Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance

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Abstract

This Article explores the relationship between the Council of Revision and the Bill of Rights. The Council of Revision, proposed at the Constitutional Convention by James Madison and the other Virginia delegates as part of the "Virginia Plan," would have been comprised of the President and several prominent members of the federal judiciary. Its task would have been to review the work of Congress and to exercise a qualified veto over those congressional acts with which it disagreed. The Council's qualified veto was intended to be a replacement for, rather than an addition to, the judicial review of constitutional questions. The authors of the Virginia Plan preferred the Council over judicial review because the Council would have represented the combined judgment of two branches of government and because its veto would have been subject to an override by Congress. These features of the Council increased the likelihood that the American people would have accepted the Council as a restraint on the political body with which they were most likely to identify, the House of Representatives.

The Bill of Rights must be understood in the context of Madison's disappointment over the rejection of the Council of Revision at the Constitutional Convention. Madison's preference for the Council of Revision helps explain his initial aversion to judicial review and his reluctance to support early efforts to propose a bill of rights. Madison's subsequent decision to assume the leading role in the enactment of the Bill

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of Rights, furthermore, is attributable in large part to the ways in which he ultimately came to view the Bill of Rights (and judicial review) as a functional equivalent to the Council of Revision. By the Spring of 1789, this Article argues, Madison had come to believe that a bill of rights could help provide the work of the judiciary with the very quality he feared that it most lacked after the Council’s demise: legitimacy in the eyes of the American people.

In addition to contributing to our historical understanding for the origins of the Bill of Rights, Madison’s commitment to the Council of Revision is worth considering today because it invites us to re-examine our own conceptions of judicial review and to explore the various ways in which the work of the judiciary can be harmonized with the tenets of representational democracy. In particular, the Council challenges us to consider the extent to which the work of the judiciary should be conceptualized as a representational enterprise rather than as a “countermajoritarian” endeavor.

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INTRODUCTION

The Constitutional Convention of 1787 was originally scheduled to begin on May 14. It did not start on time. For a variety of reasons including the weather, the difficulties of travel, and the ambivalence many Americans felt toward the project, a sufficient number of delegates did not convene in Philadelphia until May 25. While the delay irked some of the punctual delegates, it gave others a crucial opportunity to cultivate alliances prior to the start of the Convention. Taking full advantage of the

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1 The Convention was scheduled to begin on “the second Monday in May,” according to the congressional resolution that confirmed the call for a Convention that had issued from the abortive Annapolis “convention” of 1786. See Resolution of Congress of February 21, 1787, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 13, 14 (Max Farrand, rev. ed., 1937) [hereinafter RECORDS OF THE FEDERAL CONVENTION]. Of course, that was not the only provision in the congressional resolution that the Philadelphia Convention failed to satisfy. The congressional resolution stipulated that the Philadelphia Convention was to meet “for the sole and express purpose of revising the Articles of Confederation ....” Id. at 14. For the relationship between the Annapolis Convention and the Philadelphia Convention, see generally CLINTON ROSSITER, 1787: THE GRAND CONVENTION 54-55 (1966).

2 See RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 22-23 n.2 (2009) (discussing causes for the delegates’ delay). As one indication of the ambivalence that some felt toward the Philadelphia Convention, the state legislature of New Hampshire delayed its delegates’ arrival in Philadelphia by refusing to fund their travel. See ROSSITER, supra note 1, at 81 (“[I]t seems clear that inertia, isolation, suspicion, and apathy, which were obstacles to the hopes of nationalists in almost every state, came close to a demoralizing victory in [New Hampshire].”). New Hampshire’s two delegates, John Langdon and Nicholas Gilman, eventually arrived in Philadelphia on July 23 at their own expense. Id.

3 James Madison, in particular, took advantage of the delay to confer with a variety of delegates. He arrived in Philadelphia on May 3, 1787. See BEEMAN, supra note 2, at 22. Madison was particularly eager to meet with the Pennsylvania delegates, such as Benjamin Franklin, Robert Morris, Gouverneur Morris, and James Wilson, who were sympathetic to Madison’s ambition to abandon, rather than
delay, for example, James Madison and his Virginian colleagues caucused throughout the week leading up to the Constitution and formulated the outline of a new constitutional structure for the young nation.4

The "Virginia Plan," as the work of the Virginia delegates became known, was introduced on the first substantive day of debate at the Convention.5 Although it was not the only proposal offered at the beginning of the Convention,6 the prestige of the Virginia delegation helped ensure that the Virginia Plan constituted the working model for the Convention's early discussions.7 The Plan was instrumental in enabling the Virginia delegates, particularly James Madison, to seize the initiative at the

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4 See Letter from George Mason to George Mason, Jr. (May 20, 1787), in 3 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 23 ("The Virginia deputies [who are all here] meet and confer together two or three hours every day, in order to form a proper correspondence of sentiments.").

George Mason was the last of the Virginia delegation to arrive, on May 17. See id. at 22-23. The timely arrival of the Virginia delegates was probably attributable, in least in part, to Madison's desire to confer before the Convention. See, e.g., Letter from James Madison to Edmund Randolph (Apr. 15, 1787), in 9 THE PAPERS OF JAMES MADISON 379 (William T. Hutchinson et al. eds., 1961) [hereinafter PAPERS OF JAMES MADISON] (urging Randolph to meet Madison in Philadelphia prior to the start of the Convention). Beeman posits that some of the Pennsylvania delegates were regular participants in these meetings among the Virginians and contributed significantly to the formulation of the Virginia Plan. Beeman, supra note 2, at 54-57, 54 n.26; id. at 87 ("The [Virginia plan was largely Madison's handiwork, although Madison himself insisted that it was the result of a 'consultation among the deputies,' by which he meant the collection of Virginians and Pennsylvanians who had gathered in Philadelphia before the Convention."). Madison's correspondence, however, refers only to the Virginia delegates. See, e.g., Letter from James Madison to John Tyler (unsent), in 3 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 525 ("The Resolutions proposed by [Randolph], were the result of a Consultation among the Deputies, the whole number, seven being present. The part which Virga. had borne in bringing abt. the Convention, suggested the Idea that some such initiative step might be expected from her Deputation.").

5 The Virginia Plan was introduced at the Convention on Tuesday, May 29, 1787. 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 18-23. The opening day of the Convention, Friday, May 25, 1787, was largely spent on the presentation of credentials, the election of George Washington as President of the Convention, and the election of a committee to propose a set of rules. See ROSSITER, supra note 1, at 161-63. On Monday, May 28, 1787, the Convention's time was consumed with the adoption of a set of rules and procedures, perhaps the most famous of which was the strict imposition of secrecy. Id. at 166-68; BEEMAN, supra note 2, at 79-85.

6 A plan by Charles Pinckney was also introduced on May 29. See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 23. The original version of Pickney's Plan has never been recovered, but its basic contents can be reconstructed from the references made to it by the other delegates. See, e.g., 3 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 595-609. The influence of Pickney's Plan on the Convention is a matter of ongoing debate among historians. See, e.g., BEEMAN, supra note 2, at 93-98; CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787, 87-101 (1986).

7 See, e.g., BEEMAN, supra note 2, at 99 ("When the delegates reconvened at ten o'clock on the morning of May 30, the Virginians and Pennsylvanians made certain that it would be Randolph's resolutions, and not Pickney's, that would form the main topic of business."). The seven Virginia delegates were: George Washington, James Madison, Edmund Randolph, George Mason, George Wythe, John Blair, and James McClurg. See ROSSITER, supra note 1, at 118-26 (summarizing Virginia delegates).
Convention and to define the initial framework of the deliberations. Madison’s ability to influence the Convention’s ideological approach, along with his repeated defenses of the Plan’s various provisions throughout the Convention, have earned him the moniker by some as the “father” of the Constitution. One indication of the Virginia Plan’s importance to the Convention’s proceedings can be found in the number of the Plan’s provisions that ultimately found their way into the Constitution. Aspects of the Virginia Plan that survived into the Constitution of 1787 include bicameralism, the direct operation of the federal government on the people at large, age requirements for congressmen, life tenure for the federal judiciary, and the Guarantee Clause.

The Virginia Plan was not, however, an unqualified success. Several important features of the Plan were squarely rejected at the Convention and the Constitution itself bears the signature of only three of Virginia’s seven delegates. Madison himself, even though he signed the document, was

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8 See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 59 (1996) (“Introduced by Governor Edmund Randolph on May 29, the Virginia Plan formed the basis of the Convention’s first fortnight of debate.”); see also LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 138 (1995) (“[Madison] was primarily responsible for the preliminary propositions that initiated the creation of a federal republic and served throughout the summer as the outline for reform.”).

9 See, e.g., KETCHAM, supra note 3, at 229 (“In attending to every detail of this structure, and in being sensitive at every point to the effect of blending the various parts, Madison played his most critical role, and earned the title later bestowed upon him, Father of the Constitution.”).

10 Compare Virginia Plan, Res. 3, 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 20 (bicameralism); id., Res. 4 & 5, at 20 (age requirements); id., Res. 6, at 21 (empowering Congress to legislate directly); id., Res. 9, at 21-22 (judicial life tenure); and id., Res. 11, at 22 (Guarantee Clause), with U.S. CONST. art. I, § 1 (bicameralism); id., art. I, §§ 2-3 (age requirements); id., art. I, § 8 (empowering Congress to legislate directly); id., art. III, § 1 (judicial life tenure); id., art. IV, § 4 (Guarantee Clause). Many of these concepts, to be sure, were not invented by the Virginia delegates. Every state except Pennsylvania and Georgia, for example, employed a bicameral legislature at the time of the Convention. See DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL 88 (1980). Under the Articles of Confederation, however, Congress did not. See R.B. BERNSTEIN, THE FOUNDING FATHERS RECONSIDERED 68 (2009) (explaining that each state had one vote in the Confederation Congress). Perhaps the most unique or revolutionary aspect of the Virginia Plan was its proposal that the national government legislate directly upon the American people, rather than upon the states and only indirectly to the American people. See id. at 63 (“Modern students of the U.S. Constitution hail federalism as its most creative feature - yet federalism was a byproduct of individual decisions by the Federal Convention rather than a carefully devised system of relations between the federal government and the states.”).

11 John Blair, James Madison, and George Washington were the three Virginia delegates to sign the Constitution. See U.S. CONST. (signature page). Edmund Randolph and George Mason remained until the end of the Convention but chose not to sign the document. See BEEMAN, supra note 2, at 355-58. At the Virginia Ratifying Convention, Randolph decided to support the Constitution while Mason became one of the leading Antifederalists opposing ratification. See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 255-91 (2010). The two other Virginia delegates who failed to sign the Constitution, James McClurg and George Wythe, were not at the Convention on the day that the document was signed. Wythe had been called away much earlier by the
severely disappointed with the ways in which the Constitution deviated from the Virginia Plan. 12

This article will focus on one of the important aspects of the Virginia Plan that was discarded at the Convention. Resolution Number 8 of the Virginia Plan provided that the new federal government was to include a “Council of Revision” comprised of the federal executive and a select number of the federal judiciary. 13 The Plan’s Council of Revision would have been responsible for reviewing the work of Congress and would have exercised a qualified veto over all congressional acts (including both legislation and congressional vetoes of state legislation). 14 Much like the Constitution’s executive veto (which was derived from the Council of Revision), the Council’s veto could have been based either on policy or constitutional grounds and would have been subject to an override by a supermajority of Congress 15.

The Virginia Plan’s Council of Revision remains an important subject of study today for at least two reasons. First, from a historical perspective, the Council of Revision is essential to our understanding of the origins of the Bill of Rights. The Virginia Plan and the Bill of Rights are inextricably linked together in history because they share the same principal author, James Madison. 16 James Madison was the driving force behind the first Congress’ decision to adopt amendments and it is difficult to know when (if ever) Congress would have proposed a bill of rights without his leadership and influence in 1789. 17 The Bill of Rights must therefore be

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12 See infra notes 221-222 and accompanying text.
13 See Virginia Plan, Res. 8, 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 21. For the number of federal judiciary intended to sit on the Council, see infra note 105.
14 The Virginia Plan provided that the Council’s “dissent” from congressional action would “amount to a rejection” unless the congressional act was again passed by a supermajority (left unspecified under the Plan). Virginia Plan, Res. 8, 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 21.
15 See infra notes 104-120 and accompanying text.
16 See infra note 111 and accompanying text (Council of Revision) and notes 341-344 and accompanying text (Bill of Rights).
17 See, e.g., RAKOVE, supra note 8, at 330 (“For were it not for Madison, a bill of rights might never have been added to the Constitution. . . . Nearly all Madison’s colleagues in Congress thought the entire subject could be deferred until the new government was safely operating, by which point the
understood in the context of Madison’s disappointment over the rejection of the Council of Revision at the Constitutional Convention.

Madison’s initial reluctance to support a bill of rights, for example, is largely attributable to the ways in which the judiciary’s role under the Constitution differed from the role he had attempted to create for it through the Council of Revision. Madison believed that the Constitution’s form of judicial review would prove an ineffective and possibly counterproductive mechanism for restraining Congress. He was confident that the American people would identify most strongly with their elected officials in Congress, particularly in the House of Representatives, and would not countenance an unqualified check in the hands of the judiciary. Without the Council of Revision, Madison believed the Constitution’s structure of governance was likely to suffer the same “democratic excesses” that had plagued the states in the period leading up to the Convention.

It is the contention of this article that the Bill of Rights must be understood in the context of Madison’s desire to reclaim some of the ground that he had lost at the Convention when the Council had been rejected. Specifically, this article will argue, Madison had come to believe by the spring of 1789 that a bill of rights might help provide the work of the judiciary with the crucial quality that he feared it most lacked after the Council’s demise: political legitimacy in the eyes of the American polity. Madison hoped that this additional legitimacy might enable the judiciary to perform, albeit less elegantly, the same function the Council had been intended to serve in his constitutional structure. In particular, Madison hoped that judicial review based on a bill of rights could help refine the majoritarian process by interjecting additional opportunities for
deliberation and rationality. Madison's preference for the Council, however, strongly suggests that his support for the Bill of Rights was not premised on the notion that the judiciary would wield an absolute veto. Instead, his support appears to have been based on a faith that the practical limitations of the judiciary's political legitimacy would constrain the judiciary to its proper place within the constitutional structure.

The second reason the Council of Revision is worth studying stems from the ways in which it challenges our own assumptions about the proper role of the judiciary in a democratic society. Most theoretical frameworks for constitutional interpretation today conceptualize the judiciary's work as a "countermajoritarian" enterprise. As a result, the presumption is that the judiciary should strive to stand "above politics" in order to base its decisions on "legal" principles rather than political considerations. According to this view, the appointment and the life-tenure of the federal judiciary disqualifies it from a policymaking role and the legislative process altogether. The Council of Revision reveals that Madison and the rest of the Virginia delegates conceptualized the judiciary and its role within democratic governance in quite different terms. Far from disqualifying it from a policy making role, the judiciary's appointment and life tenure were viewed by Madison and the other Virginia delegates as qualifications that would have enabled the judiciary to contribute a level of deliberation and rationality to the legislative process itself. Under the Virginia Plan,

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23 This Article is concerned primarily with Madison's views regarding judicial review in the context of separation of powers (particularly with respect to the relationship between the judiciary and Congress). This focus, however, is not intended to suggest that federalism concerns did not play a leading role in the development of judicial review at the Convention and afterwards. See infra notes 213-218 and accompanying text.

24 See infra note 362 and accompanying text.

25 See infra notes 363-364 and accompanying text.

26 During the confirmation proceedings for Supreme Court Justice Elena Kagan, Senator Grassley of Iowa articulated this understanding of the judicial task:

Our goal is to see if you will exercise judicial restraint. We want to know that you will exercise the preeminent responsibilities of a Justice by adhering to the law and not public opinion. Policy choices need to be reserved for those of us elected to the legislative branch of Government. It is our duty to confirm a nominee who has superior intellectual abilities but, more importantly, it is our duty to confirm a nominee who will not come with a results-oriented philosophy or an agenda to impose his or her personal politics and preferences from the bench.

approximately three fourths of the federal government would have been appointed. The Virginia Plan’s mixture of elected and appointed officials was intended to create a structure of governance that was fundamentally democratic but which would function in a more deliberate and judicious manner than one based entirely on direct elections. By assigning primacy to the role of Congress, and particularly to the electorally accountable House of Representatives, the Virginia Plan maintained the democratic legitimacy of the structure as a whole despite the integration of the judiciary in the legislative process.

The Council was narrowly rejected at the Convention but its rejection was not based on the types of considerations that have led modern commentators to criticize the institution. No one at the Convention, for example, argued that it was improper for appointed officials to play a role in the legislative process. In fact, the original Constitution relied more heavily on the appointment process than the Virginia Plan. In the end, a slim majority of the delegates voted against the Council largely because they had more faith than the Council’s proponents in the executive’s ability to exercise the veto and because they chose to assign a central place to judicial review in the federalism context. It would be anachronistic, therefore, to interpret the Council’s rejection as a vindication of the modern conception of judicial review. Judicial supremacy, a foundational tenet of most modern schools of constitutional interpretation, was largely an invention of the late nineteenth and early twentieth centuries.

This article is not intended to suggest that we are bound by Madison’s original conceptualization of judicial review, or the Bill of Rights, simply by virtue of his role at the nation’s founding. History should not constrain the choices we make about our institutions today so much as enlighten those choices by providing a fresh perspective from which to assess them. To recognize the ways in which many of the Framers’ ideas about the judiciary and judicial review contradict our own assumptions is to invite an important normative inquiry. Have we constructed a constitutional...
paradigm that is optimal for our current society? Or, conversely, have we created a paradigm that is damaging to our society in ways that are difficult for us to detect? It is my hope that a study of the Council of Revision may provide an additional perspective with which to make that inquiry.

This article will begin in Section I with an analysis of the Council of Revision and the judiciary’s role within the constitutional framework of the Virginia Plan. Section II will address the Council of Revision’s fate at the Constitutional Convention and the reasons why it was narrowly rejected. Section III will then argue that the Bill of Rights must be understood in the context of the Council of Revision because of the ways in which the Bill of Rights represented an effort by James Madison to compensate for the Council’s rejection in 1787. The Conclusion will sketch out a few of the normative implications for the study of the Council with respect to our understanding of the judiciary and its proper role in a modern democracy.

I. THE COUNCIL OF REVISION AND THE JUDICIARY’S ROLE UNDER THE VIRGINIA PLAN

A. The Call for a Convention

The Constitutional Convention of 1787 was precipitated by the disenchantment many Americans felt toward their national and state governments.34 As Americans labored to realize the potential of democracy (for themselves as well as the world they believed was watching), the political developments of the 1780s were leading many of the nation’s political elites to question the fundamental tenet of democracy: that the people were capable of responsibly governing themselves.35

34 Historians agree that the Philadelphia Convention was animated by concerns at both the national and state levels. Historians disagree, however, about the relative significance of those concerns. For the view that the overriding concern stemmed from a disenchantment with the failings of democracy at the state level, see, for example, RAKOVE, supra note 8, at 29 (“When enlightened leaders like James Madison or Alexander Hamilton fretted about the general condition of the Republic, they increasingly worried less about the ‘imbecility’ of Congress than about the shortcomings of the individual governments of the states.”). For an example of an alternative view, see BANNING, supra note 8, at 78 (“Preoccupied with Madison’s alarm about abuses in the states, most interpreters have overlooked his claim that many of the most distressing of these evils could be traced to the debilities of the Confederation.”).

35 Many Framers believed that the fate of modern democracy was closely tied to the success (or failure) of the United States. See, e.g., RAKOVE, supra note 8, at 14 (“It is evident, too, that the delegates believed that what they did would have lasting implications not only for their constituents but for a larger world. No one dissented when Madison and Hamilton both observed that the decisions of the Convention were destined to ‘decide for ever the fate of Republican Government.’”) (quoting 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 423-24).
One of the most criticized “failings” of democracy during the period leading up to the Convention related to the states’ experimentation with paper money legislation. 36 For many of the nation’s elites, the paper money issuances of the 1780s constituted a short-sighted and fundamentally unjust effort by the various state legislatures to defraud creditors of their rightful returns. 37 This was perceived not only as an unjust taking of property from creditors but also as a threat to the health of the states’ economies, which depended so heavily upon the availability of credit. 38 In the absence of congressional authority over interstate commerce, furthermore, there was

36 Seven state legislatures—Pennsylvania (1785), South Carolina (1785), North Carolina (1785), New York (1786), New Jersey (1786), Georgia (1786), and Rhode Island (1786)—enacted some form of paper money legislation during this period. See Merrill Jensen, The New Nation: A History of the United States During the Confederation 1781-1789, at 316-26 (1950). Under most of these laws, paper money was issued as interest payments on state debts and as mortgage loans on farms and real estate. Id. New York’s legislation was fairly typical of the legislation passed at this time. New York issued £200,000 in paper, £150,000 of which was loaned on real estate and £50,000 of which was used to pay part of the interest due on the state and national debt owned by New York citizens. Id. at 321.

One of the principal criticisms of the paper money legislation was the fact that the currency tended to depreciate rapidly in value. The issuances in North Carolina, New Jersey, Georgia, and Rhode Island were particularly troubled. See id. at 320 (stating that North Carolina issuance was marked by difficulties and significant depreciation); id. at 322-23 (describing refusal of New York City and Philadelphia merchants to accept New Jersey paper money and consequential substantial depreciation); id. at 323 (describing immediate depreciation of Georgia’s money, which lost seventy-five percent of its value within one year); id. at 323-25 (describing difficulties of Rhode Island issuance).

37 See Rakove, supra note 8, at 44 (“The emission of an unsecured currency amounted to an ‘unjust’ . . . assault on the rights of property; the more popular such measures appeared, the more [James Madison] fretted that Americans were supporting a policy that would ‘disgrace Republican Govts. in the eyes of mankind.’”) (quoting Letter from James Madison to James Madison, Sr. (Nov. 1, 1786), in 9 Papers of James Madison, supra note 4, at 153-154); Gordon S. Wood, Creation of the American Republic, 1776-1787, at 404 (1998) [hereinafter Creation] (“An excess of power in the people was leading not simply to licentiousness but to a new kind of tyranny, not by the traditional rulers, but by the people themselves—what John Adams in 1776 had called a theoretical contradiction, a democratic despotism.”); Gordon S. Wood, The Radicalism of the American Revolution 252 (1991) (“As far as [the political elites] were concerned, all the paper money and debtor-relief legislation of the states were simply the consequence of men using government to promote their private interests at the expense of the public good.”). Of course, the proponents of paper money legislation viewed the matter in quite different terms. See, e.g., Gordon S. Wood, The Idea of America: Reflections on the Birth of the United States 138 (2011) [hereinafter The Idea of America] (“These calls for paper money in the 1780s were the calls of American business. The future of America’s entrepreneurial activity and prosperity lay . . . with the thousands upon thousands of ordinary traders, petty businessmen, aspiring artisans, and market farmers who were deep in debt and were buying and selling with each other all over America.”).

38 See Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy 74 (1990) (summarizing the views of the Framers as being that “[n]o one would want to risk money in ventures in a country whose government could not be relied upon to uphold the just rights of property”).
little to prevent the states from retaliating against one another through acts of economic protectionism.\textsuperscript{39}

State efforts to deprive foreign creditors (particularly British creditors) of an opportunity to collect their American debt implicated the nation's foreign relations and threatened to embroil the nation in a trade war (or worse) with Great Britain.\textsuperscript{40} Arguably these state impediments constituted a violation of the Treaty of Paris of 1783 and Britain retaliated by refusing to comply with some of its obligations under the treaty.\textsuperscript{41} Among other things, Britain refused to relinquish its forts in the Northwest Territory.\textsuperscript{42} Each state's ability to unilaterally destabilize the nation's foreign relations, furthermore, only highlighted the infirmities of the national government under the Articles of Confederation. European powers could afford to discriminate against or impede American commerce without fear of reprisal from a weak Congress.\textsuperscript{43} Even small and seemingly inconsequential states appeared capable of denigrating American interests with impunity.\textsuperscript{44}

\textsuperscript{39} See, e.g., \textsc{Beeman, supra} note 2, at 19 ("The Articles of Confederation lacked any provision permitting the American government to impose uniform commercial regulations among the states. As a consequence, the individual American states frequently fell into destructive competition with one another. Virginia and Maryland argued over navigation rights on the Potomac River, disputes between New York and the Vermont territory occasionally erupted into violence, and several of the states imposed onerous restrictions on interstate commerce.").

\textsuperscript{40} British merchants were owed large prewar debts, particularly by Southern planters, and the debts had been impossible to collect during the war. During the Revolutionary War, at least nine states had enacted legislation that sequestered debts or obstructed their collection. See \textsc{Dwight F. Henderson, Courts for a New Nation} 72 (1971).

\textsuperscript{41} Article IV of the treaty required that "creditors on either side shall meet with no lawful impediment" to the recovery of debts previously contracted in good faith. The Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 8 Stat. 80. Similarly, Article V required that the American Congress recommend to the individual states that they permit loyalists and British subjects to be able to sue for the recovery of confiscated property. \textit{Id.} at art. V, 8 Stat. 80, 82.

