note 5, vol. 9, at 342 (saying that "the *only* Constitutional mode by which the defects can be remedied" is within the revision of the confederal system).

6. Hamilton to James Duane (NY delegate to Continental Congress) (Sept. 3, 1780), in 2 *PAPERS OF ALEXANDER HAMILTON* 400–20 (Harold C. Syrett ed., 1961–87) [hereinafter PAH] (calling for Congress to have power to tax and power over internal police).

7. Virginia Plan, (May 29, 1787), in 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787* 20–22 (Max Farrand ed., 1907) [hereinafter FARRAND] (calling for national government with power over "common defence, security of liberty and general welfare"); *see, e.g.*, Gordon S. Woods, *Ideology and the Origins of Liberal America*, 44 *WM & MARY Q.* 628, 633 (1987) (calling the Virginia Plan breathtaking in novel espousal of a strong central government).

8. Resolution of May 30, 1787, in FARRAND, *supra* note 7, at 35 (stating that a national government ought to be established consisting of a supreme Legislature Executive & Judiciary with power over common defense, security of liberty and general welfare) (passing six states to one).

national government. By June of 1788, the Constitution had been ratified by enough states that the new national government could be established. Once the national government began operations, opposition to the Constitution ceased to be a viable political position.<sup>9</sup> Madison pushed the whole cascade.

Madison wanted an even stronger national government than he got in the Constitution. He wanted a national veto on state law in any case whatsoever, and the Convention would not let him have that. Still, what he got was a three-part national government able to raise taxes on its own to maintain payments on the war debts, to provide for the common defense and general welfare, able to nationalize the state militias, and able to enact laws that would be paramount over state laws and constitutions. He shifted the United States from a meeting house of diplomats into a single nation.

Madison's *Federalist* 10, moreover, is the most interesting systematic argument in favor of the new Constitution. *Federalist* 10 was proof that the new national government would better protect fundamental individual rights than had the states. The Episcopalians might abuse the Presbyterians and Baptists in Virginia, as they had. Congregationalists might abuse Baptists and Quakers in Massachusetts, as they did. Presbyterians and Quakers might abuse each other when each was in office in Pennsylvania. But on the national level, no one sect could obtain a majority, and every sect and faction would be at perfect liberty to follow their own conscience.<sup>10</sup> Only the new national government, the extended republic, could protect the fundamental rights for which the Revolutionary War had been fought.

For generations of political scientists, moreover, *Federalist* 10 was the invisible hand for political science, parallel to Adam Smith's invisible hand for economics. *Federalist* 10 proved that a special interest might prevail unjustly in an individual instance, but that over time, the law of large numbers would ensure that the

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9. See, e.g., Washington to Catherine Macauley Graham (Jan. 9, 1790), in 30 WRITINGS OF GEORGE WASHINGTON 495, 497 (John C. Fitzpatrick ed., 1931–44) [hereinafter GW] (finding it a miracle that there was such unanimity); Jefferson to Lafayette (Apr. 2, 1790), in 16 PAPERS OF THOMAS JEFFERSON 293 (Julian P. Boyd ed., 1950) [hereinafter TJ] (saying “[t]he opposition to our new constitution has almost totally disappeared.”).

10. See, e.g., THE FEDERALIST NO. 51, at 352 (Jacob E. Cooke ed., 1961) [hereinafter FEDERALIST] (saying a free government must give security to civil rights as well as religious rights).

special interests would offset each other. All that was needed was an extended republic with large enough numbers and the machine would run of itself.<sup>11</sup>

Having accomplished his strong national government, Madison denied it, so to speak, three times before the cock crowed.<sup>12</sup> By 1791, less than four years after *Federalist* 10, Madison had become Jefferson's lieutenant in the endeavor to defeat the administration of Washington and Hamilton, foremost and irretrievably on the issue of use of national bank notes as paper money. In a series of pseudonymous essays written in service of Jefferson's party, Madison called, among other things, for small ideologically homogeneous states, like Virginia, to be a check upon the national government.<sup>13</sup> For Jefferson, the states were the "surest bulwarks against anti-republican tendencies."<sup>14</sup> The ideological stance had a specific programmatic purpose: defeat of the national bank. The Jefferson-Madison opposition party was created, moreover, within a polity in which it was not yet clear that organized factions were a good thing nor that opposition could be either loyal or legitimate.

Madison in his first life is a strong, consistent nationalist. Madison's Virginia Plan gave the new national government power over "common defence, security of liberty, and the general welfare" without further limitation.<sup>15</sup> In the 1787 convention, Madison had argued that it was in the states, "the small communities where a mistaken interest or contagious passion, could readily unite a majority of the whole under a factious leader, in trampling on the rights of the Minor party."<sup>16</sup> Patrick Henry is the factious leader described by Madison's more abstract words. As Madison had to explain to Jefferson, when Jefferson first returned to America, "[t]he evils suffered and feared from weakness in Government . . . have turned the attention more

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11. See, e.g., DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 59 (1984) (calling *Federalist* 10 "the most famous and highly regarded essay . . . perhaps even of all American political writings"); see also praise collected in Larry D. Kramer, *Madison's Audience*, 112 *HARV. L. REV.* 611, 612–13 (1999).

12. *Matthew* 26:75 (King James).

13. *National Gazette* (Sept. 1791, Nov. 1791), in 6 *WRITINGS OF JAMES MADISON* 68, 81, 114 (Gaillard Hunt ed., 1900–1910).

14. Jefferson, 1st Inaugural Address (Mar. 4, 1801), in *BASIC WRITINGS OF THOMAS JEFFERSON* 334 (Philip S. Foner ed., 1944).

15. Virginia Plan, *supra* note 7.

16. Madison, *Notes on his Speech on the Right of Suffrage to the Philadelphia Convention*, in 3 *FARRAND, supra* note 7, at 454.

towards the means of strengthening the [national government] then of narrowing [it].”<sup>17</sup> The complaint was not that Congress “governed overmuch,” as James Wilson put it, but that they governed too little.<sup>18</sup> But by 1791 Madison was trying to narrow the national government for the purpose of defeating Alexander Hamilton’s programs of assumption of the state war debts, payment of war debts at the face amount rather than depreciated value of the debt, and, most of all, of creation of bank debt to serve as paper money.

Madison transformed yet again into a war president willing to override local interests, but that flip is less interesting. In the election that Jefferson justly called the Revolution of 1800, Jefferson and Madison became the victorious establishment that controlled the national government. A major issue for most of the duration of both the Jefferson and Madison administrations was trying to get the French or British belligerents in the Napoleonic wars to respect the United States’ rights of shipping as a neutral. Neither belligerent would allow U.S. shipping to supply their enemy. Ultimately, Madison declared the War of 1812, unnecessarily: Britain was willing to make concessions that should have avoided the war. The United States was grievously unprepared for war on land or on sea.<sup>19</sup>

Jefferson and Madison sponsored a broad embargo which destroyed New England shipping, and that was an exercise of national power against a smaller community. An administration that sincerely believed that the New England States were the surest bulwark against anti-republican tendencies would not have done that.

The second turning of Madison is, however, less serious than the first and may not even be an inconsistency. Even in his sharpest states’ rights mode, Jefferson was willing to concede that the national government would have responsibility for war and the common defense.<sup>20</sup> It was the ability of the national

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17. Madison to Jefferson (Feb. 4, 1790), *in* TJ, *supra* note 9, at 150.

