



THE RELEVANCE AND IRRELEVANCE OF JAMES MADISON TO FAITHFUL CONSTITUTIONAL INTERPRETATION

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A MADISONIAN CONSTITUTION FOR ALL
ESSAY SERIES



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The Federalist 49 (James Madison)

I. INTRODUCTION: MADISON VERSUS MODERN PRACTICE

The two most fundamental questions of constitutional law are *how* to interpret the Constitution and *who* is to do the interpreting. On these two questions—how and by whom, interpretive *method* and interpretive *power*—hang essentially every other issue of American constitutional law.

There exists a clear modern consensus on the answers to these bedrock questions – and that consensus is almost certainly wrong. The error starts, subtly, by taking up the questions in reverse order: It has become common in modern times to identify the power of constitutional interpretation exclusively with the decisions of courts, and especially with the decisions of the U.S. Supreme Court. The answer to the question “Who interprets?” is, most everyone today would agree, “The Supreme Court.” And once the question of interpretive power is resolved in favor of a supreme judiciary, the question of interpretive method tends to be answered in terms of deference to *whatever that supreme judiciary decides*. The judicial power “to say what the law is”¹ thus rapidly degenerates into the cynical view that the law is “what the judges say it is.”²

It has thus become commonplace to assert that the Constitution itself contains no discernible rules or instructions concerning how it is to be interpreted. All such matters are instead left to the assumed exclusive discretion of courts, to be exercised in accordance with whatever criteria judges think most appropriate. Thus, the twin pillars of American constitutional practice today have become *judicial supremacy* and *interpretive license*: The power of constitutional interpretation is exercised by a supreme judiciary according to interpretive criteria of the judges’ own choice.

Nothing could have been further from James Madison’s vision of proper constitutional interpretation and the proper, limited province of the judiciary. To be sure, Madison’s views are not necessarily dispositive as to the proper understanding of the Constitution. As I explain presently, even Madison did not think his own views should be given controlling weight, and his views were not always consistent. Nonetheless, it bears serious consideration that the Framers often called the “Father of the Constitution”³ had a quite different view of the proper role and power of courts within the U.S. constitutional system than the one that dominates today.

¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

² Charles Evans Hughes, “Speech before the Chamber of Commerce, Elmira, NY (May 3, 1907),” in Charles Evans Hughes and Jacob Gould Schurman, *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906-1908* (New York and London: G.P. Putnam’s Sons, 1908), 139. (“We are under a Constitution. ... The Constitution is what the judges say it is.”)

³ I have employed this honorific title for Madison in previous work. See Michael Stokes Paulsen and Luke Paulsen, *The Constitution: An Introduction* (New York: Basic Books, 2017), 9, 12.



Madison did not believe in judicial supremacy in matters of constitutional understanding and decision. Quite the contrary, the Madisonian model of constitutional interpretative authority is one of separation of powers and the mutual “checks” of coordinate, independent branches of government, and even of the states. No one branch of the national government possesses interpretive supremacy or superiority over the others; none is bound by the constitutional judgments of the others; and each can and should use its independent power to check the others in order to hold all accountable and to keep the Constitution secure. Likewise, the states, as parties ratifying the Constitution, have a vital role in checking and resisting unconstitutional actions of the national government. Madison’s view of constitutional interpretive authority was the very antithesis of judicial supremacy.

For Madison, the judiciary’s power of constitutional interpretation was significant and important. The judicial power of independent interpretive judgment was a vital part of the Constitution’s separation-of-powers design. More than that, Madison believed that courts frequently would have the last word simply because they typically would be the last to speak on a constitutional question. Thus, in “the ordinary course of Government” the “exposition of the laws and Constitution” would belong to courts, where constitutional questions would often receive their ultimate resolution.⁴

But Madison was careful always to emphasize that the Constitution gave the judiciary no intrinsic superiority over their co-equal branches in deciding the boundaries of constitutional power and the content of constitutional rights. Quite the contrary: “The several branches being perfectly co-ordinate by virtue of their common commission,” none could “pretend to an exclusive or superior right” to decide constitutional disagreements, Madison wrote in *Federalist 49*.⁵ Madison reiterated this view as a prominent Member of the First Congress, in 1789,⁶ and adhered to it throughout his life.⁷

Nor was the judicial power supreme over the states. In judging whether the Constitution has been violated by the national government, the national judiciary could not be the supreme authority, Madison argued as a member of the Virginia state legislature, resisting the constitutional validity of the hated Alien & Sedition acts in the late 1790s. As Madison wrote in the famous *Report of 1800* on behalf of Virginia, “the judicial department, also, may exercise or sanction dangerous powers beyond the grant of the Constitution.” Where that occurs, the right of states to resist violations of the Constitution by the national government “must extend to violations by one delegated authority as well as by another—by the judiciary as well as by the executive, or the legislature.”⁸ Madison respected judicial authority, but plainly did not accept the idea that the Constitution vests *supreme* constitutional interpretive authority in the federal judiciary, over the other branches of national government or over the states.