\textsuperscript{42} See \textsc{Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789-1815}, at 112 (2009). Britain justified its refusal to comply with the treaty's requirement that it surrender its northwestern forts by noting that the United States had failed to comply with the treaty requirements regarding British creditors. \textit{Id.} British occupation of these forts was of crucial significance to many Americans. It allowed the British both to control the important water passage between the Great Lakes and the St. Lawrence River—upon which many Americans hoped to ship their goods—and to continue to supply and support Indian tribes that were in conflict with Americans settling west of the Appalachians. See \textit{id.}

\textsuperscript{43} See \textsc{Banning, supra} note 8, at 65 ("[P]rofoundly troubled by repeated state and federal failures to retaliate effectively against the Europeans, [Madison] had voted [in 1786] for a general convention to consider better regulation of the nation's foreign trade."); \textsc{Rakove, supra} note 8, at 27 (discussing concerns by many in the South that weakness of Confederation could facilitate Spain's closing of the Mississippi to navigation).

\textsuperscript{44} See \textsc{Wood, supra} note 42, at 634 ("In 1785 Algiers, encouraged by Great Britain, captured two American ships and did enslave their crews. Lacking any resources, financial or otherwise, to retaliate, the Confederation Congress remained helpless...."); \textsc{Rossiter, supra} note 1, at 45 ("Of all the
The result was that many American elites had come to believe by the mid-1780s that a fundamental reevaluation of the nation’s overarching political structure had become necessary. In 1786, James Madison and eleven other delegates from five states met in Annapolis to explore ways in which Congress’ powers could be augmented with respect to interstate commerce. While such a small body lacked the mandate to propose fundamental changes to the Articles of Confederation, the Annapolis delegates pressed their tenuous mandate by issuing a call to all the states to send delegations to a subsequent Convention to meet the next year in Philadelphia.

The Annapolis Convention’s appeal for constitutional change gained additional momentum when the cradle of the American revolutionary movement, Massachusetts, suffered an armed conflict between its own citizens. For those who believed in the need for pervasive change, Shays’ impulses that drove men like Washington and Hamilton to Philadelphia in 1787, none was stronger than the uncomplicated, patriotic sense of shame at the contempt in which the United States seemed to be held—from Britain at one end of the scale of power to the Barbary states at the other.

Arguably the deficiencies of Congress on the national (and international) level were not sufficient, in themselves, to require the kind of pervasive overhaul of the nation’s political structure that most at the Convention were prepared to undertake. At the Constitutional Convention, Madison argued that one of the fundamental purposes of the Constitution was to “secure a good internal legislation & administration to the particular States.” Madison observed that:

In developing the evils which vitiate the political system of the U.S. it is proper to take into view those which prevail within the States individually as well as those which affect them collectively. Since the former indirectly affect the whole; and there is great reason to believe that the pressure of them had a full share in the motives which produced the present Convention.

1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 318 (June 19). It is likely that the majority of delegates agreed with Madison’s assessment. See, e.g., WOOD, CREATION, supra note 37, at 475 (“The Federalists of the late eighties wanted and believed they needed much more than the nationalists of the early eighties had sought. Their focus was not so much on the politics of the Congress as it was on the politics of the states. . . . The supporters of the new federal Constitution thus aimed to succeed where the states, not the Confederation, had failed . . .”).


47 For an historical account of Shays’ Rebellion, see DAVID P. SZATMARY, SHAYS’S REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980); ROBERT J. TAYLOR, WESTERN
rebellion was portrayed as a prime example of the precariousness of America's experiment with democracy. George Washington summarized the mood of many committed nationalists in the fall of 1786:

[The disturbances associated with Shays' Rebellion] exhibit a melancholy proof of what our transatlantic foe have predicted; and of another thing perhaps, which is still more to be regretted, and is yet more unaccountable; that mankind left to themselves are unfit for their own government. I am mortified beyond expression whenever I view the clouds which have spread over the brightest morn that ever downed upon any Country.

The armed rebellion of a segment of society in Massachusetts suggested that the divisions within American society might be too intractable to be resolved politically under the existing constitutional structure. Whichever segment of society found itself in the majority, it seemed, was determined to take advantage of its power to the detriment of others. The inevitable result appeared to be a vicissitude of injustices as electoral fortunes shifted back and forth or, worse yet, armed civil conflict in the event that electoral victories proved too permanent.

When the Philadelphia Convention met in May of 1787, James Madison and many others were prepared to press for a wholesale repudiation of the Article of Confederation and a systemic change in the nation's

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49 See, e.g., BEEMAN, supra note 2, at 18 ("[F]or those who cared about the fate of America, not as a loose collection of states and localities but, rather, as a single nation-particularly those who had seen firsthand the deficiencies of the continental government-the developments of late 1786 and early 1787 seemed ominous indeed. Shays' Rebellion convinced many of America's most influential people that something drastic needed to be done to save their experiment in liberty and union.").


51 See, e.g., RAKOVE, supra note 8, at 314 ("[Madison's] concern about the security of private rights was rooted in a palpable fear that economic legislation was jeopardizing fundamental rights of property. Paper-money laws, debtor-stay laws, and the specter of Shays' Rebellion in Massachusetts all alarmed him terribly.").

52 See WOOD, CREATION, supra note 37, at 404 ("The confiscation of property, the paper money schemes, the tender laws, and the various devices suspending the ordinary means for the recovery of debts... were... laws enacted by legislatures which were probably as equally and fairly representative of the people as any legislatures in history.").
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constitutional structure. For several years, Madison had delved into history, political philosophy, and constitutional theory in an effort to discern a political solution to the specific challenges facing American democracy in the 1780s. On the eve of the Constitutional Convention, he shared with his allies in Philadelphia a plan for constitutional governance that he hoped would save American democracy from itself.

B. The Constitutional Design of the Virginia Plan

1. The Congressional Veto over State Legislation

Madison's overarching vision was to construct a national structure of governance that was democratic at its core but which would function in a more deliberative and rational manner than the existing structure dominated by state legislatures. Central to Madison's plans was the creation of a new national government, which he believed had the potential to be intrinsically superior to the states by virtue of its larger domain.

Conventional political theory had taught that democracies could only succeed in relatively small states. For Madison, however, theory and experience both led to the opposite conclusion. Based on his review of

53 See BANNING, supra note 8, at 75 ("[T]he failings of the Union with the growing tendency of state majorities to sacrifice the general good to pressing, temporary interests would tighten in [Madison's] mind into a vision of a full-blown crisis of the Revolution. The conviction that these threats were linked . . . would be the crux of his proposals for sweeping constitutional reform.").

54 See, e.g., KETCHAM, supra note 3, at 174-89 (discussing Madison's studies and preparations between the winter of 1785-86 and the summer of 1787); RAKOVE, supra note 8, at 42-43 (same).

55 See, e.g., RAKOVE, supra note 8, at 34 ("The time had come, Madison concluded, not only to free the Union from its dependence on the states but to free the states from themselves by taking steps that would undo the damage done by the excesses of republicanism."); see also Charles F. Hobson, The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government, in THE NEW AMERICAN NATION, 1775-1820, at 217-18 (Peter S. Onuf ed., 1991) ("Madison regarded the crisis of the Confederation in the 1780s as foremost a crisis of republican government.... On the eve of the Federal Convention he sensed a widespread disillusionment with republicanism among Americans, but at the same time he saw a unique opportunity for introducing a new theory that would place republican government on a more secure and lasting foundation.").

56 In this respect, at the very least, Madison was a committed "nationalist." See BANNING, supra note 8, at 140-46. Under the Articles of Confederation, Congress could hardly claim to be a national government. Under the Articles, Congress had no power to coerce the states or legislate directly on the citizens. As a true confederation, the "national" political structure before the Constitution was more analogous to the United Nations' relationship today to its constituent members.

57 See, e.g., BANNING, supra note 8, at 204 ("On the authority of Montesquieu, opponents of the Constitution endlessly repeated that republican self-government was inappropriate for polities of great extent."); RAKOVE, supra note 8, at 49 ("[P]revious writers had argued that stable republics could survive only in small and socially homogeneous communities, where the underlying similarity of interests would reduce the temptation one part of the community might feel to exploit another, and thus encourage citizens to exercise the essential virtue of subordinating private interest to public good.").

58 See RAKOVE, supra note 8, at 47 ("One central conviction lay at the heart of [Madison's] analysis. Experience conclusively proved that neither state legislators nor their constituents could be
history and constitutional theory, as well as what he had personally observed of American politics during his career as a state and federal representative, Madison posited that the larger domain of the federal government could enable Congress to function in a more just and deliberative manner than its state analogues. The theory, well-known to all students of Madison’s political philosophy, was that majorities would find it difficult to coalesce around an issue or set of issues in Congress by virtue of the sheer scale of national politics. Madison believed that the myriad political, social, economic, and religious constituencies spread throughout the country would tend to negate each other’s political influence in Congress, thereby allowing Congress the opportunity and space to deliberate more rationally and evenhandedly than the state legislatures that were tied much more directly and immediately to the desires (and whims) of their electoral majorities. In addition, the

relaid upon to support the general interest of the Union, the true public good of their own communities, or the rights of minorities and individuals.”).

59 For the ways in which Madison’s experiences as a state and congressional representative prior to the Convention contributed to his constitutional theory, see BANNING, supra note 8, at 13-107; KETCHAM, supra note 3, at 68-174; JACK. N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 21-48 (3d ed. 2007).

60 One of Madison’s best summaries of this theory is contained in his Vices of the Political System, drafted in the Spring of 1787 prior to the Convention:

If an enlargement of the sphere is found to lessen the insecurity of private rights, it is not because the impulse of a common interest or passion is less predominant in this case with the majority; but because a common interest or passion is less apt to be felt and the requisite combinations less easy to be formed by a great than by a small number. The Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert.

James Madison, Vices of the Political System of the United States (Apr. 1787), in 9 PAPERS OF JAMES MADISON, supra note 4, at 356-57; see also THE FEDERALIST NO. 10, at 135 (James Madison) (Benjamin F. Wright ed. 1961) (“Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 84-86 (1988) (summarizing Madison’s theory of extended republic); RAKOVE, supra note 8, at 46-56 (same).

61 See, e.g., WOOD, THE IDEA OF AMERICA, supra note 37, at 150 (“[Madison] did not see public policy or the common good emerging naturally from the give-and-take of hosts of competing interests. Instead he hoped that these clashing interests and parties in an enlarged national republic would neutralize themselves and thereby allow liberally educated, rational men ... to promote the public good in a disinterested manner.”); see also THE FEDERALIST NO. 51 (James Madison), supra note 60, at 359 (“In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good....”)

One of Madison’s primary inspirations for his theory of the extended republic came from his own experiences combating religious favoritism and intolerance in Virginia. In that context, he personally
relatively small number of federal officials offered the prospect that federal legislators would be drawn from a better pool of candidates than the thousands of representatives who were sent by their constituents to the state legislatures. 62

Madison was evidently persuasive when he caucused with his Virginia colleagues on the eve of the Constitutional Convention because the Virginia Plan largely reflected his own political philosophy. 63 Among the major components of the Plan, for example, the Virginia delegates adopted a broad congressional veto over all state legislation. According to Resolution 6 of the Virginia Plan, Congress would exercise the power "to negative all laws passed by the several States, contravening, in the opinion of the National Legislature the articles of the Union . . ." 64

The veto contained in the Virginia Plan was central to Madison's constitutional structure. In fact, Madison preferred an even bolder version than that which was contained in the Virginia Plan. 65 At the Convention,
Madison argued that the congressional veto should be unlimited in scope.\textsuperscript{66} Developments at the state level during the period leading up to the Convention had convinced him that the deficiencies on the state level were so fundamental that only a remedy as drastic and complete as a congressional veto over all state legislation would suffice.\textsuperscript{67} Since the states' potential for mischief was so multi-faceted, an effective remedy would have to be equally all-encompassing.\textsuperscript{68} In the end, however, Madison had to be content to compromise the point with his Virginia colleagues and to press for a broader veto at the Convention.\textsuperscript{69}

The congressional veto over state legislation was a centerpiece to Madison's constitutional structure because he believed the national legislature would be superior to its state analogues.\textsuperscript{70} This superiority, it should be noted, was premised on the hope that Congress would be less, rather than more, democratically accountable than the state legislatures.\textsuperscript{71}

(emphasis added). The fact that Madison was willing to mirror the language of the dreaded Declaratory Act of 1766 ("in all cases whatsoever") is one indication of how committed he was to an unlimited congressional veto. See RAKOVE, supra note 8, at 51.

\textsuperscript{66} See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 164 (June 8) ("[Mr. Madison] could not but regard an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system.").

\textsuperscript{67} See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 PAPERS OF JAMES MADISON, supra note 4, at 212 ("Injustice may be effected by such an infinitude of legislative expediens, that where the disposition exists it can only be controuled by some provision which reaches all cases whatsoever.").

\textsuperscript{68} Id.

\textsuperscript{69} See Charles F. Hobson, in THE NEW AMERICAN NATION, 1775-1820, supra note 55, at 226 ("In one important particular [the Virginia Plan] did not go as far as he wished: instead of a negative 'in all cases whatsoever,' it provided that the power of the national legislature to veto state laws should be restricted to unconstitutional acts, a concession probably necessary to win the support of the entire Virginia delegation."). (emphasis added); see also BANNING, supra note 8, at 148 n.30. According to Madison, the Virginia delegates understood from the beginning that they were free to argue against the Plan where it deviated from their personal preferences. Letter from James Madison to John Tyler (unsent), in 3 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 525 ("It was perfectly understood, that the Propositions [i.e., the Virginia Plan] committed no one to their precise tenor or form; and that the members of the Deputation wd. be as free in discussing and shaping them as the other members of the Convention.").

\textsuperscript{70} See RAKOVE, supra note 59, at 60 (observing that congressional veto "lay at the heart of [Madison's] conception of the role the national government would play in preserving both the union of the states and the republican form of government."); see also Charles F. Hobson, in THE NEW AMERICAN NATION, 1775-1820, supra note 55, at 218 ("Of the reforms he offered at the Convention . . . none in Madison's view was more important than the one to vest the national legislature with the power to negative state laws.").

\textsuperscript{71} See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 PAPERS OF JAMES MADISON, supra note 4, at 214 ("If then there must be different interests and parties in Society; and a majority when united by a common interest or passion can not be restrained from oppressing the minority, what remedy can be found in a republican Government, where the majority must ultimately decide, but that of giving such an extent to its sphere, that no common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit."); see also RAKOVE, supra note 8, at 34 ("The time had come, Madison concluded, not only to free the Union from its dependence on the states..."
While Madison and the other Virginia delegates were deeply committed to the idea that true sovereignty in a democracy ultimately emanated from the people themselves, the overarching lesson gleaned from the state experiences in the period leading up to the Convention was that responsible governance required a constitutional structure that was not tied too directly or immediately to popular sentiment. A healthy degree of separation or distance between the representatives and the people would ensure that the representatives would have an opportunity to lead and shape, rather than simply slavishly follow, popular sentiment. This central idea accounts for Madison’s preference for Congress over the state legislatures and permeated his organizational structure for the federal government itself.

2. Separation of Powers within the Federal Structure

The challenge Madison and the Virginia delegates faced in constructing a new federal government was to find the proper balance between democratic legitimacy on the one hand and rationality and deliberation on the other. If there was too much separation between the governmental actors and the constituents they represented, the system as a whole could not truly be characterized as a democracy. If there was too little but to free the states from themselves by taking steps that would undo the damage done by the excesses of republicanism.

72 See RAKOVE, supra note 8, at 218 (“Madison’s bleak view of state politics suggested that their cumulative complaints were pulsing all too vigorously through the political system. The problem of representation was not to make legislators more accountable than they were already, but to find ways to dissipate the populist pressures of the people and improve the quality of lawmaking by reforming the character of the lawmakers.”); WOOD, CREATION, supra note 37, at 411 (“Yet the pressing constitutional problem was not really the lack of power in the state legislatures but the excess of it—popular despotism.”).

73 This was, after all, a primary advantage of representative, as opposed to direct, democracy. See THE FEDERALIST No. 10 (James Madison), supra note 60, at 133-34:

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.

74 RAKOVE, supra note 8, at 50 (”[Madison’s] ideas of federalism, representation, and the separation of powers—the crucial theoretical issues that the Convention would face—all reflected his disillusion with the failings of state legislators and citizens alike.”).

75 See, e.g., THE FEDERALIST No. 39 (James Madison), supra note 60, at 280-81 (“[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers
separation between the governmental actors and their constituents, by contrast, the government would inevitably suffer the same “democratic excesses” that had plagued the states in the period leading up to the Convention. The task was to construct a form of government that, as a whole, possessed the proper balance between responsiveness and rationality.

\textit{a. The House of Representatives}

Resolution 4 of the Virginia Plan called for the direct election of the members of the first branch of Congress. This first branch of Congress (which was subsequently incorporated in the Constitution as the House of Representatives) was the fulcrum of the Virginia Plan’s national government because it provided democratic legitimacy to the structure as a whole. For this reason, Madison believed that the members of this first branch of Congress should be directly elected by their constituents for relatively short terms in order to ensure that the body would directly reflect popular sentiment.

\begin{quote}
Mr. Madison considered the popular election of one branch of the national Legislature as essential to every plan of free Government. . . . That if the first branch of the general legislature should be elected by the State Legislatures, the second branch elected by the first - the Executive by the second together with the first; and other appointments again made for subordinate purposes by the Executive, the people would be lost sight of altogether; and the necessary sympathy between them and their rulers and officers, too little felt.
\end{quote}

\footnote{1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 49-50 (May 31).}

\footnote{76 THE FEDERALIST NO. 52 (James Madison), supra note 60, at 361 (“As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that [the House] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.”). When the issue of House terms was first raised, Madison proposed a three-year term. See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 214 (June 12). When Edmund Randolph proposed the two-year term, Madison argued that three years would be optimal in light of the fact that most Representatives would be forced to travel 700-800 miles between their districts and the seat of government. See id. at 360 (June 21).}
For the very reason that the people would identify so strongly with it, however, and for the very reason that this branch of the legislature was likely to be strongly tied to the vicissitudes of popular sentiment, Madison believed it was essential that this first branch of Congress be subject to the influence of less directly democratic elements. At the Convention and in *The Federalist*, Madison referred to the House as a “vortex” of power that threatened to overpower the other branches. As a result, the Virginia Plan proposed another house in Congress and two other branches of federal government that would be composed of members who were less directly accountable to the people but who would have the collective power to restrain the House’s ability to enact legislation.

**b. The Senate**

According to Resolution Number 5 of the Virginia Plan, the “second branch” of Congress (which was subsequently incorporated into the Constitution as the Senate) was to be appointed by members of the first branch (out of a pool nominated by the state legislatures). In addition, the members of this second branch of Congress were to receive “liberal stipends” and were to be given significantly longer terms than their counterparts in the House. Resolution Number 5 of the Plan provided that the members of the second branch would serve for terms long enough to

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80 Madison referred to the House as a “vortex” of power during the Convention as well as in *The Federalist* essays. See infra text accompanying note 121 (Madison’s speech at the Convention on July 21); *The Federalist* No. 48 (James Madison), *supra* note 60, at 343 (“The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”).

81 Rakove, *supra* note 46, at 360-61 (“The deep goal of [Madison’s] constitution making was not simply to assign powers and duties to institutions. It was also to foster the best deliberation possible. That required insulating the people’s elected representatives from the erratic currents of popular feeling that seemed to surge and swirl all too forcefully within the states. It also meant protecting the weaker branches of the executive and judiciary against the ‘impetuous vortex’ of legislative domination.”).

82 See Virginia Plan, Res. 5, 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 1, at 20 (“Resolld. that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures . . . .”). According to Madison, the Convention never considered the direct election of Senators. See, e.g., Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 PAPERS OF JAMES MADISON, *supra* note 4, at 209 (“In forming the Senate, the great anchor of the Government, the questions as they came within the first object turned mostly on the mode of appointment, and the duration of it. The different modes proposed were, 1. by the House of Representatives 2. by the Executive, 3. by electors chosen by the people for the purpose, 4. by the State Legislatures.”). In his observations on the proposed Kentucky constitution, Madison argued that the state’s senators should be appointed on a statewide basis rather than by districts in order to minimize the senators’ attachment to “local” interests. See James Madison, Observations on the “Draught of a Constitution for Virginia” (Oct. 15, 1788), in 11 PAPERS OF JAMES MADISON, *supra* note 4, at 285-89.

“ensure their independency.” The “independency” the authors of the Virginia Plan were seeking was from the people themselves. The Senators’ longer terms of office and their indirect election would provide the distance from popular sentiment required for their role as a foil to the more directly democratic branch of Congress (the House). Under the Virginia Plan, therefore, bicameralism provided a crucial check on the House of Representatives. At the very least, the Senate’s participation would slow the legislative process and allow opportunities for discussion and rational deliberation that might otherwise be missing were the House empowered to enact legislation on its own.

The Senate alone, however, could not be expected to balance the “vortex” of power that was the House of Representatives. The Virginia Plan provided that the Senate’s members were to be appointed by the House itself, eroding to some extent their ability and incentive to oppose the popular will expressed in the lower house. Madison therefore wanted

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84 Id. (specifying that members of the second house should “hold their offices for a term sufficient to ensure their independency”).
85 One could argue that the authors of the Virginia Plan were also seeking to ensure the Senators’ independence from the state legislatures, in light of the fact that Resolution 5 would have barred the Senators from concurrently serving in a state office. See id. at 21. This was a far more controversial proposition than ensuring the Senators’ insulation from the undue influences of the House and popular sentiment generally, since many of the Constitutional delegates were wedded to the idea that Congress’ function was to represent the states qua states. The New Jersey Plan (the Virginia Plan’s primary alternative at the Convention), for example, was premised on that notion. See BEEMAN, supra note 2, at 162 (“The architects of the New Jersey Plan plainly intended the executive to be a creature of the Congress and the Congress, in turn, to be a creature of the individual state governments.”). The deadlock between the proponents of the two plans was not resolved until the “Connecticut Compromise” on July 16. See id. at 218-25.
86 See, e.g., James Madison, Observations on the “Draught of a Constitution for Virginia” (Oct. 15, 1788), in 11 PAPERS OF JAMES MADISON, supra note 4, at 285 (“The term of two years [for Senators] is too short. Six years are not more than sufficient. A Senate is to withstand the occasional impetuosities of the more numerous branch. The members ought therefore to derive a firmness from the tenure of their places.”); see also THE FEDERALIST NO. 62 (James Madison), supra note 60, at 410 (“The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. . . [A] body which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.”).
87 See RAKOVE, supra note 8, at 41 (“Madison thought the establishment of a well-constructed Senate would provide the most effective check against the danger of faulty legislation.”).
88 See, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 114 (2004) (“Among the principle benefits of federalism and separation of powers (not to mention the extensive size of the Republic) were thought to be that these complicated and slowed politics long enough for reason to prevail.”).
89 See supra note 82 and accompanying text.
to utilize the other two branches to slow down the legislative process even further and to provide additional safeguards against the House.\(^9\)

c. The Executive and the Judiciary

As with the Senate, the Virginia Plan provided that both the executive and the judiciary should enjoy secure salaries and relatively long terms of office in order to help ensure the requisite level of independence from both the House and the people. Resolution Seven of the Plan provided that the executive would be appointed by Congress and would “receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution[.]”\(^9\) The Virginia Plan failed to specify the length of the executive’s term but the earliest proposal at the Convention would have provided the executive with a seven-year term.\(^9\) Similarly, Resolution Nine of the Virginia Plan provided that the judiciary would be appointed by Congress, would possess their offices “during good behaviour,” and would enjoy the same form of salary protection as the executive.\(^9\) Resolution Nine would appear to represent another

\(^9\) See, e.g., LUTZ, supra note 10, at 198-99 (“To control the effects of ill-considered majorities, Madison constructed the now-famous theory of the extended republic, coupled with the fracturing of government itself into competing factions through the separation of powers, and checks and balances. .. Forcing delay, enhancing due deliberation, replacing quick decision making with a slower system that permits all factions to bring their interests to bear, enhances the probability that the experiments undertaken will be well-considered and conducive to the long-run interest of the entire nation.”).


\(^9\) See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 68-69 (June 1). Some delegates argued for a shorter term (such as three years) and the vote on June 1 in favor of the seven-year term was very close (five states voting yes, four voting no, and one divided). Id. George Mason argued in favor of the seven-year term on June 1 but with the caveat that the executive should be ineligible for a second term. Id. at 68.

\(^9\) See Virginia Plan, Res. 9, 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 21-22. The accuracy of Madison’s notes with respect to the Virginia Plan is more contested with respect to Resolution 9 than any other resolution. According to Madison’s notes, the first sentence of Randolph’s original Resolution 9 read:

“Resd. that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution.”

Id. Max Farrand believed that this wording likely represented the original Virginia Plan, as it was read to the Convention on May 29, 1787. See 3 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 593-94. John Franklin Jameson, by contrast, was convinced that Madison failed to transcribe the Resolution verbatim and that the first sentence of the original Resolution 9 more likely read as follows:
compromise between Madison and the other Virginia delegates because Madison argued during the Convention that the judiciary should be appointed by the Senate rather than by Congress as a whole.\(^9\)

Providing the executive and the judiciary with a level of insulation from political and popular pressures was a relatively straightforward proposition. The real difficulty lay in constructing an institutional mechanism that would allow these two branches to appropriately and effectively restrain the House.\(^9\) Madison feared that neither the executive nor the judiciary would possess sufficient political strength to counterbalance the House.\(^9\) The very features of these two branches that most equipped them to provide rationality and deliberation to the governing process (e.g., appointment, longer terms, and salary protection) also served to limit the powers they could expect to exert within a democracy. The judiciary’s life tenure helped insulate it from the vicissitudes of political whim and caprice but also limited the extent to which the American public could identify with its members.\(^9\)

Resolved, that a national judiciary be established, to be appointed by the National Legislature, to hold their offices during good behavior; and to receive punctually, at stated times, a fixed compensation for their services . . .