18. James Wilson, Federal Convention (July 14, 1787), *in* 2 FARRAND, *supra* note 7, at 10.

19. This paragraph draws primarily from DAVID S. HEIDLER & JEANNE T. HEIDLER, *THE WAR OF 1812*, at 1–15 (2002).

20. Jefferson to Madison (Dec. 16, 1786), *in* JM, *supra* note 5, at 210, 211 (saying that the proper division between the general and state governments is that national government would have power over foreign concerns and the states would have power over the domestic ones); Jefferson to Gideon Granger (Aug. 13, 1800), *in* 9 WORKS OF THOMAS

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government to serve the general welfare that Jefferson had trouble with.<sup>21</sup>

Madison had a spectacularly interesting life, all three of them. By the measure of political success, all three of Madison's lives were highly successful. By the end of the Madison first life, the Anti-Federalist opposition was politically extinct. By the end of his Presidential term, the Federalist Party, like the Anti-Federalists before it, was politically extinct.

Feldman's book is exciting because Madison's life was exciting. Madison defends his positions articulately. Still, Feldman does not question Madison's positions, even when they need some critical appraisal.

## I. MADISON ERRS

## A. FALSE CLAIMS

Madison makes errors, as mortals do, which Feldman should correct. In debate on September 4, 1789, for example, Congress seemed set on locating the permanent capital on the Susquehanna River in Pennsylvania and Madison wanted it along the Potomac next to Virginia. Madison told Congress that if a prophet had predicted the Susquehanna location to the Virginia Ratification convention, the convention might not have ratified the Constitution (p. 278).

The claim is implausible. In the original debates in Virginia in June 1788, the Anti-Federalists treated proximity to the federal seat of government as a NIMBY—not in my backyard—issue. The ten-mile square for the federal capital, the Anti-Federalist maintained, would be the refuge for slaves,<sup>22</sup> a sanctuary for the

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JEFFERSON 138, 140 (Paul Leicester Ford ed., 1905) [hereinafter WTJ] (saying that the true theory is that “states are independent as to everything within themselves” and “general government [is] reduced to foreign concerns only”).

21. See, e.g., Thomas Jefferson to Albert Gallatin (June 6, 1817), in WTJ, *supra* note 20, at 70, 71–72 (saying that the tenet that Congress has only the power to provide for enumerated powers, and not for the general welfare, “is almost the only landmark which now divides the federalists from the republicans”).

22. John Taylor of Caroline (June 17, 1788), in 3 DEBATES IN THE CONVENTIONS OF THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 454–455 (Jonathan Elliot ed., 1907) [hereinafter ELLIOT]; William Grayson, Virginia Ratification Convention (June 16, 1788), in ELLIOT, *supra*, at 434 (saying that “persons bound to labor” would escape to the district).

blackest crimes,<sup>23</sup> and the place to prosecute the honest editors without a jury.<sup>24</sup> As the Nation expanded to the South, Anti-Federalist Grayson warned, [cue here for eerie music] the “ten miles square may approach us!”<sup>25</sup> Virginia Federalists, by way of *reassurance*, said that Benjamin Franklin had recommended far-off Philadelphia as the seat of government.<sup>26</sup> In that context, it is highly unlikely that any promise of a capital on the Potomac could have been implied or understood. Madison might be allowed some rhetorical flourish in 1789—it is a little misremembrance or at worse a little fib. Madison might be remembering only his attitude toward the ten-mile square, and not the tone of the opposition. Still, Feldman should have called him on it. Feldman’s sources are Madison’s papers, so Feldman could not spot the misdescription. Feldman also has no fulcrum from outside Madison to correct him on this or more serious issues.

#### B. NOT INVENTED HERE.

Feldman treats judicial review and the enumerated power doctrine as originated by Madison when they had in fact been well-articulated by others earlier, although outside the Madison papers. Both ideas were inconsistent with what Madison was saying when the ideas first appeared in the public debates.

##### 1. Judicial Review

Feldman, for example, calls a Madison speech of June 8, 1789, in connection with the debate over the bill of rights, the first time Madison “*or possibly anyone*—had ever made the argument that the written bill of rights would transform judges into protectors of fundamental liberties” (p. 293, *emphasis added*).<sup>27</sup>

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23. George Mason, Virginia Ratification Convention (June 16, 1788), in ELLIOT, *supra* note 22, at 431 (saying the federal district would become “the sanctuary of the blackest crimes”); John Tyler, Virginia Ratification Convention (June 17, 1788), in ELLIOT, *supra* note 22, at 455 (saying perpetrators of acts of violence would take sanctuary in the ten miles square).

24. Mason, Virginia Ratification Convention (June 16, 1788), in ELLIOT, *supra* note 22, at 431.

25. William Grayson, Virginia Ratification Convention (June 12, 1788), in 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1192 (Merrill Jensen et. al. eds., 1976) [hereinafter DOCU HISTORY].

26. A Native of Virginia, *Observations upon the Proposed Plan of Government* (Apr. 2, 1788), in 9 DOCU HISTORY, *supra* note 25, at 674.

27. Citing James Madison, Second Speech of June 8, 1789, in JM, *supra* note 5, at 203.

That misstates the originality of the claim: The Constitution before the Bill of Rights already protected critical individual rights, including the right to a jury trial in criminal cases and prohibition against retroactive laws and bills of attainder.<sup>28</sup> The supremacy clause of the Constitution, prior to the Bill of Rights, had already provided that the U.S. Constitution, including the requirement of jury trial and prohibition of retroactive bills of attainder, would be the supreme law of the land and that the judges would be bound by it.<sup>29</sup> Prakash and Yoo list eight pre-constitution state cases in which the state courts had already held rights were paramount over state legislation, including as to bills of attainder and trial by jury.<sup>30</sup> Judicial review to protect individual rights listed in the Constitution was already established by the text of the Constitution before Madison's June 8, 1789 speech.

Madison was a late convert to the judicial review remedy, resisting it in favor of his preferred remedy, a congressional veto of state law, in any case whatsoever. Both Governor Morris and Thomas Jefferson had tried to convince Madison that judicial review, striking down state laws inconsistent with the Constitution after enactment, was a sufficient remedy in lieu of Madison's deeply-felt proposal for a national pre-effective negative.<sup>31</sup> Madison at the Convention and beyond had wanted a national veto, a negative on any state law in any case whatsoever before it went into effect.<sup>32</sup>

Contrast, for example, Alexander Hamilton, as Publius, who is clearly in favor of judicial review, with Madison who fails to mention it when one would think it should be mentioned. Hamilton's *Federalist* 78 defended judicial review that would strike down legislation inconsistent with the "superior obligations" of the Constitution. Madison, as Publius, by contrast, in *Federalist* 37, seems to rely on a struggle between the people, terminated only by compromise, to settle the vague border between national and state authority. If Madison expected the Courts to rein in the federal government, *Federalist* 37 would have

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28. U.S. CONST. art. I.

29. U.S. CONST. art. VI, cl. 2.

30. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 933 (2003).

31. Jefferson to Madison (June 20, 1787), in 11 TJ, *supra* note 9, at 480–81.

32. See, e.g., JOHNSON, RIGHTEOUS ANGER, *supra* note 2, at 109–16 (discussing Madison's "immoderate" fight for the negative).

been the appropriate place to mention it. Instead, *Federalist 37* assumes a vague border between national and state scope, enforced by politics and too vague for judicial review or enforcement. When Madison does come around to endorsing judicial review in June 1789, he is two years too late for the argument to be treated as novel.

## 2. Enumerated Power Doctrine

Similarly, Feldman gives Madison credit for the argument that Congress's jurisdiction is limited to enumerated powers. The best evidence is that the limitation was made up out of whole cloth only after the ink on the Constitutional text was dry, but not by Madison.

