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## BOOK REVIEW

### THE FOUNDING REVISITED

RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788. By Pauline Maier. New York: Simon & Schuster. 2010. Pp. xvi, 589. \$30.00.

*Reviewed by Michael J. Klarman\**

Pauline Maier's *Ratification* is one of the best books ever written about the American Founding. The publication of twenty-one volumes of the *Documentary History of the Ratification of the American Constitution* has enabled her to tell the story of ratification in greater detail than one might have thought possible, and Maier is a masterful storyteller. Everyone interested in the Founding, American constitutional law, American politics, and the art of constitution-making ought to read this book. Novices will find a rich menu to pique their curiosity, while even the most knowledgeable constitutional scholars and historians will discover many delightful surprises.

#### INTRODUCTION

Maier's story is replete with heroes and villains. For fans of the Constitution, James Madison is the knight in shining armor. Without Madison, the Constitutional Convention might never have happened. Madison played a critical role both in calling for the convention and in persuading George Washington to attend — Washington's presence conferring important legitimacy upon this technically illegal proceeding (pp. 3–4).<sup>1</sup> At the Philadelphia convention, Madison was able to seize control of the agenda from the beginning, presenting his fellow delegates upon their arrival with a scheme of reform — known as the "Virginia Plan" — which quickly became the convention's point of departure (pp. 28, 36).<sup>2</sup> Madison was one of the most important contributors to convention deliberations, which he participated in virtually every day for nearly four months, while trying simultaneously to main-

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<sup>1</sup> The Philadelphia convention was illegal because the Articles of Confederation required both that all amendments emanate from Congress and that they be ratified by all thirteen states. ARTICLES OF CONFEDERATION of 1781, art. XIII.

<sup>2</sup> See JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 379–80, 393* (1979).

tain a stenographic account of the proceedings — an endeavor that he later reported nearly killed him.<sup>3</sup>

At the urging of Washington and others, Madison later agreed — against his initial inclination — to stand for election as a delegate to the Virginia ratifying convention (p. 216).<sup>4</sup> Reports from back home then convinced Madison that he might not be elected unless he returned to Virginia to campaign (p. 216). At this time, Madison was busy in New York working on the *Federalist Papers*; he had a general disdain for campaigning;<sup>5</sup> and winter travel, which was onerous under the best of conditions in 1788, was especially burdensome for Madison, who suffered from recurring intestinal ailments.<sup>6</sup> After winning his election contest, Madison served as a delegate to the Virginia ratifying convention, which featured the ablest lineup of speakers opposing the Constitution of any state convention (p. 256). (Opponents of the Constitution are henceforth referred to as “Antifederalists.”) Madison was the most prominent and forceful voice supporting ratification at the Virginia convention (p. 310).<sup>7</sup> (Supporters of the Constitution are henceforth referred to as “Federalists.”<sup>8</sup>) Madison was slight of stature, timorous, possessed of a weak constitution,<sup>9</sup> and so soft spoken in public debate that the convention’s stenographer often could not hear his words (p. 258). Yet he overcame illness and the stultifying heat of Richmond in June to battle toe-to-toe with the formidable Patrick Henry, one of the nation’s leading Antifederalists (pp. 271, 282, 297, 310).<sup>10</sup>

Were that not enough, Madison then proceeded — almost single-handedly — to oversee the process that added a bill of rights to the Constitution. Once again, Madison reluctantly had to rush home from New York to compete for election to the First Congress in what he had thought would be a safe district (p. 441).<sup>11</sup> Through a grueling five-week campaign conducted in harsh winter conditions, Madison de-

<sup>3</sup> RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 5 (2006).

<sup>4</sup> *Id.* at 30. Madison initially resisted standing for election as a delegate to the Virginia ratifying convention because he believed that those who helped to draft a constitution should not participate in its ratification (p. 216).

<sup>5</sup> LABUNSKI, *supra* note 3, at 32.

<sup>6</sup> *Id.* at 20, 22.

<sup>7</sup> *See id.* at 84, 92.

<sup>8</sup> Supporters of the Constitution quickly seized the label “Federalists” for themselves; that term connotes the idea of a federation of states, as opposed to a consolidated nation. This choice left opponents of the Constitution with the name “Antifederalists,” even though, ironically, they were the ones more opposed to consolidation and more committed to preserving the power of the states (pp. 92–95). Federalists used the term “Antifederalist” as one of derision (pp. 92–93).

<sup>9</sup> LABUNSKI, *supra* note 3, at 2, 89.

<sup>10</sup> *Id.* at 96–97, 118.

<sup>11</sup> *Id.* at 134, 144–45.

bated his opponent, James Monroe, a popular war hero.<sup>12</sup> Madison narrowly prevailed, largely because he promised his constituents that he would support a bill of rights in the First Congress.<sup>13</sup> Madison then delivered on his promise, overcoming considerable resistance from both sides of the aisle to persuade Congress to adopt a bill of rights.<sup>14</sup>

If Madison is the hero of *Ratification*, then Patrick Henry is the villain. Henry's early and vociferous opposition to British efforts in the 1760s to assert greater control over the colonies, which put him at risk of a treason prosecution, had made him a revolutionary icon.<sup>15</sup> In 1787–1788, Henry waged war on the Constitution. Widely regarded as the greatest orator of his age (p. 230),<sup>16</sup> Henry dominated the Virginia ratifying convention, holding the floor for as much as one-quarter of the proceedings and keeping his audience in rapt attention (p. 310).<sup>17</sup> Henry disparaged the Constitution for exalting the power of the federal government, threatening the existence of state governments, and posing an existential threat to individual liberty (pp. 260, 264–66). In his desperation to defeat ratification in Virginia, Henry was not above resorting to personal invective<sup>18</sup> and even outright demagoguery — playing on white Virginians' paranoia regarding slavery (p. 284).<sup>19</sup>

After failing to defeat ratification of the Constitution in Virginia, Henry promised graciously to accept defeat and become a loyal citizen of the republic. He was lying.<sup>20</sup> Instead, Henry led efforts to secure

<sup>12</sup> See *id.* at 152, 172.

<sup>13</sup> See *infra* pp. 562–63.

<sup>14</sup> See *infra* pp. 563–64.

<sup>15</sup> See LABUNSKI, *supra* note 3, at 28–29; see also RICHARD R. BEEMAN, PATRICK HENRY: A BIOGRAPHY 13–22 (1974); HENRY MAYER, A SON OF THUNDER: PATRICK HENRY AND THE AMERICAN REPUBLIC 58–66 (1986).

<sup>16</sup> The author notes that Thomas Jefferson regarded Henry as “the greatest orator that ever lived” but also hated him, disparaging his pursuit of money and fame and resenting his strong opposition to Jefferson’s treasured Statute for Religious Freedom (pp. 230–31) (quoting Letter from Thomas Jefferson to William Wirt (Aug. 4, 1805), in Stan. V. Henkels, *Jefferson’s Recollections of Patrick Henry*, 34 PA. MAG. HIST. & BIOGRAPHY 385, 387 (1910) (internal quotation mark omitted)). The author also quotes Spencer Roane, Henry’s son-in-law, comparing Henry favorably with Cicero and Demosthenes (p. 310).

<sup>17</sup> LABUNSKI, *supra* note 3, at 72–74.

<sup>18</sup> Henry’s attacks on Virginia Governor Edmund Randolph for flip-flopping over ratification were so vituperative that the Virginia ratifying convention forced him to apologize. See *id.* at 80.

<sup>19</sup> The author discusses Henry’s allusion to a “dark design” behind the Framers’ failure to explicitly protect slave property in the Constitution. Later, she discusses Henry’s warning that Congress would emancipate slaves in wartime and conscript them into the army (pp. 294–95).

<sup>20</sup> Compare, for instance, the author’s account of Henry’s conceding defeat graciously (pp. 304–05) with her later description of Madison’s suspicion that Henry continued to lead opposition to ratification after the Virginia convention (pp. 425–26). See also LABUNSKI, *supra* note 3, at 126 (quoting Henry’s intention to oppose the Constitution absent a second convention); *id.* at 298 n.3 (quoting a 1789 letter by James Duncanson claiming that Henry did everything within his power to obstruct implementation of the new Constitution).

the sort of structural constitutional amendments, such as limits on Congress's taxing and war-making powers, that Madison and other Federalists believed would eviscerate the new federal government (pp. 307–08). Madison was convinced that Henry's real aim was to divide the Union and create a separate southern confederacy (p. 126).<sup>21</sup>

Henry used his formidable political power in Virginia to retaliate against Madison, both to avenge Henry's defeat at the Virginia ratifying convention and to prevent Madison from seizing control of the project of constitutional amendments (pp. 440–41).<sup>22</sup> In the fall of 1788, after the Confederation Congress declared the Constitution duly ratified and set the date for national elections, Henry announced to the Virginia legislature, which he largely controlled,<sup>23</sup> that anyone favoring federal constitutional amendments should oppose Madison's selection as U.S. senator and warned that Madison's selection would mean bloodshed in Virginia.<sup>24</sup> The Virginia legislature proceeded to select two Antifederalists, Richard Henry Lee and William Grayson, as U.S. senators, with Madison coming third in the balloting (p. 440). Still not satisfied, Henry persuaded the legislature to implement an unfavorable gerrymander of the House district that included Madison's home in Orange County and to pass a law imposing a one-year residency requirement on congressional candidates, which would have precluded Madison from seeking election in a more favorably constituted district (pp. 440–41).<sup>25</sup> Henry and other Antifederalists then recruited the formidable James Monroe to run against Madison.<sup>26</sup> After Madison nonetheless won the election, Henry tried to kill the bill of rights that Madison shepherded through Congress, managing to stalemate the Virginia legislature over its ratification for two years.<sup>27</sup>

Maier's tale features not just heroes and villains but also chicanery, nefarious deeds, and hardball politics. In Pennsylvania, those state

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<sup>21</sup> Henry's true motives are difficult to determine. See LABUNSKI, *supra* note 3, at 123.

<sup>22</sup> See *id.* at 120, 136–38.

<sup>23</sup> *Id.* at 120, 136; see also *id.* at 122 (noting George Washington's claim that Henry "has only to say let this be Law — and it is Law" (quoting Letter from George Washington to James Madison (Nov. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 349, 351 (Robert R. Rutland & Charles F. Hobson eds., 1977)) (internal quotation mark omitted)); *id.* at 145 (noting Madison's remark that Henry was "omnipotent" in the Virginia legislature (quoting Letter from James Madison to Thomas Jefferson (Dec. 8, 1788), in 11 THE PAPERS OF JAMES MADISON, *supra*, at 381, 384) (internal quotation mark omitted)).

<sup>24</sup> *Id.* at 136.

<sup>25</sup> See *id.* at 139–41, 145; see also *id.* at 150 (noting that George Mason predicted that Madison would lose when Mason learned of the composition of the district). Because the Constitution requires only that congressional representatives reside in their state, not in their district, this law was arguably unconstitutional. *Id.* at 141.

<sup>26</sup> See *id.* at 144, 146. Monroe shared many of the usual Antifederalist concerns about the Constitution. See *id.* at 154.

<sup>27</sup> See *id.* at 248–54.

legislators who favored a quick call for a ratifying convention to endorse the handiwork of the Philadelphia Framers met a quorum call by forcibly rounding up opponents who favored greater deliberation (pp. 59–64).<sup>28</sup> The president of the Massachusetts ratifying convention, John Hancock — revolutionary leader, signer of the Declaration of Independence, and governor of Massachusetts — agreed at a critical moment in the proceedings to support ratification with a promise of subsequent amendments. He did so in exchange for promises of political support both for his gubernatorial reelection bid and for his candidacy for the American presidency, which he planned to pursue should Virginia fail to ratify the Constitution, thus disqualifying George Washington from the office (pp. 194–96). In Pennsylvania, Federalist publishers distorted their versions of the state’s ratifying convention debates in order to make it appear that no opposition to the Constitution had been expressed (pp. 100–01). In New York, where the election of delegates to the ratifying convention had produced a solid Anti-federalist majority, threats by New York City to secede from the state should the Constitution be rejected possibly swayed enough delegates to produce a narrow victory for ratification (pp. 341, 343, 381).<sup>29</sup>

In addition to compelling characters and infamous deeds, Maier’s narrative features drama. In Massachusetts, which would play a critical role in the ratification process (pp. 155, 167),<sup>30</sup> the ratifying convention debated the Constitution paragraph by paragraph over four weeks, with all eyes in the state — and many more throughout the nation — focused upon its proceedings (pp. 156, 167, 169, 204).<sup>31</sup> Federalists were gloomy about their prospects of success in Massachusetts, and the outcome remained in doubt until the very end of the convention (pp. 186–87, 199).<sup>32</sup> In Virginia, Madison arrived home to cam-

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<sup>28</sup> Maier believes that these tactics backfired, kindling greater suspicions of the Constitution (pp. 64–68). In Massachusetts, opponents of the Constitution were more easily reconciled to their defeat because they felt that they had been treated fairly and their concerns had been heard (pp. 209–10).