⁴ See the statement of Representative Madison in Joseph Gales and William Winston Seaton, *The Debates and Proceedings in the Congress of the United States* (Washington: Gales & Seaton, 1834), 500. See also James Madison, “Unaddressed Letter of 1834,” in *Letters and Other Writings of James Madison, Volume 4* (Philadelphia: Lippincott & Co., 1865), 349. For discussion of these statements, see Michael Stokes Paulsen, “The Most Dangerous Branch: Executive Power to Say What the Law Is,” *Georgetown Law Journal* 83 (1994), 217, 234, 236, 308-311.

⁵ *The Federalist* No. 49, in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Isaac Kramnick (London: Penguin Books, 1987), 313.

⁶ “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? ... I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.” Gales & Seaton, *Debates and Proceedings*, 500.

⁷ “Unaddressed Letter of 1834,” 349 (denying judicial supremacy over the other branches in constitutional interpretation as an arrangement “which was never intended and can never be proper”).

⁸ James Madison, *Report of 1800*, in “Founders Online: The Report of 1800, [7 January] 1800,” National Archives and Records Administration, accessed June 14, 2019, <https://founders.archives.gov/documents/Madison/01-17-02-0202>.

Division of interpretive authority was necessary to check abuses of the power to interpret. The two principles worked hand in glove: Just as Madison did not subscribe to judicial supremacy, neither did he subscribe to the idea of unconstrained judicial discretion in constitutional interpretation. Far from believing that the Constitution's provisions could fairly be interpreted any which way courts (or politicians) might choose, Madison viewed the Constitution as possessing on most matters a fixed, determinate meaning. That meaning was defined by the objective meaning of the words of the text—not the subjective understandings of interpreters (or even, for that matter, the subjective “intent” or expectations of its framers). The “meaning of the Instrument,” Madison insisted, “must be derived from the text itself.”⁹ Departures from the text's meaning were, simply put, *violations* of the Constitution

Moreover, for Madison, the text's meaning consisted of the *original meaning* of the words of the document—the meaning the Constitution's words and phrases would have had to those using them at the time the document was adopted (accounting for any well-understood specialized meanings or term-of-art understandings). The meaning of the Constitution's terms did not change with time. That would be anachronistic, Madison thought. “What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense!” Madison wrote in 1824, mocking the notion that “the meaning of the text be sought in the changeable meaning of the words composing it.”¹⁰ The Constitution's meaning, where sufficiently clear, was fixed by the sense of its language as it would have been understood at the time.

Where a provision was “obscure” or “equivocal,” however, Madison thought its meaning might come to be “liquidated” (that is, *settled*) by long and universally accepted practice, where such practice rested on an interpretation agreed to, over time, by all branches of government and universally embraced by the public.¹¹ Importantly, though the Constitution's meaning was *not* simply a function of judicial decisions or precedent. The courts were not vested with exclusive power to settle the Constitution's meaning for everybody else. On any such view, “the delegation of judicial power, would annul the authority delegating it.”¹² For Madison, the meaning of the Constitution was on most points a matter of objective fact, not subjective interpretation or blanket judicial discretion. On doubtful points, the Constitution's design contemplated *objective resolution by the people*, acting over time through the vehicle of consistent interpretation by all the institutions of constitutional government—not just courts.

These were James Madison's core views on the power and proper method of constitutional interpretation, compressed in a nutshell. Obviously, those views stand in stark contrast to modern constitutional practice. The two leading features of the modern consensus—judicial supremacy and interpretive license—are directly contrary to Madison's most fundamental views of proper constitutional government and correct principles of constitutional interpretation. To put it simply: If James Madison's vision of proper constitutional interpretation is right, much of our modern constitutional practice is wrong.

But how far can we credit—and should we follow—Madison's personal views on constitutional interpretation? Can we rely on a “Madisonian Constitution” as the correct understanding? Indeed, would Madison have thought we should?