In terms of judicial selection, it seems beyond question that the original version of the Virginia Plan called for the appointment of the judiciary by “the National Legislature.” The Convention delegates debated this very feature of the Virginia Plan on June 5. See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 116-21 (June 5). This fact can be reconciled with Madison’s notes, however, if the phrase “to be chosen by the National Legislature” is simply read to refer to the “National Judiciary” rather than to the “inferior tribunals.”

\(^9\) See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 120 (June 5) (“Mr. Madison disliked the election of the Judges by the Legislature or any numerous body. . . . He rather inclined to give it to the Senatorial branch . . .”). George Mason, by contrast, likely favored an appointment process that included the House because he was wary of entrusting too much power to the senatorial branch. See, e.g., George Mason, *Objections to the Constitution* (Oct. 7, 1787), in FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS, supra note 47, at 428 (arguing against ratification because Senate’s broad prerogatives under the Constitution would “enable them to accomplish what Usurpations they please upon the Rights & Libertys of the People”).

\(^9\) This conception of separation of powers represented a significant break from the “Whig” notion, prevalent among many Americans at the time, that the primary purpose of the separation of powers doctrine was to protect the House (and popular sentiment) from the other branches. See infra notes 175-177 and accompanying text.

\(^9\) See, e.g., RAKOVE, supra note 8, at 53 (“Alone, neither the executive nor the judiciary could resist a legislature speaking for the political will of the community; united in the council of revision, they might gain sufficient stature to correct its errors.”).

\(^9\) Madison briefly sketched his views regarding judicial independence in a letter to his friend in Kentucky, Caleb Wallace:

The Judiciary Department merits every care. . . . The main points to be attended to are 1. that the Judges should hold their places during good behavior 2. that
against the executive, furthermore, was the fact that it was composed of a single individual. In light of many Americans’ aversion to executive power at that time, Madison doubted that the American people would countenance a check on their favored branch (the House) by a single individual. Although the subsequent evolution of executive power may belie this concern in our eyes, Madison and many others found it difficult to conceive in 1787 that a single individual would ever possess the political will to oppose the authority of both houses of Congress. Under the Virginia Plan, furthermore, the executive would have been appointed by

Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 PAPERS OF JAMES MADISON, supra note 4, at 352.

98 See, e.g., WOOD, CREATION, supra note 37, at 138 (observing that “all of the states destroyed the substance of an independent magistracy” in their revolutionary constitutions). At the Convention, Roger Sherman of Connecticut argued against “enabling any one man to stop the will of the whole” in the context of a proposal for an unqualified executive veto. See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 99 (June 4). “No man,” Sherman argued, “could be found so far above all the rest in wisdom.” Id. The proposal was defeated unanimously on June 4, by a vote of ten states to zero. Id. at 103. When an unqualified executive veto was proposed again, on August 7, it was defeated by a vote of nine states to one. See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 200 (Aug. 7).

99 See RAKOVE, supra note 46, at 377-78 (“It was difficult to imagine the political dimensions of executive power in a republic, where the people’s own representatives were supposed to bear their trust. Or rather, it was easy to envision an executive aspiring to be either a tyrant or a demagogue, but difficult to conceive how a republic resting on the judgment and consent of the many could ever place his confidence in the authority and will of one.”); see also THE FEDERALIST NO. 48 (James Madison), supra note 60, at 344 (defending executive’s powers under Constitution but acknowledging that, “where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire”).

100 Within just a few years of the federal government’s operation, Madison realized that he had greatly underestimated the potential political strength of the Executive Branch. See Letter from James Madison to Thomas Jefferson (May 25, 1794), in 15 PAPERS OF JAMES MADISON, supra note 4, at 338 (“The influence of the [Executive] on events, the use made of them, and public confidence in the [President] are an overmatch for all the efforts Republicanism can make.”); see also WOOD, supra note 42, at 196 (“In fact, Madison now [by 1794] saw more clearly than ever before that the presidency was the principal source of governmental power.”). Today, many fear that the executive has become the very type of “vortex” of power that Madison feared from the House. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653-54 (1952) (Jackson, J., concurring) (“In drama, magnitude and finality [the executive’s] decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion, he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.”).
Congress, thus undermining to a certain degree the executive's ability to withstand political pressure from that body. With respect to both the judiciary and the executive, therefore, the very features that qualified them to perform the restraining function within the constitutional structure served to undermine their practical ability to carry out that function. If there was a political struggle between the House on the one hand and either the executive or the judiciary on the other, Madison was virtually certain that the people would vigorously support the branch with which they most closely identified. As he stated in Federalist 49:

We have seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments. But whether made by one side or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments are few in number, and can be personally known to a small part only of the people. The latter, by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions. The former are generally the objects of jealousy, and their administration is always liable to be discolored and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages, it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.

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101 See supra note 91 and accompanying text.
102 THE FEDERALIST NO. 49 (James Madison), supra note 60, at 350.
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Madison’s solution to the conundrum was to combine the executive and judiciary into a single body. His hope was that the two branches together could accomplish what he feared neither could do separately: command sufficient political legitimacy to balance the “vortex” of power that was the House. 103

3. The Council of Revision

Resolution Eight of the Virginia Plan provided:

Resd. that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular [state] Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by ___ of the members of each branch. 104

The Virginia Plan’s Council of Revision combined the executive with key figures from the judiciary and equipped them with a collective (but qualified) veto over congressional acts. 105 The Virginia Plan’s Council of Revision would have possessed the power to overturn congressional legislation as well as congressional vetoes of state legislation. In either case, however, the Council’s veto could have been overridden by

103 See, e.g., RAKOVE, supra note 8, at 53 ("Alone, neither the executive nor the judiciary could resist a legislature speaking for the political will of the community; united in the council of revision, they might gain sufficient stature to correct its errors.").

104 Virginia Plan, Res. 8, 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 21.

105 The authors of the Virginia Plan likely contemplated that a “convenient” number of the judiciary would comprise somewhere between two members of the Supreme Court and the Supreme Court as a whole. See Statement of George Mason (June 4), in 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 111 (Mason’s notes) (observing that judicial members of the Council of Revision would be drawn from Supreme Court). New York was the only state utilizing a Council of Revision at the time the Virginia Plan was formulated. New York’s Council of Revision consisted of its governor, chancellor, and “the judges of the supreme court, or any two of them ....” See N.Y. CONST. § 3 (1777). Although it was authorized to utilize more, the New York Council sat with just two Supreme Court justices. See ALFRED BILLINGS STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK (1859). The Chancellor was the head judicial officer of the state’s equity courts. Among the other antecedents for the Virginia Plan’s Council of Revision, the most prevalent was likely the British Privy Council, which had possessed the power to review and veto colonial legislation in some contexts. See, e.g., James T. Barry III, The Council of Revision and the Limits of Judicial Power, 56 U. CHI. L. REV. 235, 237-41 (1989) (discussing historical roots of Virginia Plan’s Council of Revision).
Congress. The Plan left unspecified the level of congressional support that would be required to overturn the Council but it is likely that the Virginia delegates contemplated that either a two thirds or three quarter supermajority would be sufficient. The most immediate frame of reference for Resolution Eight was New York’s Council of Revision, whose vetoes could be overridden by a two-thirds supermajority of the legislature. Toward the end of the Convention, after the Council had been rejected, Madison proposed that all congressional legislation be submitted to the executive and judicial branches separately. Under the proposal, each branch would possess its own veto, which could be overridden by two-thirds of Congress in the event that only one of the branches was exercising the veto but which would require three-quarters of Congress in the event that both branches exercised their vetoes on the same piece of legislation.

As with the President’s veto power in Article II of the Constitution (which was ultimately derived from the Virginia Plan’s Council of Revision), the Council of Revision’s veto would not have been limited to a “legal” or constitutional basis. The New York Council of Revision, upon

106 The Convention delegates initially opted for a two-thirds congressional supermajority to override the Council. See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 104 (June 4). In the context of the executive veto, which emanated from the Council, the Convention delegates vacillated between a two-thirds and three-fourths requirement. See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 300-01 (Aug. 15) (adopting the three-fourths requirement by a vote of six to four to one); id. at 585-87 (Sept. 12) (voting to replace three-fourths requirement with two-thirds by same margin). The Virginia delegation voted in favor of the more stringent three-fourths requirement on the last two occasions. Id. The Constitution ultimately specified that Congress could override the veto with a two-thirds supermajority. See U.S. CONST. art. I, § 7, cl. 2.

107 N.Y. CONST. § 3 (1777).

108 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 298 (Aug. 15).

109 Id.

110 The Virginia Plan simply specified that the Council’s dissent “amount[ed] to a rejection.” See Virginia Plan, Res. 8, 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 21. For the executive veto that ultimately emerged from the Plan, see U.S. CONST. art. I, § 7, cl. 2:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

Washington vetoed only two congressional bills during his time in office. See 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 124, 211-12 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS OF THE PRESIDENTS] (veto messages of Apr. 15, 1792 and Feb. 28, 1797). The messages he sent to Congress accompanying the vetoes suggest that one was based on policy and one on constitutional grounds. See id. John Adams and Thomas Jefferson did not veto any congressional legislation while James Monroe vetoed a single a bill on constitutional grounds. See J. Richard Broughton, Rethinking the Presidential Veto, 42 HARV. J. ON LEGIS. 91, 120 (2005).
which Madison had largely drawn his inspiration for the proposal,\(^{111}\) exercised its veto on policy as well as constitutional grounds.\(^ {112}\) None of the delegates at the Constitutional Convention, furthermore, assumed that the Council’s veto would be limited to constitutional grounds.\(^ {113}\) To the contrary, most of the arguments for and against the Council were predicated on the assumption that the Council’s veto would be far broader than the type of veto that a court would wield through judicial review. Elbridge Gerry of Massachusetts, for example, reasoned that judicial review provided the judiciary with a “sufficient check agst. encroachments.”\(^ {114}\) He argued against the Council of Revision on the grounds that it was “foreign” to the nature of the judiciary to “make them judges of the policy of public measures” (emphasis added).\(^ {115}\) Similarly, Nathaniel Gorham of Massachusetts argued against the Council because,

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\(^ {111}\) See, e.g., Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 PAPERS OF JAMES MADISON, supra note 4, at 351 (“As a further security against fluctuating & indegested laws the Constitution of New York has provided a Council of Revision. I approve much of such an institution & believe it is considered by the most intelligent citizens of that state as a valuable safeguard both to public interests & to private rights.”).

\(^ {112}\) When the New York Council of Revision vetoed legislation, it articulated the basis for its objections. See STREET, supra note 105, at 201-402 (reprinting a large body of the messages). As a result, it is possible to classify the various grounds upon which the New York Council exercised its vetoes. According to the calculations of those who have analyzed the messages, more than half of the Council’s vetoes were based on policy grounds whereas only one third were based, even in part, on constitutional considerations. Frank M. Prescott & Joseph F. Zimmerman, The Council of Revision and the Veto of Legislation in New York State: 1777-1821 (SUNY Albany, Graduate School of Public Affairs, 1972) (calculating that “55.6 per cent of the Council’s objections were mainly for policy reasons, 21.8 per cent were for lack of constitutionality, and 12.4 per cent were disallowed because they were deemed both ‘inconsistent with the spirit of the Constitution and with the public good…..’”) (cited in Barry, supra note 105, at 245 n.45).

\(^ {113}\) In fact, the line separating “policy” from “constitutional” considerations was not as distinct for the Framers as it tends to be denominated today. The Framers were operating in a tradition where fundamental “constitutional” norms were largely derived from practice, tradition, and natural law concepts. See, e.g., Suzanna Sherry, The Founders’ Unwritten Constitution, 54 U. CHI. L. REV. 1127, 1159 (1987) (observing that for Framers there was “a continuum of unconstitutionality coinciding with a continuum of injustice, lack of wisdom, dangerousness, and destructiveness.”).

\(^ {114}\) See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 97-98 (June 4) (“Mr. Gerry doubts whether the Judiciary ought to form a part of it, as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being agst. the Constitution. This was done too with general approbation. It was quite foreign from the nature of ye. office to make them judges of the policy of public measures.”).

\(^ {115}\) Id.
"[a]s Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures."\(^{116}\)

Proponents of the Council of Revision never attempted to defend the veto on the grounds that it would be limited. Instead, they relied upon the same expansive view of the Council's veto employed by its critics. James Wilson, for example, argued that the Council of Revision was superior to judicial review precisely because a purely constitutional basis of review would be too limited:

It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.\(^{117}\)

Similarly, George Mason argued that a broad veto was necessary because it would allow the judiciary to exert an influence over the legislative process that extended beyond constitutional issues:

It had been said [by Mr. L. Martin] that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He [Mason] would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as

\(^{116}\) 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 73 (July 21).

\(^{117}\) Id.
they are in the habit and practice of considering laws in
their true principles, and in all their consequences.\textsuperscript{118}

It is clear that Madison also believed the Council's veto would
encompass policy grounds. Just after the Convention, in the context of a
proposal for a constitution for the emerging state of Kentucky, Madison
stated that the "revisionary power" of the executive and the judiciary was
meant to check not only unconstitutional laws but also "precipitate" and
"unjust" laws.\textsuperscript{119} As a result, Madison proposed that the standards for
allowing the Kentucky legislature to overrule the executive and judiciary
should vary depending upon whether the veto was being exercised on
policy or constitutional grounds.\textsuperscript{120}

At the Convention, Madison made several impassioned defenses of the
Council. Typically instructive was the argument he made on July 21:

[The Council] would be useful to the Judiciary departmt.
by giving it an additional opportunity of defending itself
agst: Legislative encroachments; It would be useful to the
Executive, by inspiring additional confidence & firmness
in exerting the revisionary power: It would be useful to the
Legislature by the valuable assistance it would give in
preserving a consistency, conciseness, perspicuity &
technical propriety in the laws, qualities peculiarly
necessary; & yet shamefully wanting in our republican
Codes. It would moreover be useful to the Community at
large as an additional check agst. a pursuit of those unwise
& unjust measures which constituted so great a portion of
our calamities. If any solid objection could be urged agst.
the motion, it must be on the supposition that it tended to
give too much strength either to the Executive or
Judiciary. He did not think there was the least ground for
this apprehension. It was much more to be apprehended
that notwithstanding this co-operation of the two
departments, the Legislature would still be an overmatch
for them. Experience in all the States had evinced a
powerful tendency in the Legislature to absorb all power

\textsuperscript{118} Id. at 78 (July 21).
\textsuperscript{119} James Madison, Observations on the "Draught of a Constitution for Virginia" (Oct. 15, 1788),
in 11 PAPERS OF JAMES MADISON, supra note 4, at 292.
\textsuperscript{120} Id.; see also infra notes 243-248 and accompanying text.
into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.121

Combined together in the form of the Council of Revision, therefore, Madison hoped that the executive and judiciary would be sufficient to withstand the influence of the House. The combination of the two branches in the form of the Council would greatly increase the likelihood that the members of the Council would even be willing to assert their check on Congress. The executive, for example, would benefit psychologically from the knowledge that he was not acting alone.122 Equally important, the combined strength of the Council would dramatically increase the likelihood that the Council’s check on the House would be palatable to the public.123 The American people might have difficulty accepting the veto of either the executive or the judiciary in isolation but the Council’s rejection would constitute much more than the act of a single individual, or even the act of a single Branch. The Council’s actions would carry the combined weight of both branches and the collective gravitas of what would be, it was hoped, an eminent group of the nation’s leading figures. While Southerners would be tempted to question the legitimacy of an executive veto wielded by a Northern President with whom they might disagree, and vice versa, the Council could include individuals drawn from various parts of the country. As a result, the Council could enjoy a political legitimacy that no single individual (other than possibly Washington) appeared capable of commanding in a nation that suffered from sectional divisions and jealousies.124

4. The Council of Revision and Judicial Review

121 See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 74 (July 21).
122 Jack N. Rakove, The Madisonian Moment, 55 U. CHI. L. REV. 473, 493 (1988) (“The presence of the judges on the Council would have the added advantage of bracing the political will of an otherwise timorous executive while assuring that the veto would be exercised on appropriate rather than arbitrary grounds.”).
123 Of course, the two issues are closely interrelated. Governmental actors often gauge their political options in the context of how the public is likely to view the legitimacy of their actions.
124 The period leading up to the Constitutional Convention was marked by sectional tensions over issues such as westward expansion, the navigation of the Mississippi, and the propriety of impost taxes. By 1787, some Americans were contemplating the possibility of dividing the nation into a group of regional confederations. See, e.g., RAKOVE, supra note 8, at 33 (“By the fall of 1786 . . . sectional rifts within Congress over commercial policy and the navigation of the Mississippi had exposed the fault lines along which the Union might divide should the national government fail to satisfy the rival interests of different states and regions.”).
Under the Virginia Plan, there appeared to be little or no role for judicial review as a constitutional check on Congress or the states. Judicial review would be necessary for the resolution of private disputes and possibly to address ambiguities in statutory language. By virtue of the Council of Revision, however, judicial review would simply not be necessary to guard against constitutional violations. The judiciary’s broad opportunity to veto laws through the Council obviated the need for that type of review. It made little sense, furthermore, to give the judiciary a qualified veto through the Council if they could exercise an unqualified veto through judicial review. The Council also appeared incompatible with that type of judicial review because the judiciary’s participation in the legislative process would mean that judicial review would allow them to sit in judgment of their own work.\textsuperscript{125}

Madison’s later correspondence confirms that he viewed the Council of Revision as a replacement for, rather than a supplement to, the judicial review of constitutional questions. In an 1817 letter to James Monroe, written while the latter was President, Madison stated:

Another & perhaps a greater danger is to be apprehended from the influence which the usefulness & popularity of measures may have on questions of their Constitutionality. . . . These considerations remind me of the attempts in the Convention to vest in the Judiciary Dep\textsuperscript{1}, a qualified negative on Legislative \textit{bills}. Such a Controll, restricted to Constitutional points, besides giving greater stability & system to the rules of expounding the Instrument, would have precluded the question of a Judiciary annulment of Legislative \textit{Acts}.\textsuperscript{126}

Madison’s reference to the attempts at the Convention to bestow the judiciary with a qualified negative refers to the Council of Revision. It is not clear what he meant by “restricted to Constitutional points,” since Madison’s own letters and speeches reveal that he did not view the Council’s work as being limited to constitutional objections during the

\textsuperscript{125} As we shall see in the next section, this incompatibility between the Council and judicial review was what ultimately doomed the Council after the Convention decided to incorporate judicial review into the constitutional structure. See infra notes 190-218 and accompanying text.

\textsuperscript{126} Letter from James Madison to James Monroe (Dec. 27, 1817), in \textit{I THE PAPERS OF JAMES MADISON: RETIREMENT SERIES} 191 (David B. Mattern, et al. eds., 2009).
relevant time period. Perhaps Madison was simply clarifying that judicial review would have been necessary in some contexts (e.g., statutory construction) even with the Council of Revision. What is clear is that Madison’s 1817 recollection was that the judiciary’s qualified veto through the Council would have “precluded” any subsequent judicial review of congressional legislation based on constitutional grounds.

The crucial point is that Madison’s faith in the efficacy and legitimacy of the Council of Revision stemmed in no small measure from the qualified nature of its veto. The organic structure of the system required a careful balancing of powers between the various components. The popularly responsive House was the fulcrum of Madison’s constitutional structure because the legitimacy of the entire system depended upon the central role the House would play within that structure. An absolute veto over the House in the hands of either the executive or the judiciary would be incompatible with the House’s central role in a democracy. Insofar as judicial review could give the judiciary an unqualified veto over the House, it would appear to disrupt the delicate balance and imperil the legitimacy of the structure as a whole.

Madison’s qualms about an unqualified veto, furthermore, were not simply theoretical. Madison was convinced that the people would never accept such an invasive intrusion on the prerogatives of their elected legislators. At the time of the Convention, the practice of judicial review

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127 See supra note 121 and accompanying text.
128 See, e.g., Charles F. Hobson, in THE NEW AMERICAN NATION, 1775-1820, supra note 55, at 269 n.31 (“[Madison’s] proposal at the Convention to give the executive and judiciary a joint ‘revisionary’ power over legislative bills was designed to preclude ‘the question of a Judiciary annulment of Legislative Acts.’”) (quoting Letter from James Madison to James Monroe, supra note 126).
129 When proposals were made at the Convention for an absolute veto, for example, Madison argued against them. See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 104 (June 4) (statement of Madison); see also THE FEDERALIST No. 51 (James Madison), supra note 60, at 357 (“An absolute negative on the legislature appears, at first view, to be the natural defence with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused.”).
130 For similar reasons, Madison omitted entirely the role of judicial review in his 1785 letter to Caleb Wallace regarding constitutional theory. See Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 PAPERS OF JAMES MADISON, supra note 4, at 350-57.
131 The infirmities of judicial review constituted one of the reasons Madison advocated so strenuously in favor of the congressional veto over state legislation. See, e.g., 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 27-28 (July 17) (“Confidence can (not) be put in the State Tribunals [courts] as guardians of the National authority and interests. In all the States these are more or less dependtx. on the Legislatures . . . . In R. Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be willing instruments of the wicked & arbitrary plans of their masters.”). The controversy in Rhode Island to which Madison was referring involved the case of Trevett v. Weeden. The decision itself was not reported. For a discussion of the case and the ensuing controversy between Rhode Island’s high court
was nascent and controversial. Madison advocated for the Council precisely because it was so difficult for him to imagine that the people would accept even a qualified veto of their favored branch at the hands of a body that was so removed from their political control. The idea that they would ever come to accept an absolute veto in such hands must have seemed quite implausible to him in 1787.

Integrating members of the judiciary in the legislative process itself, therefore, gave the judicial members a political legitimacy that transcended judicial review. The judicial members of the Council would presumably not be perceived as wearing their robes, figuratively or literally, while sitting on the Council. They would operate, in essence, as ex officio members of a legislative body. By virtue of their membership on the Council, the judicial members of the Council were freed from the necessity of defending their vetoes as a legal reversal of the popular will. As with the Senate and the executive (both of whom were to be appointed by the House under the Virginia Plan), the democratic legitimacy of the appointment process would empower the Council to project its vetoes as representative of the popular will. The executive and judiciary’s individual claims of political legitimacy were not as strong as the directly elected House, but their combined claim to political legitimacy should have been sufficient to justify a veto of a qualified nature.

Finally, Madison didn’t see the need for the type of absolute veto that judicial review could bestow on the judiciary. Under the Madisonian scheme, a qualified veto was sufficient to empower the Council to perform its assigned role. It is important not to overstate Madison’s misgivings with majoritarian governance. While he may have seen the abuse of

132 See, e.g., KRAMER, supra note 88, at 69 (“The status of judicial review on the eve of the Federal Convention was thus uncertain at best. . . . There had been few cases, and no court had yet published an opinion affirmatively explaining, much less defending, judicial authority to nullify legislation.”); WOOD, CREATION, supra note 37, at 454-55 (“By the 1780’s the judiciary in several states . . . was gingerly and often ambiguously moving in isolated but important cases to impose restraints on what the legislatures were enacting as law. . . .”); Matthew P. Harrington, Judicial Review Before John Marshall, 72 GEO. WASH. L. REV. 51, 73 (2003) (“In the years immediately following the Revolution, opponents of judicial review appear to have raised enough doubts in the minds of political and legal theorists that the courts rarely exercised the power to test the constitutionality of legislative acts.”); see also Sherry, supra note 113, at 1134-46 (describing handful of state cases prior to Convention where judicial review appeared to be exercised in some form).

133 See supra notes 95-103 and accompanying text.

134 See, e.g., BANNING, supra note 8, at 184 (“In emphasizing his determination to restrain majority excesses, we should never let ourselves forget that it was popular self-governance that he was working to preserve.”); KRAMER, supra note 88, at 46 (“[S]cholars have too seldom appreciated that Madison’s
majoritarian politics as the single greatest danger to democratic governance, he never appeared to waver in his commitment to the principle of democratic governance itself. The Council of Revision would perform its critical function within the Madisonian structure by slowing down the legislative process and by interjecting critical opportunities for deliberation, rationality, and leadership. The Council’s veto would necessarily draw attention to a bill and invite further discussion over its propriety and wisdom. In addition, the veto would embolden opponents of the legislation within and without the legislature, threaten fragile coalitions that had supported the original bill, and allow for a passage of time, which might weaken public support. If a bill could survive that kind of process and still be passed by a supermajority of both houses of Congress, it deserved to be law. For Madison, the goal was not to remove certain types of laws from the majoritarian process altogether. He likely viewed such an approach as too crude to be a legitimate form of democratic governance and too audacious to be acceptable to the American public. Instead, Madison’s goal was to create a process that would ensure that the laws produced would reflect not only majoritarian politics but also the wisdom and temperance of the nation’s most responsible leaders.

C. The Role of the Judiciary under the Virginia Plan

For modern readers, the Council of Revision is one of the most provocative aspects of the Virginia Plan because it seems to contradict many of our own assumptions about the function of the judiciary in a democratic society. For modern readers, the prerogatives enjoyed by the

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135 See, e.g., BANNING, supra note 8, at 372 (“However much he feared an unrestrained, self-interested, and passionate majority of people, Madison was also adamant that once the proper checks had been imposed and passing passions had been cooled, the will of the majority must rule.”); see also THE FEDERALIST NO. 46 (James Madison), supra note 60, at 330 (“The federal and State governments are in fact but agents and trustees of the people... [T]he ultimate authority, wherever the derivative may be found, resides in the people alone...”).