<sup>29</sup> The author cites Robert Livingston’s warning of secession at the convention and John Jay’s telling Washington that threats of secession might help them convince doubtful delegates. On these threats of secession and how seriously to take them, see LINDA GRANT DE PAUW, *THE ELEVENTH PILLAR: NEW YORK STATE AND THE FEDERAL CONSTITUTION* 229–37 (1966).

<sup>30</sup> Massachusetts was the first large state in the ratification process whose approval of the Constitution was genuinely in doubt. Its decision was likely to influence subsequent ratifying conventions (pp. 155, 167).

<sup>31</sup> The author quotes a Massachusetts citizen’s remark that “[l]ittle else, among us, is thought of or talked of” (p. 156) (quoting Letter from Samuel P. Savage to George Thatcher (Jan. 11, 1788), in 5 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 692, 692 (John P. Kaminski & Gaspare J. Saladino eds., 1998)) (internal quotation mark omitted).

<sup>32</sup> See Richard D. Brown, *Shays’s Rebellion and the Ratification of the Federal Constitution in Massachusetts*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 113, 122–27 (Richard Beeman, Stephen Botein & Edward C.

paign for votes just one day before the election for delegates to the state ratifying convention (pp. 216, 236).<sup>33</sup> At that convention, he remained uncertain of the outcome until the final vote was taken (p. 293). In New York, where the battle over ratification generated unprecedented levels of political activity and voter interest (pp. 328, 341), the outcome was sufficiently in doubt that Alexander Hamilton hired — from his own pocket — fast horseback riders to carry (hopefully favorable) news from the ratifying conventions in New Hampshire and Virginia (p. 342). Federalists then sought to drag out the Poughkeepsie convention’s deliberations until such news could arrive (pp. 342, 377).

At times, Maier’s account is laugh-out-loud funny. Disparagement of Rhode Island — often referred to by contemporaries as “Rogue Island” or “Wrong Island” — is a recurring theme of *Ratification* (pp. 223–25).<sup>34</sup> Leading Founders despised the tiny state, which had been so wracked by divisions over paper money emissions in the 1780s that it failed even to choose a delegation to represent it at the Philadelphia convention.<sup>35</sup> After repeated decisions by the Rhode Island legislature not to call a ratifying convention, President Washington conspicuously avoided the state during a trip through New England in the fall of 1789, and the following spring an exasperated Congress finally threatened trade sanctions should Rhode Island persist in remaining outside the Union (pp. 458–59). Apparently, one factor leading North Carolina in 1789 to reconsider its initial rejection of the Constitution was its citizens’ disinclination to remain in a posture that associated their state with Rhode Island (p. 457).

The Pennsylvania ratifying convention also featured some comedy. When upstart Antifederalist William Findley audaciously challenged the learning of distinguished Federalists such as James Wilson and state Chief Justice Thomas McKean on the obscure topic of Swedish jury tradition, “[p]landemonium” ensued (p. 111). Returning to the floor days later with a supporting citation to Blackstone’s authoritative *Commentaries on the Laws of England*, Findley chided his adversaries for their ignorance, explaining that had his son been studying law for just six months and remained unacquainted with this passage, “I

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Carter II eds., 1987) (arguing that ratification in Massachusetts was an uphill battle, partly because the state government had overplayed its hand in suppressing Shays’s Rebellion).

<sup>33</sup> See LABUNSKI, *supra* note 3, at 46.

<sup>34</sup> Charles W. Roll, Jr., *We, Some of the People: Apportionment in the Thirteen State Conventions Ratifying the Constitution*, 56 J. AM. HIST. 21, 33 (1969) (“Wrong Island”). To George Washington, Rhode Island’s rejection of the Constitution did not even qualify as a “negative” (p. 317). Maier pokes fun at the self-righteous excuses Rhode Island gave Congress to explain its delegates’ absence (p. 52). She also observes that New York, had it refused to ratify, would have been “left in the company of the despicable Rhode Island” (p. 370).

<sup>35</sup> See RAKOVE, *supra* note 2, at 376.

should be justified in whipping him” (p. 112).<sup>36</sup> The Federalist luminaries were not amused, and Wilson quoted at Findley the old adage that he had “forgotten more law than ever you learned” (p. 113).<sup>37</sup>

## I. THEMES

### A. Contingency

The Constitution is so critical to Americans’ self-conception that we have a hard time accepting how contingent — rather than inevitable — its adoption was. Even pulling off the Constitutional Convention was something of a long shot. The call for the Philadelphia convention was an act of desperation by the few delegates — most prominently, Madison and Hamilton — who showed up in Annapolis in September 1786 to discuss commercial problems among the states, only to find too few delegates present to transact any business (p. 3).<sup>38</sup> Whether enough states would send delegates to Philadelphia in May of 1787 to attend a convention called “to render the Constitution of the Federal Government adequate to the exigencies of the Union” was far from clear (p. 3).<sup>39</sup> It was Shays’s Rebellion — a revolt by farmers in western Massachusetts against oppressive taxes that were producing mass foreclosures<sup>40</sup> — that ultimately convinced the Confederation Congress to endorse the Philadelphia convention, persuaded several states to participate, and induced George Washington to lend his prestige to the undertaking.<sup>41</sup>

<sup>36</sup> The author quotes the debates of the Pennsylvania ratifying convention on December 10, 1787, printed in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 532, 532 (Merrill Jensen ed., 1976) [hereinafter 2 DHRC]. Internal quotation marks have been omitted.

<sup>37</sup> The author quotes the debates of the Pennsylvania ratifying convention on December 11, 1787, printed in 2 DHRC, *supra* note 36, at 550, 551.

<sup>38</sup> See RAKOVE, *supra* note 2, at 374–75.

<sup>39</sup> See *id.* at 375–76.

<sup>40</sup> See generally IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION (Robert A. Gross ed., 1993). Shays’s Rebellion was not the only debtors’ revolt of the mid-1780s, but it was the largest and it attracted the most attention (p. 15). See also WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 145–52 (2007) (describing the widespread phenomenon of debtors’ rebellions during the 1780s); TERRY BOUTON, TAMING DEMOCRACY: “THE PEOPLE,” THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION 88–124, 145–67 (2007) (describing the cataclysmic economic situation in Pennsylvania in the 1780s and popular forms of protest against it).

<sup>41</sup> Washington initially had been reluctant to attend, not wishing to squander his considerable prestige on a failed enterprise, nor wishing to sacrifice his reputation as a modern Cincinnatus by appearing to grasp for power (pp. 1, 4–7). Reports from his friends in New England that the situation there neared “a beginning of anarchy with all its calamitys” induced Washington to reconsider, as he feared that Americans were rendering themselves “ridiculous & contemptible in the eyes of all Europe” (pp. 15–17, 20–23) (quoting Letter from Henry Lee, Jr., to George Washington (Oct. 17, 1786), in 4 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 295,

Even after the Philadelphia convention came to fruition, there was no guarantee that it would succeed. Washington and many other leading proponents of constitutional reform had doubted whether anything significant would be accomplished in Philadelphia (pp. 19, 23).<sup>42</sup> Disputes over how to apportion representation in the national legislature deeply divided small states from large states, as well as states that were largely dependent upon slave labor from those that were not. The convention nearly ground to a halt over such issues in July 1787 (p. 57).<sup>43</sup> Washington told Hamilton at that time that he so despaired of the proceedings producing a favorable outcome that he was beginning to regret his decision to participate (p. 38).

Even after the convention overcame such divisions to produce a constitution, ratification was far from certain. Two states, Rhode Island and North Carolina, initially rejected the Constitution (pp. 223, 421–23). New Hampshire probably would have done likewise had Federalists not deftly adjourned the state ratifying convention before a final vote could be taken (p. 220). In several other states, the ratification contest was too close to call.<sup>44</sup> The eventual favorable votes in three critical ratifying conventions were so close — 187–168 in Massachusetts, 89–79 in Virginia, and 30–27 in New York (pp. 207, 305, 396) — that a contrary result is easy to imagine. Without the participation of three of the five largest states, the Union probably could not have succeeded.<sup>45</sup>

Ratification triumphed in those critical states only because Federalists eventually recognized the need to compromise by agreeing to support subsequent constitutional amendments (pp. 196, 300, 398). Without the promise of such amendments, swing delegates in Massachusetts, the sixth state to ratify but the first to overcome serious opposition to the Constitution, probably would have voted against ratification.<sup>46</sup> Had Massachusetts voted no, critical momentum that

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295 (W.W. Abbot ed., 1995); Letter from George Washington to David Humphreys (Oct. 22, 1786), in 4 THE PAPERS OF GEORGE WASHINGTON, *supra*, at 296, 297) (internal quotation mark omitted). On the important legitimacy conferred on the Philadelphia convention by Washington's presence, see pp. 23, 68.

<sup>42</sup> The author mentions George Washington (p. 23), John Jay (p. 19), and Rufus King (p. 19). See also RAKOVE, *supra* note 2, at 378–79 (discussing several others).

<sup>43</sup> RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 181–87 (2009).

<sup>44</sup> The author discusses Gouverneur Morris's worries about New York and Pennsylvania (p. 97), Madison's concern about Virginia, North Carolina, and Massachusetts (p. 126), and Washington's concern about Virginia and North Carolina even after victory in Massachusetts (pp. 215–16).

<sup>45</sup> See BEEMAN, *supra* note 43, at 401; CLINTON ROSSITER, 1787: THE GRAND CONVENTION 288 (W.W. Norton & Co. 1987) (1966).

<sup>46</sup> See *infra* p. 561.

had developed in favor of the Constitution might have been irrevocably disrupted.<sup>47</sup>

Had the Philadelphia convention failed to produce a constitution or had the requisite number of states failed to ratify one, the new nation might have split into separate regional confederacies (p. 69).<sup>48</sup> Washington, for one, saw “no *Alternative* between the *Adoption*” of the Constitution “and *Anarchy*” (p. 127).<sup>49</sup> Profound disagreements between East and West and between North and South had erupted in 1786 over treaty negotiations between the United States and Spain.<sup>50</sup> Residents of western Virginia and western North Carolina — territory that would soon become the separate states of Kentucky and Tennessee — had been outraged to discover that Northerners were willing to trade American access to the Mississippi River, which was vital to the lifeblood of the Southwest, for a commercial treaty, which would have largely benefitted Northeastern merchants and shippers.<sup>51</sup> Much talk of disunion ensued.<sup>52</sup> To a certain extent, then, the Constitution, which almost did not come to fruition, stitched back together a union that was coming apart at the seams.

### B. *Who Were the Federalists and the Antifederalists?*

Historians studying the Founding have long sought to understand why some people supported the Constitution and others opposed it.<sup>53</sup> The Federalists often denigrated their opponents as traitors, deadbeat debtors, and disgruntled state officeholders, whose power would be

<sup>47</sup> On the importance of momentum to the success of ratification, see pp. 155, 241–43, 247, 315, 382.