⁹ “Letter from James Madison to Thomas Ritchie (Dec. 27, 1821),” in *Letters and Other Writings of James Madison, Volume 3*, 228.

¹⁰ Letter from James Madison to Henry Lee (June 25, 1824),” in James Madison, *The Writings of James Madison, Volume 9*, ed. Gaillard Hunt (New York: G.P. Putnam's Sons, 1900).

¹¹ *The Federalist* No. 37; “Letter from James Madison to Spencer Roane (Sept. 2, 1819),” in *Letter and Other Writings of James Madison, Volume 3*, 143, 145.

¹² James Madison, *Report of 1800*, in “Founders Online.”



II. THE PROBLEMS WITH RELYING ON MADISON'S VIEWS

There are just three problems with relying on Madison's views concerning constitutional interpretation. But they are fairly significant problems. First, and somewhat ironically, Madison's view was that his own views should not matter—that is, that his subjective, personal understanding of the Constitution was not important or even especially relevant. Put differently, Madison's "original intention" was that his original intention should not count—and neither should any other framer's intention. What should count is objective constitutional meaning, broadly accepted understanding, and consistent practice. (The obvious conundrum is that, on Madison's own view, we should not take Madison's word on this.) A second and perhaps more serious problem is that Madison was, over time and depending on events, somewhat inconsistent in his stated views concerning not just specific constitutional issues but also questions of interpretive method and power. In short, Madison was something of a moving target. It is at least troubling, for any theory that takes seriously Madison's approach to constitutional interpretation, that Madison sometimes can be heard speaking on both sides of an issue.

The third problem helps explain the other two: Madison was part principled constitutional theorist and part practical politician. Sometimes these two strands of Madison's constitutional personality worked together in harmony. But other times they produced contradiction and inconsistency. Madison sometimes departed in political practice from his prior positions as a constitutional theorist—and then sometimes sought to explain his departures in terms that qualified (or corrupted) his earlier views.

For these reasons, Madison's views cannot serve as a perfectly reliable decoder ring for interpreting the Constitution. There is to be sure a common core to Madison's thought: his repeated denial of any one branch's supremacy in constitutional interpretation; his emphasis on the original meaning of the text; his denial of the propriety of reliance on subjective original intention; his embrace of the possibility that long practice might "liquidate" the meaning of uncertain provisions. But these conclusions are qualified by the fact that the "Father of the Constitution" abjured any special status as its interpreter, was somewhat inconsistent in his views, and seemingly shifted positions with changing political circumstances. What is one to do with this reality?

A. THE INEVITABILITY OF INCONSISTENCY

To begin, one must confront, and accept, that some degree of inconsistency and imprecision is inevitable in all human actors, even from the estimable James Madison. For all his brilliance; for all his constitutional insight; for all his political skill and practical wisdom, Madison was not perfectly consistent in his constitutional views over the course of his long public career.

This should not be all that surprising, nor should it be particularly alarming. A person's views sometimes change over time. They are altered by events—sometimes for the better, sometimes for the worse. And even where one's core views have not changed, they sometimes come to be expressed differently or given different shades of emphasis in different circumstance.

Moreover, a practical politician—Madison would have found nothing pejorative in the term—is especially susceptible to finding his views changing with changing roles and events. And Madison certainly played many such different roles: member of congress under the Articles of Confederation; state legislator; framer of the "Virginia Plan" and key delegate to the Constitutional Convention at Philadelphia in 1787; co-author of



The Federalist essays publicly defending and explaining the draft constitution; vital advocate for the document's adoption, in Virginia's ratifying convention; leading member of the House of Representatives in the First Congress, prime drafter of the proposed Bill of Rights, and informal adviser to President George Washington; prominent leader of constitutional resistance to the Alien & Sedition Acts during the administration of President John Adams, and author of Virginia's "Report of 1800" defending the propriety of state "interposition" against unconstitutional assertions of power by the national government; President Thomas Jefferson's Secretary of State (and defendant in *Marbury v. Madison* in 1803); fourth President of the United States, from 1809-1817; and in retirement, revered elder statesman, constitutional theorist, and public advocate.

