The "Madison Problem" Revisited

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James Madison was a "law student or demi-lawyer," Mary Sarah Bilder writes, with misgivings about his own role in the lawyers' world that he helped bring into being under the new federal Constitution. If Madison was the Constitution's "father," his offspring seemed somewhat misbegotten. Structurally and ideologically the new regime was "federalist," Alison LaCroix explains, with courts and lawyers "mediating among multiple levels of government" that retained a significant degree of separation and autonomy. But this was just what Madison had hoped to avoid. The demi-lawyer instead pushed hard for a "republican remedy" for the Confederation's pathologies, a structural solution to the centrifugal tendencies that jeopardized union and republican government. His proposed federal veto and council of revision would have constituted a "republican prerogative, via Congress" to check recalcitrant state legislatures. In effect, LaCroix concludes, Madison "envisioned the legislatures"—state and federal—"operating almost as a single system—a compound legislature comprising inferior and superior bodies." Convinced by deep study and hard experience that federations must fail, the Madison who promoted the Virginia Plan was an ultranationalist, or *anti*-federalist.[1]

LaCroix makes Madison the unintentional father figure of U.S. federalism. According to her (lawyerly) definition, "federalism" was the antithesis and negation of the Madisonian vision of a unitary, "compound" government for the new United States. Was Madison's nationalist vision animated by misgivings Bilder says he may have felt about "the role of lawyers and

1. See, in this volume, Mary Sarah Bilder, "James Madison, Law Student and Demi-Lawyer," *Law and History Review* 28 (2) (2010): 389–449, and Alison L. LaCroix, "The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology," *Law and History Review* 28 (2) (2010): 451–505.

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judges in the Republic"? Bilder would doubtless resist such a neat conclusion. Her Madison "was not an idealistic philosopher as much as he was a pragmatic politician"; he was not reflexively hostile to lawyers, but simply never "'formed any absolute determination'" to become one. That he was a "student of the common law" is, of course, the very subject of her fine essay. The demi-lawyer was not an antilawyer; he would be predisposed toward continuity, not radical change. It is thus profoundly ironic that Madison should have inadvertently precipitated the kind of rupture LaCroix describes: the "structural commitment to a judicial solution" and the new "ideology and institution" she calls "federalism."[2]

Madison might have been more comfortable "in an older, imperial world" where members of provincial ruling elites were "common-law constitutionalists," whether or not they qualified for the bar, and where the "Privy Council reviewed colonial legislation on its face for constitutional conformity." But there is no good reason to think that Madison would have been uncomfortable in the company of lawyer-Founders at Philadelphia, or among the lawyer-politicians who were so well represented in the new national government. The most we can say is that Madison doubted that judges and lawyers, operating outside his proposed almost-unitary, compound continental legislature, would have the authority and coercive resources to perpetuate the union. Just as he was skeptical about "parchment barriers against the encroaching spirit of power" (*Federalist* 48), he doubted that lawyer-judges could resist and counter legislative or executive encroachments at the federal or state level.[3]

There are some suggestive affinities between the two Madisons our authors have presented here. Bilder's Madison is ambivalent about the law and lawyers; LaCroix's sees no role for them in his constitutional design. The "Virginia legal education" of Bilder's self-taught Madison "emphasized legislation"; his commonplacing of Salkeld's *Reports* under alphabetically arranged heads would orient him (quoting David Seip) "in terms of the legal landscape outside the courtroom." LaCroix's Madison looked to legislators not judges, laws not "law," to sustain republican government. Bilder says that Madison's "tendency" in commonplacing "to skip the marginalia—which usually had the holding—suggests he was "not that interested in reconstructing the common law as a system of rules." For Bilder's Madison the law was not an autonomous domain, presided over by authoritative interpreters with the power to enforce their determinations. LaCroix's Madison would agree, concluding that federal

2. Bilder, "James Madison," 441, 443; LaCroix, "Authority for Federalism," 459.

3. This and subsequent references to *The Federalist* are from the Avalon Project at Yale Law School, http://avalon.law.yale.edu/subject_menus/fed.asp.