In *Federalist 41*, first published in January 19, 1788, Madison argued that the list of powers enumerated by clauses 2–18 of Article I were the “clear and precise” expressions of Congressional power, and that the more general language in clause 1, that Congress would have the power to tax to provide for the common defense and general welfare, was limited by the more “precise expressions.”<sup>33</sup> “This is the embryo—still undeveloped, to be sure,” Feldman claims, “of a narrow construction of Congress's enumerated powers” (p. 204).

The argument for a limitation to enumerated powers arose before Madison took it up, and at a time when Madison was still committed to a more general jurisdiction for his national government. In October 1787, shortly after the convention broke up, in a speech in front of Philadelphia Independence Hall where the convention had taken place, James Wilson argued that the states had plenary powers, but the federal government did not: “[T]he congressional authority is to be collected, not from tacit implication,” he said, “but from the positive grant expressed in the” proposed Constitution. The states, he argued, could have powers not mentioned in any document. For the federal government, however, “every[]thing which is not reserved is given.”<sup>34</sup> Also before Madison, Charles Pinckney told the South

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33. FEDERALIST NO. 41, *supra* note 10, at 277 (James Madison); *see also* FEDERALIST NO. 45, *supra* note 10, at 313 (James Madison), which is more famous and better expressed: “The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”

34. James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *in* 13

Carolina House that in the federal government, “no powers could be executed, or assumed, but such as were *expressly delegated*.”<sup>35</sup>

Madison himself was extraordinarily soft on the limitations of his national government when Wilson made his claim. In his first explanation of the newly framed Constitution to Jefferson in far off Paris on October 24, 1787, Madison had said there would be “a continual struggle” between the national head and the state inferior members, “until a final victory has been gained in some instances by one, in others, by the other of them.”<sup>36</sup> Neither the local nor the general government would entirely yield to the other, he wrote in *Federalist* 37 (January 11, 1788), “and consequently that the struggle could be terminated only by compromise.”<sup>37</sup> The national government would prevail, *Federalist* No. 46 (January 29, 1788), only by offering “manifest and irresistible proofs of a better administration.”<sup>38</sup> Madison is sounding like Hamilton who wrote, in *Federalist* No. 31 (January 1, 1788), that it would be a “vague and fallible” conjecture as to where politics would set the line between national and state.<sup>39</sup> When Wilson first claimed that the Congress had only listed powers in October 1787, Madison was still considering the document to give a general power over national welfare, with the actual border between national and state to be worked out by politics, not by courts.

The best evidence is that neither the text nor the drafting history of the Constitution supports the enumerated power limitation. Thomas Jefferson, reading the sacred text in far off Paris, dismissed the argument:

To say, as Mr. Wilson does that . . . all is reserved in the case of the general government which is not given . . . might do for the Audience to whom it was addressed, but is surely gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present

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DOCU HISTORY, *supra* note 25, at 339; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 143–46 (1996) (describing the importance of Wilson’s speech within the entire ratification process).

35. Charles Pinkney, Speech to the South Carolina House of Representatives (Jan. 16, 1788), *in* 4 ELLIOT, *supra* note 22, at 259 (emphasis added).

36. Madison to Jefferson (Oct. 24, 1787), *in* 10 JM, *supra* note 5, at 205, 210–11.

37. FEDERALIST NO. 37, *supra* note 10, at 237 (James Madison).

38. FEDERALIST NO. 46, *supra* note 10, at 317 (James Madison).

39. FEDERALIST NO. 31, *supra* note 10, at 198 (Alexander Hamilton).

confederation [Article II] which had declared that in express terms.<sup>40</sup>

Article II of the Articles Confederation had provided that Congress would only have the powers “expressly delegated” to it, and the framers took the limitation out because it had proved “destructive” to the Union.<sup>41</sup>

The Anti-Federalists were devastating as to Wilson’s claim. “Let us compare” Wilson’s claim that all powers not granted are reserved, said a Republican in New York, “with the sense of the framers, as *expressed* in the instrument itself.”<sup>42</sup> In his first essay, Brutus labeled Wilson’s argument that all which is not given is reserved as “rather specious than solid.”<sup>43</sup> “The powers . . . granted to the general government by this constitution,” Brutus said, are “complete.”<sup>44</sup> “If this [enumerated powers] doctrine is true,” said “A Democratic Federalist” in Pennsylvania, “it ought at least to have been clearly expressed in the plan of government.”<sup>45</sup> Arthur Lee wrote in Virginia that “Mr. Wilson[’s] sophism has no weight with me when he declares . . . that in this Constitution we retain all that we do not give up, because I cannot observe upon what foundation he has rested this curious observation.”<sup>46</sup> If the Framers promised a limitation of the federal government to a list of narrow powers, they did not do so in the writing of the Constitution.

The enumerated power limitation, however, ultimately prevailed. Jefferson would later maintain that the tenet that Congress had only the power to provide for enumerated powers, and not for the general welfare, is “almost the only landmark that divides the federalists from the republicans.”<sup>47</sup> Jefferson was elected President in 1800 and his views prevailed. Supreme Court doctrine adopted the enumerated power doctrine with a sufficiently generous penumbra from the necessary and proper

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40. Jefferson to Madison (Dec. 20, 1787), in 12 TJ, *supra* note 9, at 438, 440.

41. Edmund Randolph, Virginia Convention, ELLIOT, *supra* note note 22, at 600–01.

42. A Republican I: To James Wilson, Esquire, NEW YORK J. (Oct. 25, 1787), in 13 DOCU HISTORY, *supra* note 25, at 477, 478.

43. Brutus II (Nov. 1, 1787), in 13 DOCU HISTORY, *supra* note 25, at 524, 526.

44. *Id.*

45. A Democratic Federalist, PENNSYLVANIA HERALD (Oct. 17, 1787), *reprinted* in 13 DOCU HISTORY, *supra* note 25, at 386, 387.

46. George Lee Tuberville to Arthur Lee (Oct 28, 1787), in 13 DOCU HISTORY, *supra* note 25, at 505, 506.

47. *See, e.g.*, Thomas Jefferson to Albert Gallatin (June 6, 1817), in 12 WTJ, *supra* note 20, at 70, 71–72.

clause to allow a bank. In 1813, the Supreme Court, in an opinion by Chief Justice John Marshall in *McCulloch v. Maryland*, declared the enumerated power limitation to be triumphant, but he simultaneously allowed the necessary and proper clause, at the end of the article I, section 8 list of powers, to justify a national bank.<sup>48</sup> By 1813, the Federalists were on the wane, on the way to extinction as a party, and the Jeffersonian Party was dominant, including on the Court. Marshall, a last survivor of the Federalist Party, was giving the Jeffersonians the enumerated power limitation while simultaneously in the Court's holding allowing the bank that was the first program-target of the enumerated power doctrine.

I have argued before<sup>49</sup> and will argue again, that the enumerated power doctrine arose in the ratification debate without foundation in the text. If the Constitution is like the Holy Bible binding in its text, it is the text that is binding and not the Concordances. Here, however, it is sufficient to say that Madison was not the source of the enumerated power doctrine, notwithstanding Feldman's giving him credit.

## II. WHY MADISON FLIPPED

Madison at the start of the Washington Administration was Washington's chief lieutenant, but he went in opposition to the Administration in service of or in alliance with Thomas Jefferson. Political arguments, even those sounding the most abstract and eternal, should always be understood in the context of the time they were made as an attempt to accomplish or defeat some set of programs.<sup>50</sup> Madison's switch is in reaction to specific programs offered by Alexander Hamilton and endorsed by Washington: paper money, assumption of state war debts, and payment of debts at face value.<sup>51</sup> Feldman describes the controversies from what Madison says about them, but without a critical stance or description of the other, Hamiltonian side of the issue. Feldman relates that he is pained that his daughter depicts *Hamilton* as her

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48. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

49. Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25 (2005).