Who, in the course of such a long and distinguished public career, spanning six decades, would not, at least sometimes, change or shift positions? Who would remain perfectly consistent in his stated views concerning constitutional questions? Surely Madison may be forgiven his occasional deviations from pure principle and slight reformulations of earlier positions. If he strayed, it was not too far or often; if he changed, it was (with few exceptions) not very much and not at the sacrifice of first principles. We should acknowledge—and accept—a tolerable degree of inconsistency in Madison, and not seize on small differences to dismiss his thoughts entirely. The goal should be to find the core of coherence on points of principle and to weigh that coherence more heavily than episodic inconsistency.

B. THE IMPORTANCE OF OBJECTIVE, IMPERSONAL STANDARDS

Another response to the problem of Madison's inconsistency is to reduce its relevance. And here, Madison himself helps. Not only are Madison's changes in his constitutional views—his adjustments of position and variations in formulation—to be expected, but they arguably are less cause for alarm because of Madison's views about the essential irrelevance of his personal opinions and statements on constitutional questions.

As noted, Madison believed that his own views about the proper interpretation of specific constitutional provisions did not matter much. What mattered was the public meaning of the words of the text as adopted by the people, not the subjective understandings of members of the Constitutional Convention, who served as mere draftsmen of a proposal to be submitted to the People. As Madison once put it, as a member of Congress in 1796:

"[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as an oracular guide in expounding the Constitution. As the instrument came from them, it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity was breathed into it by the voice of the people, speaking through the several State Conventions.¹³

The Constitution was a public document—the enactment of "We the People," not of the Constitutional Convention. As such, the Constitution's meaning consisted of the objective, public meaning of its words and

¹³ Gales & Seaton, *Debates and Proceedings*, 776 (statement of Representative Madison). Interestingly, Madison was then arguing *against* a position taken by delegates to the Constitutional Convention: the decision to exclude the House of Representatives entirely from any role in the treaty-making process. Madison was arguing that that intention did not control the issue of whether the House legitimately could seek documents concerning the negotiation of the Jay Treaty.

phrases. That truth was at the core of Madison’s constitutional methodology. The Constitution meant *what its words said*, as those words would have been understood by the political community that brought them to life. That understanding would in turn be informed by public deliberations and debates, of course. But the Constitution’s meaning ultimately flowed from the document itself. As Madison put it late in his public life, “the legitimate meaning of the Instrument must be derived from the text itself.”¹⁴ It did not consist of the un-enacted, private “intentions” or subjective expectations of the Framers, because those were not part of the written document adopted by the People. It therefore did not really matter to Madison what he (or anyone else) might have “had in mind.” What mattered was what the document objectively said and meant. Madison’s intention was that his personal intentions should not matter.¹⁵

This seems plainly correct. Madison’s theory of constitutional interpretation rightly emphasizes that the Constitution’s meaning is something objective that stands on its own, outside the subjective (and sometimes idiosyncratic) views of individuals. It was to Madison’s credit—not really *a problem*, at all—that he applied this principle even to himself. Indeed, it is a principle that helps mitigate the problem of Madison’s own inconsistencies over time. If individual framers’ views do not themselves determine the Constitution’s proper understanding, it is less of an issue if those views might shift over time. The Constitution’s meaning remains anchored to the objective, original public meaning of the text. There is thus less at stake with Madison’s changes of mind on specific topics, given Madison’s (correct) view that his mind is not what needs to be read in the first place. (It is the document that needs to be read.) Further, to the extent that individual framers’ statements might be thought competent *evidence* of the probable meaning of the Constitution’s words and phrases, Madison’s emphasis on the primacy of the *original* meaning of the text suggests a principle for assigning relative weight to his different views at different times: Madison’s contemporaneous expositions of the text at or about the time of its adoption—like *The Federalist* and, to a lesser degree, his statements in the First Congress—furnish better evidence of the text’s original meaning than do his own later interpretations and reformulations.¹⁶

C. EXPLAINING INCONSISTENCY: MADISON AND “LIQUIDATED” UNDERSTANDINGS

As noted, Madison recognized that some of the Constitution’s terms had an uncertain or indefinite meaning, admitting a range of plausible readings. As to such terms, Madison believed that a long, consistent, and broadly accepted interpretation and practice might, over time, settle the understanding of such uncertain terms or phrases as a practical matter. In this respect, the Constitution was no different from other laws, which “are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications,” Madison wrote in *The Federalist* No. 37. Much later

¹⁴ “Letter from James Madison to Thomas Ritchie (Dec. 27, 1821),” in *Letters and Other Writings of James Madison, Volume 3*, 228.