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courts could not harmonize diverse, autonomous, and conflicting lawmaking authorities through adjudication. Only by reviving and expanding the legislative review that Privy Council had exercised in the colonial period would it be possible to bring "wayward peripheries into line with the central authority."[4]

Yet for all the affinities we might tease out between our Madisons, they do not finally seem comfortable with each other. LaCroix identifies Bilder with Jack P. Greene, Daniel Huselbosch, and other historians who have emphasized "continuity" from "Britain's 'composite empire' to the United States' federal republic." Similarly, Bilder's Madison is a characteristic provincial product of the imperial old regime, whose political horizons were shaped by the enduring dynamic of center-periphery relations. LaCroix, by contrast, portrays Madison as a bold, innovative thinker whose federal negative precipitated an epochal "shift" in ideology and "institutional focus." Coupling the old provincial commitment to jurisdictional "multiplicity" with a new reliance on "courts as a mode of mediating among multiple levels of government," the "federalism" that emerged in reaction to Madison's proposal "offers a counterpoint" to the Greene school's "overarching story of imperial-to-federal continuity."[5]

The contrasting images of Madison in these two essays is at least partly a function of temporal focus. Bilder reconstructs Madison's life as a law student in order to gain "an uncensored glimpse of Madison's mind," demonstrating his abiding interest in specific legal issues facing Virginians and more abstract questions of language and time. LaCroix instead focuses on Madison's mind at work at a specific moment as he engaged with the particular problem of authority in an extended, federal republic, reading everything he could lay his hands on that might reveal more general patterns. In his self-appointed role as practical political theorist and would-be Founder, Madison transcended the provincial paradigm and broke with the past—and, perhaps, with himself. In this epochal moment, however brief, Bilder's Virginian Madison gave way to LaCroix's American Madison.[6]

LaCroix thus presents us with yet another version of the famous "Madison problem." How can the Madison who so vigorously promoted a hypercentralizing federal negative be reconciled with what we know about him either as a Virginia politician or as a leader of the national opposition to the Federalists' overly energetic administrations? The late Lance Banning took the broad view in his brilliant *Sacred Fire of Liberty*, emphasizing Madison's lifelong commitments to the Revolution—a national

4. Bilder, "James Madison," 436; LaCroix, "Authority for Federalism," 498.
5. Bilder, "James Madison"; LaCroix, "Authority for Federalism," 453, 504, 505.
6. Bilder, "James Madison," 436; LaCroix, "Authority for Federalism."

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movement—and to the success of republican government in his beloved Virginia.[7] Sustaining the "federal balance" was thus his great desideratum. With the union on the verge of collapse in the mid-1780s and faction-ridden states threatening to implode, Madison contemplated extreme, nationalizing expedients to redress the radical imbalance. Here is where I think LaCroix makes a valuable contribution, for her Madison was as deeply committed to "multiplicity," the "protofederal ideology of multilayered government," as any other patriotic Virginian. Vigorously denying any consolidationist intent, Madison insisted that his federal negative was the only possible means to guarantee American independence and therefore to secure the multiplicity he and his fellow Revolutionaries so cherished. Far from seeking to obliterate the states, Madison sought to save them from certain destruction. When the federal balance shifted dramatically in the other direction, with the rights of states and citizens jeopardized by an overly energetic national administration, the Virginian yet again assumed a leading role. Madison's changing positions did not reveal a fickle, incoherent, or opportunistic character, but instead reflected radical regime changes in the broader context of geopolitical instability. The crisis of the union made Madison a momentary "nationalist," and his nationalism in turn precipitated a "federalist" reaction that Madison himself subsequently embraced.[8]

LaCroix offers an elegant solution to the Madison problem, but questions nonetheless linger. How could Madison possibly think that his fellow Framers, much less voters in the state ratifying conventions, would find his putative remedy palatable? Jefferson suggested that his friend was out of his mind. "The hole & the patch should be commensurate," Jefferson wrote from Paris, but the federal negative "proposes to mend a small hole by covering the whole garment." Madison may somehow have thought that "multiplicity" would survive and flourish under his proposal, but incredulous auditors would be forgiven for reaching the opposite conclusion. The federal government would exercise a comprehensive authority over all American legislation that British imperial reformers could never have contemplated in their wildest dreams: in effect, as LaCroix concludes, Madison would have created a complicated, multibranch legislature for the continent, a "compound legislature" in which Congress would exercise supreme authority.[9]

7. Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca, N.Y.: Cornell University Press, 1995).