50. See, e.g., SKINNER, *supra* note 3, at 3.

51. John Zvesper, *The Madisonian Systems*, 37 W. POL. Q. 236, 249-50 (1984) (emphasizing contrast of Madison before and after break with Hamilton).

favorite musical (p. 630). Still, Feldman's daughter's choice seems fully justified. Consistently, Alexander Hamilton is right on the merits of the programs that caused the shift, and Madison and Jefferson are cleanly wrong.

#### A. PAPER MONEY

In 1791, Hamilton proposed a national bank that would issue bank notes that would increase the supply of money. The country needed paper money. If there is not enough money in circulation to effect trades, then sellers are able to sell their wheat or their cloth only by barter or by extending credit. Barter requires a rare event, a double coincidence of finding someone who has something the seller wants who also wants the seller's wheat or cloth. Extending credit is relying on the hope that the buyer will be able to pay later. Sales to strangers that would get done if a reliable currency were available do not get done. A government can then increase the long-run wealth of the nation if it will ensure an adequate enough supply of money to allow the trades demanded by economic activity without barter.<sup>52</sup>

In the shared mercantilist diagnosis of the times, the ills of the economy were said to be caused by excessive imports that had drained gold and silver coinage from the country and left too little to enable the domestic trades. Anti-Federalist John Lansing opened the Anti-Federalist opposition at the New York Ratification Convention with a fine mercantilist diagnosis, that the current economic woes were caused by "imported European goods to an amount far beyond our ability to pay."<sup>53</sup> From the Federalist side, James Wilson argued that we needed to replace the Articles of Confederation, because we could not restrict the "excessive importations which lately deluged the country"<sup>54</sup> George Washington put it pungently that imports were "luxury, effeminacy, & corruption."<sup>55</sup> Madison had joined in the attack

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52. Charles W. Calomiris, *Institutional Failure, Monetary Scarcity, and the Depreciation of the Continental*, 48 J. ECON. HIST. 47, 48–49 (1988); Hamilton, *Report on a National Bank* (Dec. 13, 1790), in 7 PAH, *supra* note 6, at 305, 311, 320, 321 (saying without money trades would be reduced to barter).

53. John Lansing, New York Ratification Convention (June 20, 1787), in 2 ELLIOT, *supra* note 22, at 218.

54. James Wilson, Pennsylvania Ratification Convention (Nov. 24, 1787), in 3 FARRAND, *supra* note 7, at 141.

55. See, e.g., George Washington to James Warren (Oct. 7, 1785), in 3 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 298, 299–300 (W.W. Abbot ed.,

describing imports as “draining us of our metals,” so as to furnish “pretexts for the pernicious substitution of paper money.”<sup>56</sup>

Fiat paper money, issued by the sovereign and made legal tender as a matter of law, works, but only if the sovereign re-absorbs by taxation the currency in excess of what is needed for trades.<sup>57</sup> In the Revolutionary War, the intended system was that Congress could issue Continental Dollars to buy war goods and pay soldiers and the states would pull the excess dollars out of circulation by taxation by their usual mode.<sup>58</sup> The states, however, were unwilling to tax by enough to keep the dollars in circulation within the needs of the trade, although the states had the taxable capacity to carry more taxation. The Continental Dollar had thus first inflated and then failed in full to be acceptable as payment.<sup>59</sup>

With the failure of the Continental Dollar, and the withdrawal of the state paper moneys, the country needed a substitute paper money. Hamilton attributed the decrease in value of land to the scarcity of money.<sup>60</sup> In *Federalist* 12, Hamilton argued that that greater volume and circulation of money would not only enable the domestic trades, but would also makes taxes easier to pay.<sup>61</sup> Paper money would replace the precious metals sucked out to pay for machine-woven British cloth.

Hamilton proposed a form of paper money, distinguishable from the Continental dollar, based upon debt of a bank that Congress would charter. In Hamilton’s system, bank notes would remain sound currency, whereas the Continental Dollar had failed, because a bank would be willing to issue its notes only for credit-worthy borrowers able to repay the bank.<sup>62</sup> Under

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1994).

56. Madison to Jefferson (Mar. 18, 1786), in 8 JM, *supra* note 5, at 500, 501.

57. Calomiris, *supra* note 52, at 51 (citing, e.g., ADAM SMITH, THE WEALTH OF NATIONS 311 (Edwin Canaan ed., 1937)).

58. Jefferson, *Notes on Debates in the Continental Congress* (July 29, 1775), in 2 JOURNALS OF THE CONTINENTAL CONGRESS 220, 221 [hereinafter JCC] (reporting Congress resolving that “each colony provide ways and means to sink its proportion of the bills ordered to be emitted by this Congress, in . . . the usual mode of levying taxes in such colony”).

59. JOHNSON, RIGHTEOUS ANGER, *supra* note 2, at 33–34 (describing the decline and fall of the Continental dollar).

60. See Hamilton, *Report Relative to a Provision for the Support of Public Credit* (Jan. 9, 1790), in 6 PAH, *supra* note 6, at 51, 72.

61. FEDERALIST NO. 12, *supra* note 10, at 73–75 (Hamilton).

62. Hamilton, *Report on a National Bank* (Dec. 12, 1791), in 7 PAH, *supra* note 6, at 305, 322 (saying that bank notes were different from government paper money “bubble” because funds and demand for loan would limit the debt).

Hamilton's system, a bank would issue its own notes but only as a loan to those who could be expected to repay with interest. The bank might, for example, issue \$1000 in notes to a builder. The builder would use the notes to pay off workers and suppliers. The workers and suppliers would be entitled to redeem the notes from the bank in specie, but they would ordinarily not ask for redemption immediately, because the bank was a credible debtor who would pay whenever asked, and the notes were easier to carry and hide. The bank notes would circulate within the economy as money, indefinitely, so long as the bank would credibly redeem the notes on demand. A bank would issue the \$1000, however, only because it expected to be repaid on the loan by the builder with interest.

The bank needed a specific federal charter in the days before there was general law allowing formation of corporations, but it was essentially a private profit-making institution. Since the bank was trying to get repaid with interest to make a profit, the bank notes could not be expected to expand beyond the needs of economic activity of people willing to repay with interest nor to inflate nor fail as the continental dollar had.<sup>63</sup> The bank could also issue bank notes usable as convenient paper money in return for deposits of gold or silver coins, but of course it was the shortage of coinage that made the paper money so necessary, and it was only the bank loans given out as bank notes that would expand the quantity of money.

Jefferson and Madison did not understand Hamilton's system, or at least did not understand it enough to distinguish it from the Continental Dollar or any other paper money. Jefferson thought Hamilton would "delug[e] the states with paper-money."<sup>64</sup> Jefferson told Washington the bank was a "species of gambling, destructive of morality."<sup>65</sup> Madison joined Jefferson in

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63. See, e.g., Hamilton, *Report Relative to a Provision for the Support of Public Credit* (Jan. 9, 1790), in 6 PAH, *supra* note 6, at 51, 70–72 (arguing for public debt as a substitute for money).

64. Jefferson, *Memoranda of Conversations with the President* (Mar. 1, 1792), in 23 TJ, *supra* note 9, at 184, 186; see also, Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), in 19 TJ, *supra* note 9, at 275, 278 (saying that Hamilton's paper money was "clearly a demerit"); Jefferson to Edward Rutledge (Aug. 25, 1791), in 22 TJ, *supra* note 9, at 73, 74 (attributing economic ills to paper money). Later Jefferson would characterize bank notes as like a "South Seas bubble." Jefferson to Charles Yancey (Jan. 6, 1816), in 11 WTJ, *supra* note 20, at 493, 494.