¹⁵ A wag might well note that, if Madison was right about his views not being controlling, that same reasoning would suggest that his *views about his views not being controlling* should not be controlling either! Indeed, I think this observation is correct: If “objective original public meaning” is the right approach to constitutional interpretation, it is right *because it is right*—because it is the approach textually and logically suggested by the document itself, not because Madison *thought so*. See generally Michael Stokes Paulsen, “Does the Constitution Prescribe Rules for Its Own Interpretation?,” in *Northwestern University Law Review* 103 (Spring 2009), 857.

¹⁶ See Paulsen, *The Most Dangerous Branch*, 309-310 (making the point that for purposes of faithfully understanding the original meaning and structure of the Constitution, “it is Madison-as-Publius that counts” and that “earlier, general statements of principle control over the later, case-specific practice.” If Madison’s later statements or actions were “unfaithful to Publius’s principles, one should question the application, not the principle.”).



in his career, he again affirmed that it “was foreseen at the birth of the Constitution” that “difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.”¹⁷

The process of “liquidation”—to embrace Madison’s quaint eighteenth century term (understood in terms of its contemporaneous, not its modern, meaning)—could thus play a role in constitutional interpretation. Practice could settle, as a practical matter, certain questions genuinely left open by the Constitution’s text.

And it might even do so in a fashion contrary to Madison’s original personal views on particular constitutional questions. In one famous instance, Madison, as president, switched his position on the constitutionality of Congress’s power to create a “Bank of the United States.” As a member of the First Congress, he had taken a narrow view of Congress’s enumerated powers and denied that it could create such a bank. As president, nearly a quarter century later, he concluded that long practice and consensus had settled on a view other than his initial one.¹⁸

Taken seriously, such a stance might go a long way toward mitigating (or at least explaining) the apparent inconsistency of Madison’s views over time. Interpretation and practice could not actually change the Constitution. (Madison never said *that*.) But it sometimes could change Madison’s own mind about what should be understood as the accepted public meaning of the Constitution, even where Madison had initially thought differently.

Madison embraced the idea of “liquidation” from the start. As noted, it is present in his discussion of the Constitution in *The Federalist*.¹⁹ There is no reason to believe that it was not an honestly believed position. Nonetheless, there is reason to be at least mildly suspicious that this view became a convenient way for Madison to rationalize inconsistencies between his later actions and earlier stated positions. (This seems especially true with respect to the question of congressional power to create a national bank, as many have observed.²⁰) At all events, Madison’s view of “liquidation” was not a theory of *judicial* power to alter, or settle, the meaning of the Constitution by dint of their decisions alone, but a political theory of public consensus on (formerly) uncertain but no longer disputed questions.

Finally, this distinctively Madisonian theory of liquidation surely qualifies as a specific *opinion* of Madison’s—his subjective, individual view about how the Constitution might be expected to work in practice. It is not a prescription to be found in the document itself. As such, it might well be one of those matters on which Madison believed his own intentions or expectations do not count.

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¹⁷ See *The Federalist* No. 37; “Letter from James Madison to Spencer Roane (Sept. 2, 1819),” in *Letters and Other Writings of James Madison*, 143, 145.

¹⁸ For a good short distillation of this story, see Richard S. Arnold, “How James Madison Interpreted the Constitution,” in *New York University Law Review* 72 (1997), 267, 274–276.

¹⁹ See *The Federalist* No. 37, 245.

²⁰ See Marvin Meyers ed., *The Mind of the Founder: Sources of the Political Thought of James Madison* (London: University Press of New England, 1981), 390 (noting Madison’s evident desire to reply to “the common charge of inconsistency”).

With these concessions to the problems and paradoxes of relying on Madison's views, we can now return to and reexamine Madison's bedrock positions on the fundamental questions of constitutional interpretation: *who* interprets the Constitution, and *how* is the document faithfully to be interpreted and applied? While Madison is not perfectly consistent on these points, there is an essential unity that is hard to miss—and an implicit indictment of modern practice that is hard to deny.

III. WHO INTERPRETS? MADISON VERSUS THE MYTH OF JUDICIAL SUPREMACY

Who has the power to interpret the Constitution? For Madison, the answer was clear: *everybody*. The power of constitutional interpretation is not vested exclusively in any one branch or institution of government—including the courts—but is instead divided and shared among all of them, and by officers of state governments as well. All who exercise governmental power under the Constitution share in the power and duty of faithful constitutional interpretation, with none literally bound by the views of any of the others. That is the simple Madisonian vision. It is clear in his most fundamental political premises, stated in *The Federalist* and later statements. And it is clear in his specific statements concerning the power of constitutional interpretation. While there are certain later comments, and actions, by Madison that taken in isolation might suggest a changed view—a stronger embrace of the priority of judicial interpretations of the Constitution—Madison actually remained remarkably consistent on this point throughout his long public career.