136 See, e.g., BANNING, supra note 8, at 137 (“[A]s the states’ experience had shown, a prompt response by government to the majority’s immediate demands was not the only quality to be desired... In the circumstances of the middle 1780s, Madison was more and more inclined to favor measures that would temper the majority’s demands with wisdom, steadiness, and new protections for the rights of the propertied few...”).

137 See infra notes 362-365 and accompanying text.
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Council of Revision would seem to be too limited in some respects and too expansive in others.

Under the Council of Revision, for example, the judiciary possessed only a qualified power to define the Constitution. The Council of Revision was empowered to veto congressional actions but that veto, even when purported to be based on constitutional norms, could subsequently be overturned by Congress. Under the Virginia Plan, therefore, Congress possessed the ultimate power to define the meaning of the Constitution and perhaps even natural rights. The structure of the Virginia Plan is therefore completely antithetical to the notion of judicial supremacy and contradicts a fundamental tenet of modern constitutional interpretation that it is "emphatically the province and duty of the judicial department to say what the law is."\[138\]

Another striking feature of the Council for modern readers is the way in which the judiciary’s sphere of influence was extended beyond that which is typically viewed as appropriate today. By virtue of the Council of Revision, members of the federal judiciary would have played an integral role in the legislative and policy-making process. The members of the federal judiciary sitting on the Council would have exercised this political function in the constitutional framework of governance despite the fact that they would have possessed those very characteristics that many now argue disqualify them from making policy: appointment, life tenure, and salary protection.\[139\]

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\[138\] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). It is unlikely that anyone believed those words signified a broad doctrine of judicial supremacy at the time they were written. See, e.g., KRAMER, supra note 88, at 125 ("Read in context, this sentence [from Marbury] did not say what, to modern eyes, it seems to say when read in isolation."); Gordon S. Wood, The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less, 56 WASH. & LEE L. REV. 787, 806 (1999) ("The decision was so subtle and so oblique that most people did not see its implications... . Marshall in 1803 was not embarking on a crusade for judicial supremacy."). By virtue of Supreme Court’s revisionist history, however, the words are frequently employed today for the proposition of judicial supremacy. See, e.g., Cooper v. Aaron, 358 U.S. 1, 18 (1958) (claiming that Marbury "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"); see also WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 59 (2000) ("Marshall and the other justices... . had no intention to behave as the Supreme Court ultimately would in Cooper v. Aaron, a 1958 school desegregation case in which the Court for the first time in its history explicitly arrogated to itself the exclusive power to interpret the Constitution.").

\[139\] See, e.g., Lino A. Graglia, How the Constitution Disappeared, 81 Commentary (Feb. 1986), reprinted in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 35, 45 (Jack N. Rakove ed., 1990) [hereinafter INTERPRETING THE CONSTITUTION] ("The basic premise of democratic government [is] that public-policy issues are ordinarily to be decided through the electoral process, not by unelected judges... ."); see also ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 152-53 (2002) ("We cannot simultaneously lodge the authority to make laws and policies exclusively in the hands of elected officials who are, at least in principle, accountable to
There were several reasons why all the authors of the Virginia Plan (including the soon to be antifederalist George Mason) would view the judiciary’s role on the Council as democratically legitimate. The first reason is that the authors of the Virginia Plan viewed the appointment process itself as a democratically legitimate form of representation.\textsuperscript{140} Under the Virginia Plan, three of the four units of government were to be appointed rather than elected (the Senate, the executive, and the judiciary were to be appointed while only the House was to be elected).\textsuperscript{141} In this respect, the authors of the Virginia Plan were in concert with the majority of the Framers at the Convention. As with the Virginia Plan, the original Constitution provided for the appointment of Senators and the federal judiciary.\textsuperscript{142} In addition, the Constitution provided a mode of selection for the executive that was essentially appointive in nature. The Constitution provides that the state legislatures “shall appoint” the Electors, who in turn have the responsibility of choosing the executive.\textsuperscript{143} In the first four presidential elections, the prevailing practice was for the state legislatures to simply appoint the Electors without any reference to elections.\textsuperscript{144} The result was that the people elected the state legislatures, who then appointed citizens through elections and at the same time give the judicial branch the authority, in effect, to make crucial public policies.”).\textsuperscript{145}

\textsuperscript{140} The Federalist No. 39 (James Madison), supra note 60, at 281 (“It is essential for [a republican form of government] that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it . . . . It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people . . . .”).

\textsuperscript{141} See supra notes 77-93 and accompanying text.

\textsuperscript{142} See U.S. Const. art. II, § 2 (providing for Presidential appointment of the “Judges of the supreme Court, and all other Officers of the United States”); see also Banning, supra note 8, at 157 (“Nearly all [the Convention delegates] agreed . . . . that what they wanted in a senate was a body that would stand at a sufficient distance from the people and the lower house to check majority oppression, but one that would be chosen in a manner that would not offend the democratic precepts of the Revolution.”).

\textsuperscript{143} U.S. Const. art II, § 1 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress . . . .”).

\textsuperscript{144} In the 1792 presidential election, for example, the state legislatures directly chose the electors in nine of the fifteen states; only five states relied on direct elections to choose all of their electors and one state (Massachusetts) chose its electors from a combination of legislative appointment and popular election. See Neal R. Peirce & Lawrence D. Longley, The People’s President: The Electoral College in American History and the Direct Vote Alternative 247-48 (rev. ed. 1981). In the 1800 presidential election, the state legislatures directly chose the electors in ten of the sixteen states; only five states relied on direct elections to choose all of their electors and one state (Tennessee) chose its electors from a combination of legislative appointment and popular election. Id. It was not until 1816 that popular election permanently became the method employed by a majority of states. Id. South Carolina, the last state to abandon the legislative appointment of its electors, did so until 1860. Id. at 249.
the Electors, who then appointed the executive. The first several presidential “elections,” therefore, involved a scheme of appointment that was even more indirect and removed from popular control than the mode of executive selection contemplated by the Virginia Plan (direct appointment by the Congress).

The essential point is that the Virginia delegates and the majority of those at the Convention viewed the appointment process as a legitimate form of representative democracy. The Senate, executive, and judiciary were all understood to represent the people despite the fact that they were not directly elected. While their connection to the people may have been indirect, the means of selection for all three could ultimately be traced back to the popular will.

The second basis for the democratic legitimacy of the judiciary’s role on the Council derived from the fact that the authors of the Virginia Plan

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145 See STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, at 514 (1993) (“Perhaps the Electoral College could be said to have functioned in 1796 more or less the way the Founders intended, with the people or their representatives choosing their most prominent citizens to serve as electors, and the electors in turn meeting and choosing without coercion the two worthiest of the candidates for the nation’s two highest offices. A presidential contest organized by competing parties and designed to draw in as many voters as possible was a thing the Fathers neither planned nor wanted.”).

146 For a criticism of the Electoral College, see generally GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (2001). Many political scientists and constitutional scholars have argued that numerous aspects of the original constitutional structure are incompatible with modern concepts of democracy. See, e.g., DAHL, supra note 139, at 15-20 (discussing undemocratic aspects of the original constitutional structure with respect to the electoral college, slavery, equal state suffrage in the Senate, the legislative appointment Senators, federalism, and judicial review); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 6 (2006) (“I believe that it is increasingly difficult to construct a theory of democratic constitutionalism, applying our own twenty-first-century norms, that vindicates the Constitution under which we are governed today.”). Assessing the democratic viability of our current constitutional structure is made all the more difficult by the wide variety of possible meanings for democracy. See, e.g., CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 62 (2001) (“Democracy, in sum, is not the same thing as ‘government by voters.’ From the standpoint of democratic theory, the first question we should ask is not how to make government accountable to voters, but under what circumstances ‘voters’ (or ‘the electorate’) can adequately represent the people.”).

147 See, e.g., WOOD, CREATION, supra note 37, at 546 (“And to the Federalists, using and broadening the connotations of actual representation that had developed in the years since 1776, the entire government, president as well as Congress, became a responsible agency of the people. For the Federalists the historic distinction between rulers and people, governors and representatives, was dissolved, and all parts of the government became rulers and representatives of the people at the same time.”).

148 See, e.g., THE FEDERALIST NO. 39 (James Madison), supra note 60, at 281 (“The President is indirectly derived from the choice of the people, according to the example in most of the States. Even the judges with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves.”).

149 Id.
did not evaluate the political legitimacy of the branches in isolation. Rather, they evaluated the democratic legitimacy of the structure as a whole. The various branches were intended to collectively represent the values, priorities, and morality of the American people.  

The House, in particular, was expected to mirror public sentiment. By design, however, the other branches were not intended to reflect popular sentiment as closely or as immediately as the House. The Framers' ambition was to create a governmental structure that functioned, as a whole, in a manner that was both tied to popular control and simultaneously possessing a requisite distance from it. The fact that Madison and the other Virginia delegates were willing to reject a formalistic approach to “separation of powers” and combine the executive and judiciary on the Council demonstrates the organic way in which they viewed the structure. Rather than treating the judiciary or any branch as a sui generis entity, they focused on the task of organizing the various branches to function together as an integrated whole. The directly elected House of Representatives was the fulcrum of the system while the less democratically accountable branches interjected elements of rationality and deliberation into the process of governance without destroying the legitimacy of the structure as a whole.

In the overarching context of the Virginia Plan's constitutional structure, therefore, there was nothing incongruous with assigning

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150 For a thoughtful exploration of how this system of overlapping institutions is legitimate from a modern, pluralistic perspective, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 216 (1999) (“The appropriate standard in a pluralist system for determining an institution’s legitimacy and value is not whether it is majoritarian or subject to elections. Rather, that standard is the degree to which it adds to the number and diversity of arenas in which groups can regularly and effectively advance their interests, thereby contributing to the reliability and stability of the political process as a whole in ascertaining the enduring bases of political consent.”). An eighteenth-century product of the enlightenment, Madison did not think in such terms. See WOOD, THE IDEA OF AMERICA, supra note 37, at 149 (“We have too often mistaken Madison for some sort of prophet of a modern interest-group theory of politics.... Despite his hardheaded appreciation of the multiplicity of interests in American society, he did not offer America a pluralist conception of politics.”).

151 See supra note 79 and accompanying text.

152 For Madison's views regarding separation of powers, see infra notes 180-189 and accompanying text.

153 Madison's own statements at the Convention are instructive. On May 31, he argued:

[Madison] was an advocate for the policy of refining the popular appointments by successive filtrations, but thought it might be pushed too far. He wished the expedient to be resorted to only in the appointment of the second branch of the Legislature, and in the Executive & judiciary branches of the Government. He thought too that the great fabric to be raised would be more stable and durable if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislatures.

1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 50 (May 31).
members of the judiciary to a political role within the legislative process. Quite to the contrary, Madison and the other proponents of the Virginia Plan wished to provide the federal judiciary with a measure of independence from popular sentiment because that very independence would uniquely qualify them to play their assigned political role within the constitutional framework. A degree of separation from popular sentiment allowed the judiciary, through the Council of Revision, to inject the requisite levels of deliberation and caution that might otherwise be lacking from the legislative process (and was largely viewed as lacking in the state governments). The judiciary's proposed political role on the Council was not viewed as an usurpation of the other branches' right to govern or an illegitimate assertion of power by an "oligarchy" of unelected judges, any more than the Senate's ability to frustrate the House's will through bicameralism or the executive's ability to oppose Congress through the veto.

II. THE COUNCIL OF REVISION AT THE PHILADELPHIA CONVENTION

Despite considerable support from Madison and a number of other influential delegates, the Council of Revision was ultimately rejected at the Constitutional Convention by a narrow margin of four states to three (with two states divided and one abstaining). There were three principal reasons for its demise. First, support for the Council began to erode when a number of delegates expressed optimism about the executive's ability to

154 Of the three branches, the federal judiciary was arguably the most removed from the electorate by virtue of the judges' life tenure. Perhaps for that very reason, the judiciary's political role under the Virginia Plan was the most limited of the three branches. Unlike the Senate, it could not propose laws. Unlike the executive, it did not possess a broad power or discretion to enforce the law. Nor did the Virginia Plan appear to contemplate a role for judicial review based on constitutional grounds. Instead, the Virginia Plan bestowed the federal judiciary with a political role on the Council, and even here, the judiciary's role was limited by the fact that it shared the Council with the executive and by the fact that its vetoes could be overridden by Congress. See supra notes 104-109 and accompanying text.

155 See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 72, 80 (July 21) (Massachusetts, Delaware, North Carolina, and South Carolina voted against the Council. Virginia, Connecticut, and Maryland voted in favor of the Council. Pennsylvania, and Georgia were divided on the question, and New Jersey abstained). The July 21 decision represented the final vote at the Convention on the Council. The Council had previously been considered and voted upon on June 6, where it had lost by a vote of eight states to three. See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 140 (June 6). One of the three votes in favor of the Council on June 6 had been New York. See id. If the New York delegation had not left the Convention early, perhaps the Constitution would have included the Council. For more on the departure of the New York delegation, see BEEMAN, supra note 2, at 202-03.
wield the veto power effectively without the assistance of the judiciary. This confidence in the executive eviscerated a primary rationale for including the judiciary on the Council and led some delegates to argue that the judiciary’s presence on the Council might actually undermine the executive’s prerogatives within the constitutional structure. Second, a number of delegates objected to the Council on the grounds that it violated formalistic notions of separation of powers. Third, and probably most significantly, proponents of the Council were hindered when the Convention opted to assign a central role within the constitutional structure to judicial review. As was discussed earlier, the Council of Revision was intended to be a replacement for, rather than a supplement to, the judicial review of constitutional issues. When judicial review assumed a prominent role at the Convention, the Council suffered a fatal setback.

A. The Council of Revision and Executive Power

Many of the Convention delegates did not appear to share the Virginia delegates’ pessimism regarding the executive’s potential as an independent counterweight to Congress. In fact, the Convention sought to provide the executive with a number of prerogatives that were missing in the Virginia Plan. The Constitution provided the executive with a relatively short term of four years but did not limit the executive to one term, as the Virginia Plan had done. Whereas the Virginia Plan provided that the executive would enjoy “the Executive rights vested in Congress by the Confederation,” the Convention arguably strengthened the executive’s powers by specifying a number of independent bases for authority. Equally significantly, the Convention stripped Congress of the power to appoint the executive (as provided in the Virginia Plan), and instead

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156 For the debates at the Convention regarding the Council and the executive veto, see infra notes 159-172 and accompanying text.

157 For the debates at the Convention regarding the Council and separation of powers, see infra notes 173-189 and accompanying text.

158 For the debates at the Convention regarding the Council and judicial review, see infra notes 190-218 and accompanying text. At the Convention, judicial review assumed a particularly central role with respect to federalism. See infra notes 201-218 and accompanying text.

159 See Virginia Plan, Res. 7, 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 21 ("Resd. that a National Executive be instituted; to be chosen by the National Legislature for the term of __ years, ... and to be ineligible a second time..."); 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 520, 525 (Sept. 6) (reporting vote of Convention in favor of four year terms). The length of the President’s term of office, as well as whether s/he should be limited to one term, was interrelated to the mode of the President’s selection. See, e.g., BEEMAN, supra note 2, at 302-05.

assigned the state legislatures with the freedom to choose the means of selecting the Electors.\textsuperscript{161}

Throughout the Convention, proponents of the Council of Revision maintained that the executive would find it difficult to effectively wield the veto without the assistance of the judiciary. George Mason, for example, argued that the presence of judiciary on the Council would "give a confidence to the Executive, which he would not otherwise have, and without which the Revisionary power would be of little avail."\textsuperscript{162} Oliver Ellsworth of Connecticut argued that the presence of the judiciary on the Council would give "more wisdom & firmness to the Executive."\textsuperscript{163}

In addition, several proponents of the Council argued that the judiciary could assist the executive's ability to wield the veto prudently. Mason, for example, argued that the members of the judiciary were well suited to exercise the veto power because of their "habit and practice of considering laws in their true principles, and in all their consequences."\textsuperscript{164} Madison, Ellsworth, and others made similar arguments that the executive would benefit from the judiciary's expertise on the Council.\textsuperscript{165}

In the end, however, the proponents of the Council were unable to persuade a sufficient number of delegates that the executive needed the judiciary to effectively wield the veto. By virtue of the fact that the Council's veto would be based on policy as well as constitutional grounds, a number of delegates were skeptical of the benefits of including the judiciary on the Council. Luther Martin of Maryland argued: "A

\textsuperscript{161} See U.S. CONST. art. II, § 1. Providing the executive with an independent means of selection that circumvented Congress allowed for the possibility that the executive would enjoy an independent basis of political power and support. It should be noted, however, that the Convention's decision to abandon the executive's congressional appointment came after the Convention's final decision to reject the Council, thereby undercutting this rationale as a basis for the Council's rejection. The key compromises that led the Convention to abandon congressional selection for the executive occurred within the "Committee of Eleven" (aka the "Committee on Postponed Parts") and between September 4 and September 6 during the Convention. See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 493-531; see also BEEMAN, supra note 2, at 296-305.

\textsuperscript{162} See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 74 (July 21). Mason stated that he had "always been a friend to this provision," which is consistent with Madison's assertion that the Virginia Plan enjoyed the unanimous support of the Virginia delegation. Id.

\textsuperscript{163} Id. at 73-74. Ellsworth also argued that the judiciary should be included on the Council because of their "systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess." Id. He specifically referenced the judges' knowledge of international law as something that would be beneficial to the Council's work. Id.

\textsuperscript{164} See supra note 118 and accompanying text.

\textsuperscript{165} See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 74 (July 21); see also RAKOVE, supra note 8, at 260-62 ("[T]he case for a joint council assumed that the executive, acting alone, would lack the political resources to withstand the legislature. . . . This pragmatic argument reflected the deeper difficulty the framers faced in imagining how a single official, however independent, could set his opinion against the collective weight and influence of a representative assembly.").
knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature.” As previously mentioned, Elbridge Gerry argued that it was “quite foreign from the nature of ye. office to make [the judiciary] judges of the policy of public measures.” For those who believed that the executive possessed the political strength to wield the veto successfully, in short, there simply appeared to be little need or benefit to forcing the executive to share the veto power.

The Convention’s efforts to strengthen the executive’s prerogatives, furthermore, provided an affirmative argument against the Council insofar as some delegates feared that the judiciary’s share of the veto power might undermine the executive’s position within the constitutional structure. John Dickinson of Delaware summarized this point at the Convention when he argued against the Council:

Secrecy, vigor & despatch are not the principal properties reqd. in the Executive. Important as these are, that of responsibility is more so, which can only be preserved; by leaving it singly to discharge its functions.

Along the same lines, Rufus King of Massachusetts argued that the Council was inconsistent with the “unity of the Executive.” Nathaniel Gorham, the other signer from Massachusetts, pointed out that the President would be outnumbered on the Council by the members of the judiciary and feared that the judicial members could therefore use the Council to “sacrifice” the Executive. Some proponents of executive power went so far as to propose that the executive should enjoy an unqualified veto power over congressional acts.

Madison, of course, remained convinced that a veto power invested solely in the executive was unlikely to be effective. Typically instructive
was his argument on June 4 in favor of the Council and against vesting an absolute veto in the hands of the executive:

[I]f a proper proportion of each branch should be required to overrule the objections of the Executive, it would answer the same purpose as an absolute negative. It would rarely if ever happen that the Executive constituted as ours is proposed to be would, have firmness eno' to resist the legislature, unless backed by a certain part of the body itself. The King of G. B. with all his splendid attributes would not be able to withstand ye. unanimous and eager wishes of both houses of Parliament. To give such a prerogative would certainly be obnoxious to the temper of this Country; its present temper at least.172

Here we see Madison’s pessimism regarding the executive veto. According to Madison, the “temper” of the Country was unlikely to countenance an absolute veto against the people’s beloved legislature. Even in Britain, where the monarchy enjoyed a theoretical right to veto Parliament, the veto could not be exercised with success. How unlikely, it seemed to Madison, that an American executive who did not enjoy the traditional prerogatives of the British monarchy would fare any better.

B. Separation Powers

A second obstacle for the proponents of the Council was the fact that it appeared to contradict a formalistic interpretation of the principle of separation of powers. According to the prevailing theory inherited from Montesquieu and others, the various branches of government were required to be as separated as possible.173 Many Americans had come to accept Montesquieu’s notions as dogma because they continued to view separation of powers in the context of ensuring that the various branches

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172 See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 99-100 (June 4). The proposal for an absolute veto for the executive was defeated on that same day by a unanimous vote of the states. See id. at 103 (June 4). As previously noted, Madison quickly learned that the Constitutional framework actually provided the executive with far more opportunities to wield and aggrandize power than he had anticipated. See supra note 100.

173 See THE FEDERALIST No. 47 (James Madison), supra note 60, at 299-300 (“One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. . . . The oracle who is always consulted and cited on this subject is the celebrated Montesquieu.”).
remained faithful to the will of their constituents. Since Whig theory held that the legislature was the branch most in tune to the will of the people, separation of powers in this context was viewed predominately as a protection for the legislature against the other branches. This was the perspective of the one delegate, Elbridge Gerry, who offered the most thorough argument against the Council on separation of powers grounds:

The [Council] was liable to strong objections. It was combining & mixing together the Legislative & the other departments. It was establishing an improper coalition between the Executive & Judiciary departments. It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people. He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It was making the Expositors of the Laws, the Legislators which ought never to be done. A better expedient for correcting the laws, would be to appoint as had been done in Pena. a person or persons of proper skill, to draw bills for the Legislature.

For Gerry, the elected legislators were the “proper guardians” of the people’s rights and interests because the legislature was the most directly linked to popular sentiment. The primary purpose of separation of powers, therefore, was to wall off the executive (and to a lesser extent the judiciary)

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174 See RAKOVE, supra note 8, at 249 (“From the memory of the wrongs inflicted by generations of royal governors and the belief that ambitious monarchs and their ministers regularly threatened liberty, the American constitution writers of 1776 drew two great lessons. The first was to ‘strip’ the new state executives of what John Adams called ‘those badges of domination called prerogatives’; the second was to affirm the principle of separated powers with the fervor that enabled the Virginia constitution of 1776 to declare ‘that the legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time.’”) (quoting Virginia Constitution of 1776, reprinted in 1 THE FOUNDERS’ CONSTITUTION 7 (Philip B. Kurland & Ralph Lerner eds., 1987)).

175 See, e.g., WOOD, CREATION, supra note 37, at 157 (“When Americans in 1776 spoke of keeping the several parts of the government separate and distinct, they were primarily thinking of insulating the judiciary and particularly the legislature from executive manipulation.”). For an additional discussion of Whig political theory and its evolution in America, see LUTZ, supra note 10, at 1-18.

176 See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 75 (July 21). Caleb Strong echoed Gerry’s argument immediately thereafter. See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 75 (July 21) (“Mr. Strong thought with Mr. Gerry that the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws.”). John Dickinson argued against the Council on the grounds that it “involved an improper mixture of powers.” See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 140 (June 6).
from the legislative function so that those branches could not interfere with
the legislature’s ability to represent the popular will.177

It is important to note, however, that Gerry’s argument against the Council was not specifically premised on the fact that the judiciary was appointed. Not a single delegate at the Convention made that argument. Most, if not all, of the Convention delegates shared the Virginia delegates’ overarching view that the appointment process was a legitimate form of democratic representation.178 As has been discussed, the Constitution relied as heavily, if not more heavily, on the appointment process for the Senate, the executive, and the judiciary and sought to equip these less democratically accountable branches, much as Madison had sought to do in the Virginia Plan, with the collective power to check the more electorally responsive House.179

Madison’s views regarding the doctrine of separation of powers diverged sharply from those espoused by Gerry.180 While Gerry was most concerned with protecting the legislature from the encroachments of the executive branch, Madison feared the very opposite, namely, that the “vortex” of power that was the legislative branch would devour the other branches.181 Madison was therefore prepared to abandon a formalistic interpretation of the separation of powers principle in order to find the best solution to what he perceived as the fundamental challenge of democratic governance: to moderate and refine popular sentiment as it was reflected in the legislative branch.182 In a sense, Madison was prepared to redefine the fundamental notions of separation of powers by reconceptualizing their purpose.