65. Jefferson, *Memoranda of Conversations with the President* (Mar. 1, 1792), in TJ, *supra* note 9, vol. 23, at 184, 186.

opposing bank debt as a substitute for *real* money.<sup>66</sup> Madison had previously argued that paper money was “a fictitious money,” which “feed[s] . . . the spirit of extravagance.”<sup>67</sup> Paper money was an “unrighteous measure[.]” by which the majority oppressed the minority.<sup>68</sup> Paper money destroyed “that confidence between man & man.”<sup>69</sup> “Nothing but evil springs from this imaginary money.”<sup>70</sup> Jefferson also played for keeps: Once the bank went into effect, Jefferson proposed that the Virginia Assembly make doing bank business treason, punishable by death.<sup>71</sup>

On the merits of the issue, however, Hamilton’s bank notes costlessly fostered rational trades, and a Jefferson-Madison victory would have unnecessarily suppressed economic activity. Tight money also made existing debts harder to pay. For a yeoman farmer deeply in debt, the Jefferson-Madison tight money would have been very painful. As William Jennings Bryan would put it, much later, hard money would “crucify mankind upon a cross of gold.”<sup>72</sup> Moreover, Madison’s alternative cure for the paucity of money, that is, suppress imports to preserve specie for domestic use, is a standard mercantile remedy, but that cure would cause unnecessary harm. As Adam Smith convinced the world, the wealth of a nation is improved by imports rather than by domestic hoarding of specie.<sup>73</sup>

Charles Beard’s famous *Economic Interpretation of the Constitution* interpreted Madison’s stance banning state paper money, adopted by Article I, section 10 of the Constitution, as the smoking gun that proved that the Constitution was written by economic elites to suppress the democratic aspirations of less elite

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66. Madison, *The Bank Bill*, House of Representatives (Feb. 2, 1791), in 13 JM, *supra* note 5, at 372, 373 (opposing bank debt as substitute for specie money).

67. Madison to Jefferson (Aug. 12, 1786), in 9 JM, *supra* note 5, at 93, 95.

68. Madison to Jefferson (Mar. 19, 1787), in 9 JM, *supra* note 5, at 317, 318.

69. Madison, *Notes for a Speech Opposing Paper Money*, (Nov. 1, 1787), in 9 JM, *supra* note 5, at 158.

70. Madison to Jefferson (July 18, 1787), in 10 JM, *supra* note 5, at 105, 106.

71. Jefferson to Madison (Oct. 1, 1792), in 14 JM, *supra* note 5, at 375.

72. William Jennings Bryan, *Cross of Gold*, Speech at the Democratic Convention in Chicago (July 9, 1896). Charles Beard picked up Madison’s opposition to paper money as if the entire Constitution was written to crucify mankind upon a cross of gold. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 154, 324 (1913).

73. See, e.g., DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* (4th ed., 2015); the literature on the consensus that import restrictions reduce the wealth of this nation is very large.

classes.<sup>74</sup> That interpretation has far more to do with William Jennings Bryan and the progressive movement of Beard's times than it has to do with the constitutional period. Prohibitions on state paper money was not a contested issue in the constitutional debates. The Anti-Federalists joined in the "unanimous wish[]" that state paper money would be prohibited.<sup>75</sup> "[P]aper money would be the bane of this country. I detest it," Anti-Federalist Patrick Henry told the country.<sup>76</sup> The ban on state paper money was no more controversial than the constitutional ban on titles of nobility. Notwithstanding the apparent "unanimity" against state paper, Hamilton bank debt notes were distinguishable from fiat money and served a real economic need.

The public debate on bank notes as paper money largely took the form of a debate over scope of the national power. Madison took the position that there could be no national bank because a bank was not on the list of powers enumerated in Article I, section 8.<sup>77</sup> Hamilton took the position that section 8 gave the national government power to sponsor a national bank.<sup>78</sup>

The Madison-Jefferson finding that the national government could not incorporate a bank to issue paper money is an especially constrictive interpretation of Congressional power, even assuming arguendo that Congress has no general power to provide for the general welfare. Madison had acquiesced in a national bank under the Articles of Confederation, which had not listed a bank within the powers expressly delegated,<sup>79</sup> and Madison would acquiesce in a national bank again under his Presidency.<sup>80</sup> The Congress also had the enumerated power to regulate commerce and surely the establishment of an adequate supply of sound nation-wide currency is an appropriate tool to foster trades within the national economy. In the nineteenth

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74. BEARD, *supra* note 72, at 154, 324.

75. William Grayson, Virginia Ratification Convention (June 9, 1788), in 10 *DOCUMENTS OF THE AMERICAN REVOLUTION*, *supra* note 25, at 1447.

76. Patrick Henry, Virginia Ratification Convention (June 9, 1788), in 9 *DOCUMENTS OF THE AMERICAN REVOLUTION*, *supra* note 25, at 1055.

77. Madison, *The Bank Bill* (Feb. 2, 1791), in 13 *JM*, *supra* note 5, at 372–82.

78. Opinion on the Bank (Feb. 23, 1791), in 8 *PAH*, *supra* note 6, at 97.

79. Madison to Pendleton (Jan. 8, 1782), in 4 *JM*, *supra* note 5, at 22, 23 (voting in favor as "acquiescing rather than an affirmative vote"); Madison, *The Bank Bill* (Feb. 2, 1791), in 13 *JM*, *supra* note 5, at 372, 375 (saying the Articles of Confederation bank was a "child of necessity," not "justified by regular powers").

80. Madison, *To the Senate* (Jan. 30, 1815), in 8 *THE PAPERS OF JAMES MADISON: PRESIDENTIAL SERIES 541* (Angela Kreider et al. eds., 2015).

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century, the Supreme Court held that Congress had the power to print paper money, acceptable to pay tax and other debts as legal tender, as part of its powers to borrow and to coin money.<sup>81</sup> Now our money is entirely federal bank notes, except for loose change.<sup>82</sup> The Jefferson-Madison position that the scope of the national power did not reach bank notes seems first to be driven by their abhorrence of paper money of any kind. Once we conclude that Hamilton is right on the wisdom of bank-note paper money, and Jefferson-Madison wrong, the Jefferson-Madison position on scope of the Congressional powers does not look any better.

## B. ASSUMPTION OF STATE DEBT

The bank notes as money issue marked the unbridgeable rift between Jefferson-Madison and the Washington-Hamilton Administration, but two smaller schisms preceded it and contributed to the division: assumption of state debt and “scaling” of the purchase price of debt. Hamilton again had the better of the argument on the merits.

Hamilton’s position was that the federal government should assume all the war debts and war expenses incurred by the states. All expenses of the war were expenses for the common defense even if incurred by the states rather than by the Congress: “The objects for which both [federal and state] debt were contracted, are in the main the same.”<sup>83</sup> It was one war conducted under one banner of “United We Stand,” and for the same goal of independence from Britain. The goals of the various states did not vary. After the failure of the Continental Dollar, the states had stepped in to pay soldiers and suppliers, because Congress could not. The entire debt should be paid, Hamilton argued, by one general plan from one authority. Federal creditors should not be more favored than state creditors.<sup>84</sup> Federal taxes should carry the whole. In the Philadelphia convention, John Rutledge of South Carolina had argued, like a true mercantilist economist, that the

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81. *Juilliard v. Greenman*, 110 U.S. 421 (1884) (upholding paper money without gold or silver backing as legal tender, under Congressional power to borrow and coin money).

82. Authorized by 12 U.S.C. § 411.

83. Hamilton, *Report Relative to a Provision for the Support of Public Credit* (Jan. 9, 1790), in 6 PAH, *supra* note 6, at 51, 81.