The place to begin is Madison's political theory of the Constitution in *The Federalist*, grounded firmly in the ideas of separation of powers and federalism. If there is one theme that pervades James Madison's constitutional thought from start to finish, *it is the importance of avoiding the concentration of government power in a single institution or group of actors*. It is this cornerstone of Madison's thought that makes the modern practice of judicial supremacy so deeply problematic.

The very point of the separation of powers is to divide and diffuse governmental authority in order to avoid concentrations of power dangerous to liberty. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny," Madison wrote in *Federalist* 47.²¹ Maintaining the necessary degree of separation—and thus thwarting accumulations of power—required that the several branches "be so far connected and blended, as to *give to each a constitutional control over the others*," he wrote in *Federalist* 48. Each branch must possess checks on the encroachments and aggressions of the others. But, crucially, none must be permitted to exercise, "*directly or indirectly, an overruling influence over the others in the administration of their respective powers*."²²

This necessarily entails a denial of judicial supremacy in constitutional interpretation. For Madison, granting interpretive supremacy to any one branch would directly contradict the foundation of separation of powers: it *would* amount to the accumulation of all powers in the same hands—"the very definition of tyranny" deplored in *Federalist* 47. Interpretive supremacy—the power to determine the scope of all other powers—would give the judiciary preeminence over the other branches. It would literally give courts "an overruling influence" over the other branches "in the administration of their respective powers"—a flat contradiction of *Federalist* 48. Judicial supremacy is thus

²¹ *The Federalist* No. 47; see also *The Federalist* No. 48 (again discussing the danger of "assembling all power in the same hands").

²² *The Federalist* No. 48 (emphasis added).

irreconcilable with Madison's understanding of the separation of powers. It is no surprise, then, that Madison included in *Federalist* 49 the famous line quoted at the outset of this essay: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."²³

That statement of Madison's is about as clear and categorical a rejection of judicial supremacy as it is possible to imagine. The solution to the problem of maintaining the Constitution's separation of powers clearly was not, in his view, to vest interpretive supremacy in one branch, and the Constitution clearly did not do so. Madison discussed but rejected (as either naïve or impractical) the possibilities of leaving powers to a "mere demarcation on parchment"²⁴ or relying on constitutional conventions to enforce the separation.²⁵ But what is striking to modern sensibilities is that Madison did not even *consider* the idea that courts would have the supreme or final word. One-branch interpretive supremacy simply was not a serious option for Madison.

The Constitution's solution was quite the opposite: to empower rival power centers, making them as independent of each other as possible, and "so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."²⁶ Each branch must "have a will of its own" and the ability to exercise that will *independently* of the control of the others. "Ambition must be made to counteract ambition," Madison wrote in a famous line, so that "opposite and rival interests" might supply "the defect of better motives."²⁷

Judicial independence formed an integral part of this system. Life tenure and salary guarantees provided courts the security they needed to resist the encroachments or usurpations of the other branches with respect to exercise of the courts' one true power: independent judgment. As Madison's co-author of *The Federalist*, Alexander Hamilton, would explain in *Federalist* 78, these safeguards were designed to protect the intrinsically *weak* judiciary from being overawed by the political branches. But protecting judicial independence hardly meant establishing judicial supremacy. Quite the contrary: the judiciary remained the "least dangerous" branch because it possessed the *least* power,²⁸ and because it remained subject to the stronger checks held by the other branches.²⁹

For the most part, Madison remained consistent throughout his years in denying that the federal courts possessed interpretive supremacy over the other branches of the national government. (I will note some cautionary exceptions presently.) Besides *The Federalist*—the most important and directly relevant datum bearing on the question—there is the statement made by Madison as a member of the First Congress, briefly noted above, defying his colleagues to show "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?" Madison asserted, to the contrary, that no one of "these independent departments" possessed "more right than another to declare their

²³ *The Federalist* No. 49.

²⁴ *The Federalist* No. 48.

²⁵ These are the principal topics of Madison's discussion in *The Federalist* 49 and *The Federalist* No. 50.

²⁶ *The Federalist* No. 51.