8. LaCroix, "Authority for Federalism," 457.

9. LaCroix, "Authority for Federalism," 488.

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Madison did not disguise the fact that "he sought to use one of the preeminent tools of British imperial practice to create a unique system of American federal government." Quoting the inflammatory language of Parliament's 1766 Declaratory Act, Madison provocatively asserted that the negative should apply to state legislation "*in all cases whatsoever*." To be effective, the negative would require an elaborate national administration, "some emanation of the power" of the national government in "each State" that could review state legislation in cases of "urgent necessity." These "emanations" would represent an Americanized—and much more efficient and powerful—version of imperial administration. What could Madison have been thinking? Perhaps, as LaCroix suggests, he had spent too much time in "the confines" of his "study," obsessing about the authority conundrum and convincing himself that his colleagues would find his radically reductive theorizing as compelling as he did.[10]

The only plausible argument for Madison's extreme solution is that its ongoing operation would be political, not legal, and therefore subject at all points to the will of the people as expressed by their elected representatives. The judicial solution that the Framers instead adopted raised a series of problems for Madison that temporarily blunted his sensitivity to provincial Americans' anti-imperialist prejudices. First, resort to federal courts would leave autonomous lawmaking authorities intact, and thus capable of resisting perceived encroachments. To overcome this resistance the judiciary would have to threaten violent sanctions against rogue state legislatures, but "the prospect of building force into the Constitution as a last resort dismayed Madison." States with conflicting interests would turn to the federal government to gain the upper hand against one another, thus calling the legitimacy of the union itself into question. Given the imbecilities of their faction-ridden governments, the states were unlikely to recognize or pursue their own long-term interests, further destabilizing federal politics. As a provincial insider, Madison was thus even more acutely sensitive to these centrifugal tendencies than the British imperial reformers who preceded him—his federal negative was the only logical antidote to these pathologies. Because it would express the will of the American people through the coordinated operations of a unified federal government, it would not jeopardize the liberties Revolutionary patriots had fought to secure. Madison must have been baffled that his critics could not grasp this fundamental, redemptive difference between his negative and its imperial prototype.

Madison may also have been blinded by Virginia's central and prospectively preeminent role in a more perfect American union. The Virginia

10. LaCroix, "Authority for Federalism," 475, 481, 489, 502.

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Plan's provision for proportional representation in the new national legislature is indicative: the large states would of course exercise more effective power—and therefore would need fewer constitutional protections—in a truly "national" government. A more equal, "republican" representation obviously would serve Virginia's interests better than the Confederation's unequal, "federal" representation. In geopolitical terms, Virginia's position changed fundamentally with independence. No longer facing "metropolitan assertions of Parliament's supremacy," Virginians could abandon the defensive ramparts they had once manned in union with sister provinces, when colonial assemblies claimed "independent regulatory power" within "a discrete, spatially defined sphere of exclusive authority." At this critical juncture, Madison's opponents—including Elbridge Gerry of Massachusetts and other large state delegates—were much more sensitive than he to the dangers of recrudescent metropolitan power. The "language of enslavement and encroachment" that had inspired antimetropolitan Revolutionaries still resonated: the substitution of an *American* national government for a *British* imperial government did not convince them that their liberties were secure.

Madison was dazzled by his own perspicuity or by Virginia's position in a reformed union, or perhaps by both. Yet if Madison more or less consciously expressed a Virginian bias in his brief "nationalist" phase, he was much less interested in or optimistic about the reformation of Virginia's constitution than his colleague Jefferson, then in Paris. For all of Jefferson's concerns about the impotence of the Confederation, he nonetheless remained convinced that more perfect state-republics were the fundamental building blocks of a more perfect union. The pragmatic realist who knew that men were not "angels" had no illusions that republican constitutions could renovate human nature; instead, a plurality of constitutions would make Virginians and Americans contentious and conflict-prone.