<sup>48</sup> The author notes that Hamilton predicted civil war and possibly the establishment of a monarchy should ratification fail. See also LABUNSKI, *supra* note 3, at 78 (noting Randolph’s attribution of his shift in favor of the Constitution to fear of disunion should ratification fail). Federalists frequently invoked this doomsday scenario. Antifederalists generally replied that such risks were greatly exaggerated. See *id.* at 102–03 (noting Grayson’s ridiculing of Randolph for exaggerating the risks that rejecting the Constitution would lead to civil war, Native American attacks, and foreign invasions). It is hard to know how serious the risk to the union was. See *id.* at 1–2 (taking the risk seriously).

<sup>49</sup> The author quotes a letter from George Washington to Charles Carter, as it appeared in the *Maryland Journal* on January 1, 1788, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 276, 277 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter 8 DHRC].

<sup>50</sup> See generally Eli Merritt, *Sectional Conflict and Secret Compromise: The Mississippi River Question and the United States Constitution*, 35 AM. J. LEGAL HIST. 117 (1991).

<sup>51</sup> See *id.* at 129–32.

<sup>52</sup> See *id.* at 135–36; see also RAKOVE, *supra* note 2, at 349–50; *id.* at 372 (suggesting that the Confederation Congress may have abandoned proposed amendments to the Articles partly because delegates thought the confederacy would soon dissolve over the Mississippi crisis). Maier also notes how the Mississippi episode fostered Westerners’ suspicion of the Constitution in Virginia and North Carolina (pp. 238, 241, 276–78).

<sup>53</sup> For a good historiography of the issue, see generally James H. Hutson, *Country, Court, and Constitution: Antifederalism and the Historians*, 38 WM. & MARY Q. 337 (1981).

diminished under the Constitution (pp. 80, 132, 208, 351). Unsurprisingly, Antifederalist motivations were far more complicated than Federalists acknowledged.

The early twentieth-century historian Charles Beard offered a famous economic interpretation of the Federalists' motivations. On Beard's view, supporters of the Constitution were mostly creditors determined to suppress state debtor relief laws and inflationary monetary schemes, as well as speculators in government securities who stood to make a fortune through the establishment of a national government possessed of adequate taxing power to pay off its debt at face value.<sup>54</sup> By contrast, Gordon Wood posited a social explanation for the Federalist/Antifederalist division. On this view, the Federalists were predominantly affluent, well-educated, aristocratic types who had been displaced from political power in the 1780s by the middling classes — shopkeepers, tavern owners, skilled craftsmen — and who were determined to use the Constitution to restore what they regarded as the natural order of things.<sup>55</sup> Through the use of large constituencies, indirect elections, and longer terms in office, the Constitution would ensure the election to national office of the "better sort."<sup>56</sup>

Fifty years ago, Stanley Elkins and Eric McKittrick offered a generational explanation of the Federalist/Antifederalist division, positing that the Federalists were, on average, about ten to twelve years younger than the Antifederalists.<sup>57</sup> The formative experiences of this younger generation — people like John Jay, Alexander Hamilton, and

<sup>54</sup> CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (2d ed. 1935). Beard sometimes charged the Framers with lining their own pockets. *See, e.g., id.* at 149. At other times, however, he suggested only that the Framers advanced the economic interests of the class to which they belonged. *See, e.g., id.* at 73. Beard's argument was refuted in the 1950s. *See* ROBERT E. BROWN, *CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION"* (1956); FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958). For two terrific recent discussions of profound conflict over monetary and fiscal policy in the states in the 1780s, which was instrumental to the calling of the Philadelphia convention, see BOUTON, *supra* note 40; and HOLTON, *supra* note 40.

<sup>55</sup> *See* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 483–99 (1969); Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *BEYOND CONFEDERATION*, *supra* note 32, at 69, 69.

<sup>56</sup> Indeed, one principal Antifederalist objection to the Constitution was that it tended toward aristocracy, especially in the Senate and the presidency, both of which featured indirect methods of election and lengthy tenures in office (pp. 79, 354). *See, e.g.,* SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 45 (1999); JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788*, at 130–38 (1961); WOOD, *supra* note 55, at 487–92. Madison favored even longer terms for senators, *see* JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 79 (1996), and Hamilton would have made both senators and presidents life-tenured (p. 37).

<sup>57</sup> Stanley Elkins & Eric McKittrick, *The Founding Fathers: Young Men of the Revolution*, 76 *POL. SCI. Q.* 181, 203 (1961).

James Madison — were service in the Revolutionary Army or with the Confederation Congress, both of which were nationalizing experiences that left them more favorably inclined toward centralized government power.<sup>58</sup> By contrast, the formative experiences of the Antifederalist generation — people like Patrick Henry, George Mason, and Samuel Adams — were the various political crises with Great Britain that began with colonial resistance to the Stamp Act in 1763.<sup>59</sup> The service of such men in colonial governments, which had effectively mobilized resistance to British rule, left them more favorably disposed toward local governmental authority and gravely concerned about the risk of distant governmental power turning tyrannical.<sup>60</sup>

In the 1950s, Cecelia Kenyon argued for an ideological explanation of the division, noting that the Antifederalists tended to accept Montesquieu's notion that republican government could thrive only in small, homogeneous communities that cultivated citizens' virtue — the willingness to subordinate self-interest to the greater good of the community — and enabled tight connections between representatives and constituents.<sup>61</sup> By contrast, Federalists tended to embrace James Madison's theory of the large republic, which turned Montesquieu's understanding on its head.<sup>62</sup> Max Edling has recently argued that Federalists and Antifederalists largely divided over the wisdom of conferring upon the national government the sort of taxing and war-making powers that were necessary to turn lightly governed America into a powerful nation-state in the modern European mold.<sup>63</sup>

Although Maier does not stake out a firm position on this historiographical debate, she does advance our understanding of it. First,

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<sup>58</sup> See *id.* at 202–06. Unhappy experiences dealing with obstreperous state governments during the war left soldiers like George Washington and John Marshall profoundly skeptical regarding whether states had any constructive role to play in the new government framework. See RON CHERNOW, *WASHINGTON: A LIFE* 327–29, 369 (2010); R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 23–24 (2001).

<sup>59</sup> See Elkins & McKittrick, *supra* note 57, at 203–04.

<sup>60</sup> The author notes that when Richard Henry Lee of Virginia formulated his amendments to the Constitution, he instinctively sent them to Samuel Adams of Massachusetts, simply assuming that his fellow revolutionary-era patriot would concur with his concerns about a powerful centralized government (p. 163).

<sup>61</sup> Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 6–13 (1955).

<sup>62</sup> On Madison's view, an extended geographic sphere would expand heterogeneity of interest, which was the best safeguard against the development of majority factions, and would foster looser connections between representatives and constituents (especially if large constituencies were combined with indirect elections and long tenures in office), which would enable the former to "refine and enlarge" the interests of the latter. THE FEDERALIST NO. 10, at 76–77 (James Madison) (Clinton Rossiter ed., 2003).

<sup>63</sup> See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* 8–10, 55–57, 219–27 (2003).

Maier notes that Antifederalist opinion is better understood as a spectrum of views than as a unitary phenomenon (p. 93). Some Antifederalists, such as Patrick Henry of Virginia and Luther Martin of Maryland, probably favored discarding the Constitution and returning to the idea of a confederation, perhaps conceding a few amendments to the Articles to redress obvious defects (pp. 93, 232).<sup>64</sup> Other Antifederalists, such as George Mason of Virginia, would have been fine with the Constitution if a few additional restrictions on the federal government's power were added, especially on its taxing authority (pp. 262–63).<sup>65</sup>

Second, Maier observes that different Antifederalists had very different reasons for opposing the Constitution; it is a mistake to treat them as if they were of one mind (pp. 93–94, 157, 375–76, 388).<sup>66</sup> Some Antifederalists were primarily concerned about the absence of a bill of rights (p. 56).<sup>67</sup> Others were worried about Congress's virtually unlimited taxing power, its authority to create standing armies in peacetime, and its ability to call state militias into federal service essentially without restriction (p. 109).<sup>68</sup> Still others were unhappy with the constraints that Article I, Section 10 imposed on state redistributive authority (p. 224).

Third, Maier nicely explains why one cannot infer from particular Antifederalist arguments against the Constitution the true motives of those making the arguments: some motives for opposition may have been widely seen as more worthy of respect than others and thus were more likely to appeal to swing delegates at the ratifying conventions. Thus, for example, although Massachusetts delegates from the region of Maine might have opposed the Constitution because they believed Maine was less likely to become an independent state under it, this was not an argument they chose to make publicly. Instead, they em-

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<sup>64</sup> The author also notes that Robert Yates and John Lansing, Jr., of New York attributed their early departure from the Philadelphia convention to the delegates' exceeding their instructions to limit themselves to redressing flaws in the Articles of Confederation (p. 92).

<sup>65</sup> Other examples include the pseudonymous "Federal Farmer," who favored amendments to the Constitution while conceding that it had many virtues (p. 83), and a delegate from Spotsylvania County, Virginia, who expressed admiration for parts of the Constitution while noting genuine concerns about the absence of explicit provisions for liberty (p. 301). It bears emphasis that Congress's unlimited taxing power played a huge role in the Antifederalists' critique of the Constitution (pp. 179–82, 362–69).

<sup>66</sup> See also CORNELL, *supra* note 56, at 7–8, 22.

<sup>67</sup> Elbridge Gerry and George Mason objected to the absence of a bill of rights from the Constitution. See ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776–1791*, at 119 (Ne. Univ. Press 1983) (1955).

<sup>68</sup> For more examples of Antifederalist concern with the taxing power, see pages 179–82 and 362–63; for the ability to keep standing armies, see pages 119, 121, 266, and 282; and for federal control of state militias, see pages 370–71. See also EDLING, *supra* note 63, at 43–44 (emphasizing the extent to which Federalists and Antifederalists were divided over the desirability of state-building and, specifically, over federal powers involving taxation and the military).

phasized Congress's extensive powers, the lack of House involvement in the ratification of treaties, and other issues (p. 161). Similarly, western Massachusetts farmers who might have opposed the Constitution because of Article I, Section 10's restrictions on debtor relief measures were apparently disinclined to articulate their objections in such terms (p. 160).<sup>69</sup>

Despite these important qualifications, *Ratification* does shed light on the various considerations that led individuals to support or oppose the Constitution. Residents of the largest cities almost universally supported the Constitution, across class lines (pp. 217, 223, 332). So did the overlapping but not identical class of commercial interests: shippers, merchants, and manufacturers (pp. 164, 217, 405).<sup>70</sup> Large creditors, especially those holding U.S. government bonds, overwhelmingly supported the Constitution.<sup>71</sup> Americans living along the eastern seaboard were much more supportive of the Constitution than those inhabiting the western frontier. Backwoodsmen not only tended to hold more favorable views of debtor relief, but they also manifested a generic distrust of easterners who lorded over westerners in malapportioned legislatures, imposed onerous taxes on them, and happily traded away the West's interests in opening access to the Mississippi River (pp. 160, 207–08, 238, 263, 405–06, 422).<sup>72</sup>

In most states — Virginia being an important exception<sup>73</sup> — the social elite tended to support the Constitution, while the “middling sort” were much more dubious.<sup>74</sup> Religious dissenters, especially Bap-

<sup>69</sup> See also Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 269, 271 (Gaillard Hunt ed., 1904) (identifying “the true grounds of opposition” to the Constitution as “[t]he articles relating to Treaties, to paper money, and to contracts”); Kenyon, *supra* note 61, at 32 n.111 (noting that opposition to restrictions on debtor relief measures was generally expressed only outside of ratifying conventions).

<sup>70</sup> See also MAIN, *supra* note 56, at 193, 240.

<sup>71</sup> HOLTON, *supra* note 40, at 239; see also *id.* at 9 (noting that many people treated Article I, Section 10 as “the soul of the Constitution” (quoting Statement of Charles Pinckney in the South Carolina Ratifying Convention (May 20, 1788), in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 333, 333 (Jonathan Elliot ed., Washington D.C., 2d ed. 1836)) (internal quotation marks omitted)); *id.* at 7–8 (suggesting that Madison's principal concern was that the Constitution forbid state debtor relief legislation).

<sup>72</sup> Many of those westerners who supported the Constitution were convinced of the need for a strong federal government that could raise an effective army to control Native American tribes and thus enhance western land values (pp. 124, 457). See also HOLTON, *supra* note 40, at 244.