177 See RAKOVE, supra note 8, at 253 (“Americans . . . still regarded separation of powers more as a formula for restricting the executive than as a symmetrical balance among coequal departments.”).
178 See supra note 147.
179 See supra notes 142-149 and accompanying text.
180 After the Council had been rejected, Madison attempted to salvage something of his original design by proposing that the Judiciary and the executive each be given their own qualified vetoes over pending congressional legislation. See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 298 (Aug. 15). Under this proposal, Congress would have been able to override the veto with a two-thirds supermajority if only one of the branches was exercising the veto but would have been required to muster a three-fourths supermajority in the event that both branches were exercising their vetoes. Id. The proposal was defeated by the same margin (eight to three) by which the Council was rejected for the first time on June 6. Compare id. with 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 140 (June 6). In fact, the Council received more votes on July 21 than the proposal for separate vetoes received on August 15. See supra note 155.
181 See supra note 80 and accompanying text.
182 See, e.g., RAKOVE, supra note 8, at 53 (“The benefits this council [of revision] would provide justified the threat it posed to the axiomatic view that the three powers of government had to be rigidly separated.”).
For Madison, the primary danger of democratic government was not the possibility that it would deviate from popular control and seek to oppress the majority of people. That was a legitimate fear in the context of a monarchical or aristocratic regime.\footnote{Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 PAPERS OF JAMES MADISON, supra note 4, at 214 ("In absolute monarchies, the Prince may be tolerably neutral towards different classes of his subjects, but may sacrifice the happiness of all to his personal ambition or avarice.").} For democracies, by contrast, the greatest danger was that the legislature would manifest popular sentiment only too well, and seek to oppress minorities through the legitimate exercise of majoritarian rule.\footnote{Id. ("In small republics, the sovereign will is controlled from such a sacrifice of the entire Society, but is not sufficiently neutral towards the parts composing it.").} The complete separation of branches, therefore, was neither necessary nor advantageous in the context of democratic government.\footnote{See THE FEDERALIST NO. 48 (James Madison), supra note 60, at 343 ("[The separation of powers doctrine] does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other...[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.").} Instead, Madison’s goal was to overlap and blend the functions of the various branches in order to slow down the democratic process itself and introduce opportunities and avenues for deliberation, rationality, and leadership.\footnote{See id.} As Madison summarized the point at the Convention:

Mr. Madison could not discover in the proposed association of the Judges with the Executive in the Revisionary check on the Legislature any violation of the maxim which requires the great departments of power to be kept separate & distinct. On the contrary he thought it an auxiliary precaution in favor of the maxim. If a Constitutional discrimination of the departments on paper were a sufficient security to each agst. encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct, it was
proposed to add a defensive power to each which should maintain the Theory in practice.\textsuperscript{187}

The genius and originality of Madison’s thought was arguably most evident in instances like the Council of Revision where he was willing to discard prevailing theories in order to construct new models and approaches.\textsuperscript{188} For Madison, theory gave way to experience and practical considerations and observations outweighed theoretical principles.\textsuperscript{189}

C. Judicial Review

Probably the single most important reason the Council of Revision was rejected derived from the Convention’s commitment to judicial review as an integral part of the constitutional structure.\textsuperscript{190} The incompatibility between the Council and judicial review was the most cited argument against the Council at the Convention.\textsuperscript{191} It was feared that the Council would undermine the judiciary’s credibility with respect to judicial review because the Council would compel at least some members of the Supreme Court to play a legislative role in creating the very same acts the Court would later review. The result appeared to be a conflict of interest, or at least a perceived impropriety.

Many of the arguments against the Council along these lines emanated from the members of the Massachusetts delegation. Rufus King argued that the Judges “ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.”\textsuperscript{192} King’s Massachusetts colleague, Caleb Strong, similarly argued that “[t]he Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws.”\textsuperscript{193} Nathaniel Gorham (also from Massachusetts) made essentially the same point when he contended that

\begin{footnotesize}
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\item \textsuperscript{187} 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 77 (July 21).
\item \textsuperscript{188} See RAKOVE, supra note 8, at 55 (arguing that originality of Madison’s thought “lay in part in its self-conscious willingness to challenge received wisdom, even if that wisdom often took the form of clichés about small republics and the separation of powers”).
\item \textsuperscript{189} See Rakove, supra note 122, at 489 (“Nothing better illustrates the pragmatic cast of Madison’s mind than his efforts to modify the strict theory of the separation of powers that so many Americans had seemingly imbibed from their reading of ‘the celebrated Montesquieu.’”).
\item \textsuperscript{190} This point, of course, is related to the separation of powers arguments insofar as judicial review based on constitutional issues was identified as the core function of the judiciary. But for Madison and many others, it was not. As previously discussed, the Council of Revision appeared to be a replacement for rather than a supplement to the constitutional review of legislation by the judiciary in the form of judicial review. See supra notes 125-128 and accompanying text.
\item \textsuperscript{191} See infra notes 192-196 and accompanying text.
\item \textsuperscript{192} 1 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 98 (June 4).
\item \textsuperscript{193} 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 75 (July 21).
\end{itemize}
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"the Judges ought to carry into the exposition of the laws no prepossessions with regard to them." 194

Beyond Massachusetts, John Rutledge of South Carolina and Luther Martin of Maryland voiced similar concerns. Rutledge maintained that "Judges ought never to give their opinion on a law till it comes before them." 195 Martin argued:

And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature. 196

Note that Martin’s idea of a “double negative” was contrary to Madison’s belief that the Council of Revision would replace, rather than supplement, the judicial review of congressional acts based on constitutional grounds. 197

There were several reasons why the Convention placed more emphasis on judicial review than the Virginia Plan. Unlike the Virginia Plan, the Convention chose to include a number of specific restrictions on Congress. Article I, Section 9 prohibited Congress from, inter alia, passing bills of attainder, enacting ex post facto laws, taxing exports, curtailing the slave trade prior to 1808, and improvidently suspending the writ of habeas corpus. 198 In addition, the distribution of powers between the executive and Congress were left somewhat ambiguous. It is not clear, for example, to what extent the executive’s powers as Commander in Chief overlaps with

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194 Id. at 79.
195 Id. at 80.
196 Id. at 76-77.
197 See supra notes 125-128 and accompanying text.
198 U.S. CONST. art. I, § 9. With respect to habeas corpus, the Constitution is not entirely clear whether the power to suspend belongs entirely to Congress or is shared with the executive. Abraham Lincoln argued that the executive is empowered to suspend the Writ of Habeas Corpus in the absence of congressional legislation. See, e.g., Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-65, at 246, 253 (Don E. Fehrenbacher ed., 1989) ("But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together... ").
Congress’ power to declare war and to raise and support armies and provide and maintain a Navy. \(^{199}\) The Convention delegates must have anticipated that judicial review would play an important role with respect to these prohibitions and, quite possibly, with the ongoing clarification of the overlapping prerogatives. It is also quite possible that many of the Framers envisioned that the courts could conduct judicial review of congressional acts based on natural rights. \(^{200}\)

Even more than the federal government, furthermore, judicial review was implicated with respect to federalism and the enforcement of the boundaries between federal and state authority. In that respect, much of the Convention’s decision to rely on judicial review flowed from its decision to reject the Virginia Plan’s congressional veto over state legislation. \(^{201}\) The majority of Framers appeared to be in agreement that the state legislatures had been guilty of dangerous transgressions during the period leading up to the Constitutional Convention. \(^{202}\) When the Virginia Plan’s congressional veto was rejected as too radical a solution to that problem, the delegates were forced to devise alternative means of restraining the states. Most of these alternatives implicated judicial review in a way that the Virginia Plan did not.

One of the Convention’s approaches to restraining the states, for example, was to embed a number of specific prohibitions within the Constitution itself. Article I specifically prohibits some of the more egregious (in the eyes of the Framers) state practices that had characterized the period leading up to the Convention. Section 10 of Article I prohibits

\(^{199}\) See U.S. Const., art. 1, § 8, cl. 11-13.

\(^{200}\) Justice Samuel Chase espoused this view in his seriatim opinion in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (“There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power....”). In a separate opinion from the same case, Justice Iredell contested Chase’s conclusion that the judiciary was empowered to overturn legislation on the basis of natural rights. See id. at 399 (Iredell, J.) (“[T]he Court cannot pronounce [legislation] to be void, merely because it is, in their judgment, contrary to the principles of natural justice.”). The controversy, of course, remains with us to this day in no small measure by virtue of the Ninth Amendment, which refers to rights not found (“enumerate[ed]”) in the Constitution but nonetheless “retained” by the people. See U.S. Const. amend. IX. For a thoughtful exploration of the possibility that the Framers intended judicial review based on natural rights, see Sherry, supra note 113, 1158 (“[T]he Framers apparently contemplated that laws not prohibited by the Constitution might still be invalid as contrary to natural law.”); see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

\(^{201}\) See Jack N. Rakove, Judicial Power in the Constitutional Theory of James Madison, 43 WM & MARY L. REV. 1513, 1523 (2002) (“In the aftermath of [the Connecticut Compromise], the negative was eliminated, and the Convention instead began the process of making the judiciary, acting under the Supremacy Clause, the institution responsible for weighing the legislative acts of the states against the dictates of the Constitution.”).

\(^{202}\) See supra notes 34-55 and accompanying text.
the states from issuing paper money, \textsuperscript{203} from "impairing the Obligation of Contracts," \textsuperscript{204} and from imposing imposts or duties on goods traveling between states from foreign countries. \textsuperscript{205} In addition, Section 10 prohibits the states from entering into treaties or alliances with other states or with foreign nations, from passing bills of attainder or enacting ex post facto laws, from granting titles of nobility, and from engaging in war or even maintaining their own "Troops or Ships of War" without the consent of Congress. \textsuperscript{206}

Article IV, similarly, was intended to curtail a number of specific state practices deemed detrimental to the nation. The Full Faith and Credit Clause requires the states to respect each others' laws and judgments. \textsuperscript{207} Section 2 of Article IV includes a constitutional requirement for criminal extradition between the states \textsuperscript{208} and prohibits states from discriminating against each others' citizens with respect to the "[p]rivileges and [i]mmunities" of citizenship. \textsuperscript{209} Finally, Section 4 of Article IV prohibits the states from employing non-representative forms of government and allows the state legislatures to request federal intervention in response to domestic violence. \textsuperscript{210}

All of these specific prohibitions contrasted sharply with the Virginia Plan's more open ended and flexible approach of allowing Congress to exercise an ad hoc review of state legislation through the veto. The enforcement of the Constitution's specific prohibitions would naturally devolve to the judiciary in the course of their review of the cases these

\textsuperscript{203} U.S. CONST. art I, § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender Payment of Debts. . . .").

\textsuperscript{204} Id.

\textsuperscript{205} Id. cl. 2. The prohibition is qualified to allow states to impose duties or imposts when "absolutely necessary for executing its inspection Laws." This exception is subject to the control of Congress and, in the event that a state is allowed to impose a duty or impost for such purposes, the State is required to render all the proceeds to the federal government. \textit{Id.} With respect to foreign countries, Section 10 provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage . . ." \textit{Id.} cl. 3.

\textsuperscript{206} Id. cls. 1, 3 (providing that a state can defend itself, prior to congressional approval, in response to an invasion or other "imminent Danger").

\textsuperscript{207} U.S. CONST. art. IV, § 1.

\textsuperscript{208} U.S. CONST. art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

\textsuperscript{209} Id. cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). Section 2 also included the Fugitive Slave Clause, that was repudiated by the Thirteenth Amendment. See \textit{id.} cl. 3, \textit{repealed by U.S. CONST. amend. XIII.}

\textsuperscript{210} U.S. CONST. art. IV, § 4.
Lessons from a Lost Constitution

constitutional prohibitions would inevitably generate.211 When the Convention opted for specific prohibitions, therefore, the process of judicial review became implicated in the constitutional structure in a way that it simply was not under the Virginia Plan.212

Theoretically, the Council of Revision might have survived the federal judicial review of state legislation because the primary objection to the Council was based on the federal judiciary’s integral role in congressional legislation. It was the second method the Convention chose to restrain the states, therefore, that delivered the most devastating blow to the Council.

In Article I, Section 8, the Convention delegated specific areas of authority to the national Congress.213 The Convention then took the additional step of subordinating state authority in those areas by formulating the Supremacy Clause.214 The result was “dual federalism,” where the authority of the state legislatures would be severely constrained in those substantive areas that were seen as prime candidates for state abuse and where state transgressions were viewed as particularly threatening to national interests.215

As with the specific prohibitions, dual federalism necessarily implicated judicial review. Controversies regarding the boundaries between federal and state authority were inevitable. Congress’ powers under Article I, Section 8 would need to be defined (as would the concept of what was “necessary and proper” to Congress’ execution of its Article I powers), and the courts were the logical place where such controversies would be contested. 216 In short, the Supremacy Clause required the judiciary,

211 At the Convention, for example, Madison observed that the ex post facto prohibition would “oblige the Judges to declare such [state] interferences [with existing contractual rights] null & void.” See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 440 (Aug. 28).
212 See KRAMER, supra note 88, at 73 (“[T]he Framers clearly opted for judicial review as a device to control state law.”).
214 U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
215 See, e.g., BERNSTEIN, supra note 10, at 63-73 (describing origins of dual federalism in United States).
216 Madison made this precise point in The Federalist:

In this relation, then, the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government.
through the process of judicial review, to police the contours of the dual federalist structure by reviewing congressional acts that purported to be consistent with it. Indeed, many of the Supreme Court’s most controversial rulings during the first twenty-five years of its existence involved issues of federalism and the interpretation of Article I, Section 8.

In summary, the Framers expected judicial review to play an integral role in the maintenance of the overarching constitutional structure. It was expected to function as a direct restraint on the states, as the primary referee to police the contours of dual federalism, and to some extent as a restraint on the federal government itself. The result was the demise of the Council of Revision. In light of the widespread belief that it was improper for the judiciary to review its own actions, the Council of Revision had been premised on the idea that judicial review of congressional legislation, at least with respect to constitutional issues, would be inconsequential.

The loss of the Council of Revision and the Convention’s decision to drop the congressional veto were severe blows to the constitutional structure of the Virginia Plan. Despite the fact that a number of their proposals had been adopted, the majority of the Virginia delegation failed to sign the Constitution. Even Madison, who signed the document, was severely disappointed with the Constitution. He had succeeded in shaping the Convention’s early deliberations and the Constitution itself appeared to reflect his overarching ideological outlook. The federal government included three branches and a bicameral legislature. The

217 See Jack N. Rakove, The Original Justifications for Judicial Independence, 95 GEO. L.J. 1061, 1068-69 (2007) ("The significance of the Supremacy Clause cannot be understated. It not only confirmed the status of the Constitution as fundamental law, but it also made the enforcement of its essential division of power between the Union and the States an inherently judicial function."); see also KRAMER, supra note 88, at 75 ("By adding the Supremacy Clause, Martin removed all doubts, again allaying the fears of others who wanted guarantees of an effective alternative [to the Virginia Plan's legislative veto]. . . . From this point on, then, the delegates assumed the existence of judicial review over state laws in their deliberations.").

218 See, e.g., FRIEDMAN, supra note 131, at 44-104.

219 A third major blow to the Virginia Plan was the loss of proportional representation in the Senate by virtue of the "Connecticut Compromise." See BEEMAN, supra note 2, at 200-25. These three losses were viewed as devastating to its proponents. See RAKOVE, supra note 59, at 73 ("To sustain three such defeats in the space of a week must have devastated the Madison who had come to Philadelphia imbued with such faith in his own ideas. From this point on, he began to fear that the results of the Convention would fall far short of the reforms required.").

220 See supra note 11 and accompanying text.

221 See RAKOVE, supra note 59, at 78 ("Believing that in his understanding of the principles of government he had now surpassed the celebrated writers of ancient and modern times, Madison viewed all the decisions that had so diluted his system not as necessary compromises but as fundamental errors of judgment.").
House of Representatives was structured to be electorally responsive to the people. The various branches enjoyed a degree of separation from popular sentiment and possessed avenues for restraining the House. By virtue of the Supremacy Clause and a host of specific prohibitions, there were even opportunities for the federal government to rein in the most egregious instances of state misrule. Despite all of that, however, Madison had lost two key features of the Virginia Plan that he had considered essential to the proper functioning of the constitutional structure. As a result, before the Convention was even over, Madison expressed his dismay about the Constitution's inadequacies to his friend Thomas Jefferson: "I hazard an opinion nevertheless that the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts agst the state governments." 

Madison's actions in the years following the Convention must be understood in the context of this disappointment that he felt after the Convention. In particular, Madison's views with respect to the Bill of Rights must be understood in the context of his frustration over the loss of the Council of Revision. As we shall see in the next section, Madison's initial reluctance to support the Bill of Rights is attributable largely to the ways in which judicial review differed from the Council. Madison's eventual decision to draft and press for the adoption of the Bill of Rights, furthermore, manifested (at least in part) an effort to address and correct some of the fundamental inadequacies that had been created in his constitutional structure when the Council was rejected. From an historical point of view, therefore, the Bill of Rights and the Council of Revision are inextricably bound together.

III. MADISON'S BILL OF RIGHTS AND THE NATURE OF JUDICIAL REVIEW

A. Madison's Disappointment with the Constitution

Madison believed that the loss of the Council of Revision and the congressional veto over state legislation had fundamentally undermined his constitutional scheme with respect to both state and federal legislation. In each of those contexts, the Constitution essentially provided two separate checks where the Virginia Plan had provided only one. With respect to state legislation, for example, the Virginia Plan had provided a

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222 See Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 PAPERS OF JAMES MADISON, supra note 4, at 163-64.
223 See infra notes 226-257 and accompanying text.
single congressional veto whereas the Constitution provided both judicial review (based on a litany of specific prohibitions) and the added protection of dual federalism (made effective through the Supremacy Clause). In the congressional context, the Virginia Plan had essentially provided one check (the Council of Revision) whereas the Constitution provided both the executive veto and judicial review based on specific prohibitions (and even, possibly, natural rights). From Madison’s perspective, however, the Constitution’s structure was inadequate in both the state and congressional contexts because he believed that two ineffective checks were inferior to a single restraint that had the capability of being effectively implemented.

1. The Constitution’s Deficiencies with Respect to State Legislation

Madison believed the Constitution’s litany of specific prohibitions would never adequately remedy the deficiencies of the state legislatures for several reasons. First, Madison believed the flexibility of the legislative process would enable the states to circumvent the constitutional limitations in myriad ways. In a letter to Jefferson on October 24, 1787, Madison articulated his disappointment in the Convention’s decision to rely on judicial review as the mechanism for controlling the states:

A constitutional negative on the laws of the States seems equally necessary to secure individuals agst. encroachments on their rights. The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism. . . . The restraints agst. paper emissions, and violations of contracts are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark. Injustice may be effected by such an infinitude of legislative expedients, that where the disposition exists it can only be controuled by some provision which reaches all cases whatsoever.

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224 See supra notes 203-218 and accompanying text.
225 See supra notes 198-200 and accompanying text.
226 See, e.g., Rakove, supra note 61, at 264 (“By its very rulemaking powers, the legislature could circumscribe the best efforts of the two weaker branches of government to correct the injustices of legislation.”).
227 Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 PAPERS OF JAMES MADISON, supra note 4, at 212.
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The Convention’s reliance on judicial review was equally misplaced because the process of judicial review was unlikely to be viewed as legitimate by those it sought to constrain. As Madison articulated in the same letter:

It may be said that the Judicial authority under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law, than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal agst. a State to the supreme Judiciary; that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible.228

One can ask why Madison was so much more confident that the states would accept the Virginia Plan’s legislative veto when he was so pessimistic about the states’ willingness to accept the legitimacy of judicial review. Part of the answer lies in the fact that the legislative veto was something of a preemptive strike. People were less likely to get attached to a particular law if it was struck down in its infancy as a mere bill.229

The other half of the answer, however, relates to the legitimacy of the process by which the law was to be struck down under the Virginia Plan. Under the Virginia Plan, the House would have played a key role in the congressional veto. As we have seen, Madison’s fear of the House as a potential “vortex” of power drove much of his constitutional theory with respect to separation of powers.230 With respect to the veto of state legislation, however, Madison had sought to harness the House’s tremendous power for the cause of good. What is more, the House would have been incapable of vetoing state legislation on its own accord. The Senate would have had to concur with the House before the veto could be exercised and, even then, the executive and the judiciary would have had

228 Id. at 211.
229 In Madison’s terminology, it was more “convenient” to prevent a law’s passage than to declare it void after its enactment. Id.
230 See supra notes 75-103 and accompanying text.
the power to overrule the veto through the Council of Revision.\footnote{231 See supra notes 104-107 and accompanying text.} In other words, a state law could only have been vetoed if all of the federal branches were in agreement that the law should be struck.

The thorough and democratic process by which state laws could be vetoed under the Virginia Plan contrasted sharply with the Constitution's nearly exclusive reliance on judicial review. Rather than implicating all of the branches, including the single branch most likely to merit the trust and confidence of the American people, the Constitution bestowed the responsibility for enforcing the specific prohibitions, as well as for policing the contours of dual federalism, to the one branch of the federal government that was the farthest removed and least accountable to the people themselves.\footnote{232 See, e.g., Rakove, supra note 201, at 1525 ("[Madison's] reservations were pragmatic. Judicial power simply will be too weak to provide a satisfactory solution to the challenges to national supremacy that he still expected the states to mount.").} The Constitution devolved primary responsibility in the federalism context, in other words, on the branch that was least likely to be perceived as legitimate in the eyes of the American people.\footnote{233 One of the best articulations of these concerns was voiced by one of the leading antifederalists ("Brutus") in March of 1788:}

As his letter to Jefferson demonstrates, Madison doubted that the state constituencies would allow such a body to wield an absolute check over state legislation without the involvement (let alone the consent) of the other federal branches.

It is easy to see how Madison could argue that his congressional veto actually constituted a less intrusive encroachment on the states than the

\begin{quotation}
Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. . . .

Had the construction of the constitution been left with the legislature, they would have explained it at their peril; if they exceed their powers, or sought to find, in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, and do themselves right; and indeed I can see no other remedy that the people can have against their rulers for encroachments of this nature. A constitution is a compact of a people with their rulers; . . . if they determine contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil, but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them but with a high hand and an outstretched arm.
\end{quotation}

form of judicial review that the Constitution ultimately employed.\textsuperscript{234} The Virginia Plan's sweeping congressional mandate could be perceived as less intrusive of state independence and authority because it required the consent of every branch of the federal government and provided the flexibility of evaluating state practices in an individualized context. For Madison, the scheme employed under the Virginia Plan was a far more effective alternative both in the sense that it was broader than judicial review and more likely to be accepted as legitimate by the citizens of the states.

2. The Constitution's Deficiencies with Respect to Judicial Review

In terms of the Constitution's limitations on congressional action, Madison had an equal if not greater cause for pessimism. The Constitution relied heavily on the executive veto as a restraint on Congress. As has been discussed, however, Madison was convinced that the executive alone would not be able to muster the political will or command the type of political legitimacy that would allow it to effectively restrain Congress.\textsuperscript{235} For those who were committed to legislative supremacy, the weakness of the executive veto was a potential blessing. For some others, less sanguine about the infallibility of representative bodies, the potential weakness of the executive veto was compensated, at least in part, by the prospects of judicial review. Alexander Hamilton, one of Madison's co-authors of \textit{The Federalist}, summarized the case in support of judicial review in \textit{Federalist} 78:

No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be

\textsuperscript{234} See, e.g., 2 \textit{Records of the Federal Convention}, \textit{supra} note 1, at 28 (July 17) (quoting Madison's argument at Convention that congressional veto was "the most mild & certain means of preserving the harmony of the system").

\textsuperscript{235} See \textit{supra} notes 98-102 & 172 and accompanying text.
the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.\textsuperscript{236}

Undoubtedly, Madison would have agreed with some of the assertions contained in Hamilton's \textit{Federalist} 78 when he first read them in the spring of 1788.\textsuperscript{237} He would have agreed that the Constitution was fundamental law and took precedent over legislative acts.\textsuperscript{238} He would have agreed that ultimate sovereignty rested with the people. He also would have agreed with Hamilton's assertion that the judiciary could serve as an "intermediary" of the people insofar as that suggested that the judiciary could function in a representative capacity.\textsuperscript{239} The Council of Revision demonstrated Madison's belief that the judiciary, by virtue of its appointment, was qualified to serve in a policy-making (and hence representative) capacity within the democracy.

The idea in \textit{Federalist} 78 that would have perplexed Madison, however, was the notion that the judiciary occupied a place in the democracy

\textsuperscript{236} \textit{The Federalist} No. 78 (Alexander Hamilton), \textit{supra} note 60, at 492.

\textsuperscript{237} \textit{Federalist} 78 was first published on May 28, 1788. \textit{Accord Kramer}, \textit{supra} note 88, at 81, 284 n.45. It is unlikely that Madison read it before May 28 because he had stopped sharing drafts with Hamilton after the early essays had been published. \textit{See Banning}, \textit{supra} note 8, at 396 (concluding from a review of Madison's writings that he and Hamilton had quickly "dispensed with their initial practice of reading each other's essays before they went to press.").

\textsuperscript{238} \textit{See, e.g., Sherry, supra} note 113, at 1153-54 (outlining Madison's belief during Convention that Constitution would constitute a positively enacted form of fundamental law).

\textsuperscript{239} \textit{See, e.g., Wood, supra} note 138, at 794 ("[I]n \textit{Federalist} 78]Hamilton implied, and others drew out the implication much more fully in subsequent years, that the judges, though not elected, resembled the legislators and executives in being agents or servants of the people with a responsibility equal to that of the other two branches of government to carry out the people's will, even to the point of sharing in the making of law.").
between the people and their elected representatives. Since the ultimate source of authority and legitimacy in a democracy flowed from the people, Hamilton's assertion that the judiciary stood closer to the people than the legislature was antithetical to Madison's entire constitutional structure, premised as it was on the belief that the American people would identify most strongly with their elected representatives in the House. 240 In 1788, Madison would have had great difficulty with the proposition that the judiciary could (or should) occupy a superior place over the legislature in the democratic hierarchy.241 That was the type of structural error that Madison had sought to avoid in the Virginia Plan with the Council of Revision. If too many Americans viewed judicial review as illegitimate, as Madison feared they would, the practical consequence would be that the judiciary would have no functional capacity to correct congressional errors.