Madison's loss of faith in a self-sufficient, self-governing Virginia is familiar. But LaCroix's provocative essay suggests that at this critical juncture he also had little faith in the nation as a whole. The alternative to his federal negative, the supremacy clause, was predicated on the existence of an American people, a larger whole that was in some ambiguous sense not simply or solely the sum of its disparate parts. "The power" of the federal judiciary, LaCroix writes, "would originate in the power of the nation itself, from which the court would derive authority to police the states." But for Madison, American nationhood was *not* the predicate but rather the product of a reconstituted union that merged "two levels of government power into one compound legislature." If the nation already existed—and the "fiction" of popular sovereignty then could be projected across the peoples of the respective states—then the conceptual conundrum could be resolved: the nation delegated authority to distinct levels of government,

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relying "not on legislatures, but on judges and courts to mediate among disparate sources of law."[11] Only in this way could the genuine jurisdictional multiplicity that (most) Revolutionaries had fought for be secured.

If Madison suffered a loss of faith both in the states and in the (not yet existing) nation, his quest for the ever-elusive "federal balance" would necessarily take a structural form. The federal judiciary might *not* in fact "be the least dangerous to the political rights of the Constitution," as Hamilton later claimed in *Federalist* 78: If the judiciary were too weak, the states would spin out of the federal orbit; if too strong, it could destroy them. "Madison argued that the Constitution as ratified gave far greater power to the general government than the British government had wielded over the colonies," LaCroix concludes, "especially with regard to the thorny issue of taxation." In retrospect, the federal negative would seem much less dangerous, even to Old Republican ideologues like John Taylor of Caroline, than "the more robust centralization embodied in the supremacy clause" and implemented by the Marshall Court. Taylor would not go this far, but Madison could tell himself in his old age that his Virginia Plan would have better secured multiplicity and the federal balance than would the federal judiciary under the supremacy clause. Of course, this self-serving reflection was mistaken—unless we take the Civil War to be Madison's ultimate vindication.[12]

Whatever Madison told himself, he took a leading role under the new regime in exploiting the language of the Constitution to interpret it in the federal terms that best served the emerging opposition's partisan interests. That the once-nationalist should discover the virtues of federalism within the ideological parameters LaCroix describes should come as no surprise. After all, as Bilder makes so compellingly clear, Madison was a lifelong law student fascinated with language and therefore with interpretation. What became clear to him was that constitutional hermeneutics provided essential grist for the new political mill, and that dedication to the precepts of the federal ideology his federal negative inadvertently precipitated could reanimate the "Spirit of 1776" and so mobilize the American people in opposition to High Federalist, neometropolitan centralization. This was the Madison whose collaboration with Jefferson and their Republican followers led him to recognize the critical role of states (who gave life to the Constitution by ratifying it) even as he embraced a conception of an American nation embodied in the people—and not

11. LaCroix, "Authority for Federalism," 487, 494. Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton, 1988).

12. LaCroix, "Authority for Federalism," 497.

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manufactured by the compound, continental lawmaking authority he recommended to his fellow Framers in Philadelphia.[13]

What is the connection between LaCroix's federal "ideology" and the experience of multilayered authority emphasized by Greene and the continuity theorists? I suspect that LaCroix, in her provocative engagement with the "Madison Problem," overstates discontinuities and perhaps leans too heavily on the definition of ideology she draws from David Armitage—party leader Madison harked back to 1776, not 1787, mobilizing the electorate and interpreting the Constitution in ways that would sustain the Revolutionary legacy. And it is worth noting that many Republicans would continue to take their bearings from the Articles of Confederation, insisting that the Constitution simply perfected the union that the patriots of 1776 had first contemplated. If not fully persuaded by LaCroix, I am nonetheless grateful to her for making me think about Madison in fresh ways. These two excellent essays bring to the fore the critical and ambiguous conjunction of law and politics in the formative years of the American federal republic.

13. See Madison's essay in the *National Gazette* on "Consolidation," December 3, 1791, in Lance Banning, ed., *Liberty and Order: The First American Party Struggle* (Indianapolis, Ind.: Liberty Fund, 2004), http://oll.libertyfund.org/title/875 (accessed on August 18, 2009).

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