<sup>73</sup> Madison observed that in Virginia, unlike in New England, “men of intelligence . . . [and] property” were divided on the Constitution (p. 232) (quoting Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 8 DHRC, *supra* note 49, at 226, 227).

<sup>74</sup> In Massachusetts, for instance, the “better people” were almost all in favor of the Constitution (p. 157), whereas North Carolina had fewer of these “men of wealth and education” and thus fewer Federalists (p. 405). George Washington likewise expected that the “better kind of people” would support a stronger national government (p. 14) (quoting Letter from John Jay to George Washington (June 27, 1786), in 4 THE PAPERS OF GEORGE WASHINGTON, *supra* note 41, at 130, 131).

tists who had recently suffered religious persecution in states such as Virginia and Massachusetts, often opposed the Constitution because it contained no explicit safeguard for religious liberty (p. 207).<sup>75</sup> The ratifying conventions of small states generally endorsed the Constitution by overwhelming votes, probably because of some combination of factors. They had extracted a good deal at the Philadelphia convention regarding equal apportionment in the upper house of the federal legislature. It was infeasible for them to go it alone (which an enormous state like Virginia realistically might have been able to do, or at least credibly threaten to do). Many of them were dependent on the federal government to protect them from physical challenges posed by Native Americans and from commercial depredations inflicted by neighboring states (pp. 122–23, 137–38).

### C. Was It a Fair Fight?

Federalists barely won the ratification contest despite enjoying a number of structural advantages.<sup>76</sup> In South Carolina especially, and in New York and Rhode Island to a lesser degree, representation in the ratifying conventions was malapportioned in favor of regions that were bastions of Federalism.<sup>77</sup> Coastal districts in South Carolina containing fewer than 29,000 people were represented by 143 delegates at the state ratifying convention, while the backcountry, with nearly four times that population, had only 93 representatives (p. 250).

In addition, ratifying conventions were often held in eastern cities — such as Charleston, Boston, Philadelphia, and Annapolis — where support for the Constitution was nearly universal (p. 255). (By contrast, New York’s convention was held in Poughkeepsie, where opinion on the Constitution was divided and so was the crowd attending the convention (p. 345).) When ratifying conventions were open to the public, which they generally were, the audiences in attendance

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<sup>75</sup> See also LABUNSKI, *supra* note 3, at 44–45 (discussing Baptist opposition to the Constitution in Virginia). Of course, religious persecution is in the eye of the beholder. In New England and North Carolina, objections were raised against the Constitution because, unlike some state constitutions, it did *not* forbid officeholding by Jews, Catholics, and pagans. One Massachusetts town wanted to bar “Atheists Deists Papists or abettors of any false religion” from office (p. 152), and some Antifederalists believed that only Christianity guaranteed good morals and expressed concern that “pagans, deists, and Mahometans might obtain offices among [them]” (p. 420) (quoting Statement of Henry Abbot at the North Carolina Ratifying Convention (July 30, 1788), in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 71, at 191, 192).

<sup>76</sup> See James W. Ely, Jr., “The Good Old Cause”: *The Ratification of the Constitution and Bill of Rights in South Carolina*, in THE SOUTH’S ROLE IN THE CREATION OF THE BILL OF RIGHTS 101, 108–10, 118–19 (Robert J. Haws ed., 1991).

<sup>77</sup> See Roll, *supra* note 34, at 30, 32–34. In several other states, malapportionment benefited Antifederalists, although generally not enough to influence the outcome of ratifying conventions. 1 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 110 (7th ed. 1991).

were not shy about voicing their opinions (p. 102). In Connecticut, for example, a largely Federalist audience coughed, chattered, and shuffled their feet when Antifederalist delegates spoke (p. 137). Moreover, when delegates adjourned in the evenings to nearby inns and taverns, the population with which they mingled was overwhelmingly supportive of the Constitution. Charleston's wealthy merchants and planters held open houses during the South Carolina convention (p. 250), undoubtedly filling delegates' ears with paeans to the wisdom of the Constitution.<sup>78</sup> Also, because supporters of the Constitution tended to be concentrated in larger cities and along the eastern seaboard generally, they were easier to organize than their opponents, whose strength was concentrated along the frontier and outside of commercial networks.<sup>79</sup> For this reason, Federalists generally pushed for quick votes on ratification while Antifederalists urged delay (pp. 59, 125, 242).

Federalists enjoyed another important structural advantage during the ratification contest: press coverage was strongly slanted in favor of the Constitution. In 1787–1788, more than ninety percent of the population lived outside of urban areas, but most newspapers were published in cities, and most publishers and editors strongly favored the Constitution and were predisposed to publish mostly — in some cases, *only* — essays supporting it (pp. 70–75, 130, 218, 333). Even those rare newspaper editors who believed that the concept of a free press obliged them to present both sides of important political debates often had to relent — or were fired for refusing to do so — in the face of economic boycotts launched by their advertisers and readers, who tended to be overwhelmingly Federalist (pp. 73, 142). Of the more than ninety American newspapers and magazines in circulation at that time, only twelve published any significant amount of material criticizing the Constitution (p. 74).

Because the educational and cultural elite overwhelmingly supported the Constitution,<sup>80</sup> Federalists also had an oratorical advantage in the ratifying conventions (pp. 137, 184–85, 345–47). Backwoodsmen were neither particularly inclined nor able to hold their own in intellectual jousts with classically educated patricians who could recite Cicero in the original Latin. Furthermore, in an era in which social “inferiors” still tended to defer to their “betters,” most middling Antifederalists were disinclined to directly challenge the arguments of Federalist orators (p. 301).<sup>81</sup> Thus, to the extent that some delegates ar-

<sup>78</sup> See Ely, *supra* note 76, at 119.

<sup>79</sup> See *id.* at 118–19; see also BOUTON, *supra* note 40, at 183.

<sup>80</sup> See *supra* note 74 and accompanying text.

<sup>81</sup> During the maiden speech of a Spotsylvania County backbencher at the Virginia convention, the speaker explained that he had remained silent until that point partly out of a “sense of the inferiority of his talents” (p. 301). See also WOOD, *supra* note 55, at 486.

rived at ratifying conventions with open minds, the debate they witnessed was likely to appear rather one-sided. Probably for this reason, Federalists generally opposed the practice of constituents issuing binding instructions to delegates (pp. 147–48), and they boycotted the one popular referendum — in Rhode Island — that was conducted on the Constitution (p. 223).<sup>82</sup>

Federalists enjoyed one other significant advantage in the ratification struggle: the genius of Article VII. Under the Articles of Confederation, unanimous state consent was required for amendments.<sup>83</sup> On more than one occasion, a single state had defeated a proposed amendment to confer vital revenue-raising authority on Congress (pp. 111–12). The Framers in Philadelphia were determined to protect their handiwork from a similar fate. Under Article VII, only nine states had to ratify the Constitution for it to become operational.<sup>84</sup> Although ratifying states could bind only themselves, Article VII's rejection of a unanimity requirement radically shifted the bargaining power of prospective holdouts. Under the Articles, the last state needed to ratify an amendment could extract concessions with holdout threats.<sup>85</sup> By contrast, the last states to ratify the Constitution — after the new federal government was up and running — faced the prospect of being excluded from the union, denied federal military protection, victimized by trade sanctions, and barred from participating in important decisions being made by the First Congress, including situating the nation's permanent capital (pp. 395–96, 429, 458–59). New York's convention probably ratified the Constitution only because the requisite nine states — ten, in fact — had already done so, which confronted New York not with a choice of whether to put the Constitution into effect but instead of whether to become part of the new nation (pp. 378, 382). North Carolina and Rhode Island eventually fell into line for similar reasons (pp. 457–59).

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<sup>82</sup> In Virginia, where Federalists were less certain that they enjoyed any oratorical advantage, they were less opposed to constituents' issuing binding instructions (pp. 232–33). Federalists in Massachusetts supported the state legislature's decision to pay the expenses of delegates to the ratifying convention, realizing that the likely alternative was for town meetings simply to vote the Constitution up or down, which would deprive Federalists of the opportunity to make their eloquent arguments in favor of the Constitution at the ratifying convention (p. 143).

<sup>83</sup> ARTICLES OF CONFEDERATION of 1781, art. XIII.

<sup>84</sup> One other small advantage of Article VII, from the Federalists' perspective, was the use of state ratifying conventions, rather than state legislatures, to determine the fate of the Constitution. State legislatures were big losers under the Constitution, which might have made them somewhat less inclined to ratify it than were delegates elected to special ratifying conventions. See BEE-MAN, *supra* note 43, at 245.

<sup>85</sup> For example, under the Articles, New York had stated that it would agree to an amendment authorizing a congressional impost only if state officials were the ones collecting the duties and only if state-issued paper money were an acceptable form of payment (p. 12).

The Federalists enjoyed numerous advantages in the ratification contest. Had the Constitution instead been submitted to a national referendum, it is anybody's guess whether it would have been approved.<sup>86</sup>

#### D. *The Bill of Rights*

Maier's account reminds us of how critical the Federalists' concession of a bill of rights was to the success of ratification, yet also, ironically, of how little esteem both the Federalists and the Antifederalists had for the rights provisions that eventually found their way into the Constitution. Five days before the Philadelphia convention ended, George Mason of Virginia proposed a bill of rights.<sup>87</sup> The motion in support was defeated by unanimous vote of the state delegations (p. 44).<sup>88</sup> With the aid of hindsight, it is clear that the Federalists had made a major strategic blunder.<sup>89</sup>

During the ratification debates, Federalists made a variety of arguments against a bill of rights. A bill of rights was unnecessary, Federalists insisted, because the federal government was one of enumerated powers (p. 444). Thus, for example, a constitutional ban on laws abridging freedom of the press would be superfluous, given that Congress had no enumerated power to interfere with such freedom (p. 78).<sup>90</sup> A bill of rights was dangerous, Federalists contended, because enumerating all of the rights that warranted protection against government interference would be impossible, and a partial enumeration would inevitably generate an inference that those rights not listed were not protected (p. 79).<sup>91</sup> Finally, Federalists argued that a bill of rights was useless because it would amount simply to "parchment barriers,"

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<sup>86</sup> See HOLTON, *supra* note 40, at 249 (suggesting that about half the country opposed the Constitution); cf. Ely, *supra* note 76, at 118 (noting that a majority of South Carolinians opposed the Constitution).

<sup>87</sup> LABUNSKI, *supra* note 3, at 9.

<sup>88</sup> Mason later reported that he was upset by the way the Philadelphia convention delegates had casually dismissed his suggestion. *Id.* at 41.

<sup>89</sup> *Id.* at 10, 243; see also HOLTON, *supra* note 40, at 253.

<sup>90</sup> See THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 62, at 513–14. Federalists did not consider bills of rights superfluous in state constitutions, however, because those documents treated states as governments of inherent — not enumerated — powers (pp. 56, 78).

<sup>91</sup> James Wilson of Pennsylvania asked who would "be bold enough to undertake to enumerate all the rights of the people?" Yet, he warned, "if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted." Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 311 (quoting Statement of James Wilson in the Pennsylvania Convention (Nov. 28, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 144, 144 (Max Farrand ed., rev. ed. 1937)) (internal quotation marks omitted).

which would prove insufficient to restrain determined majorities from doing as they pleased, especially during times of war or emergency.<sup>92</sup>

Whether Federalists genuinely believed these arguments, most of which were not terribly persuasive, is an interesting question.<sup>93</sup> They may simply have wished to avoid opening up a new can of worms — either late in the Philadelphia convention or during the ratification contest — when they were so close to achieving their goal of establishing a more efficacious federal government.<sup>94</sup>

During the ratification struggle, Federalists initially were determined to resist all proposed amendments to the Constitution. Facing possible defeat in the Massachusetts ratifying convention, however, Federalists decided to compromise by offering subsequent amendments, including a bill of rights, to be recommended along with ratification and proposed by the state's representatives to the new Congress, in exchange for swing delegates' support of ratification (pp. 187, 192–93).<sup>95</sup> The compromise worked, as some delegates who had earlier expressed doubts about the Constitution now embraced it — with the promise of amendments (p. 208). Once Federalists had conceded on the question of amendments, much of the subsequent debate — in other states like Virginia (pp. 294–305) and New York (pp. 379–82, 385–93, 395–97), if not so much in Massachusetts (pp. 193, 202) — was over whether such amendments would be an antecedent condition of ratification or whether a promise that such amendments would be forthcoming after the Constitution became operational would suffice.<sup>96</sup>

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<sup>92</sup> Letter from James Madison to Thomas Jefferson, *supra* note 69, at 272.