The state of Madison's thinking with respect to judicial review during the critical period over the summer and fall of 1788 was revealed in a letter he wrote in October of 1788. Just five months after Hamilton's Federalist 78, Madison drafted a letter regarding Jefferson's draft for a constitution for the emerging state of Kentucky.242 In that correspondence, Madison proposed that the Kentucky constitution provide both the executive and the judiciary with an opportunity to veto legislation.243 This was essentially the

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240 See, e.g., BANNING, supra note 8, at 398 ("Sensible conjecture can suggest, although it cannot prove, that there were several topics on which Hamilton might well have made the other Publius uneasy. Notwithstanding Hamilton's denials that it did have this effect, Madison may well have seen his doctrine of judicial review (78:524-26 and 81:542-46) as implying 'a superiority of the judiciary to the legislative power' in the construction of the Constitution (78:524). This was undeniably a prospect that worried him at the time.").

241 Madison did not have to look far, or wait long, to confirm that other Americans shared precisely these types of reservations regarding the legitimacy of judicial review. In Essay XV, Brutus criticized the Constitution's scheme for judicial review:

The power of this court is in many cases superior to that of the legislature. I have shewed [sic], in a former paper, that his court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature. For all the departments of this government will receive their powers, so far as they are expressed in the constitution, from the people immediately, who are the source of power.

"Brutus," supra note 233, at 440. In fact, Hamilton's Federalist 78 was in large part a response to this essay by Brutus. See, e.g., KRAMER, supra note 88, at 79.

242 James Madison, Observations on the "Draught of a Constitution for Virginia" (Oct. 15, 1788), in 11 PAPERS OF JAMES MADISON, supra note 4, at 292-93.

243 Id.
same proposal Madison had made at the Convention on August 15, after the Council had been rejected.  

Under Madison’s proposal for Kentucky, the executive and judiciary vetoes would be subject to varying override procedures depending upon how the vetoes were exercised. In the event that the executive and the judiciary were both in agreement that the legislation should be vetoed on policy grounds, Madison proposed that the legislature should be allowed to override the vetoes with a three-quarters supermajority of each House. In the event that the executive and the judiciary were in disagreement about a policy veto, by contrast, Madison proposed that the legislature should be allowed to override the veto with only a two-thirds supermajority.  

In the event that the veto was based on constitutional grounds, Madison believed that the procedure should be altered in order to make a legislative override more difficult. When the veto was based on constitutional grounds, by either the executive or the judiciary, Madison proposed that the legislature be required to wait until a subsequent election before being allowed to reconsider the veto. It would then be allowed to override the veto based on the same supermajority requirements as a policy veto (two-thirds for one branch and three-fourths for both).  

Several aspects of this proposal shed light on the state of Madison’s thinking about judicial review as of October 1788. First, the proposal demonstrates that Madison believed that the executive should have the power to veto legislation on constitutional grounds. Here we discern his commitment to the principle that the judiciary had no special prerogative or claim with respect to constitutional interpretation. For Madison, the people were the ultimate source of authority and legitimacy and therefore ultimately responsible for defining the Constitution. For this reason, the
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executive and legislative branches were as qualified to decide issues of constitutional interpretation as the judiciary. In fact, insofar as the legislature was more closely tied to popular sentiment, it was the legislative branch rather than the judicial branch that wielded the strongest prerogative for constitutional interpretation. As a result, Madison persisted in his belief that constitutional objections by the executive and judiciary should be subject to an override by the legislative branch. As much as he may have feared the House as the "vortex" of power, Madison was simply not prepared to bestow either the executive or judicial branches with an absolute veto over the legislative prerogative, even when such a veto was asserted by both the executive and the judiciary on constitutional grounds. For Madison, that would amount to "disarming the Legislature of its requisite authority." Madison elaborated the point in the letter:

In the State Constitutions & indeed in the Fedl one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making their decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended, and can never be proper.

Giving the judiciary an absolute veto over the legislature (as Federalist 78 seemed to do) threatened to destroy the symmetry and legitimacy of the system as a whole. The qualified nature of Madison's veto would have ensured its legitimacy within the constitutional structure because it included an institutional mechanism whereby the people could assert the final word on constitutional meaning through a supermajority of the

whenever any one of the departments may commit encroachments on the chartered authorities of the others. . . . [A]nd how are the encroachments . . . to by [sic] redressed, without an appeal to the people themselves, who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance?  

250 For Madison's references to the House of Representatives as a "vortex" of power, see supra note 80 and supra note 121 and accompanying text.
251 See James Madison, Observations on the "Draught of a Constitution for Virginia" (Oct. 15, 1788), in 11 PAPERS OF JAMES MADISON, supra note 4, at 292-93 (stating that the revisionary power of the executive and the judiciary could be implemented "without disarming the Legislature of its requisite authority" provided the legislature retained the power to overturn the vetoes by a supermajority and that when the legislature exercised its option to overturn the veto it should "not be allowed the Judges or the Ex to pronounce a law thus enacted, unconstit. & invalid").
252 Id. at 293.
legislature. Rather than removing issues from the majoritarian process, Madison's veto would have performed its critical function by, inter alia, slowing down the legislative process, by interjecting opportunities for additional debate and consideration, by threatening fragile coalitions, and by requiring that controversial legislation command a supermajority of support.\textsuperscript{253}

Madison's proposal for the Kentucky constitution of requiring an intervening election before the Legislature could override the judicial veto was ingenious. It provided a solution to the conundrum of what to do when the various branches were in disagreement about constitutional meanings because it invited the people to assert their primacy over the entire system and break the tie between coordinate branches. The people were the legitimate tiebreaker because only they stood above all three branches. An intervening election allowed the people to weigh in on the controversy and encouraged the various branches to make the election a plebiscite on the constitutional controversy dividing the government.\textsuperscript{254}

As with state legislation, therefore, Madison was doubtful that judicial review could command sufficient legitimacy in the eyes of the people to be an effective restraint on congressional legislation.\textsuperscript{255} In fact, the infirmity of judicial review may have been more acute in the separation of powers context than it was in the context of state legislation. In the federalism context, Madison was willing to press for the congressional veto because

\textsuperscript{253} See supra notes 134-136 and accompanying text.

\textsuperscript{254} Even in this context, however, Madison desired that the popular will be mediated through the refining filter of representation. In Federalist 49, Madison argued against the utilization of popular conventions to resolve every constitutional disagreement between the branches. For one, such a device would be destabilizing to the government. See The Federalist No. 49 (James Madison), supra note 60, at 349 ("[F]requent appeals would, in a great measure, deprive the government of that veneration which time bestows on every thing....") In addition, Madison was loathe to rely on frequent appeals to raw public sentiment. See id. ("The danger of disturbing the public tranquility by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society.").

\textsuperscript{255} Madison's concerns in this regard were confirmed by Antifederalists such as Brutus, who criticized the legitimacy of judicial review in the strongest terms possible:

I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible....

There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

"Brutus," supra note 233, at 438.
he believed that the federal government had a broader claim to legitimacy than the states. Madison was not prepared to accept the type of nullification arguments that others like Thomas Jefferson and Spencer Roane would later employ. At least in theory, therefore, the Supreme Court might have the authority to command the states by virtue of its federal nature.

In the separation of powers context, by contrast, the judiciary had no claim over the other coordinate branches. Madison believed his proposal for the Council of Revision had surmounted these concerns because it represented the combined strength and prestige of two branches, because it struck down bills before they became law, and because the Council’s veto could be overridden by a supermajority in Congress. Judicial review lacked all of these crucial components of legitimacy. If there was a political struggle between the House and the federal judiciary, Madison could not see how the people would fail to vigorously support the branch with which they most closely identified. The “vortex” of power that was the House seemed poised to overwhelm judicial review under the new constitutional structure, Hamilton’s suggestion of judicial supremacy notwithstanding.

B. Madison’s Initial Ambivalence toward the Bill of Rights

Prior to the Constitution, Madison had been generally supportive of efforts to include declarations of rights at the state level. He had been particularly solicitous and successful in winning protections in Virginia for the freedom of conscience. When proposals were first made for a federal declaration of rights, however, Madison refused to lend his support. When George Mason proposed at the Convention that a declaration of rights be added to the Constitution, for example, Madison declined to support his fellow Virginian’s motion.

256 See infra notes 322-324 and accompanying text.
257 See THE FEDERALIST NO. 39 (James Madison), supra note 60, at 285 (“It is true that in controversies relating to the boundary between the two jurisdiction [state and federal], the tribunal which is ultimately to decide, is to be established under the general government.”).
258 RAKOVE, supra note 59, at 15-16 (describing Madison’s contribution to the religious freedom provision in Virginia’s Declaration of Rights of 1776).
259 See, e.g., BANNING, supra note 8, at 84-104; KETCHAM, supra note 3, at 162-68.
260 See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 587-88 (Sept. 12). Mason’s motion was unanimously rejected by a vote of ten states to zero. See id. at 583, 588. It seems almost certain that Madison voted against it. Both the Journal and Madison’s notes record Virginia as having voted against the measure. In addition to Mason, one of the other Virginia delegates, Edmund Randolph, was strongly critical of the Constitution’s lack of a bill of rights. See MAIER, supra note 11, at 90 (“Like Mason and Gerry, Randolph wanted amendments adopted prior to ratification.”). If Randolph was present on September 12, therefore, Virginia only could have voted against the measure if Washington, Blair, and Madison all opposed it. McClurg and Wythe were both absent by then. See
Throughout the ratification period, furthermore, Madison continued to oppose efforts to append a declaration of rights to the Constitution. Among his chief concerns at that time was his desire to stave off antifederalist efforts to use the issue as leverage for a second constitutional convention and to support federalist efforts to defeat conditional ratifications in key states such as Massachusetts, New York, and Virginia. Even after ratification had been safely secured, however, Madison remained ambivalent about a federal bill of rights into the fall of 1788 and did not publicly support such proposals until the beginning of 1789. Madison’s early reluctance to support proposals for a bill of rights must be understood in the context of the ways in which judicial review appeared inferior to the Council’s veto.

The evolution of Madison’s thought regarding a bill of rights can be glimpsed in a letter he wrote to Thomas Jefferson in October of 1788 (the same month he commented on the draft for the Kentucky constitution). In this private correspondence with his close friend, Madison suggested that he would be prepared to support certain proposals for a bill of rights out of deference to those proponents whom he respected (such as Jefferson). He also stated, however, that he personally saw no significant advantage or need for such proposals. “I have never thought the omission [of a bill of rights] a material defect,” Madison wrote, “nor been anxious to supply it

supra note 11. If Randolph was absent, by contrast, it is theoretically possible that Virginia could have voted down the measure solely on the strength of Washington and Blair’s votes but only if Madison had failed to support Mason by abstaining.

At least some of the delegates’ opposition to Mason’s motion may have been attributable to the timing of the motion. The delegates had endured a trying ordeal throughout the summer of 1787 and the Convention closed just five days later on September 17. See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 1, at 641-49 (Sept. 15); BEEMAN, supra note 2, at 343-44 (“They were desperately weary and hot in the stuffy Assembly Room and profoundly anxious to avoid anything that would prolong the Convention. Although Mason had suggested that ‘a bill might be prepared in a few hours,’ the delegates knew better.”).

261 At the Virginia Ratifying Convention, Madison argued that a bill of rights could dangerously imply greater powers for the federal government than were intended. See 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 233, at 1473, 1501-02 (Virginia Ratifying Convention, June 24, 1788) (“If an enumeration be made of our rights, will it not be implied, that everything omitted, is given to the General Government?”).

262 See, e.g., MAIER, supra note 11, at 395-96 (regarding conditional ratification). For Madison’s opposition to a second convention, see Letter from James Madison to George Lee Turberville (Nov. 2, 1788), in 11 PAPERS OF JAMES MADISON, supra note 4, at 330-31.

263 See, e.g., BANNING, supra note 8, at 281 (“[I]t seems quite certain that until the fall of 1788, Madison agreed with many other Federalists that a reservation of essential rights was inappropriate in a federal Constitution and could, indeed, be positively dangerous to many of the liberties that its proponents wanted to protect.”).

264 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 PAPERS OF JAMES MADISON, supra note 4, at 297.
even by subsequent amendment, for any other reason than that it is anxiously desired by others."

The letter to Jefferson suggests that Madison wished to support proposals for a federal bill of rights but was struggling to find principled reasons for such a course. Support for a bill of rights was strong in his native Virginia, which meant not only that many of his most respected friends were in favor of such proposals but also that it would be difficult for Madison to gain election to the newly created Congress if he were perceived to be against them. To a certain extent, therefore, the October letter to Jefferson appears to have been an effort by Madison to work out his own position on the subject rather than an effort to convince Jefferson of any proposition (who was already steadfastly in favor of amendments). While Madison failed to reach a definitive conclusion in the letter itself, the thoughts contained in the letter strongly suggest that Madison was very close in the fall of 1788 to a resolution of the key issues that most perplexed him.

After expressing his initial ambivalence in the letter, Madison began his discussion by articulating a number of arguments against a bill of rights. Two of these arguments related to the federal government’s relative weakness within the constitutional scheme. Stripped of the congressional veto, Madison believed that the Constitution had allocated too much freedom to the states and it was therefore those entities that warranted the most scrutiny under the new system. A bill of rights was simply not as necessary on the federal level, he argued, by virtue of the limited nature of Congress’ enumerated powers and by virtue of the states’ abilities to rein in the federal government.

The argument against a bill of rights that Madison articulated in greatest detail, however, stemmed from his pessimism that a bill of rights could be successfully implemented. Madison stated:

Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. . . . Wherever the real power in a Government lies, there is

265 Id.
266 See infra note 333.
267 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 PAPERS OF JAMES MADISON, supra note 4, at 297.
268 Id.
the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. . . . Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince. . . . [I]n a popular Government, the political and physical power may be considered as vested in the same hands, that is in a majority of the people, and, consequently the tyrannical will of the Sovereign is not to be controlled by the dread of an appeal to any other force within the community. What use then it may be asked can a bill of rights serve in popular Governments?  

Here we see the connection between Madison’s ambivalence toward the bill of rights and his reservations about judicial review. How could the Bill of Rights, in themselves mere “parchment barriers,” serve to restrain the majority when the American people were so unlikely to accept judicial review as a constitutional practice? Madison had difficulty believing that a federal bill of rights could be successfully implemented and enforced in light of the public’s propensity to identify so closely with their elected representatives in Congress. In a struggle between the judiciary and Congress, it seemed inevitable that the people would vigorously support the branch with which they most closely identified. 

Madison’s pessimism regarding the legitimacy of judicial review not only undermined his support for a bill of rights but also supplied an affirmative argument against their adoption. There was “great reason to

269 Id. at 297-98.

270 See RAKOVE, supra note 8, at 314 (arguing that Madison failed to see the value of a bill of rights “because he doubted whether any bill of rights, however carefully drawn or exhaustive, could counter the real forces of republican politics”).

271 See, e.g., Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 STAN. L. REV. 1031, 1060 (1997) (“Madison found it difficult to imagine how courts could withstand the superior political power that legislators and voters wielded—whether or not it was finally proper for judges to countermand the considered decisions of representative assemblies.”).

272 See Harrington, supra note 132, at 88 (“Madison thought it unlikely that judges, either federal or state, would have the political courage to stand up to efforts by the states to enlarge their powers. Indeed, this same sort of pessimism was behind Madison’s belief that a bill of rights was unnecessary.”).
fear," Madison stated in his October letter, that a "positive declaration of some of the most essential rights could not be obtained in the requisite latitude."\textsuperscript{273} Jefferson argued in response that "half a loaf is better than no bread."\textsuperscript{274} Madison, however, had perceived the possibility that a bill of rights could actually prove counterproductive. In addition to his concern that the articulation of the rights themselves might be unduly narrow, Madison feared that the rights could be eviscerated through the process of their interpretation.\textsuperscript{275}

There were at least two ways in which a bill of rights could prove counterproductive as a result of the infirmities of judicial review. In the event that judicial review lacked legitimacy in the eyes of the American public, there was the distinct possibility that the judiciary would feel compelled to capitulate to Congress in controversial cases. A bill of rights could then prove counterproductive if the judicial capitulation constituted a precedent that invited still further encroachment by Congress.\textsuperscript{276} Under this scenario, it might be better not to commit the rights to writing at all because the absence of a definitive interpretation by the courts might help preserve the ability of others to argue for more expansive interpretations of the rights in the future.

Similarly, a bold effort by the judiciary to restrain Congress could prove equally counterproductive. The people’s propensity to support their legislators might empower Congress to disregard judicial rulings in controversial cases. As with judicial capitulation, therefore, the likely practical result would be an institutional narrowing of rights. Madison summarized the point towards the end of his letter to Jefferson:

Supposing a bill of rights to be proper the articles which ought to compose it, admit of much discussion. I am inclined to think that absolute restrictions in cases that are

\textsuperscript{273} Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 PAPERS OF JAMES MADISON, \textit{supra} note 4, at 297.

\textsuperscript{274} Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 12 PAPERS OF JAMES MADISON, \textit{supra} note 4, at 14.

\textsuperscript{275} See, e.g., Rakove, \textit{supra} note 61, at 264 ("An enumeration of rights, [Madison] feared, would prove far more effective in limiting the judicial protection of rights than an enumeration of legislative powers would in preventing their violation. . . . The enumeration of rights, in other words, might prove restrictive in a way or to an extent that the enumeration of legislative powers could not.").

\textsuperscript{276} This concern was particularly germane when set against the backdrop of British constitutionalism, where practice and tradition were central elements in defining constitutional norms. See, e.g., Sherry, \textit{supra} note 113, at 1131 ("[E]arly American revolutionaries stressed that acquiescence to abhorrent Parliamentary actions was dangerous precisely because it threatened to ratify such actions as consistent with or part of fundamental law.").
doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy.\textsuperscript{277}

Under either scenario that Madison thought likely under judicial review, therefore, the end result could be a counterproductive narrowing of the meaning of the very rights that the amendments were intended to preserve.

While he articulated a potential danger that seemed to escape Jefferson’s blithe disposition, Madison’s October 1788 letter was not so much an attempt to dissuade his friend of the propriety of a bill of rights as it was an effort by Madison to work out his own position. As a result, Madison followed his discussion of the disadvantages of a bill of rights with an exploration of their potential benefits. In response to his own query whether a bill of rights could possibly serve a legitimate purpose in democracies, he offered two possible answers. The first potential benefit was the possibility that “[t]he political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”\textsuperscript{278} The second benefit he articulated accrued in those occasions (which Madison thought would be rare) where a duly elected government usurped its role and consciously acted contrary to the best interests of the majority.\textsuperscript{279} In that event, Madison argued, “a bill of rights will be a good ground for an appeal to the sense of the community.”\textsuperscript{280}

Conspicuously absent from his discussion of the putative benefits of a bill of rights was any reference to judicial review. Jefferson pointed out this deficiency in the return letter he penned in March of 1789,\textsuperscript{281} but it is easy to understand why Madison chose to omit the prospect of judicial

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\textsuperscript{277} Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 PAPERS OF JAMES MADISON, supra note 4, at 299.  \\
\textsuperscript{278} Id. at 298-99.  \\
\textsuperscript{279} Id. at 299.  \\
\textsuperscript{280} Id.  \\
\textsuperscript{281} Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 12 PAPERS OF JAMES MADISON, supra note 4, at 13 (“In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary.”).
\end{flushleft}
review from his October letter. Madison was as committed as anyone to the idea of equipping the judiciary with a form of veto over Congress. He had labored for months at the Convention to convince the other delegates to accept a judicial veto in the form of the Council of Revision. As of October 1788, however, he was having difficulty seeing how a bill of rights could be implemented successfully in light of the infirmities of judicial review. He had read Hamilton’s *Federalist* 78 a few months prior and it had failed to persuade him.

As a result, Madison’s focus on the potential benefits for a bill of rights was initially limited to the ways in which he believed a bill of rights could directly affect the American public. Madison undoubtedly found this point insufficient in itself to persuade him of the need for a bill of rights. Madison had been driven to the Philadelphia Convention out of a profound concern about the ability and willingness of majorities to govern responsibly without the interceding influence and direction of well-chosen leaders. It is difficult to believe that his apprehensions on this point could be so easily assuaged by a bill of rights that he repeatedly referred to as mere “parchment barriers.” It is the contention of this article, however, that Madison’s remarks about the bill of rights in his October letter to Jefferson signaled an impending shift in his thinking about judicial review. It is the further contention of this article that this shift in his perspective played a pivotal role in his decision to advocate for a federal bill of rights the next year.

C. Madison’s Conversion

1. Parchment Barriers to Guardians in a Peculiar Manner

According to his October 1788 letter to Jefferson, the redeeming virtues of a bill of rights derived from the effect such a document could have on the American people themselves. The values and norms expressed in a bill of rights, he stated, could “become incorporated with the national sentiment” and could inform and inspire “the sense of the community.” This was a crucial observation with seemingly inevitable consequences.

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282 Rakove, supra note 201, at 1531 (“That Madison could in fact omit an argument that modern commentators would place high if not indeed atop their accounts of the functions of a bill of rights is, of course, the key point in itself, for it confirms how little faith Madison placed in the efficacy of judicial power.”).
283 See supra notes 45-55 and accompanying text.
284 See supra note 269 and accompanying text.
285 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 PAPERS OF JAMES MADISON, supra note 4, at 299.
under Madison's political philosophy. For Madison, as we have seen, the political legitimacy of the constitutional structure flowed from its connection to the people. The House of Representatives was the fulcrum that lent legitimacy to his entire constitutional structure by virtue of the ways in which the people identified with that body. The other branches were further removed from popular sentiment in order to add additional opportunities for deliberation and leadership to the governing process. The fact that the executive and the judiciary were further removed from the people, however, ultimately required that their position in the constitutional structure be subservient to the House. That fact accounts for the qualified nature of the Council's veto. Madison must have objected to Hamilton's vision of judicial review in *Federalist* 78 because it appeared to invert the natural order of the constitutional structure by making the House subservient to the judiciary. That was not only a theoretical problem but a practical one as well, since Madison perceived little likelihood that the American people would accept such an arrangement.

Madison's realization that a bill of rights could directly affect the people, however, provided the basis for a significant shift in Madison's thinking about judicial review. Insofar as a bill of rights became "incorporated with the national sentiment," it could constitute an additional source of legitimacy for the institution most connected to it: the judiciary. To the extent that the people personally identified with the rights embodied in a bill of rights, it was possible that they could come to identify more strongly, and more directly, with the judiciary whose constitutional task it was to assert and defend those rights. In other words, a bill of rights had the potential to foster and institutionalize a direct political connection between the people and the judiciary that could augment the existing indirect connection derived from the appointment process. The power of

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286 See *supra* notes 75-136 and accompanying text.
287 The fact that the Virginia Plan provided for the appointment of the judiciary and the executive by Congress helps illustrate how Congress (particularly the House) served as the fulcrum of the structure and how the judicial and executive roles were ultimately subservient to the House. See *supra* notes 150-153 and accompanying text.
288 See *supra* notes 240-253 and accompanying text.
289 See *supra* notes 130-133 and accompanying text.
290 See Wood, *supra* note 138, at 793 ("The sources of something as significant and forbidding as judicial review never could lie in the accumulation of a few sporadic judicial precedents, or even in the decision of *Marbury v. Madison*, but had to flow from fundamental changes taking place in the Americans' ideas of government and law.... Perhaps the most crucial of these changes involved reducing the representative character of the people's agents in the legislatures and enhancing the representative character of judges.")
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a bill of rights to become incorporated into a national consensus, therefore, helped provide the answer to Madison’s perplexing question about why the people would ever countenance a check from the judiciary that lacked an institutional mechanism for override.

It is the contention of this article that Madison proposed the Bill of Rights precisely because he hoped that it would help create and institutionalize a connection between the people and the judiciary that would approximate and approach (although probably never equal) the ways in which the people identified with Congress (particularly the House). 291 In fact, a direct connection between the judiciary and the people could provide an avenue by which the judiciary could escape its entirely subordinate role in the constitutional structure. It would have been natural for Madison to think in such representational terms about the judiciary because the judiciary’s intended function on the Council had been fundamentally political.

In his letter to Jefferson in October of 1788, Madison failed to spell out the ramifications of his observations with respect to judicial review. Quite likely he had not yet fully grasped those ramifications. But his intuition about the capacity of a bill of rights to be incorporated into the public sentiment was a watershed statement with inevitable consequences under his political philosophy.

Less than three months after his letter to Jefferson, Madison publicly expressed his support for a bill of rights. 292 When he arrived in the House of Representatives a few months later, he announced his intention to submit a bill of rights for Congress’ consideration. 293 On June 8, 1789, he introduced nineteen proposed alterations and additions for the House’s consideration. 294 Madison’s statements to the House when he introduced

291 That is not to say that this was the only reason Madison advocated for the Bill of Rights in 1789. Undoubtedly Madison perceived strategic advantages to their passage that may have contributed to his desire to propose them in Congress. See infra notes 332-335 and accompanying text.

292 On January 2, 1789, for example, Madison wrote a letter to a prominent Baptist minister in his House district which expressed his willingness to support a federal bill of rights. Letter from James Madison to George Eve (Jan. 2, 1789), in 11 PAPERS OF JAMES MADISON, supra note 4, at 404 (“The Constitution is established on the ratifications of eleven States and a very great majority of the people of America; and amendments, if pursued with a proper moderation and in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty.”). Accord KETCHAM, supra note 3, at 276 (describing Eve as an “influential Baptist preacher”). For a discussion of Madison’s other public statements in support of a federal bill of rights in the months leading up to his House election, see id.

293 On May 4, 1789, Madison announced his intention to introduce a bill of rights later in that month. See 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 391-92 (Charlene Bangs Bickford et al. eds., 2004).

the amendments suggest that his position with respect to judicial review and the bill of rights had evolved significantly since the prior year.