84. *Id.* at 78–79.

federal government should assume all the state debts because it had the best tax, a tax that would suppress imports.<sup>85</sup>

Jefferson initially supported assumption of state debts because nine-tenths of the debts had been incurred for the general defense.<sup>86</sup> In a compromise between Hamilton and Jefferson, Hamilton agreed to allow the capital to be placed along the Potomac and Jefferson agreed that the federal government would assume state debts. Jefferson no longer considered the capital to be a liability in the neighborhood, akin to a toxic waste dump. But Jefferson was later to say that his agreement to allow federal assumption of state debts was the biggest mistake of his political life.<sup>87</sup> As Feldman accurately describes it, Madison was skeptical from the start about assumption and defeated assumption when it was first proposed (pp. 297-298).<sup>88</sup>

The states were intensely jealous of disproportionate benefits going elsewhere and they did have widely varying amounts of debt that would be assumed. Assume, reasonably, that the burden of assumption would be paid by citizens of various states in proportion to the apparent wealth of the states.<sup>89</sup> The various states had outstanding debts assumed that were widely disproportionate to their apparent wealth.<sup>90</sup>

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85. Motion at the Federal Convention (Aug. 18, 1787), in 2 FARRAND, *supra* note 7, at 327.

86. Jefferson to John Harvie, Jr. (July 25, 1790), in 17 TJ, *supra* note 9, at 270, 271.

87. Jefferson to Washington (Sept. 9, 1792), in 24 TJ, *supra* note 9, at 351, 352.

88. Madison, *Assumption of the State Debts*, House of Representatives (Apr. 22, 1790), in 13 JM, *supra* note 5, at 80.

89. Population, counting slaves at three-fifths, was a compromise measure widely viewed as the best measure of the relative wealth of the states. *See, e.g.*, Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 300-04 (2004). The Framers, in U.S. CONST. art. I, § 2, cl. 3, set the allocation of votes of the various states in the House of Representatives based on their estimate of population, including three-fifths of slaves, before the first census results came in.

90. The estimates for disbursements are from the “Aug. 4, 1790 Act for Assumption of State Debt,” 1st Cong. 2d Sess., setting the maximum amounts of certificates per state. 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 1044-45 (Joseph Gales ed., 1834-56) [hereinafter ANNALS]. The estimates of wealth are the state population, counting slaves at three-fifths, from U.S. CONST. art. I, § 2, cl. 3.

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Rank of Benefit		Wealth (votes in House from population with 3/5ths of slaves)	% of total	Assumed debt in \$1000s	% of total	Ratio of percentage of assumption to percentage of wealth
1	S.C.	5	8%	4,000	19%	2.5
2	Mass.	8	12%	4,000	19%	1.5
3	N.C.	5	8%	2,200	10%	1.4
4	Conn.	5	8%	1,600	8%	1.0
5	Va.	10	15%	3,200	15%	1.0
6	Pa.	8	12%	2,200	10%	0.9
7	R.I.	1	2%	200	1%	0.6
8	N.Y.	6	9%	1,200	6%	0.6
9	N.J.	4	6%	800	4%	0.6
10	Del.	1	2%	200	1%	0.6
11	Md.	6	9%	800	4%	0.4
12	N.H.	3	5%	300	1%	0.3
13	Ga.	3	5%	300	1%	0.3
Totals:	seats	67	100%	21,000	100%	1

South Carolina and Massachusetts did much better by assumption than they bore of its costs. New Hampshire and Georgia did the worst in relation to taxable wealth. South Carolina did 2.5 times better in relation to its wealth, and Georgia and New Hampshire would receive benefit of only 30 percent of what they could expect to bear of the cost by reason of their wealth. Virginia, Madison and Jefferson's home state, is right in the middle, receiving the same percentage of the total disbursements by assumption of state debts as Virginia wealth is to total wealth. It is plausible, however, that Madison and Jefferson did not know that.

State debt is uneven because states paid more expenses when the fighting was local, and the fighting was not evenly divided geographically. The British abandoned New England after they evacuated Boston in 1776, and before then, the Congress was still

paying expenses with the Continental Dollar. States that had paid off their war debts also did so because they used the funds to redeem their debt instead of paying their supposedly mandatory federal requisitions or buying back Continentals as they were supposed to do.<sup>91</sup> Still, whatever the distribution of benefits compared to wealth of the state, the federal government had the duty, as one Demosthenes Minor of [adversely affected] Georgia put it, “to discharge the debts contracted upon the collective faith of the states.”<sup>92</sup> Hamilton had the better of the issue.

### C. SCALING

Hamilton proposed that holders of the war debts, incurred at both congressional and state level, would be paid off at their promised face amount. Madison proposed instead what was called “scaling,” giving the current holders of the Congressional debt no more than the current fair market value of the debt. The “stockjobbers” and speculators who held the debt currently had paid a heavily discounted value to acquire the debt, sometimes only a trivial amount. Payment to them would give them a large profit, but not help original army suppliers or veterans. Madison would pay the current holders only the depreciated value of the debt, with the rest going back to the original holders, that is, the soldiers, suppliers, or lenders to whom the debt had first been issued.<sup>93</sup>

Madison’s remedy would have been impossible to implement. The record of most debt was the certificate itself, there was no other public record of who first received a certificate, and no record of the price paid in the serial bargains between first and current possessor. Madison conceded the administrative difficulties.<sup>94</sup>

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91. JOHNSON, *RIGHTEOUS ANGER*, *supra* note 2, at 26 (reporting Governor Clinton of New York buying certificates from his supporters instead of paying requisitions).

92. Demosthenes Minor of Georgia, *Gazette of the State of Georgia* (Nov. 22, 1787), *in* 3 *DOCU HISTORY*, *supra* note 25, at 245.

93. Madison, *Discrimination between Present and Original Holders of the Public Debt*, House of Representatives (Feb. 11, 1790), *in* 13 *JM*, *supra* note 5, at 34–39. Compare, e.g., E. JAMES FERGUSON, *THE POWER OF THE PURSE* 298 (1961) (calling Madison’s turn a purely political move, not realistic, but also the point at which Madison turned to state-oriented politics, where before he had been a nationalist), *with* STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 16, 68, 139–45 (1995) (concluding that Madison was sincere in explaining his opposition as coming from being upset at paying the “stockjobbers” full value when they had paid so little to acquire the debt).

94. Madison, *Discrimination between Present and Original Holders of the Public Debt*

Paying buyers only fair market value would have also destroyed the possibility of finding any buyer of debt the next time out. The debt had depreciated because of very reasonable doubts that the Congress or the state issuers would pay the debt and fair interest any time soon. The only recourse the original holders of debt had to supply their current needs was speculators willing to gamble to make a profit. Take away their chance of receiving a profit and the buyers stop. Buyers of debt took risks even once they knew of Hamilton's plans. The Congress led by Madison defeated assumption of state debts the first time it was offered.<sup>95</sup> Speculators who bet on the Continental, instead of debt certificates, lost out because Congress ultimately paid only one cent per Continental Dollar redeemed, whereas Hamilton had proposed redemption at two and a half cents per Dollar.<sup>96</sup>

Moreover, "scaling" would allow the state or national borrower to reduce the amount they would have to repay of the amount borrowed just by increasing market doubts about their own willingness to pay. It was morally right, Hamilton concluded, that the issuers of the debt who had received full value should repay the debt according to what they had promised.<sup>97</sup> Madison's proposal lost in the House, 11-55, as it should have.