<sup>93</sup> In response to the Federalists' argument that the Constitution's limitation of Congress to enumerated powers rendered a bill of rights unnecessary, Antifederalists convincingly noted that enumerated powers, such as that over taxation, could be used to interfere with freedom of the press, such as by taxing newspapers out of existence. See LABUNSKI, *supra* note 3, at 104. It is also peculiar that the Federalists made such an argument, given that the original Constitution did protect certain individual rights, such as that of jury trial in criminal cases. To the argument that no bill of rights could be exhaustive, the obvious response was to include a proviso, as Madison ultimately did with the Ninth Amendment, declaring that the enumeration of certain rights should not be construed to deny the existence of others. It was more difficult, however, for Antifederalists to respond to the "useless" argument. See *infra* p. 575.

<sup>94</sup> See LABUNSKI, *supra* note 3, at 9.

<sup>95</sup> Previous experience with adopting a state constitution had accustomed Massachusettians to genuine deliberation, and they resisted the Federalists' "take it or leave it" notion of ratification (pp. 138–39).

<sup>96</sup> Amendments came in a variety of forms. Some Antifederalists insisted that amendments be adopted before ratification of the Constitution (p. 317). Others supported ratification subject to retraction if promised amendments did not materialize by a certain date (p. 389). Still others demanded a second convention before ratification (pp. 76, 421). Finally, some New York Antifederalists were willing to ratify only on the condition that Congress not exercise certain enumerated powers until after amendments had been actually proposed (p. 379). Federalists tended to resist anything short of unconditional ratification (pp. 193, 202, 297–98, 380–81, 421).

Massachusetts became the sixth state to ratify the Constitution, but the first to endorse a list of recommended amendments (p. 316). Every subsequent state ratified with its own list of proposed amendments; in at least some of these states, Federalists likely would not have secured ratification without promising to support some such amendments.<sup>97</sup> These amendments fell into two general categories (pp. 197, 307–09, 397). One set consisted of the individual rights provisions that dominate our Bill of Rights — for example, freedom of the press, free exercise of religion, and the right to jury trial in criminal and civil cases. The other category consisted both of amendments that added limitations on Congress's enumerated powers — for example, on the taxing power; on the power to create a standing army or call up state militias; and on the power to alter the time, place, and manner of congressional elections as set by state governments — and of amendments that altered the structure of the federal government — for example, increasing the number of House districts, limiting the sharing of powers between the Senate and the President, and imposing mandatory rotation in office upon senators and presidents. For the most part, Federalists staunchly resisted the second category of amendments, while they proved willing to acquiesce in the first set.

Federalists had promised to support amendments in exchange for favorable votes on ratification; whether they would honor those promises was anybody's guess (p. 431). At this point, Madison returned to center stage.<sup>98</sup> As late as October 1788, Madison had told Jefferson that the absence of a bill of rights was, at most, a minor defect in the Constitution.<sup>99</sup> However, seeking election to the First Congress early in 1789, Madison was forced to respond to rumors circulating in his district suggesting that he thought the Constitution was perfect and therefore would oppose any amendments to it.<sup>100</sup> With the absence of a bill of rights becoming the dominant issue in his congressional contest,<sup>101</sup> Madison explained in widely circulated letters that he had opposed amendments until the Constitution was ratified but now saw no harm in them, so long as they were limited to reaffirming individual

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<sup>97</sup> For example, New Hampshire Federalists acquiesced with respect to proposed amendments in order to make victory more certain (p. 316). *See also, e.g.,* LABUNSKI, *supra* note 3, at 50 (noting Edmund Randolph's statement that the opportunity to consider amendments was essential to Virginia's ratification). In South Carolina, where Federalists probably could have secured ratification even without recommending amendments, they nonetheless made the concession with the aim of reconciling Antifederalists to the Constitution (p. 251).

<sup>98</sup> For Madison's critical role in enacting the Bill of Rights, see Finkelman, *supra* note 91.

<sup>99</sup> *See* Letter from James Madison to Thomas Jefferson, *supra* note 69, at 271.

<sup>100</sup> *See* LABUNSKI, *supra* note 3, at 158–59, 162.

<sup>101</sup> *See id.* at 158.

liberties, such as freedom of the press.<sup>102</sup> Madison promised that, if elected, he would work for such a bill of rights in the First Congress (p. 441).<sup>103</sup> He narrowly won the election (p. 443). Without Madison's endorsement of a bill of rights, a contrary outcome would have been likely.<sup>104</sup>

Once ensconced in Congress, Madison delivered on his promise. As President Washington's confidential advisor, Madison helped draft the President's inaugural address, which included a call for Congress to consider constitutional amendments guaranteeing individual liberties while warning against the sort of structural amendments that might weaken the new federal government (pp. 439–40).<sup>105</sup> Then, wearing his hat as a congressman from Virginia, Madison drafted the House's reply to the President's address, which seconded Washington's call for a bill of rights.<sup>106</sup> In June 1789, Representative James Madison made a speech to the House, in which he insisted that Congress make good on Federalist promises of a bill of rights (pp. 446–47). Many Federalist congressmen now vociferously objected, noting that Congress had more pressing concerns, such as raising revenue and establishing executive departments and the federal judiciary (p. 446).<sup>107</sup> One South Carolina Federalist went so far as to instruct Madison that now that he had done his duty to his constituents, he should drop the matter.<sup>108</sup> With only Virginia supporting New York's circular letter calling for a second convention, and opposition to the Constitution seeming to dry up almost overnight even in New York, many Federalists felt no imperative to honor their earlier pledges to support amendments (pp. 455–56). Accordingly, the House repeatedly put off Madison's urgings to consider a bill of rights in order to transact more urgent business.<sup>109</sup>

Madison persisted, however, warning that Federalists' failure to honor their promises would simply confirm Antifederalist suspicions of

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<sup>102</sup> See *id.* at 162–64. That Jefferson deemed the absence of a bill of rights to be a major flaw in the Constitution likely would have carried weight with Madison as well. See *id.* at 62.

<sup>103</sup> *Id.* at 159. Madison's promises were especially credible to minority religious sects because he had previously defended them from persecution by the state's Anglican establishment, supported a right of religious liberty in the Virginia Declaration of Rights in 1776, and played a critical role in enacting Virginia's Statute of Religious Freedom in 1786 (p. 230). See LABUNSKI, *supra* note 3, at 162–63.

<sup>104</sup> See LABUNSKI, *supra* note 3, at 174–75.

<sup>105</sup> See *id.* at 188.

<sup>106</sup> See *id.* at 189.

<sup>107</sup> See *id.* at 194–96; RUTLAND, *supra* note 67, at 200–01.

<sup>108</sup> LABUNSKI, *supra* note 3, at 195; see also *id.* at 210 (describing Grayson telling Henry that Madison was “so ‘embarrassed’ by the reaction of his colleagues” that he considered withdrawing his motion to consider amendments (quoting Letter from William Grayson to Patrick Henry (June 12, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 757, 759 (Charlene Bangs Bickford et al. eds., 2004))).

<sup>109</sup> See *id.* at 191–92, 213–14.

a conspiracy against liberty.<sup>110</sup> He also argued that adopting a bill of rights might induce North Carolina and Rhode Island to ratify the Constitution and join the Union.<sup>111</sup> Madison eventually brought his colleagues on board.

Having seized control of the amendments project, Madison powerfully influenced its shape and scope. He rejected nearly all of the states' proposed structural amendments, sometimes arguing that they were simply too controversial to secure the requisite two-thirds majority from both houses of Congress.<sup>112</sup> Madison's proposed amendments were limited almost entirely to individual rights provisions (pp. 447–50).<sup>113</sup> Now, it was the Antifederalists' turn to disparage Madison's proposed amendments. To them, Madison's bill of rights was simply a distraction from the important task of securing structural amendments, as well as a transparent effort to divide their ranks.<sup>114</sup>

Madison ultimately prevailed, however. The Senate acquiesced in most of his proposed amendments, and three-quarters of the states soon ratified all but two of those.<sup>115</sup>

*E. Why Were the Federalists So Desperate to Avoid  
a Second Convention?*

One recurring theme of the ratification struggle, as recounted by Maier, was the staunch determination of Federalists to avoid either a conditional ratification of the Constitution or a second convention. When the Confederation Congress, which had been sent the Constitution by the Philadelphia convention, deliberated on whether to forward it to the states, Federalists demanded an up-or-down vote, de-

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<sup>110</sup> See *id.* at 202; *id.* at 206 (noting that Gerry made similar arguments).

<sup>111</sup> *Id.* at 202.

<sup>112</sup> See *id.* at 227, 230.

<sup>113</sup> The exceptions were two amendments dealing with, respectively, the size of House constituencies and the procedure for congressional pay raises — neither of which were ratified at the time by the requisite number of states, see *id.* at 256 — and the amendment that we know today as our Tenth, which Madison rendered palatable by omitting the word “expressly” from its reservation to the states of powers not delegated to Congress (pp. 447–50).

<sup>114</sup> One Antifederalist derided Madison's amendments as “whip-syllabub” and analogized them to “‘a tub thrown out to a whale’ by sailors to divert it from attacking their ship” (p. 452) (quoting Statement of Aedanus Burke in the Debates in the House of Representatives (Aug. 15, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 175, 175* (Helen E. Veit et al. eds., 1991)). See also, e.g., LABUNSKI, *supra* note 3, at 210 (describing Henry's deriding Madison's amendments as “guileful bait” to North Carolina and Rhode Island (quoting MAYER, *supra* note 15, at 457) (internal quotation marks omitted)); *id.* at 242 (noting Henry's describing the proposed amendments as intended to “lull Suspicion” away from the “exorbitan[t]” powers granted to the federal government (quoting Letter from Patrick Henry to Richard Henry Lee (Aug. 28, 1789), in *CREATING THE BILL OF RIGHTS, supra*, at 289, 290) (internal quotation marks omitted)).

<sup>115</sup> LABUNSKI, *supra* note 3, at 256.

terminated to avoid any discussion of amendments (pp. 52–53).<sup>116</sup> Similarly, in the state ratifying conventions, Federalists initially insisted on an up-or-down vote with no proposed amendments (pp. 67–68, 105, 243). Although Federalists eventually recognized the need to concede future amendments to secure ratification, they remained resolutely opposed to anything that smacked of conditional ratification — a notion that Madison called “pregnant with such infinite dangers, that I cannot contemplate it without horror.”<sup>117</sup> Even more anathema to most Federalists was the idea of a second convention, which the New York and Virginia legislatures were strongly advocating even after the Constitution had been duly ratified by the requisite number of states.<sup>118</sup> To Madison and his Federalist compatriots, a second convention would be an unmitigated disaster. At the Philadelphia convention, Federalist Charles Pinckney warned that a second convention would open a Pandora’s box (pp. 67–68). Madison later wrote to Jefferson that a second convention was “in every view to be dreaded,” and he called the New York circular letter proposing such a convention “extremely dangerous” (p. 426).<sup>119</sup>

Federalists offered legal arguments against conditional ratification and a second convention. Madison explained that conditional ratification would not be legally effective because all states must ratify the same document and other states had already ratified unconditionally.<sup>120</sup> Once the Constitution had been ratified, Madison argued that Congress was powerless to call a new convention, as Antifederalists were urging, unless two-thirds of the states first demanded one.<sup>121</sup>

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<sup>116</sup> Antifederalist Richard Henry Lee declared that Congress should be able to amend the Constitution before forwarding it to the states (p. 56). Madison argued to the contrary, insisting that if Congress amended the Constitution in any way, it would become the work of Congress and thus subject to the provision in the Articles of Confederation requiring unanimous consent of all thirteen state legislatures for amendments (p. 55). Congress ultimately neither approved nor disapproved of the Constitution, but instead simply forwarded it to the states (p. 58). Federalists saw this result as a victory. See LABUNSKI, *supra* note 3, at 18.

