Introduction

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For a man who studied, but never practiced law, laws and lawgiving played a central role in the life of James Madison. In a public career spanning forty years, in which he served in the Virginia General Assembly, the Continental Congress, the Constitutional Convention, the United States Congress, as secretary of state, and as president, Madison could be found at the center of events, at one time or another, either establishing, expounding, discussing, interpreting, or executing state or federal law. Even in his long retirement, he had important things to say about constitutional interpretation. In all this activity, vital to the creation and continued well-being of the early Republic, did Madison's status as a law student, but not a lawyer, matter much in his search for solutions to the persistent problems of republican self-governance?

The two essays that follow certainly think Madison's "demi-lawyer" status did make a difference. In the first article, Mary Sarah Bilder, professor of law and Michael and Helen Lee Distinguished Scholar at Boston College Law School, in a remarkable feat of detective work, has established that a legal commonplace, originally attributed to Thomas Jefferson, was actually that of James Madison. Bilder's essay falls into three parts: evidence for Madison's interest in and experience with reading the law within the context of colonial and revolutionary American law education; the persuasive evidence that the commonplace of William Salkeld's *Reports* was kept by Madison; and a painstaking analysis of Madison's unusual method of taking the notes and, most importantly, an exploration of what those notes tell us about Madison's mind.

Bilder's impressive deconstruction of Madison's notes shows a man less interested in theoretical constructs than practical information, a man who preferred to learn about American and Virginia law of current applicability

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than the full scope of common law, and, most of all, a man who loved language and appreciated the difficulties involved in crafting careful and precise prose that would not be open to misinterpretation. That this latter was an impossible standard did not discourage Madison from attempting it, or engaging in spirited debate over constitutional questions well into his retirement years. Nor did his demi-lawyer status inhibit him from entering those debates. Despite the fact that those conversations were dominated by lawyers and judges, who was better qualified than a man who had played such a central role in the Constitutional Convention and followed the boisterous politics of the next three decades with such close attention?

That constitutional interpretation had become a matter for judges and lawyers lies at the heart of the essay by Alison L. LaCroix, assistant professor of law at the University of Chicago Law School. Her article examines Madison's abortive effort in the Constitutional Convention to give Congress the power to negative state laws within the context of the struggle to create new institutions that would solve the problem of *imperium in imperio*. For LaCroix, the origins of federalism lay in an amalgam of "British imperial precedents, colonial practices, postwar exigency, and political theory" that, under the pressure of debate at the Convention, enabled the delegates to design a new government of multilayered authority. Tracing each of these components at some length, she is able to argue persuasively that the "miracle at Philadelphia" was less a moment of divine inspiration than "a shuffling of fundamental ideas" with which Americans were familiar and had been experimenting with years before.

One of those "fundamental ideas" was Madison's proposed negative. LaCroix provides a succinct summary of Madison's thinking about what he considered an essential part of the requisite powers of a national government, noting that it was borrowed directly from the power of the British king over colonial assemblies. Madison's conception of the federal negative as a neutral umpire, however benign, was cloaked in the language of the British empire and colonial servitude, and it aroused suspicion and opposition among enough delegates that the measure was defeated.

As LaCroix explains, the necessity of some kind of mechanism to ensure the supremacy of the federal government over the states led the delegates to turn to a judicial solution. The final result was a new development, not just a court, but an enhanced separate branch of government, the "judicial power," with the capability to rule in all cases arising under the U.S. Constitution, laws, and treaties. The problem of authority in the federal system was solved, not by a formal legal structure, either new or borrowed from British imperial precedence, but by, in LaCroix's words, "a new category of *law*—namely, the 'supreme law of the land.'"

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Our first commentator, David Thomas Konig, professor of history and law at Washington University, agrees with Bilder on the importance of Madison's demi-lawyer status, noting the sophistication and persuasiveness of his understanding of practical legal questions, and locating his sense of the law in a "common-law mind." This way of thinking focused on particular cases rather than theories and relied on custom and precedent for its authority. Here Konig has identified an essential component of Madison's thinking. It was in this vein that Madison explained his concurrence with the Second Bank of the United States after his vehement opposition to the first, when he wrote that he waived "the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."[1] And again, it had always been Madison's opinion that "in the case of a Constitution as of a law a course of authoritative, deliberate, and continued decisions, such as the Bank could plead, was an evidence of the public judgment, necessarily superseding individual opinions."[2] Madison's law reading may have been more practical than comprehensive, but as Konig points out, Bilder's essay is a good place to begin understanding the influence of the common-law tradition on early American history.

Our second commentator, Peter Onuf, Thomas Jefferson Foundation Professor of History at the University of Virginia, finds a profound irony in the fact that the rejection of Madison's "vision of a unitary 'compound' government" with its "republican prerogative," the negative, paved the way for the multilayered authority in which lawyers and judges mediated between "multiple levels of government." As Onuf notes, LaCroix's Madison feared that such a judicial solution would not be strong enough to hold together a federal system and that this was no surprise given Bilder's Madison's expressed ambivalence toward law and lawyers. Tracing both the affinities and differences in the Madisons described by Bilder and LaCroix, Onuf places their arguments within the context of the "Madison problem," that is, how historians try to reconcile the nationalist Madison of the Constitutional Convention with the republican Madison of the late 1790s. LaCroix's contribution to this debate, according to Onuf, is to show that Madison's deep commitment to the legislative veto was in aid of the very multiplicity that resulted from the judicial solution,

1. Presidential Message, January 20, 1815, in David B. Mattern et al., eds., *The Papers of James Madison, Retirement Series* (1 vol. to date; Charlottesville, Va., 2009—), 1:622n34.
2. Madison to Nicholas P. Trist, December 1831 (DLC: Madison Papers).

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so that his nationalism was in fact an attempt to provide the states a secure place in the federal order.

However ambivalent Madison was about law as a profession, or as a solution to political problems, or as a parchment barrier against tyranny, all the contributions to this forum show that in his public life he grappled constantly with its place and meaning in practical politics. These lively and excellent discussions about James Madison, one of the most private of men and, perhaps, one of the most difficult Founders to know, reveal aspects of Madison's mind and actions along the junction of history and law during the crucial period of America's founding.

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