Madison began his June 8 statement with a summary of the weaknesses of the constitutional structure as it had emerged from Philadelphia.295 The statements reveal Madison’s continued belief that the rejection of the Council of Revision had thrown his constitutional structure out of balance by providing Congress too much power:

In our government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker: It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least control; hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper.296

The deficiency of the executive veto, Madison made sure to point out, was a consequence of the Convention’s decision to reject his Council of Revision.297 To the end of his days, Madison likely believed in the superiority of the Council over judicial review.

Madison then clarified that the legislative branch was the most to be feared not because it was the most likely to deviate from public sentiment but rather because it was likely to reflect it closely:

The prescriptions in favor of liberty, ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power: But this [is] not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.298

Majorities were destined to control the legislative branch and the legislative branch seemed destined to reflect the majority will, to the

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295 See 12 PAPERS OF JAMES MADISON, supra note 4, at 199.
296 Id. at 204.
297 Id. at 199 ("There have been objections of various kinds made against the constitution: Some were levelled against its structure, because the president was without a council. . . ").
298 Id. at 204.
detriment of the nation as a whole when the majority clamored for shortsighted or irrational legislation.

Madison continued by reiterating the fundamental logic contained in his letter to Jefferson from the prior year.\textsuperscript{299} The key to a bill of rights derived from the possibility that the values and norms expressed in such a document might actually become incorporated into the national sentiment:

\begin{quote}
It may be thought all paper barriers against the power of the community are too weak to be worthy of attention. I am sensible they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defence; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one mean to control the majority from those acts they might be otherwise inclined.\textsuperscript{300}
\end{quote}

For Madison, the value of a bill of rights did not derive from its creation of a set of enforceable rights in the positivist sense. Instead, the value of a bill of rights derived from the document's capacity to create a consensus among the American people about their defining values, norms, and principles. In this respect, Madison's speech in June of 1789 mirrored the letter to Jefferson he had written the prior October. But then Madison went on to articulate the natural consequence of his logic with respect to judicial review:

\begin{quote}
It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of the particular states. It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated; but does it not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an
\end{quote}

\textsuperscript{299} See supra text accompanying note 278.  
\textsuperscript{300} Id.
impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. 301

These remarks would appear to reflect a significant shift in Madison’s thinking regarding judicial review. Conspicuously absent was the pessimism that had pervaded his outlook regarding judicial review just eight months before. If a bill of rights could inspire a consensus among the American people regarding their fundamental values, he appeared to reason, it could empower the judiciary to restrain Congress in the way that the Council of Revision had been originally intended. 302 As the self-conscious “guardians” of the American people’s fundamental values, the judiciary could enjoy a source of legitimacy that would approach and rival, if never fully equal, that of Congress. 303 By June of 1789, therefore, Madison seemed prepared to believe (or hope) that a bill of rights could help provide judicial review with the type of legitimacy that could restore balance to the constitutional structure; a balance he had previously believed, just eight months before, had been permanently lost with the rejection of the Council of Revision.

The modern tendency to treat the Bill of Rights as a positivist creation of rights had little allure for Madison. To conceive of the Bill of Rights in such terms would relegate them to mere “parchment barriers” that enjoyed little or no chance of successful implementation. The capacity of a bill of rights to foster a consensus within the American people was the principal benefit for Madison because that consensus that could forge a direct connection between the judiciary and the people. 304

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301 Id. at 206-07.
302 There was also the possibility that such a consensus of norms and values could directly influence Congress by virtue of the American public’s control over that body, but it is unlikely that Madison was very optimistic about such a prospect in 1789. See supra text accompanying notes 283-284.
303 See, e.g., WOOD, THE IDEA OF AMERICA, supra note 37, at 185-86 (“When, in order to justify judicial review, Alexander Hamilton in The Federalist No. 78 referred to judges as agents of the people and not really inferior to the people’s other agents in the legislature, he opened up a radically new way of thinking of the judiciary. . . . Conceiving of judges as just another one of their agents perhaps helps explain why Americans eventually became so accepting of judicial review . . . .”).
304 Legal historian William Nelson argues that this was the approach ultimately employed by the Marshall Court. See NELSON, supra note 138, at 59 (“[T]he foundation of Marshall’s constitutional jurisprudence is the distinction between political matters, to be resolved by the legislative and executive branches in the new democratic, majoritarian style, and legal matters, to be resolved by the judiciary in the government-by-consensus style that had prevailed in most eighteenth century American courts.”).
The fact that the Bill of Rights was intended to foster and reflect a consensus among Americans is consistent with the fact that they were drafted in the broad, political language of natural rights. All of the Bill of Rights can be traced back to Madison’s proposal of June 8. One of the amendments that Madison proposed, for example, read:

The rights of the people to be secured in their persons, their houses, their papers, and their property from all unreasonable searches and seizures, shall not be violated by warrants issued without probably cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

With very slight alteration, this proposal was subsequently adopted as the Fourth Amendment. Similarly, his proposal that “No soldier shall in time of peace be quartered in any house without the consent of the owner; nor at any time, but in a manner warranted by law” became the basis for the Third Amendment with very slight changes.

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305 The vast majority of additions and alterations that Madison proposed concerned individual rights. In addition to proposing a series individual rights, Madison’s proposals included a slight alteration to the required population ratio for representatives, a limitation on the ability of members of Congress to alter their own salaries during the same session (which was ultimately was ratified in 1992, in slightly altered form, as the Twenty-Seventh Amendment), a precursor to the Tenth Amendment that sought to clarify that federal powers were delegated by the states, a requirement for the strict separation of powers, and a preamble of sorts that included a declaration of general principles self-consciously modeled after the Declaration of Independence. See 12 PAPERS OF JAMES MADISON, supra note 4, at 196-207.

306 See RAKOVE, supra note 8, at 331 (“[T]he amendments [Congress] eventually submitted to the states in September 1789 followed closely the proposals [Madison] introduced in June.”). In fact, the similarities include the Ninth and Tenth Amendments. With respect to the Ninth Amendment, Madison’s original language proposed: “The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.” 12 PAPERS OF JAMES MADISON, supra note 4, at 201-02. For the Tenth Amendment, Madison proposed: “The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the States respectively.” Id. at 202. This language largely tracks the ultimate language of the amendments, with the notable exception that “or to the people” was added at the end of the Tenth Amendment. See U.S. CONST. amend X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”) (emphasis added).

307 See 12 PAPERS OF JAMES MADISON, supra note 4, at 201.

308 U.S. CONST. amend. IV.

309 Compare 12 PAPERS OF JAMES MADISON, supra note 4, at 201, with U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).
the Second Amendment varied little from the final version although Madison couched the need for militias in terms of the "country's" freedom rather than the "State's" and would have included a specific provision relieving conscientious objectors from military service. The Fifth and Seventh Amendments represented compilations of Madison's proposals but contained only slight variations from Madison's original proposals and the Eighth Amendment was derived from his June 8 proposals without any alteration. The only two amendments which contain significant variations from Madison's original language are the First and Sixth Amendments, but even here the final versions retained Madison's preference for natural rights language.

310 Compare 12 PAPERS OF JAMES MADISON, supra note 4, at 201 ("The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."); with U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

311 One of Madison's proposals protected an individual's right to a civil jury, while a different proposal protected the factual findings of juries (both criminal and civil) from appellate review. See 12 PAPERS OF JAMES MADISON, supra note 4, at 202. These two protections were combined into the Seventh Amendment. U.S. CONST. amend. VII. Under Madison's proposals, there would have been a general monetary floor for all appeals to federal court. See 12 PAPERS OF JAMES MADISON, supra note 4, at 202. The Seventh Amendment, by contrast, imposed a twenty dollar requirement for an individual's right to a civil jury but dropped the requirement for appeals. U.S. CONST. amend. VII. With respect to the Fifth Amendment, Madison's proposal would have protected an individual from double jeopardy in cases other than impeachment. See 12 PAPERS OF JAMES MADISON, supra note 4, at 201. The Fifth Amendment, as ultimately adopted, did not carve out impeachment as an exception and limited the double jeopardy protections to cases involving "life or limb." U.S. CONST. amend V. The Fifth Amendment, furthermore, specifically limited the protection against self-incrimination to criminal cases. Id. Madison's proposed protection against self-incrimination arguably applied to civil cases as well. See 12 PAPERS OF JAMES MADISON, supra note 4, at 201 ("No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial of the same offence; nor shall be compelled to be a witness against himself ... "). For the Eighth Amendment, compare 12 PAPERS OF JAMES MADISON, supra note 4, at 201 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); with U.S. CONST. amend. VIII.

312 In the context of criminal jury trials, Madison would have required a "jury of freeholders of the vicinage" whereas the Sixth Amendment ultimately required simply that the jury be drawn from "the State and district wherein the crime shall have been committed." Compare 12 PAPERS OF JAMES MADISON, supra note 4, at 202, with U.S. CONST. amend VI. Madison's proposal, furthermore, would have explicitly required that criminal juries be unanimous, that defendants would have a "right [to] challenge" the jury, and that the jurors would possess "other accustomed requisites." 12 PAPERS OF JAMES MADISON, supra note 4, at 202. None of these additional requirements were incorporated in the Sixth Amendment as it was ultimately adopted, leaving open the question of whether the ratifiers were consciously subjecting those aspects of the criminal jury to modification. U.S. CONST. amend VI. The Supreme Court grappled with the Sixth Amendments requirements regarding unanimity in Apodaca v. Oregon, 406 U.S. 404 (1972), where a plurality decision found that the Sixth Amendment does not require unanimity with respect to trials in state court but refused to overturn prior case law finding that the Sixth Amendment implied a unanimity requirement in federal trials.

With respect to the First Amendment, Madison's original draft would have required: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national
2. The Middle Course between Judicial Review and Judicial Supremacy

In *Federalist* 78, Hamilton argued that the judiciary could function as “an intermediate body between the people and the legislature.”\(^{313}\) It is unlikely that Madison ever accepted the proposition that the judiciary could occupy a place in the constitutional structure that was superior to the legislature. Madison likely believed that there were limits to how much the American public would ever identify with an unelected body with life tenure and that such limits would always serve to restrain the judiciary’s role within the constitutional structure. While he undoubtedly hoped that the judiciary would enjoy sufficient legitimacy to restrain Congress in a meaningful way, he likely assumed as a practical matter that the judiciary would never enjoy much more than the type of qualified veto intended for the Council of Revision. Where a determined supermajority of the legislature was intent on a particular course of action, Madison probably believed (at least in 1789) that the judiciary would be essentially powerless to stop such actions even when purporting to act pursuant to the Bill of Rights.

Over the course of his life, Madison did become increasingly confident in the judiciary’s ability to elicit the respect and attachments of the American public. Some fifty years after the Constitutional Convention, just before he died, Madison sounded his most confident note in the strength of the judicial mandate:

> It is the Judicial department in which questions of constitutionality, as well as of legality, generally find their ultimate discussion and operative decision: and the public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities implied in its members; by the gravity and deliberations of their proceedings; and by the advantage their plurality gives them over the unity of the Executive department, and their fewness over the multitudinous composition of the Legislative department.

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\(^{313}\) *See supra* text accompanying note 236.
Without losing sight, therefore, of the co-ordinate relations of the three departments to each other, it may always be expected that the judicial bench, when happily filled, will, for the reasons suggested, most engage the respect and reliance of the public as the surest expositor of the Constitution, as well in questions within its cognizance concerning the boundaries between the several departments of the Governments as in those between the Union and its members.\textsuperscript{314}

Here we see a loud echo of Madison’s June 1789 statement regarding the public’s capacity to identify with the judiciary as the “guardians” of their fundamental values.\textsuperscript{315} It is interesting to speculate how far he had come to believe the public’s “deference and confidence” to the judiciary could extend.\textsuperscript{316} When Madison stated that the judiciary would “most engage the respect and reliance of the public,” had he come to believe by the end of his life that the judiciary could equal or surpass the legislature in terms of their institutional claims to constitutional interpretation?\textsuperscript{317} If so, did he believe that such a state of affairs was consistent with the principles of democratic governance underlying his constitutional theory?

Such questions are difficult to answer with any conviction. In the same writing quoted above, Madison emphasized that he continued to reject the notion of judicial supremacy as a theoretical matter (at least with respect to Congress):

As the Legislative, Executive, and Judicial departments of the United States are co-ordinate, and each equally bound


\textsuperscript{315} For Madison’s statements in June of 1789 when he introduced his amendments, see supra notes 295-301 and accompanying text.

\textsuperscript{316} Although they were generally adversaries and Madison was frequently at odds with his rulings, it is interesting to speculate whether Madison’s later optimism in the judiciary’s standing could have been attributable, at least to some degree, to John Marshall’s largely successful tenure as Chief Justice from 1801 to 1835. For a useful summary of Marshall’s career as Chief Justice, see generally CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996). For Madison’s views regarding some of Marshall’s more important rulings, see McCoy, supra note 134, at 68-70, 99-103.

\textsuperscript{317} In this respect, it is possible that Madison drew a distinction between the federalism and separation of powers contexts. See supra notes 255-257 and accompanying text. Madison’s criticisms of judicial supremacy often occurred in the separation of powers context while his later defenses of judicial review most often occurred in the federalism context. See infra notes 318-324 and accompanying text.
to support the Constitution, it follows that each must, in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it; and, consequently, that in the event of irreconcilable interpretations, the prevalence of the one or the other department must depend on the nature of the case, as receiving its final decision from the one or the other, and passing from that decision into effect, without involving the functions of any other. 318

It seems, therefore, that Madison was committed to the very end of his life to charting a middle course between judicial review and judicial supremacy. 319 As a result, he was never reluctant to criticize judicial rulings that he believed were mistaken. As Secretary of State in Marbury v. Madison, 320 he even appeared prepared to flout a Supreme Court ruling that he was convinced would be wrong. 321 By the same token, however, Madison always seemed to stop short when the criticisms of the judiciary were directed at the legitimacy of judicial review itself. 322 In a letter to Jefferson in 1823, he stated:

I acknowledge, in the ordinary course of government, that the exposition of the laws and constitution devolves upon the judicial. But, I beg to know, upon what principle it can be contended that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. The constitution is the charter of the people to the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.

318 Id.
319 See, e.g., Wood, supra note 138, at 796 (“Both Jefferson and Madison remained convinced to the end of their lives that all parts of America’s governments had equal authority to interpret the fundamental law of the Constitution....”). In fact, one of Madison’s most vigorous renunciations of judicial supremacy came during the very same month he introduced the Bill of Rights, in the context of a congressional debate regarding the executive power over the removal of federal officers:

12 THE PAPERS OF JAMES MADISON, supra note 4, at 238 (June 17, 1789).
320 5 U.S. (1 Cranch) 137 (1803).
321 As the official defendant, Madison failed to appear before the Court and did little to defend the case. See, e.g., JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 177-79 (2002). Had Marshall ordered Madison to deliver the commissions, in all likelihood, Madison would have ignored the order. See, e.g., id. at 183 (“No matter how erudite an opinion demanding that Jefferson’s secretary of state deliver the commissions might be, the likelihood that the president and his secretary would bow to the Court’s dictate was remote.”).
322 This was particularly true with respect to federalism, the context in which Madison offered his strongest defenses of judicial review. See, e.g., Letter from James Madison to Edward Everett (Aug. 28,
I am not unaware that the Judiciary career has not corresponded with what was anticipated. At one period the Judges perverted the Bench of Justice into a rostrum for partizan harangues. And latterly the Court, by some of its decisions, still more by extrajudicial reasonings & dicta, has manifested a propensity to enlarge the general authority in derogation of the local, and to amplify its own jurisdiction, which has justly incurred the public censure. But the abuse of a trust does not disprove its existence.

Even in the context of the Virginia Resolves, when Madison was perhaps at the height of his criticism of the federal judiciary, he was careful to avoid the type of fundamental attacks upon the legitimacy of judicial review that Jefferson wished to include.

In summary, there is no reason to think that Madison ever relented in his belief that the Council of Revision was superior to judicial review. In terms of theoretical purity, the Council of Revision was free of the internal contradictions and limitations that plagued judicial review. As in so many other respects, however, Madison proved to be a pragmatist with respect to judicial review and the Bill of Rights. Ultimately, he was willing to adapt to a theoretically flawed paradigm in the hope and confidence that it could be made to function correctly in the real world. A bill of rights could elevate the political legitimacy of the judiciary and thereby enable it to perform, albeit much less elegantly, the essential function he had hoped the Council of Revision would perform under his preferred constitutional structure.

1830) (published in _North American Review_), reprinted in _JAMES MADISON'S WRITINGS_ 847 (Jack N. Rakove ed., 1999) ("Those who have denied or doubted the supremacy of the judicial power of the U.S. & denounce at the same time nullifying power in a State, seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition & execution of the law...."); see also McCoy, _supra_ note 134, at 130-51 (describing Madison's defense of judicial review in the context of the Nullification Crisis of the 1830s).

323 Letter from James Madison to Thomas Jefferson (June 27, 1823), in _9 THE WRITINGS OF JAMES MADISON_ 142-43 (Gaillard Hunt ed., 1900-1910).

324 See Banning, _supra_ note 8, at 388 ("Madison was similarly cautious in his draft of resolutions for Virginia, which also called on the other states to concur in declaring that the acts in question were 'unconstitutional,' but which did not add that they were 'not law, but utterly null, void, and of no force or effect.' Madison, indeed, was possibly, although not certainly, responsible for checking an attempt by Jefferson to have the latter phrase inserted in his text."); McCoy, _supra_ note 134, at 145 ("Apparently Madison, in 1798, did not see Jefferson's draft before it was on the wing to Kentucky... but once he did, he lost no time alerting Jefferson to the errors and dangers in his logic. Above all, Madison rejected any hint of the notion that the Constitution conferred upon each state legislature the power to act within its borders against federal laws that it judged unconstitutional.").
In terms of the compatibility of judicial review with the fundamental tenets of democracy, Madison likely trusted that the practical limits of the judiciary’s legitimacy would ultimately consign it to its proper place within the constitutional framework. What he viewed as that “proper place” by the end of his life is difficult to say. What does seem clear is that, when occupied with the task of constructing a government in the late 1780s and early 1790s, he was prepared to prioritize practical solutions over theoretical objections. In fact, his adaptation to judicial review as a replacement for the Council of Revision was reminiscent of the manner in which he had adopted the Council of Revision in the first place. In both contexts, he discarded formalist conceptions of separation of powers in favor of a device that he believed could, as a practical matter, lend balance to the structure as a whole.\textsuperscript{325}

\textbf{3. The Timing of Madison’s Evolution}

It is clear that Madison’s position regarding judicial review changed dramatically over time. Immediately after the Convention, he harbored profound doubts about its efficacy.\textsuperscript{326} Later in his life, he expressed profound confidence in the judiciary’s capacity to “most engage the respect and reliance of the public as the surest expositor of the Constitution.”\textsuperscript{327} We will never be able to pinpoint the precise timing of the evolution in his thought.\textsuperscript{328} Most scholars have speculated that it was a slow process and that he did not come to genuinely espouse judicial review until well after he had proposed the Bill of Rights.\textsuperscript{329} According to this view, Madison was merely feigning confidence in his June 8 speech before the House of Representatives when he expressed optimism about the utility of the bill of rights and the prospects of judicial review.\textsuperscript{330} With respect to his June 8 contention that a bill of rights could lead the American public to identify directly with the work of the judiciary as the “guardians” of their rights, for example, many scholars have suggested that Madison essentially parroted

\begin{itemize}
\item \textsuperscript{325} See supra notes 180-189 and accompanying text.
\item \textsuperscript{326} See supra notes 235-257 and accompanying text.
\item \textsuperscript{327} See supra text accompanying note 314.
\item \textsuperscript{328} See, e.g., Rakove, supra note 61, at 257 (observing “the difficulty, if not the absurdity,” of “attempting to freeze a moment of historical time as the point when [Madison] possessed a true original understanding of exactly how the Constitution was to protect rights”).
\item \textsuperscript{329} Those espousing this view include the most eminent Madison scholars. See, e.g., Rakove, supra note 122, at 501 (“Political calculations, not a fundamental change of opinion, were what led [Madison] by late 1788 to accede to the idea that a bill of rights could be safely added to the Constitution so long as no door was thereby opened for more substantive or structural amendments.”).
\item \textsuperscript{330} See, e.g., Finkelman, supra note 17, at 302-03 (“Madison, even as he introduced the Bill of Rights in the Congress, had little faith in the value of what he derisively called ‘parchment barriers.’”).
\end{itemize}
the proposition from a letter he had recently received from Thomas Jefferson.\footnote{Andrew Burstein & Nancy Isenberg, Madison and Jefferson 196-97 (2010) ("[Jefferson] did not, as some have suggested, convince Madison to support a bill of rights. . . . As a result of their correspondence, [Madison] inserted Jefferson's concern with judicial review into a speech before Congress.")}

It is the contention of this article that the evolution of Madison's thought occurred much more quickly, and that the shift in his perspective began to take place as early as October of 1788. It is the further contention of this article that this shift in his views regarding judicial review helps account for the relatively sudden change in his position with respect to the Bill of Rights. In fact, Madison's views toward judicial review and the Bill of Rights seemed to be linked together in a symbiotic way. Madison's desire for some type of judicial veto over congressional action, like the one he had lost with the Council of Revision, led Madison to actively seek out a way to legitimize judicial review. Madison's belief that a bill of rights could be instrumental in legitimating judicial review paved the way for his support of the Bill of Rights.

Those scholars who are not convinced that Madison had come to believe in the utility of the Bill of Rights by June of 1789 have emphasized (in this author's view, overemphasized) Madison's strategic purposes for introducing the amendments in Congress.\footnote{See, e.g., Kenneth R. Bowling, "A Tub to the Whale": The Founding Father and Adoption of the Federal Bill of Rights, 8 J. Early Republic 223, 224 (1988) (arguing that "practical political concerns were [Madison's] primary motivation" for proposing the amendments that became the Bill of Rights); Finkelman, supra note 17, 345-46 (arguing that Madison's support of the Bill of Rights was "fundamentally political" and that "[t]o the end Madison was uncertain about the value of a bill of rights").} These scholars point to the fact that Madison's support for a bill of rights helped him secure election in the closely contested battle for his first House seat.\footnote{See e.g., Richard Labunski, James Madison and the Struggle for the Bill of Rights 158-77 (2006); Arthur E. Wilmarth, The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power, 26 Am. Crim. L. Rev. 1261, 1264 (1989) ("Madison sponsored the Bill of Rights in the First Federal Congress both to persuade moderate Antifederalists to accept the Constitution, and to fulfill his own campaign pledge."). Some of Madison's (less charitable) contemporaries ascribed his support for the amendments to his experiences in the recent election. See Letter from Robert Morris to Francis Hopkinson (Aug. 15, 1789), in Creating the Bill of Rights: The Documentary Record from the First Federal Congress 278 (Helen E. Veit et al. eds., 1991) ("[P]oor Madison got so Cursedly frightened in Virginia that I believe he has dreamed of amendments ever since.").} Some have also
argued that Madison intended his amendments to undermine antifederalist efforts to make more substantive changes to the Constitution (by proposing a more pervasive set of amendments and/or by calling a second convention). In addition, Madison may have wished to use the Bill of Rights to engender support for the new federal government from those who had opposed ratification and from those who had yet to ratify (North Carolina and Rhode Island). While at least some of these strategic considerations undoubtedly contributed to Madison’s desire to propose the Bill of Rights, however, it would be a mistake to overlook the sincerity of Madison’s commitment to the amendments at the time he proposed them in Congress.

When Madison arrived as a representative in the first federal Congress in 1789, there was little immediate support for amending the Constitution. Both houses of Congress were dominated by supporters of the Constitution who, like Madison, had ardently fought to secure the passage of the Constitution without a declaration of rights. A number of these “federalists” had voiced strong opposition to a federal bill of rights during the ratification period on the grounds that the enumeration of a specific set

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334 See, e.g., Bowling, supra note 332, at 224 (“[Madison] believed rights related amendments would satisfy enough Antifederalists to protect the new Constitution from both the structural amendments and the second Federal Convention which Antifederal leaders demanded ....”).

335 See, e.g., Finkelman, supra note 17, at 303 (“Madison’s primary purpose in supporting amendments was two-fold: to fulfill promises made to his constituents during his campaign for Congress and to undermine opposition to the Constitution.”); Rakove, supra note 61, at 254 (arguing that “Madison remained convinced that his reasons for dismissing bills of rights as useless ‘parchment barriers’ were still sound” but nonetheless proposed the Bill of Rights because “public opinion demanded the addition of some amendments to the new Constitution”).

336 See, e.g., BANNING, supra note 8, at 286 (“[The Federalists'] resentment of concessions they considered both unnecessary and improper prompted much of the resistance to [Madison's proposal for amendments], which was reinforced by sheer impatience to get on with other business.”). At the first Federal Congress, the number of senators who had supported the Constitution’s adoption ranged from twenty to twenty-one, due to William Paterson’s resignation. Members, BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS 1789-1791, http://www.gwu.edu/~ffcp/exhibit/p1/members/ (last visited Apr. 7, 2012). The remaining five to six members of the Senate either had opposed the Constitution’s ratification or did not have clearly articulated positions. Id. In the House of Representatives, thirty-nine of the chamber’s sixty-five members had supported the Constitution’s ratification. Id. Of the remaining twenty-six Representatives, twenty-five had either opposed the Constitution, were ambivalent, or did not have clearly articulated positions. Id. The only member who is unaccounted for in this list is Alexander White, for whom relevant biographical information is unavailable. Id.
of rights could be used to derogate or undermine those rights that were left out of the enumeration. Secure and fresh from their victory, most of them saw little need or advantage in revisiting a battle they had already won. Virtually everyone in the first Congress agreed, furthermore, that the body’s most pressing tasks related to the construction of an infrastructure for the nation’s first federal government. The antifederalists, many of whom had strenuously criticized the Constitution during ratification for its failure to include a declaration of rights, showed little interest in pursuing amendments during the first Congress because they knew it was unlikely that they could secure the full range of amendments they desired.