<sup>117</sup> LABUNSKI, *supra* note 3, at 109 (quoting Statement of James Madison in the Debates of the Virginia Convention (June 25, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1515, 1518 (John P. Kaminski & Gaspare J. Saladino eds., 1993)) (internal quotation marks omitted).

<sup>118</sup> See *id.* at 66, 129; see also *id.* at 126 (describing Patrick Henry insisting on a second convention before the Constitution was implemented).

<sup>119</sup> The author quotes first a letter from James Madison to Thomas Jefferson, dated August 23, 1788, printed in 11 THE PAPERS OF JAMES MADISON, *supra* note 23, at 238, 238; and second, a letter from James Madison to Edmund Randolph, dated August 22, 1788, printed in the same volume at page 237. Internal quotation marks have been omitted.

<sup>120</sup> See Letter from James Madison to Alexander Hamilton (July 20, 1788), in 11 THE PAPERS OF JAMES MADISON, *supra* note 23, at 189, 189. John Jay made the same argument against conditional ratification in New York (p. 380).

<sup>121</sup> See LABUNSKI, *supra* note 3, at 191.

Federalists also made a number of policy arguments against a second convention. A second convention would take much longer to propose amendments than would the First Congress, and the delay could prove fatal to the union.<sup>122</sup> Delegates attending such a convention were likely to be extremists disinclined to compromise (p. 337)<sup>123</sup> or would come fettered by instructions that would render impossible the sorts of compromises that had proved indispensable to the success of the Philadelphia convention (p. 45). Foreign countries would seek to influence the deliberations of a second convention (p. 337), and the uncertainty created by such a convention would disincline foreign creditors to loan money in the United States.<sup>124</sup>

Despite such arguments, one is entitled to wonder what the Federalists were so worried about. Antifederalists made good points in support of conditional ratification and a second convention. Many Antifederalists were happy to abandon the Articles of Confederation and conceded that the Constitution was a step in the right direction, but they nonetheless believed that it could be improved upon.<sup>125</sup> What gall the Federalists showed in trying to force an up-or-down vote on the Constitution, as if it were a perfect document!<sup>126</sup> And who would be so foolish, Patrick Henry wondered, as to ratify an admittedly defective constitution on the mere promise of subsequent amendments?<sup>127</sup> Surely, James Monroe suggested, the Federalists would be less motivated to amend the Constitution after it had been ratified than if ratification were made contingent upon amendment.<sup>128</sup> What was all the rush about anyway?<sup>129</sup> The Federalists were exaggerating,

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<sup>122</sup> See *id.* at 55.

<sup>123</sup> See *id.* at 52.

<sup>124</sup> See *id.* at 55.

<sup>125</sup> Lee conceded that he had no desire to “interfere with the general nature of the plan,” though he favored amendments (p. 67) (quoting Letter from Richard Henry Lee to William Shippen, Jr. (Oct. 2, 1787), in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 289, 289 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter 13 DHRC]). Madison observed that Randolph, Mason, and others endorsed the general nature of the new government but wanted amendments (p. 232).

<sup>126</sup> Mason declared it “improper to say to the people, take this or nothing” (p. 45) (quoting James Madison, Notes of the Constitutional Convention (Sept. 15, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 622, 632 (Max Farrand ed., rev. ed. 1966) [hereinafter 2 FARRAND’S RECORDS]) (internal quotation mark omitted).

<sup>127</sup> Henry called the strategy of ratifying in reliance on the promise of future amendments an “absurdity” that only a “lunatic” would advise (p. 294) (quoting Statement of Patrick Henry in the Debates of the Virginia Convention (June 9, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1050, 1070, 1072 (John P. Kaminski & Gaspare J. Saladino eds., 1990)).

<sup>128</sup> See LABUNSKI, *supra* note 3, at 109–10.

<sup>129</sup> In Pennsylvania, William Findley urged against hasty consideration of the Constitution, stating that the assembly should take time to make the document “as agreeable as possible” (p. 60) (quoting Debates of the Pennsylvania Assembly (Sept. 28, 1787), in 2 DHRC, *supra* note 36, at 65, 71) (internal quotation mark omitted). Lee likewise argued for “cool, sober, and intense considera-

their opponents insisted, when they warned that the nation faced a dire emergency, necessitating quick ratification (p. 339). Certainly, approving a new constitution was sufficiently serious business that they should take the time to get it right. Now that an extended public debate on the virtues and vices of the Constitution had been conducted, the People should be consulted, delegates to a second convention should be selected, and the work of the Philadelphia Framers could be perfected (p. 45).

These were pretty good arguments. Federalists may have been less than fully candid in their reasons for rejecting them. The Federalists' principal concern seems to have been that they could never recreate the conditions that had enabled the Philadelphia convention to produce the nationalist document that it had.

Some states' rights-oriented political figures had declined their appointments to the Philadelphia convention because, like Patrick Henry, they "smelt a rat."<sup>130</sup> Henry was prescient. Meeting behind closed doors, convention delegates, almost from the first day, ignored their limiting instructions — imposed both by Congress and by some state legislatures<sup>131</sup> — and scrapped the Articles of Confederation in favor of a vastly more nationalist scheme.<sup>132</sup> Some states' rights supporters who had shown up in Philadelphia — such as Robert Yates and John Lansing, Jr., of New York and Luther Martin of Maryland — soon departed because they disapproved of the nationalizing trend in the debates.<sup>133</sup> Despite the nationalist bias such departures created in the remaining pool of delegates, Madison and Hamilton were profoundly disappointed that the convention did not produce an even more nationalist document than it did.<sup>134</sup>

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tion" of the Constitution (p. 67) (quoting Letter from Richard Henry Lee to Samuel Adams (Oct. 5, 1787), in 13 DHRC, *supra* note 125, at 323, 325) (internal quotation mark omitted).

<sup>130</sup> Lance G. Banning, *The Constitutional Convention*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 112, 112 (Leonard W. Levy & Dennis J. Mahoney eds., 1987); see also CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787, at 18 (1986) (noting that Samuel Adams, although not named a delegate, had stated his suspicion "of a general revision of the Confederation"); HOLTON, *supra* note 40, at 181 (noting that Madison and other strong nationalists did not publicize their hope that the Philadelphia convention would repudiate the Articles because, if they had, their states would likely not have selected them as delegates); ROSSITER, *supra* note 45, at 94 (suggesting that George Clinton, an opponent of a strong national government, was glad to be able to cite his responsibilities as governor of New York to justify declining the opportunity to attend the convention).

<sup>131</sup> See BEEMAN, *supra* note 43, at 20, 148.

<sup>132</sup> See *id.* at 20–21, 148; LABUNSKI, *supra* note 3, at 15.

<sup>133</sup> BEEMAN, *supra* note 43, at 353.

<sup>134</sup> Madison was especially depressed over the failure of his proposal for a national veto of state legislation (p. 36). See RAKOVE, *supra* note 56, at 81–82. He had also suffered significant defeats on the method of selecting senators — the Constitution provided for state legislative selection — and on the method of apportioning the Senate — equal apportionment among the states, rather

During the ratification struggle, Federalists tried to force a quick up-or-down vote upon the nation.<sup>135</sup> They seemed to appreciate that, although the country might prefer the Constitution to the status quo of an obviously flawed Articles of Confederation, the country also might prefer, if given the choice, an amended Constitution to what had come out of Philadelphia.<sup>136</sup> The Federalists also seemed convinced that the more time the country had to learn about the Constitution and undertake a full deliberation upon it, the less likely ratification without substantial amendments would become.<sup>137</sup> Moreover, if those proposed amendments were to come from a second convention, rather than from Congress, they were much more likely to be of the sort that eviscerated federal power (pp. 426–27).<sup>138</sup> Federalists believed — no doubt with good reason — that a second convention would never replicate the strongly nationalizing features of the Constitution.<sup>139</sup>

## II. SOME IMPLICATIONS FOR CONSTITUTIONAL THEORY

Maier's rich and fascinating study provides fodder of all sorts for constitutional theory, both positive and normative. I shall limit myself here to noting four of its most salient implications.

### A. *Was the Founding a "Constitutional Moment"?*

Some scholars have treated the Founding as a "constitutional moment," entitled to special deference by future generations despite the notorious dead hand problem because of the Founders' disinterested pursuit of the public good.<sup>140</sup> From this perspective, Maier's account

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than apportionment according to population, as Madison had favored (p. 36). RAKOVE, *supra* note 56, at 62. Hamilton's disappointment with the Constitution was evident in his description of it as a "shilly-shally thing of milk and water which could not last and was good only as a step to something better." DE PAUW, *supra* note 29, at 66 (quoting Jefferson's "Anas" (Oct. 1, 1792), in 1 THE WRITINGS OF THOMAS JEFFERSON 202, 204 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1892)).

<sup>135</sup> See *supra* notes 116–117 and accompanying text.

<sup>136</sup> For example, most Americans probably preferred that Congress be given unlimited taxing power rather than be denied all independent revenue-raising authority, as it was under the Articles of Confederation. But it is also possible that most Americans would have preferred that Congress be restricted to import duties or be forced to requisition states before imposing direct taxes rather than having unlimited taxing authority. The Federalists did not permit Americans to confront such choices.

<sup>137</sup> Morris, Washington, and Madison expressed concern about delays in ratification proceedings (pp. 125–26). The Pennsylvania legislature tried to call for a ratifying convention even before the Constitution had been formally received and read (pp. 59–61).

<sup>138</sup> See, e.g., LABUNSKI, *supra* note 3, at 129–30, 165.

<sup>139</sup> *Id.* at 52–53.

<sup>140</sup> See, e.g., BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 165, 171 (1991) (arguing that "higher lawmaking," *id.* at 165, occurs under conditions of "public-regarding political activity involving citizen sacrifice of private interests to pursue the common good," *id.* at 171).

is sobering: constitutional ratification was pervaded by interest group politics.

Creditors largely supported the Constitution because Article I, Section 10 barred paper money emissions and secured debt agreements against retrospective impairment.<sup>141</sup> Merchants, shippers, and manufacturers overwhelmingly favored the Constitution because it enabled Congress to retaliate against British trade restrictions, through its power to regulate foreign commerce, and to impose protective tariff barriers, through its power to raise taxes.<sup>142</sup> States such as Delaware, New Jersey, and Connecticut strongly endorsed the Constitution partly because it would liberate them from paying the hated impost that re-dounded largely to the benefit of neighboring states, such as New York and Pennsylvania, that had been blessed with more natural ports of entry (pp. 122–23, 129).<sup>143</sup> George Washington and others speculated that Georgia quickly ratified the Constitution because it desperately needed federal military protection from violent confrontations with Native Americans (p. 124).<sup>144</sup> The “better sort” — well-educated, aristocratic types — generally supported the Constitution, at least in part because its use of larger constituencies, longer terms in office, and indirect elections to select national officeholders enhanced their prospects for political success.<sup>145</sup> Hopes of being chosen as the site of the new national capital helped generate support for the Constitution in several mid-Atlantic states (pp. 59, 122).<sup>146</sup>

Opposition to the Constitution was also frequently driven by considerations of interest. Westerners in Virginia and North Carolina generally opposed the Constitution, partly from fear that Congress would deploy its treaty power to bargain away their claims of access to the Mississippi River (pp. 238, 276–78).<sup>147</sup> Debtor farmers, like those who had recently revolted against oppressive taxes in western Massachusetts, often opposed the Constitution because Article I, Section 10 severely constrained their access to debtor relief laws and paper money emissions (pp. 160, 224–25).<sup>148</sup> Many New Yorkers opposed the Con-

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<sup>141</sup> See *supra* note 71 and accompanying text.

<sup>142</sup> See *supra* note 70 and accompanying text.

<sup>143</sup> See HOLTON, *supra* note 40, at 241.