Scaling was a wound to the relationship between Madison and the Washington-Hamilton Administration, but not yet the fatal blow. Hamilton later related that Madison's position on scaling had diminished his respect for the force of Madison's mind and the soundness of his judgment, but that his prior respect for the fairness of Madison's character and reliance on Madison's good will carried over, so that he thought that Madison was misguided but sincere. But then Madison began to cooperate with Jefferson, who seems to have viewed Hamilton as evil from the first meeting in their relationship.<sup>98</sup> Then Madison became

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(Feb. 11, 1790), in 13 JM, *supra* note 5, at 34, 36 (saying that apportioning repayment was getting into "a labyrinth, for which it is impossible to find a clue"); *id.* at 55 (saying that splitting the redemption payments according to current market value was not "perfect justice").

95. April 12, 1790, in 1 ANNALS, *supra* note 90, at 1577 (assumption of state debts defeated by 31-29).

96. FERGUSON, *supra* note 93.

97. Hamilton, *Report Relative to a Provision for the Support of Public Credit* (Jan. 9, 1790), in 6 PAH, *supra* note 6, at 73-74.

98. Forrest McDonald traces Jefferson's uncompromising hatred of Hamilton to a dinner party at which Hamilton revealed his agreement with the "corruptions" by which Walpole party in England of 1730s accomplished its legislative agenda on behalf of the

“personally unfriendly” to Hamilton and dropped expressions in Hamilton’s presence, “sometimes without sufficient attention to delicacy.”<sup>99</sup> Madison questioned Hamilton’s principles with asperity and the conversations got back to Hamilton.<sup>100</sup> Perhaps the disagreement over scaling might have healed eventually, or been written off as private disagreement among strong allies who had together just won the Constitution. Still because of, or by the time of, the national bank, the Founders had split into two warring camps, never able to cooperate again. Madison disclaimed on the superiority of the small homogeneous state, as a part of what became a permanent Jeffersonian party.

#### D. IS THE BILL OF RIGHTS THE TRANSFORMATION?

Feldman treats the Bill of Rights as the first step of Madison’s second life, as a Jefferson-Party anti-nationalist. Placing the Bill of Rights as the first day of Madison’s new life misstates Madison’s consistent commitment to fundamental rights, and misidentifies what the Anti-Federalist were trying to accomplish with what they called a Bill of Rights.

Madison had opposed a Bill of Rights in the ratification debate, but he was the sponsor in the First Congress of the first ten amendments to the Constitution that became known as the Bill of Rights. Feldman treats the two positions as a change attributable to Madison’s campaign for a seat in the House of Representatives in the First Congress (pp. 252-254).<sup>101</sup> Patrick Henry, who was Madison’s implacable foe in the decade before in the Virginia legislature, both caused the Virginia legislature to deny Madison appointment to the U.S. Senate by the Virginia legislature, and also put a formidable candidate, the future President James Monroe, up against Madison in Madison’s home district in the race for Congress in the first U.S. House of Representatives. In the election campaign, Madison promised the Presbyterian and Baptist constituents that since the Constitution

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Crown. Jefferson was a staunch believer in the country-gentry Bollingbroke opposition. FORREST McDONALD, *HAMILTON* 212–17 (1979). By 1790s, the Walpole-Bollingbroke disputes were almost sixty years old, but it was apparently a festering wound. *Id.*

99. Hamilton to Edmund Carrington (May 26, 1792), in 11 PAH, *supra* note 6, at 426, 428–29, 436.

100. *Id.*

101. *Accord* ROBERT ALLEN RUTLAND, *JAMES MADISON: THE FOUNDING FATHER* 44, 46–49 (1987).

was now settled, Madison would offer amendments to protect the rights of conscience, freedom of the press, and trials by jury.<sup>102</sup>

Madison does transform between his first and second life, but his stances on Bills of Rights are not an evidence of it. The “Bill of Rights” amendments offered by the Anti-Federalists in the ratification debate were very different from the Bill of Rights offered by Madison. Madison is consistent on protecting individual rights, and the Anti-Federalists are the lesser guardians of individual rights than is implied by placing the bill of rights as a first episode after transformative turn. It was not protection of rights that Madison objected to in the ratification debate, but the impairment of national power.

Lansing and Yates, the Anti-Federalists delegates from New York, had set a standard for Anti-Federalism that “the leading feature of every amendment [to the Constitution that came out of Philadelphia] ought to be the preservation of the individual states in their uncontrolled constitutional rights.”<sup>103</sup> In New York, only about twenty-five percent of the Anti-Federalist proposed amendments reflected ideas that were later incorporated in the Amendments I–X of the Constitution. The other three-quarters were restrictions on the power of the new national government, preventing tax on dry land, making it harder to borrow, and limiting the new government to only those powers expressly delegated to it.<sup>104</sup> Rights are mostly states’ rights to the opponents of the Constitution, and Madison’s Bill of Rights protected not states but individuals. Madison, from his point of view, considered the various Bill of Rights amendments offered by the Anti-Federalists as insincere, mere excuses to block the essence of the proposed national government,<sup>105</sup> which is plausible in the context of the debate.

The most important of the Anti-Federalists’ amendments was the proposal to prevent Congress from laying “direct” or dry land tax. Denying Congress the power to lay direct tax was considered “the point most dear to the opposition.”<sup>106</sup> As Anti-

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102. Madison to [Baptist Minister] George Eve (Jan. 2, 1789), in 11 JM, *supra* note 5, at 404–05.

103. Robert Yates and John Lansing, Jr., to N.Y. Governor George Clinton, DAILY ADVERTISER (New York) (Jan. 14, 1788), in 1 ELLIOT, *supra* note 22, at 481.

104. Calvin H. Johnson, “*Impost Begat Convention*”: Albany and New York Confront the Ratification of the Constitution, 80 ALB. L. REV. 1489, 1509–14 (2016).

105. Madison to Randolph (Apr. 10, 1788), in 11 JM, *supra* note 5, at 18–19.

106. Tench Coxe to Madison (July 23, 1788), in 11 JM, *supra* note 5, at 194; *see also*

Federalist James Monroe put it, “to render the [Congress] ‘safe and proper,’ I would take from it one power only—I mean that of direct taxation.”<sup>107</sup> For the Federalists, the prohibition on federal direct tax cut to the heart of the Constitution. As George Washington explained the Constitution to Thomas Jefferson in far off Paris: “For myself . . . there are scarcely any of the amendments . . . to which I have *much* objection, except that which goes to the prevention of direct taxation; and that, I presume, will be more strenuously advocated and insisted upon . . . than any other.”<sup>108</sup> For Washington, a federal direct tax was expected to “do justice to the public creditors and retrieve the [n]ational character. But [he said that] if no means [we]re to be employed but requisitions . . . [they] may as well recur to the old [c]onfederation.”<sup>109</sup> For Washington, the purpose of the Constitution and the replacement of the confederation of sovereign states was to pay the war debts. The Anti-Federalist’s Bill-of-Rights prohibition on direct taxes would prevent the prime purpose.

The Anti-Federalists considered Madison’s Bill of Rights protecting individuals to be “trivial and unimportant,” neglecting the more fundamental issues of structure of government.<sup>110</sup> Madison’s amendments were “good for nothing” and “will do more harm than benefit.” They “shall affect personal liberty alone,” the Anti-Federalists whined, “leaving the great points of the Judiciary & direct taxation [et]c. to stand as they are.”<sup>111</sup> The Bill of Rights amendments, Anti-Federalists argued, were “not those solid and substantial amendments which the people expect; they are . . . frothy and full of wind.”<sup>112</sup> Madison’s Bill of Rights were “a tub thrown out to whale” to divert the whale and “secure

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Madison to Randolph (Dec. 2, 1787), in 10 JM, *supra* note 5, at 289, 290 (direct tax is most popular topic among adversaries); Hardin Burnley to Madison (Dec. 5, 1789), in 12 JM, *supra* note 5, at 460 (saying that direct tax prohibition is “chief object” of Anti-Federalists’ dispute).