In light of the federalists’ control over Congress, the pressing need for alternative business, and the malaise of the antifederalists, it seemed unlikely that anyone, even Madison, would be able to marshal a set of amendments through the first Congress. Madison nonetheless assumed the task of culling through the mass of proposals for amendments that had been submitted during the ratification period (as well as at least some of the rights declarations already existing at the state level) and formulated a list of nineteen proposed amendments. What is more, he relentlessly

337 See, e.g., Speech of James Wilson to the Pennsylvania Ratification Convention, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 233, at 387-91; Speech of James Wilson in the Statehouse Yard (Oct. 6, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 233, at 167-72; see also Sherry, supra note 113, at 1161-64 (describing federalists’ arguments that enumeration could lead to counterproductive narrowing of rights). As previously discussed, Madison himself had expressed these same concerns at the Virginia Ratifying Convention. See supra note 261 and accompanying text.

338 See Bowling, supra note 332, at 234 (“Most Federalists, basking in their election sweep, believed amendments unnecessary either as a political stratagem or because personal rights needed protection at the federal level.”); see also LABUNSKI, supra note 333, at 194-206 (describing initial opposition in Congress to Madison’s proposal for a Bill of Rights).

339 See LABUNSKI, supra note 333, at 203 (“Madison had barely [introduced a bill of rights] when one member after another denounced his proposals - primarily arguing that amendments were unnecessary, premature, and certainly less important than other legislative business.”).

340 See RAKOVE, supra note 8, at 330 (“By the time the First Congress mustered a quorum in April 1789, it was not evident that action on amendments was imperative. Most Federalists had grown indifferent to the question, nor were former Anti-Federalists now sitting in Congress any more insistent, largely because they knew that the substantive changes they desired in the Constitution lay beyond their reach.”); Bowling, supra note 332, at 224 (“Antifederal members saw them [proposals for a bill of rights] as an impediment to the changes in the structure and power of the new federal government that they sought.”)

341 See RAKOVE, supra note 8, at 330 (“Nearly all Madison’s colleagues in Congress thought the entire subject [of Amendments] could be deferred until the new government was safely operating...”).

342 See LABUNSKI, supra note 333, at 198-99; RAKOVE, supra note 59, at 96-100. Prior to the first Congress, two hundred and ten proposals for amendments had emanated from eight ratifying conventions. See Bowling, supra note 332, at 228. According to Kenneth Bowling, approximately one hundred separate amendments can be distinguished from that set of two hundred and ten proposals. See id. Madison assumed that the text of the Constitution would be changed, rather than simply appended.
pressed a largely recalcitrant Congress to take up consideration of his proposals at a time when it was consumed with a host of other matters.\textsuperscript{343} As one scholar has summarized, "[w]ithout Madison's commitment there would have been no federal Bill of Rights in 1791.\textsuperscript{344}

It seems unlikely that Madison would have gone to such lengths, in the face of such varied obstacles, purely for the strategic considerations outlined above.\textsuperscript{345} While he may have felt some obligation to propose the amendments in light of the statements he had made during his campaign for Congress, for example, it is difficult to believe that Madison would have consciously espoused a position in which he did not believe for the purpose of securing an election.\textsuperscript{346} Whatever moral obligations Madison may have felt toward his constituents, furthermore, were likely satisfied when Madison proposed the Bill of Rights for Congress' consideration. Some of his federalist colleagues made that point when they attempted to dissuade him from pursuing his proposals further.\textsuperscript{347}

Similarly, there are fundamental limitations to the "tub to the whale" theory that Madison proposed his set of amendments to undermine antifederalist efforts to change the Constitution in more substantive ways.\textsuperscript{348} With respect to a second constitutional convention, there was no immediate threat of such during the summer of 1789. Despite concerted

As a result, his proposals included the specific places in the Constitutional text where his alterations would occur. 12 PAPERS OF JAMES MADISON, supra note 4, at 207.

\textsuperscript{343} See LABUNSKI, supra note 333, at 213-40 (describing congressional debates and amendments to Madison's proposals).

\textsuperscript{344} See Bowling, supra note 332, at 224; see also supra note 17...\textsuperscript{345} For concurring views, see BANNING, supra note 8, at 281 ("A close examination of Madison's thinking shows that while he did have reservations, he had also privately concluded that the Bill of Rights was proper in itself. The reasons ran much deeper than can possibly be captured in a cynical, reductionist account."); LABUNSKI, supra note 333, at 194 ("It is hard to believe that political expediency, keeping his word to local constituents, or a wish to assuage the concerns of those who remained opposed to the new government would be enough to motivate an individual to endure what Madison would go through during the summer of 1789. Only a genuine conviction that such rights were necessary and important could have generated the passion and commitment that Madison poured into his campaign for amendments....").

\textsuperscript{346} It is possible that Madison had come to believe in the utility of a bill of rights, at least to some extent, by the time he first expressed his willingness to support amendments in January of 1789. It is this author's contention that Madison's perspective regarding the Bill of Rights and the ways it could legitimate judicial review had begun to shift by October of 1788. See supra notes 285-292 and accompanying text.

\textsuperscript{347} William Loughton Smith of South Carolina, in an apparent effort to assuage Madison's conscience on this point and placate his desire to continue, told Madison that his proposal had satisfied Madison's "duty" and "if he did not succeed he was not to blame." 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 293, at 804-05, 816.

\textsuperscript{348} See, e.g., Bowling, supra note 332, at 236-37 (recounting congressman George Clymer's description of Madison's proposals as "merely a tub to the whale," in reference to a contemporary idiom that referred to an effort to distract one's opponents through the offer of an empty gesture).
efforts by some antifederalists, only two states had petitioned Congress for a second convention by June of 1789, far short of the two-thirds requirement contained in the Constitution. There was no indication, furthermore, that the antifederalists in Congress were willing or able to propose a broader set of amendments in 1789. To the contrary, Madison must have known that his amendments created the very risk that he was trying to avoid. The evidence taken as a whole suggests that, in the absence of Madison’s proposal for amendments, Congress would not have taken up the subject at all during its first term. After Madison proposed his amendments, however, the antifederalists attempted to interject the very types of fundamental changes that Madison wished to curtail. Insofar as Madison’s goal was to forestall such efforts, surely the easiest and most effective course of action would have been simply to refrain from creating the opportunity for the antifederalists to propose their amendments. It is possible that Madison may have wished to press the issue while the federalists had strong numbers in the first federal Congress, but this assumes that Madison feared the composition of Congress was likely to change (to his detriment) in the near future, a supposition for which there is little support.

Finally, while Madison desired to engender support for the new government among those who had opposed ratification (and among those in North Carolina and Rhode Island who remained opposed to ratification), this factor alone cannot account for Madison’s commitment to his amendments. One of the strongest criticisms of Madison’s proposals, for example, was that it distracted and delayed Congress from fostering support for the new government through the timely creation of its institutional structure. The most persuasive evidence that Madison was

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349 See LABUNSKI, supra note 333, at 189-90 (noting that on May 5, 1789, Virginia submitted its petition to Congress, and on May 6, 1789, New York followed suit).
350 See U.S. CONST. art. V.
351 See supra notes 336-341 and accompanying text.
352 See, e.g., Bowling, supra note 332, at 241-46 (summarizing antifederalists’ efforts to add more ambitious amendments to Madison’s proposals); see also LABUNSKI, supra note 333, at 213-40 (same).
353 Madison’s proposals actually antagonized many of the antifederalists in Congress because they perceived his proposal as an attempt to undermine antifederalist efforts to propose more pervasive changes to the Constitution. See Bowling, supra note 332, at 240 – 245 (describing antifederalists’ hostility to Madison’s proposals in Congress). Madison apparently hoped that his amendments would be sufficiently palatable to rank and file antifederalists that they would create a wedge between the antifederalists in Congress and their constituencies. See, e.g., Letter from James Madison to Thomas Jefferson (Mar. 29, 1789), in 12 PAPERS OF JAMES MADISON, supra note 4, at 38 (stating Madison’s hope that the amendments would “extinguish opposition to the [federal] system, or at least break the force of it, by detaching the deluded opponents from their designing leaders”).
354 See LABUNSKI, supra note 333, at 203-05, 215, 218 (discussing various criticisms of Madison’s amendments on grounds that they delayed Congress from matters of more immediate importance).
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Madison's "fifth" resolution would have required that: "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." This amendment was the only one of Madison's proposals that would have been applicable to the states. Although he must have known that such an encroachment on the states' prerogatives was a dubious proposition in 1789, Madison argued in Congress that it was "the most valuable amendment on the whole list." Madison stated in his June 1789 address to the House, "that the state governments are as liable to attack these invaluable privileges as the general government is, and therefore ought to be as cautiously guarded against." If Madison was motivated purely by tactical considerations, it is difficult to understand why he would have proposed, and placed such importance on, this particular amendment. In terms of engendering support among antifederalists, who were overwhelmingly apprehensive about the consolidation of power in federal hands, Madison must have known that this amendment was likely to have the very opposite effect. It is also difficult to see how such an amendment fits within the "tub to the whale" theory. Instead, Madison's fifth resolution more likely represents what it appears to be: an expression of Madison's frustration with the Constitution's failure to rein in the states and an attempt to compensate for the loss of the congressional veto at the Convention. This more straightforward explanation for Madison's motivations presumes, however, that he had come to believe in the potential efficacy of judicial review by June of 1789.

In short, it is the contention of this article that Madison's commitment to the Bill of Rights in 1789 has been unfairly overshadowed by the tactical considerations that might also have contributed to his motivations. A key reason for this mistake is the failure to appreciate the significant

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355 See 12 PAPERS OF JAMES MADISON, supra note 4, at 202. Madison would have had this amendment inserted into section 10 of Article 1. Id.
356 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 293, at 1292.
357 See 12 PAPERS OF JAMES MADISON, supra note 4, at 208. Madison was unsuccessful, however, and it was not until the Reconstruction Amendments were passed that the states were subject to any new constitutional limitations. See U.S. CONST. amends. XIII, XIV, XV; see also Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that none of the Bill of Rights, as originally drafted, were applicable to the states).
358 See LABUNSKI, supra note 333, at 202-03.
shift that began to occur in Madison’s thinking regarding judicial review during the fall of 1788. While we can never be absolutely certain that Madison believed his own statements to Congress in June of 1789 regarding the prospects of judicial review, there are several reasons to accept his statements at face value. For one, the position he espoused appeared to naturally flow from the logic of his prior positions and political philosophy. As early as October 1788, Madison had identified that the redeeming virtue of a bill of rights was the way in which it could be incorporated into the national sentiment, specifically, the way in which it could express and reflect a consensus among the American people regarding their fundamental norms and values. It stands to reason that Madison would eventually perceive the connection between that consensus and the impact it could have on the perceived legitimacy of judicial review. In fact, he articulated precisely this connection in his later correspondence. The real question, therefore, seems to be whether Madison made this connection as early as May (or possibly January) of 1789. In light of how much Madison devoted himself to this issue during the fall of 1788 and the winter of 1788-89, the importance of the issue to his overarching political philosophy, and the alacrity with which he generally constructed constitutional theory, it seems most likely that these developments in his thought occurred by the first half of 1789.

CONCLUSION

The Virginia Plan’s Council of Revision was narrowly rejected at the Constitutional Convention in 1787. The addition of two or three individual votes might have been sufficient to secure its incorporation into the Constitution. It is interesting to ponder how different our governmental structure might look today, and perhaps how different our society might look, if Madison and his allies had succeeded in persuading their colleagues about the Council’s superiority over judicial review. Despite the Council’s rejection at the Convention, however, our Constitution continues to bear the imprint of the Council by virtue of the Bill of Rights. This article maintains that the Council’s demise at the Convention provided one of Madison’s primary motivations for proposing the Bill of Rights. In light of Madison’s pivotal role in their introduction and passage, therefore, an understanding of the origins of the Bill of Rights requires an appreciation for the role the Council of Revision played in Madison’s constitutional structure and the void created in that structure by the Council’s rejection.
At the Constitutional Convention, Madison attempted to construct a national structure that assigned primacy to the legislative branch but which nonetheless subjected the legislative process to a series of restraints that would interject additional opportunities for deliberation, rationality, and leadership. As a centerpiece in Madison’s system of restraints, the Council of Revision was of crucial importance to Madison and its rejection at the Convention helped shatter his constitutional structure. Without the Council’s veto, Madison believed, the federal government was likely to prove little better than the state analogues it was supposed to correct. The executive veto and the prospect of judicial review were little consolation for Madison, who initially believed that neither mechanism could be effectively implemented. In particular, Madison was pessimistic about the unqualified nature of judicial review. Under the Virginia Plan, Congress’s ability to overturn the Council’s veto had been a crucial component of the Council’s democratic legitimacy because Madison believed the American public would not countenance a more pervasive encroachment into the prerogatives of its favored branch (the House).

The Bill of Rights can best be understood, therefore, as an effort by Madison to reclaim some of the ground he had lost at the Convention when both the congressional veto and the Council of Revision had been rejected. By October of 1788, Madison had begun to focus on the ways in which a bill of rights could directly influence the American people. In his words, he was drawn to the possibility that the values and norms reflected in a bill of rights could become “incorporated with the national sentiment.” This realization was a critical step because the capacity of a bill of rights to foster a consensus among Americans about their fundamental norms and values had logical repercussions for the ways in which Madison thought about judicial review. Insofar as a bill of rights could reflect a consensus of the American people’s values, and insofar as the judiciary was perceived as the “guardians” of those rights, a bill of rights had the capacity to foster and institutionalize a direct political connection between the people and the judiciary. By augmenting the indirect connection the judiciary already enjoyed by virtue of the appointment process, the Bill of Rights could potentially elevate the judiciary’s role beyond the strictly subservient place

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359 Rakove, supra note 201, at 1521 (observing that the Council of Revision “occupied a major place in [Madison’s] larger constitutional scheme”).

360 As previously discussed, Madison hoped that the newly designed federal government could correct many of the deficiencies at the state level by virtue of a plenary congressional veto over state legislation. See supra notes 63-74 and accompanying text.

361 See supra text accompanying note 278.
it had occupied in the Virginia Plan. The delicate balance to the constitutional structure that Madison believed had been lost with the Council's rejection could in the end be restored (at least in part) by virtue of the Bill of Rights and the process of judicial review which it helped legitimate and institutionalize.

For Madison, therefore, the Bill of Rights was not intended to create a set of positivist rights so much as to foster a consensus among Americans about the fundamental rights that defined their society and to institutionalize the judiciary as the guardian of those rights. As a result, Madison probably anticipated that the reach of the judiciary would always be constrained by the extent to which the American people could identify with the judiciary. Madison must have hoped that the judiciary would enjoy sufficient political legitimacy to operate as a meaningful restraint on Congress but it is unlikely that he envisioned a world where the American people would ever identify more strongly with the judiciary than with Congress. Just as with the Council, therefore, Madison probably assumed that the judiciary would be able to restrain Congress in important cases where Congress and the American people were closely divided. As with the Council, however, Madison probably assumed that the judiciary would be powerless where a determined supermajority was intent on a particular course of action. It is important to remember that such a result was perfectly compatible with Madison's overarching constitutional vision. The Council of Revision had been intended to perform its role through a qualified veto by interjecting critical opportunities for deliberation, rationality, and leadership into the majoritarian process. Similarly, from Madison's perspective, the function of judicial review under the Bill of Rights was to refine and improve the majoritarian process rather than circumvent it.

One benefit of studying the Council of Revision is that it provides a perspective for the ways in which modern constitutional jurisprudence has evolved away from Madison's original vision. Modern constitutional jurisprudence tends to conceptualize judicial review as a "countermajoritarian" enterprise whose purpose is to remove issues from the majoritarian process.362 Under this model, the Bill of Rights is

362 This conception of judicial review was well summarized by the Supreme Court in 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 and officials and to establish them as legal principles to be applied by the courts." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). The term "countermajoritarian difficulty" was popularized by Alexander Bickel in the early 1960s. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our
conceptualized in terms of a positivist creation of rights whose interpretation and definition is assigned primarily, if not exclusively, to the judiciary. Rather than serving as a legitimizing link between the judiciary and the people, the Bill of Rights is conceptualized as a barrier which seeks to protect the American people from themselves by cutting off their access to the document's interpretation and definition. The Council of Revision seems foreign to modern eyes because its vetoes could have been overturned by a supermajority of Congress; a practice wholly inimical to the concept of judicial supremacy that serves as a fundamental corollary to most modern schools of constitutional interpretation.

From a normative point of view, one could argue that Madison's original vision for the Bill of Rights is no longer compatible with American democracy. We are more inclined to view the law today in positivist terms than did those who lived in the eighteenth century. We live in the world of Erie R.R. Co. v. Tompkins rather than Swift v. Tyson. Additionally, our governmental structure today would appear to rely less on the appointment process, calling into question the legitimacy of conceptualizing the work of the judiciary as representative in nature.
There are, nonetheless, normative problems with abandoning Madison’s original vision, which this article will sketch in only their barest form. The first problem stems from the fact that Madison drafted the Bill of Rights in the broad, open-ended language of natural rights. To reconceptualize the Bill of Rights as a positivist set of rights is to ask the language to perform a function it was never intended to perform and in many ways is ill-suited to perform. Terms such as “due process,” “unreasonable searches,” “cruel and unusual,” and “freedom of speech” simply do not lend themselves easily to a positivist approach. Such language was intended to constitute the beginning, rather than the end, of a discussion within the American polity.

The second potential problem with abandoning Madison’s original understanding for the Bill of Rights relates to the legitimacy of judicial review. Modern scholars and jurists have struggled with this issue since the conceptual moorings of constitutional interpretation first began to shift in the twentieth century. For nearly one hundred years, academics have spent thousands of pages attempting to resolve the “countermajoritarian difficulty” inherent in the twentieth century approach to constitutional jurisprudence.

The Council of Revision reveals two important facets of Madison’s political philosophy that bear on this inquiry. First, Madison’s preference for the Council reveals that his instinct was to refine the majoritarian process rather than circumvent it. Second, Madison’s willingness to entrust the judiciary with a policy-making role on the Council demonstrates his faith both in the democratic legitimacy of the appointment process and in


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370 For a normative argument that judicial review should still play this role, see Friedman, supra note 131, at 16 (“The value of judicial review in the modern era is that it . . . serves as a catalyst for the American people to debate as a polity some of the most difficult and fundamental issues that confront them.”); see also Barry Friedman, The Politics of Judicial Review, 84 TEX. L. REV. 257 (2005); Barry Friedman, The Importance of Being Positive: The Nature and Function of Judicial Review, 72 U. CIN. L. REV. 1257 (2004).

371 See, e.g., Peretti, supra note 150, at 3 (“The primary assumption of conventional constitutional theorists is that judicial review is fundamentally at odds with democratic values and, thus, is in need of a special or exceptional source of legitimacy.”).

the ability of the judiciary to serve in a representative capacity. Madison’s writings after the Convention, furthermore, demonstrate that his attraction to the Bill of Rights flowed from the ways in which it could reflect (and perhaps catalyze) a consensus among the American people regarding their fundamental norms and values. In contrast to most modern schools of constitutional interpretation, therefore, Madison appeared to view the judicial enforcement of the Bill of Rights as a fundamentally majoritarian enterprise. The fact that judicial interpretations would occasionally conflict with congressional legislation was the point of constructing a multi-branch form of representational democracy. Madison (and many others) hoped that the tension resulting from an overlapping system of multi-branch government would create a process that would produce better laws than one based on a single governing entity comprised of directly elected officials.

Without conceptualizing judicial review in similarly representational terms, most modern schools of constitutional interpretation are challenged to harmonize judicial review with the overarching tenets of democratic governance. Under some countermajoritarian models, such as originalism, an effort is made to legitimate judicial review by basing it upon “objective criteria.” From a normative point of view, however, it is not clear why any set of “objective criteria” would be preferable to Madison’s original vision. Insofar as the “objective criteria” cease to reflect a current American consensus of fundamental freedoms and values, for example, why should objectivity serve as the society’s overriding value? Any paradigm that assigns lawyers and historians with a privileged position for the interpretation of the Constitution, furthermore, necessarily relegates the American people to little or no role in defining the Bill of Rights. To

373 Although he disagrees that the judiciary originally was intended to function in this manner, Barry Friedman argues that this is in fact how judicial review operates today. See FRIEDMAN, supra note 131, at 367-68 (“Judicial review provides a catalyst and method for [the American people to define the Constitution]. Over time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values.”).

374 See, e.g., Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971), reprinted in INTERPRETING THE CONSTITUTION, supra note 139, at 201-02 (“We have been talking about neutrality in the application of principles. If judges are to avoid imposing their own values upon the rest of us, however, they must be neutral as well in the definition and the derivation of principles.”); see also PERETTI, supra note 150, at 227 (“Conventional constitutional law scholars see their central task as ‘saving the Court’s legitimacy.’ . . . [T]hey attempt to present constitutional interpretation as an objectively determined or at least an objectively constrained process of decisionmaking.”).

375 See, e.g., KRAMER, supra note 88, at 233 (“It is not too much to say that [the acceptance of judicial supremacy] has fundamentally altered the meaning of republican citizenship by, as a conceptual matter, taking ordinary people out of the process of shaping constitutional law.”).
what extent can a society be characterized as a democracy, if the vast majority of its citizens are so far removed from the process by which that society defines its fundamental values?\textsuperscript{376} How could such a removal, furthermore, fail to engender the type of widespread passivity and disengagement that undermines the long-term health of democracies?

As Madison well understood, there are practical ramifications for the way the work of the judiciary is conceptualized.\textsuperscript{377} The final arbiter of the legitimacy of judicial review is not the judiciary but rather the American public that must ultimately decide whether to abide by its rulings.\textsuperscript{378} Constitutional crises may be relatively rare but history suggests that interbranch confrontations are inevitable.\textsuperscript{379} If the American public comes to believe that the judiciary is not intended to reflect their own norms and values, what is the likelihood that it will support the judiciary through such confrontations?\textsuperscript{380} How much respect will the judiciary continue to receive in the future if its rulings are based principally, if not entirely, on a deference to someone else’s conception of the law?\textsuperscript{381} The American judiciary may enjoy more legitimacy today in the eyes of the American public than it did at the time Madison first proposed the Bill of Rights. It is

\textsuperscript{376} See, e.g., PERETTI, supra note 150, at 252 (“The idea that we can avoid confronting and resolving difficult moral and political choices by easy resort to a hallowed document interpreted by Platonic Guardians undermines democracy.”).

\textsuperscript{377} See, e.g., KRAMER, supra note 88, at 233 (“Public acceptance of judicial supremacy pervades constitutional law and politics. It changes how the Justices conceive their role, how they decide cases and write opinions. It changes how politicians, the press, and other affected actors internalize the Court’s rulings . . . .”).

\textsuperscript{378} See id. at 227 (“[E]very reaffirmation of popular constitutionalism has predictably been followed by efforts to restore or enlarge judicial authority. . . . In each instance, the Justices eventually went too far . . . precipitating a confrontation with the political branches that called upon Americans to decide yet again whether judges should have so much say over their lives.”); see also FRIEDMAN, supra note 131, at 234 (“For all of history’s frequent talk about the independence of the judiciary, that independence exists only at public sufferance.”).

\textsuperscript{379} See, e.g., FRIEDMAN, supra note 131, at 119-36 (discussing confrontations between judiciary and other branches in the context of the Civil War and Reconstruction), 167-236 (discussing same in context of New Deal).

\textsuperscript{380} See NELSON, supra note 138, at 123 (observing that judicial attempts to reflect a consensus views will necessarily be imperfect but arguing that such attempts are necessary because “[n]oncoercive democratic societies cannot exist without at least some agreement on values—without at least some consensus”).

\textsuperscript{381} See, e.g., WHITTINGTON, supra note 363, at 26 (“Constitutional maintenance is above all a political task. . . . Constitutions are made real by being constantly embraced and reenacted by citizens and government officials.”); see also PERETTI, supra note 150, at 252 (“When constitutional interpretation is regarded and practiced as a broadly shared democratic exercise, even if Court led, the values to which the Constitution variously speaks should in the end be more rather than less broadly and meaningfully felt.”).
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not clear, however, whether that legitimacy is in the process of growth or erosion.382

Despite its rejection over two hundred years ago, therefore, the Council of Revision continues to offer us several important lessons. Among other things, it demonstrates that there is nothing inevitable, or intrinsically correct, about the ways we have come to think about judicial review and constitutional interpretation. In addition, it sheds light on Madison's initial doubts about the legitimacy of judicial review and reveals how he sought ways to ground it within (rather than elevate it above) representational democracy. And finally, it invites us to consider the continuing merits of Madison's original approach, not simply because Madison thought it, but because it might in some respects constitute a normative improvement over the paradigms that have come to dominate modern constitutional interpretation.

382 For an argument that the Supreme Court currently enjoys a position of relative prestige and stability as a result of its practice of rendering judgments that more or less reflect the consensus of Americans' views and values, see FRIEDMAN, supra note 131, at 15 ("[O]ver time... the Court and the public will come into basic alliance with each other. In the course of acting thus, the Supreme Court has made itself one of the most popular institutions in American democracy.")