<sup>144</sup> *Id.* at 244–46.

<sup>145</sup> See *supra* note 74 and accompanying text.

<sup>146</sup> See, e.g., LABUNSKI, *supra* note 3, at 178–79.

<sup>147</sup> See *id.* at 94, 111–12, 295 n.98.

<sup>148</sup> Holton makes the intriguing argument that many debtor farmers supported the Constitution despite Article I, Section 10 because they believed — with good reason, it turned out — the Federalist promises that their tax burden would decline under the new regime, as states would no longer need to meet federal requisitions through direct taxes and the federal government would raise revenue primarily through import duties. HOLTON, *supra* note 40, at 240–42; see also EDLING, *supra* note 63, at 192–95, 211–12; cf. BOUTON, *supra* note 40, at 182 (noting that promises of eco-

stitution because it would end their state's ability to extract tax revenue from neighboring states through impost duties (pp. 323–26).<sup>149</sup> Many southerners opposed the Constitution, fearing that Congress would use the commerce power to benefit northern shippers, that the North would dominate the equally apportioned Senate,<sup>150</sup> and that slavery was insufficiently protected from federal interference (pp. 248, 420).

The contest over ratification of the Constitution featured a veritable smorgasbord of interest group conflict. The Founders talked a great deal about virtuous subordination of individual self-interest to the public good of the community,<sup>151</sup> but their actions largely belied their ideals.

### B. *The Constitution's Democratic Legitimacy*

Some schools of modern constitutional theory attribute the binding normative force of the Constitution today to its democratic pedigree.<sup>152</sup> Indeed, even the Federalists of 1787–1788 often invoked the balm of popular sovereignty to cure antecedent procedural irregularities in the constitution-making process, such as the Philadelphia convention's transgressing its limiting instructions.<sup>153</sup> Yet Maier's account provides ample basis for questioning the Constitution's democratic legitimacy.

Even leaving aside stock objections, such as the property-based suffrage qualifications and the racial and gender exclusions that effectively disqualified most Americans from participating in the making of the Constitution, the ratification project lacked democratic legitimacy

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conomic revival and of a federal tax on imports encouraged Philadelphia's "lower sort" to support the Constitution).

<sup>149</sup> New York's impost, which provided one-third to one-half of the state's income in the mid-1780s, enabled it to keep other taxes low, helping to avoid the farm foreclosures and debtor unrest that afflicted other states (p. 324).

<sup>150</sup> The general understanding in 1787–1788 was that there were eight northern states — Delaware and the seven states to its north — and five southern ones. See Banning, *supra* note 130, at 123.

<sup>151</sup> See, e.g., WOOD, *supra* note 55, at 65–70. Federalists tended to assume that only well-educated, affluent landowners were sufficiently disinterested to possess such virtue; Antifederalists thought that such persons simply possessed a different set of interests. See Wood, *supra* note 55, at 101–02; see also CORNELL, *supra* note 56, at 97–98.

<sup>152</sup> See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (1997) (arguing that respect for "the democratic process" should lead judges to "feel bound not to tinker with a constitution" and rejecting living constitutionalism as an illegitimate departure from the "democratically adopted text"); see also ACKERMAN, *supra* note 140, at 6 (attributing the binding force of the Constitution partly to the democratic pedigree of "higher lawmaking").

<sup>153</sup> See, e.g., LABUNSKI, *supra* note 3, at 75 (describing how Edmund Pendleton, chair of the Virginia ratifying convention, refused to allow debate on Henry's motion to read Congress's limiting instructions to the Philadelphia convention, on the ground that the people of Virginia had the power to cure any illegality).

in several ways. The Federalists generally exhibited profound distrust of the People. They blamed the debtor relief laws and paper money emissions of the 1780s on “excessive democracy,” “democratical tyranny,” and “democratic licentiousness.”<sup>154</sup> Behind the closed doors of the Philadelphia convention, some Founders referred to democracy in disparaging terms — “the worst . . . of all political evils,” according to Elbridge Gerry.<sup>155</sup> Madison opposed a second convention specifically on the ground that the People, at least at that moment, were neither well enough informed nor sufficiently dispassionate to participate responsibly in making a constitution.<sup>156</sup> In Massachusetts, Federalists were horrified at the idea that the state ratifying convention should be adjourned in order to enable delegates to consult their constituents (p. 204).<sup>157</sup> In Congress, some Federalists were so distrustful of the People that they preferred to close the House galleries before debating possible amendments to the Constitution.<sup>158</sup>

As already noted, Federalists generally sought to preempt debate over the Constitution. In state ratifying conventions, they pushed for quick votes, opposed paragraph-by-paragraph consideration of the Constitution, and tried to foreclose all discussion of possible amendments.<sup>159</sup> Outside of conventions, they tried to stifle open and robust debate over the Constitution by retaliating against newspapers that dared to publish Antifederalist arguments.<sup>160</sup> In some states, malapportionment of ratifying conventions enabled Federalist minorities to

<sup>154</sup> HOLTON, *supra* note 40, at 5 (quoting *Extract of a Letter from a Gentleman in Washington County to His Friend in Albany*, ALBANY GAZETTE, June 21, 1787, reprinted in 13 DHRC, *supra* note 125, at 141, 141; *Hartford Dateline*, U.S. CHRONICLE, June 1, 1786, at 2; James Madison, Notes of the Committee of the Whole (June 12, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 214, 218 (Max Farrand ed., rev. ed. 1966) [hereinafter 1 FARRAND’S RECORDS] (statement of Edmund Randolph)) (internal quotation marks omitted).

<sup>155</sup> James Madison, Notes of the Constitutional Convention (Sept. 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 126, at 641, 647; see also EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 271 (1988) (describing Roger Sherman’s warning that “[t]he people . . . (immediately) should have as little to do as may be about the Government” (second alteration in original) (quoting James Madison, Notes of the Committee of the Whole (May 31, 1787), in 1 FARRAND’S RECORDS, *supra* note 154, at 47, 48) (internal quotation mark omitted)); James McHenry, Notes of the Constitutional Convention (May 29, 1787), in 1 FARRAND’S RECORDS, *supra* note 154, at 24, 26 (statement of Edmund Randolph) (declaring that the country’s “chief danger arises from the democratic parts of [the state] constitutions”).

<sup>156</sup> See LABUNSKI, *supra* note 3, at 52. Federalists were playing a kind of shell game with democracy: in response to Antifederalist procedural objections, they declared that the sovereign People had the power to cure all irregularities, but on issues of popular participation in governance, they denied that the People could be trusted to govern themselves.

<sup>157</sup> Federalists had no general principled objection to adjournments; in New Hampshire, they pushed for one after realizing they would probably lose an immediate vote on ratification (p. 220).

<sup>158</sup> See LABUNSKI, *supra* note 3, at 215–16.

<sup>159</sup> See *supra* p. 565.

<sup>160</sup> See *supra* p. 558.

impose their will on Antifederalist majorities.<sup>161</sup> For all Federalists, the utmost priority was avoiding a second convention, which would have enabled the People to weigh in too directly on the terms of proposed revisions to the Constitution.<sup>162</sup> To criticize the ratification process as undemocratic is not to indulge in anachronism: most of the procedural constraints just noted directly contravened ordinary practices of government decisionmaking in New England, where town meetings were accustomed to exerting direct influence over important decisions such as declaring independence from Great Britain, raising taxes, and ratifying state constitutions (pp. 139–41, 217).<sup>163</sup>

The substance of the Constitution — as opposed to the procedures by which it was adopted — also contravened the customary constitutional practices of the revolutionary era. State constitutions of the 1770s tended to use direct elections, small legislative districts, and annual terms in office.<sup>164</sup> Evaluated against that baseline, the Constitution was an extraordinary shift toward less accountable government: indirect elections of senators and Presidents, enormous congressional districts, vastly longer terms in office, and no provision for mandatory rotation in office.<sup>165</sup> Antifederalists regularly charged that the Constitution, especially in its design of the Senate and the presidency, tended strongly aristocratic.<sup>166</sup> In Pennsylvania, conflicting opinions regarding the federal Constitution closely tracked views on the state's 1776 constitution, which was widely regarded as the most democratic and radical in the nation — abolishing property requirements for both voting and officeholding (which meant that ninety percent of the adult male population could participate in politics) and establishing a weak executive and a unicameral legislature that was required to hold public sessions and to publish records of its proceedings.<sup>167</sup> Those citizens supporting Pennsylvania's existing constitution tended strongly to oppose the federal Constitution, while those seeking to amend the state's

<sup>161</sup> See *supra* p. 557.

<sup>162</sup> See *supra* p. 565.

<sup>163</sup> See also HOLTON, *supra* note 40, at 164–65 (arguing that the Revolutionary War had rendered ordinary Americans more confident in their ability to govern themselves); *id.* at 169 (noting calls in the 1780s for more democratic reform of even the most democratic state constitutions, such as that of Massachusetts).

<sup>164</sup> See WOOD, *supra* note 55, at 165–72.

<sup>165</sup> See HOLTON, *supra* note 40, at 188, 190–91, 196–97, 200; WOOD, *supra* note 55, at 506–18. Holton makes the nifty point that the Framers probably would have preferred that the Constitution move even further away from direct democracy, but they felt constrained by what state legislatures would ratify. HOLTON, *supra* note 40, at 191–93, 196–97, 201, 204–05, 211. These shifts toward less accountable government were not made simply for their own sake: the Framers' dominant motivation was curtailing the debtor relief laws and paper money measures adopted by state legislatures in the 1780s. See *id.* at 182–87, 205–06, 212, 228–29.

<sup>166</sup> See *supra* note 56.

<sup>167</sup> BOUTON, *supra* note 40, at 5–6, 52–55; WOOD, *supra* note 55, at 169, 226–27, 231–32.

charter in order to temper direct democracy generally endorsed the handiwork of the Philadelphia convention (p. 63).<sup>168</sup>

The Constitution provided far less direct democracy at the federal level than most Americans by the late 1780s had become accustomed to in their state governments.<sup>169</sup> It was ratified through a process that was stacked against democratic deliberation. Why such a document should enjoy binding normative force today is a challenging question for constitutional theorists to answer.

Yet Maier also provides interesting evidence that after the ratification process was completed, the country seemed largely to acquiesce to the Constitution (pp. 432–33, 456). New York, where Antifederalists had dominated the state ratifying convention, quickly elected Federalist to its two U.S. Senate seats and to four of its six seats in the new House (p. 433).<sup>170</sup> Virginia, another state with a powerful Antifederalist contingent at its ratifying convention, elected seven or eight Federalists out of the ten congressmen who would represent it in the First Congress.<sup>171</sup> By the end of 1789, Madison was telling President Washington that, so far as he could tell, the fears of former Antifederalists had been laid largely to rest.<sup>172</sup> Support for the idea of a second constitutional convention had largely evaporated by 1791.<sup>173</sup> The booming economy and the lightened tax load probably did not hurt in this regard.<sup>174</sup> If H.L.A. Hart is right that the ultimate rule of recognition for law is simply the positive fact of its acceptance,<sup>175</sup> then perhaps the Constitution became legitimate, despite democratic defects in its substance and in the process by which it was enacted, once the People came to accept it.

### C. Structure and Rights

Much of modern constitutional law and theory is preoccupied with the Bill of Rights and its supposedly vital contribution to the protection of our fundamental liberties.<sup>176</sup> Against this backdrop, the

<sup>168</sup> See BOUTON, *supra* note 40, at 194.

<sup>169</sup> See *id.* at 261–62; HOLTON, *supra* note 40, at 16–17.

<sup>170</sup> See also DE PAUW, *supra* note 29, at 272 (noting that by 1789 there was virtually “no trace” of Antifederalist activity left in New York).

<sup>171</sup> LABUNSKI, *supra* note 3, at 176; see also *id.* at 246–47 (noting that the Federalists were much stronger in the Virginia House by the fall of 1789 than they previously had been).

<sup>172</sup> *Id.* at 248.

<sup>173</sup> *Id.* at 256.

<sup>174</sup> EDLING, *supra* note 63, at 207–08, 211 (discussing the lightened tax load); HOLTON, *supra* note 40, at 267 (same); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 73 (1993) (noting the return of prosperity by the summer of 1789).