²⁷ *The Federalist* No. 51.

²⁸ *The Federalist* No. 78.

²⁹ For a full description and defense of such checks, see Michael Stokes Paulsen, "Checking the Court," *NYU Journal of Law & Liberty* 10 (2016), 18. Each of these checks is embraced by Alexander Hamilton's discussion of the judicial branch in *The Federalist*, Nos. 78-83.

sentiments on that point.” The Constitution, Representative Madison declared, simply did not make provision “for a particular authority to determine the limits of the Constitutional division of power between the branches of Government.” Those were matters that “must be adjusted by the departments themselves, to which no one of them is competent.”³⁰

Madison’s position is clear: No branch is the superior of the others in constitutional interpretation. None has “more right than another” to press its views. No branch is “competent” to speak above all others as to what the Constitution means.

In the main, Madison remained remarkably consistent in affirming the complete co-ordinacy of the branches and their resulting independent, co-equal power of constitutional interpretation. There are occasional remarks, in specific contexts, that might be taken to suggest a somewhat more prominent role for judicial decisions. But none, considered in their circumstances, gives reason to doubt the core point of equality and independence of the branches. Consider a few instances:

First, Representative Madison, introducing in the First Congress what would become the Bill of Rights, expressed faith in the courts as “impenetrable bulwark[s]” who would guard the Constitution “against every assumption of power in the legislative or executive.”³¹ This was not an assertion of judicial supremacy but an appeal to the role of courts as “independent tribunals.”

Then, more than a decade later, as a Virginia legislator defending the propriety of that state’s actions declaring the Alien and Sedition acts unconstitutional, Madison noted, hypothetically, that “[h]owever true” it “may be” that the judiciary would decide “in the last resort ... in relation to the authorities of the other departments of the government,” that could not license the federal judiciary to authorize national violation of the Constitution at the expense of the States. In context, Madison’s seeming concession to judicial supremacy (for the purposes of argument) was far more apparent than real, for Madison emphatically denied judicial supremacy over the Constitution in the same breath: Judicial authority derived from “the parties to the constitutional compact” and was limited by the terms of the commission. “On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers, might subvert forever, and beyond the possible reach of any rightful remedy, the very constitution, which all were instituted to preserve.”³² It is hard to construe this, fairly, as an endorsement of judicial supremacy, even over the other branches. (Moreover, to do so would have the James Madison of 1800 contradicting the James Madison of *The Federalist*, in 1788, and the James Madison of the First Congress, in 1789.)³³

³⁰ See Paulsen, *The Most Dangerous Branch*, 234, quoting Rep. Madison in Gales & Seaton, *Debates and Proceedings*, 500.

³¹ James Madison, “Rights,” June 8, 1789, in *The Papers of James Madison* 12, ed. William T. Hutchinson et al. (Chicago and London: University of Chicago Press, 1962--77), available at The Founders’ Constitution Online, vol. 1, chapter 14, document 50 <http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html>.

³² Madison, *Report of 1800*.

³³ Indeed, in general, Madison’s position in the Report of 1800 goes too far, suggesting that States are the *supreme* interpreters of the Constitution – the ultimate judges of constitutional boundaries. This position is as flawed as the assertion of judicial supremacy. See Paulsen and Paulsen, *The Constitution: An Introduction*, 134-136. Aspects of Madison’s rhetoric during this period of intense political controversy are careless and imprecise, perhaps attributable to the heat of political circumstances, and should be discounted appropriately.

Fast forward another decade. In 1809, Madison, as President of the United States, rejected a request by Pennsylvania's governor to intervene to deny enforcement of a judicial decree in a messy litigation of an admiralty dispute.³⁴ In refusing the request, Madison stated that a judicial decision was binding on the executive in particular cases, remarking that he was "not only unauthorized to prevent the execution of a Decree sanctioned by the Supreme Court" but obliged to carry the judgment into effect.³⁵

It is not clear how much weight can be placed on this incident or Madison's statement, which might simply have been an expedient excuse to avoid becoming embroiled in a dispute of middling consequence. Madison never retreated from his core theoretical position embracing the co-ordinacy of the branches, including in matters of constitutional interpretation. Madison might have thought that the duty of the executive to enforce the decrees of courts in decided cases was a specific exception to this principle, not at odds with the general rule. Or his concession might be thought an example of deference to the judiciary in cases not especially within the executive's area of expertise. Or his statement might have been nothing more than a politically convenient excuse not to make the case a bigger problem. At all events, it is hard to view it as a repudiation of Madison's earlier statements of constitutional principle rejecting judicial supremacy.