107. Monroe, Virginia Convention (June 10, 1788), in 9 DOCU HISTORY, *supra* note 25, at 1109.

108. Washington to Jefferson (Aug. 31, 1788), in 30 GW, *supra* note 9, at 79, 82–83.

109. *Id.*

110. Abraham Yates, *quoted in* Staughton Lynd, *Abraham Yates’s History of the Movement for the United States Constitution*, 20 WM. & MARY Q. 223, 227 (1963).

111. William Grayson to Patrick Henry (Sept. 29, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 248–49, 300 (Helen E. Veit et al. eds., 1991).

112. Aug. 15, 1789, in 1 ANNALS, *supra* note 90, at 774.

the freight of the ship and its peaceable voyage.”<sup>113</sup> George Mason had announced he opposed ratification in part because the Constitution lacked a bill of rights, but he was not mollified by this set. Madison’s amendments, Mason claimed, were a “Farce.”<sup>114</sup> The Virginia Anti-Federalists so hated Madison’s list that they defeated Virginia ratification of the Bill of Rights Amendments when it was first offered in Virginia in 1789.<sup>115</sup>

Madison was not opposed to the protection of individual rights. In 1785, Madison had offered a constitution for the state of Kentucky that included a bill of rights preventing the legislature from meddling with religion, right to a jury, taking away habeas corpus, forcing a citizen to testify against himself, controlling the press, enacting retrospective laws, and seizing private property for public use without paying full value. The Bill of Rights that Madison proposed to Congress in 1789 has far stronger resemblance to his own 1785 list than to the Anti-Federalists’ lists, the latter so heavily leaning on restrictions on national power. Madison’s *Federalist* 10, moreover, is a proof that the extended republic, the new national government, would be a better protector of individual rights than the states had been. It was Anti-Federalist Patrick Henry who had been the abuser of the rights of dissenting religions (pp. 58-67).

The Constitution without the Bill of Rights amendments already protected the essential right to jury in criminal law, and prohibited ex post facto laws and bills of attainder. Indeed, much of the enacted Bill of Rights is criminal procedure safeguards that are of secondary importance to the prime right to trial by jury in criminal cases. In his inauguration address in April 1789, President Washington recommended that the Constitution be amended to make certain that “the characteristic rights of freemen” might be “impregably fortified.”<sup>116</sup> Once the

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113. Aedanus Burke, *Gazette of the United States* (Aug. 19, 1789), reprinted in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS*, *supra* note 111, at 175.

114. George Mason to John Mason (July 31, 1789), in 3 *THE PAPERS OF GEORGE MASON* 1162, 1164 (Robert A. Rutland ed., 1970); *accord*, Mason to Jefferson (Mar. 16, 1790), in *THE PAPERS OF GEORGE MASON*, *supra*, at 1188, 1189 (saying that the Constitution was a “great [d]anger to the Rights & Liberties of our Country” even after the Bill of Rights).

115. RISJORD, *supra* note 4, at 356–57. The Bill of Rights Amendments were, however, ratified when the Virginia legislature revisited the issue in 1791. *Id.*

116. George Washington, First Inaugural Address (Apr. 30, 1789).

Constitution was secured, Madison was willing to make changes, not impairing the national structure, in order to bring the two states, Rhode Island and North Carolina, which had not yet ratified, and, indeed, to convince the minority that the Constitution was as wise as the majority saw it.<sup>117</sup> Washington and Madison, and indeed all Federalists, were members of the Revolutionary generation that had fought for independence in defense of the rights of Englishmen, even when they ceased to want to be Englishman. For Madison, the Bill of Rights is not a turn.

One defect of the argument treating the Madison-Monroe congressional race as a trigger for the transformation is that the Bill of Rights is a misdirected remedy for the Virginia dissenting religions. Patrick Henry had sponsored tax assessments to support Christian teachers. Madison, in alliance with the Baptists and Presbyterians, had defeated the proposal.<sup>118</sup> For Madison, it was Patrick Henry working within the smaller community of Virginia that posed the danger of state establishment of religion. The dissenting religions had reason to fear the State of Virginia, but on the Federal level, as *Federalist* 10 explained, no one sect had a majority by which it could oppress a competing sect. The First Amendment as passed, however, only limited the extended republic, Congress, from subsidizing religion and left Virginia free to abuse.

#### E. SLAVERY

While the increasing separation between Madison and Hamilton can be traced from minor fissure (scaling) to chasm (bank-note paper money), there is an unstated issue, slavery. Slavery is the elephant in the room, not mentioned specifically, but weighty. Slavery was for the South an increasingly intense reason for wanting to corral national power. Patrick Henry's major platform in the Virginia Ratification Convention was the argument that "adopt this Constitution and the northern states can and will end slavery." Allow them to lay direct taxes and the Congress will tax the slaves to manumission. Allow them power over commerce, and the Congress will prohibit slave trading. Allow them power over war and the Congress will draft slaves and

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117. Madison, House of Representatives (June 8, 1789), in 1 *ANNALS*, *supra* note 90, at 448–49.

118. RISJORD, *supra* note 4, at 203–10, describes the controversy.

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free them. Allow them power over the general welfare and the Congress will declare slavery against the general welfare and free them.<sup>119</sup> Patrick Henry is right about the power of Congress, but wrong about the will of the Northern states to abolish slavery, at least for another seventy-four years. Jefferson and Madison are slaveholders from a slaveholder state.

Slavery does not show up in Madison's papers as a reason for moving to limit his powerful national government into a narrow corral. But then Washington is also a slaveholder and it is his administration that Jefferson and Madison are breaking from. The slavery chasm is not yet intense enough for war until the Civil War. Still, slavery has to be considered a major factor, indeed the predominant factor for any decision protecting states' rights in the South even if not stated explicitly.

## CONCLUDING SUMMARY

Professor Feldman performs a useful service by summarizing the 32,000 or so pages of the Madison papers into a fine narrative. All three of Madison's lives are important to our national history. Still, Professor Feldman does not give a critical review or appraisal of Madison's position, with a fulcrum for leverage from outside Madison's papers. The focus of this review has been on Madison's denial of the strong national government that Madison, foremost among others, created.

Feldman gets the story of Madison's denial wrong. Feldman treats the Bill of Rights as the first step in Madison's turn from nationalist to anti-nationalist. Madison is, however, a consistent defender of the fundamental individual rights for which we had fought the War for Independence. Indeed Madison's *Federalist* 10 is a proof that the national government, the extended republic, will better protect individual rights than the states had done. Madison is not, however, sympathetic to the hobbles on the new national government, which were at the core of what Anti-Federalist called a bill of rights.

Historical arguments need to be understood as advocacy for or against a specific set of programs. Madison breaks with Hamilton and the Washington Administration, in partnership with Jefferson, over three specific issues: (1) "scaling," which is

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119. JOHNSON, *RIGHTEOUS ANGER*, *supra* note 2, at 183 (collecting Patrick Henry's and other southern Anti-Federalist arguments).

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the proposal to pay for the war debts by paying only the depreciated value of the debts and not the amount originally promised, (2) assumption of state debts, and (3) bank notes as a form of paper currency. On the three issues, Hamilton was right and Madison and Jefferson were wrong. Slavery is probably the most important factor in pushing for restrictions on the national government, even if it is not stated as a factor by either Madison or Jefferson. Feldman describes Madison's papers on the issues, but he is of no help in evaluating the arguments or assessing their historical meaning.

Feldman also gives Madison credit for inventing judicial review to protect individual rights and for the argument that Congress has no general power to provide for the common defense and general welfare, and has only the powers listed in clause 2–18 of the article 1, section 8 descriptions of the national jurisdiction. Neither argument originates with Madison, and both are inconsistent with Madison's thinking at the time they first arose.