<sup>175</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 100–10 (1961).

<sup>176</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (referring to the “guarantees of the Bill of Rights” as “fundamental safeguards of liberty”); *W. Va. State Bd. of Educ. v. Barnette*, 319

Founding generation's general disdain for constitutional enumerations of rights is stunning.<sup>177</sup> Federalists regularly disparaged such provisions as "parchment barriers."<sup>178</sup> Madison thought they would never be effective "when opposed to the decided sense of the public."<sup>179</sup> Thus, "[s]hould a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the Hab[itas] Corp[us] be dictated by the alarm, no written prohibitions on earth would prevent the measure."<sup>180</sup>

When Madison ultimately became a proponent of a bill of rights,<sup>181</sup> he offered arguments in support: "political truths declared in [a] solemn manner," as with a bill of rights, would "acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion."<sup>182</sup> Moreover, Madison declared, in the unlikely event that the federal government did become oppressive, a bill of rights would be "a good ground for an appeal to the sense of the community."<sup>183</sup>

Still, Madison's heart was never really in what he dismissively called the "nauseous project of amendments" (p. 455).<sup>184</sup> He had compelling political reasons to support a bill of rights: getting elected to Congress, fulfilling a promise made to his constituents, propitiating anxious Antifederalists, dividing opponents of the Constitution, and controlling the direction of the amendments project.<sup>185</sup> But Madison always found it perplexing that some people deemed a bill of rights useful — even necessary — in securing individual liberty.<sup>186</sup> Other Federalists who ultimately came on board thought that a bill of rights was unlikely to do much harm and might, perhaps, do a bit of good.<sup>187</sup>

Most Antifederalists were no more enthusiastic about the amendments that Madison ultimately proposed. They disparaged the indi-

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U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . .").

<sup>177</sup> See HOLTON, *supra* note 40, at x.

<sup>178</sup> Letter from James Madison to Thomas Jefferson, *supra* note 69, at 272.

<sup>179</sup> *Id.* at 274.

<sup>180</sup> *Id.*

<sup>181</sup> See *supra* pp. 562–64.

<sup>182</sup> Letter from James Madison to Thomas Jefferson, *supra* note 69, at 273.

<sup>183</sup> *Id.*

<sup>184</sup> The author quotes a letter from James Madison to Richard Peters, dated August 19, 1789, printed in 12 THE PAPERS OF JAMES MADISON 346, 346–47 (Charles F. Hobson et al. eds., 1979). On Madison's distaste for the amendments project, see pp. 444, 446. *But see* LABUNSKI, *supra* note 3, at 192–94 (noting that historians disagree on whether Madison ever genuinely became a fan of a bill of rights and expressing the view that he did).

<sup>185</sup> See *supra* pp. 562–64.

<sup>186</sup> LABUNSKI, *supra* note 3, at 62–63.

<sup>187</sup> See, e.g., *id.* at 239–40.

vidual rights provisions as “milk-and-water amendments”<sup>188</sup> and as “little better than whip-syllabub, frothy and full of wind.”<sup>189</sup> Many Antifederalists voted against Madison’s proposed bill of rights, deeming it worse than useless.<sup>190</sup>

Interestingly, Madison, other Federalists, and the Antifederalists all placed much greater stock in structural constitutional provisions than in individual rights guarantees. None of them disparaged as “parchment barriers” constitutional provisions dealing with the size of legislative districts, the method of selecting federal government officials, limits on Congress’s enumerated powers, or the separation of powers between the branches of the federal government. Federalists valued the constitution that emerged from the Philadelphia convention because they believed that its structural provisions would enable the establishment of a powerful national government that could raise taxes, defend the nation’s security, reestablish its public credit, effectively impose its will on the states, and avoid the pitfalls of debtor relief and inflationary monetary policy that they believed had beleaguered the states in the 1780s.<sup>191</sup> Federalists strongly resisted Antifederalist calls for structural amendments, such as provisions to limit Congress’s taxing and military powers, to reduce the size of congressional constituencies, and to increase the popular accountability of the President and the Senate.<sup>192</sup> Conversely, these amendments were the very sort that the Antifederalists insisted upon, preferring to try to kill Madison’s proposed individual rights provisions rather than to accept them in lieu of such structural changes (pp. 454–55).<sup>193</sup>

Why both Federalists and Antifederalists were confident that structural constitutional provisions were not mere “parchment barriers” is an interesting question. Enumerated limits on congressional power and allocations of authority to different branches of government can

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<sup>188</sup> *Id.* at 235 (quoting Letter from Pierce Butler to James Iredell (Aug. 11, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 114, at 274) (internal quotation marks omitted).

<sup>189</sup> *Id.* at 226 (quoting Statement of Aedanus Burke, *supra* note 114, at 175) (internal quotation mark omitted).

<sup>190</sup> *See id.* at 239.

<sup>191</sup> On the importance of the national government’s being able to raise taxes and create a powerful military, see EDLING, *supra* note 63, at 8–10, 55–57, 73–88, 163–74, 219–27; on suppressing debtor relief and paper money laws, see sources cited *supra* note 71.

<sup>192</sup> *See supra* p. 562.

<sup>193</sup> Lee was deeply disappointed by the amendments Congress had passed and believed that the Federalists had duped some Antifederalists with provisions that addressed their concerns only superficially (p. 454). Grayson agreed that they had been deceived and that the adopted amendments were “good for nothing” (p. 455) (quoting Letter from William Grayson to Patrick Henry (Sept. 29, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 114, at 300) (internal quotation mark omitted). *See also* LABUNSKI, *supra* note 3, at 209–10 (describing how Henry told Grayson and Lee to hold out for the structural amendments); *id.* at 236 (noting Henry’s wish that Madison’s proposed amendments be killed so that more substantial ones could be adopted later).

be transgressed in much the same way that individual rights provisions, such as freedom of speech or the right to a jury trial, can be. Constitutional scholars are just beginning to examine why, if at all, structural constitutional provisions are more durable and efficacious than individual rights guarantees.<sup>194</sup> This question ought to be of enormous interest to anyone concerned with questions of constitutional design.

#### D. Judicial Review

Most constitutional lawyers will probably be shocked by the nearly complete absence from *Ratification* of any discussion of judicial review. This omission is not attributable to authorial judgment; rather, the topic rarely came up during the ratifying debates.

To claim that the Founders did not contemplate judicial review at all would be going too far. Delegates to the Philadelphia convention sporadically considered whether judges should have power to invalidate unconstitutional statutes, and of those delegates expressing an opinion, more favored the practice than opposed it.<sup>195</sup> Yet the topic attracted very little attention in Philadelphia and even less during the ratifying contest.<sup>196</sup>

Even when Antifederalists railed against the absence of a bill of rights from the Constitution, which they did frequently, they almost never said anything about judicial review.<sup>197</sup> It is stunning that when James Madison, in correspondence with his Virginia friend and mentor Thomas Jefferson, reviewed the arguments for and against a bill of rights, he seemed entirely blind to the possibility that judges would

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<sup>194</sup> See, e.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 694–97 (2011) (suggesting various factors that may explain the greater durability of institutional arrangements than of particular substantive commitments).

<sup>195</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 73 (2004); Ralph A. Rossum, *The Courts and the Judicial Power, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION*, *supra* note 130, at 222, 232–36.

<sup>196</sup> Maier identifies only two exceptions. Samuel Adams observed that courts would declare void “any federal laws that went beyond” Congress’s enumerated powers (p. 205). In response to Mason’s claim that federal court jurisdiction would expand dramatically under the Constitution because Article III vested federal courts with jurisdiction over cases “arising under federal law” and the scope of Congress’s authority to create federal law was vast, Marshall declared that federal judges would invalidate congressional statutes that exceeded Congress’s enumerated powers (p. 290). See also THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 62, at 466–68 (defending judicial review). For disagreement regarding whether one should be more struck by how much or by how little the topic of judicial review was discussed during the ratifying debates, compare KRAMER, *supra* note 195, at 78–83 (focusing on how little), with Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 956–74 (2003) (focusing on how much).

<sup>197</sup> For example, at the North Carolina ratifying convention, when Federalists and Antifederalists debated the necessity of a bill of rights, they did not mention the issue of judicial enforcement (pp. 417–19).

feel bound to enforce such constitutional provisions.<sup>198</sup> Only after Jefferson mentioned to him the notion that judges would enforce a bill of rights did Madison then deploy this argument as his own in congressional speeches urging a bill of rights.<sup>199</sup> Similarly, several passages in the *Federalist Papers* that seem to cry out for invocation of judicial review are silent on the topic.<sup>200</sup> Alexander Hamilton's famous discussion of judicial review in *The Federalist No. 78* appears almost as an afterthought.<sup>201</sup>

The trivial role played by judicial review in debates surrounding the framing and ratification of the Constitution ought to be relevant to modern constitutional lawyers and theorists for at least two reasons. First, it is a fascinating question why the Founding generation paid so little attention to judicial review, while we moderns pay so much. How much of this shift is attributable to the dramatic expansion of judicial power over the course of American history?<sup>202</sup> How much is attributable to the gradual replacement of the Founders' skepticism that judicial enforcement would make individual rights guarantees any less "parchment barriers" with a modern commitment to the romantic image of heroic courts defending minority rights against majoritarian oppression?<sup>203</sup> Is it possible that the Founding generation was right to believe that individual liberty depends less on judicial enforcement of individual rights provisions and more on heterogeneity of interests among the citizenry, a culture of toleration, large legislative districts, and remotely accountable representatives?<sup>204</sup>

Second, the derisory role played by judicial review in Founding-era debates ought to be relevant to those scholars and judges who are committed to an originalist methodology of constitutional interpretation. Regardless of the original understanding of particular constitutional provisions, if the Founding generation was not especially focused upon judicial review, then originalist-minded judges and

<sup>198</sup> Letter from James Madison to Thomas Jefferson, *supra* note 69, at 271–75. For a description of Jefferson's response, which brought to Madison's attention the potential for judicial enforcement, see RUTLAND, *supra* note 67, at 196.

<sup>199</sup> See RUTLAND, *supra* note 67, at 202.

<sup>200</sup> Rossum, *supra* note 195, at 234–35.

<sup>201</sup> *Id.* at 234.

<sup>202</sup> For an exploration of the reasons for the increase in the Supreme Court's power over the first half of the nineteenth century, see Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1153–81 (2001).

<sup>203</sup> See generally Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996) (exploring the reasons for the persistence of this romantic image of the Court and seeking to debunk its accuracy).

<sup>204</sup> See THE FEDERALIST NO. 10 (James Madison), *supra* note 62, at 75–79; cf. LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY 155, 164 (Irving Dilliard ed., 3d ed. enlarged 1960) ("[A] society so riven that the spirit of moderation is gone, no court can save . . .").

scholars ought to be leery about calling for judicial enforcement of those provisions. Originalism is a controversial approach to constitutional interpretation for many reasons that have been adequately rehearsed elsewhere.<sup>205</sup> But one additional reason to be dubious of originalism is that its proponents have largely ignored the Founding generation's relative inattention to judicial enforcement of the Constitution.<sup>206</sup>

#### CONCLUSION

Pauline Maier has written an incisive, comprehensive, and sparkling narrative of the ratification of the American Constitution. It is a tale of extraordinary people who had ordinary interests and who disagreed among themselves about sound economic policy and the virtues of democratic decisionmaking. It is a story that ought to be of interest not only to lawyers, judges, and historians, but also to all Americans committed to understanding, rather than fetishizing, our nation's founding.

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<sup>205</sup> See generally, e.g., Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997) (noting the problems of dead hand rule, varying levels of generality at which the Framers' intentions can be accurately stated, and the Founders' exclusionary conception of the body politic); see also Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

<sup>206</sup> Even to the extent that the Founders did contemplate judicial review, it was generally with sufficiently stringent qualifications to render their conception impossible to reconcile with today's practice. See Klarman, *supra* note 202, at 1120-21 (noting that the Founding generation would have understood judicial review as limited to matters of special judicial concern and to instances of concededly unconstitutional laws).