Madison returned to those first principles in a memorable, unaddressed memorandum (or letter) that he penned in retirement, in 1834. The constitutional issues of the recent past had included South Carolina's attempted "nullification" of federal law and, separately, President Andrew Jackson's veto of the bill reauthorizing the Second Bank of the United States on constitutional grounds that had been rejected by the U.S. Supreme Court in the case of *McCulloch v. Maryland*, in 1819. Madison noted that legal questions "generally find their ultimate discussion and operative decision" in the courts, because of the order in which the branches typically act on a question. (Interestingly, Madison largely reversed positions on state-versus-national supremacy in law interpretation from the position he had taken in the *Report of 1800*.) But Madison noted that this observation about judicial resolution of constitutional questions was subject to the principle of the co-ordinacy of the branches:

As the Legislative, Executive, and Judicial departments of the United States are co-ordinate, and each equally bound 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 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.³⁶

In many ways, the 1834 unaddressed memorandum is a reprise of the themes of separation of powers and the "perfectly co-ordinate" status of the three branches of government that Madison advanced in *The Federalist*, applied once again to the specific task of interpreting the Constitution. While Madison may have qualified his views somewhat (or simply stated them differently) during certain periods of his political career, or departed from principle on occasion, whether in the heat of political battle or to avoid an unnecessary conflict, he always returned to home base. And that base point was the impropriety of concentrations of power and the incorrectness of reading the Constitution as centralizing the power of constitutional interpretation in any one institution or set of hands.

³⁴ I tell a fuller version of this story in Paulsen, *The Most Dangerous Branch*, 308-311.

³⁵ "Letter from James Madison to Simon Snyder (April 13, 1809)," in *Papers of James Madison: Presidential Series, Volume 1*, ed. Robert A. Rutland et al., (Charlottesville: University Press of Virginia, 1984), 114.

³⁶ James Madison, "Unaddressed Letter of 1834," in *Letters and Other Writings of James Madison, Volume 4*, 349.



IV. HOW TO INTERPRET? MADISON VERSUS INTERPRETIVE LICENSE

How is the Constitution to be interpreted? The question is fully as urgent where interpretive power is decentralized and shared (Madison's vision) as where it is viewed as concentrated and exclusive (the myth to which most subscribe today). Centralized interpretive power can be abused if there are no standards to constrain its use (and especially if there exists no competing power to check the abuse). But it is equally true that decentralized interpretive authority could tend toward chaos and incoherence if there are no standards to constrain its exercise. As I have put it in other writing: "What if one branch, or body, advances a highly idiosyncratic interpretation, and insists, for its own policy or self-interested purposes, on pressing such a position to the wall?"³⁷

Madison did not believe that the Constitution lacked objective criteria for its interpretation. He did not assume that all branches and institutions would *agree* as to the correct resolution of any particular constitutional question—disagreements were inevitable—but that is not to say that there are no standards by which all constitutional interpreters should be governed, and by which all should be held accountable.

It is here that Madison's views stand in most clear contrast to modern practice—and also where it is most clear that they did not materially vary through his long career. Though he occasionally changed his mind about specific conclusions on specific constitutional questions, he rarely if ever deviated from first principles as to *what properly counts*—and, equally important, what does not—in sound constitutional interpretation. At the risk of oversimplifying, Madison can be seen to embrace, with a relatively high degree of consistency over time, five core principles of constitutional interpretation.

First, Madison embraced the absolute primacy of the constitutional text itself. To be "legitimate" interpretation, the meaning of the Constitution must be "derived from the text itself."³⁸ This may seem elementary, but it is a rule that is violated with distressing frequency in modern judicial practice. Only in the loosest and almost empty sense of the term can certain of the Supreme Court's modern landmark decisions be thought "derived" from a fair and natural sense of the words of the text. Madison was an early opponent of loose, or tendentious, construction of the Constitution's powers. It seems plain that he would not have accepted as legitimate the free-wheeling invention that characterizes so many modern judicial decisions.

Second, and reinforcing this first principle, Madison believed that the Constitution's text had to be interpreted and applied in accordance with the *original* sense of its words and phrases—not anachronistic readings that removed the meanings of words from the sense in which they were understood at the time (which could work a shocking "metamorphosis" in the meaning of constitutional law, given the changeable meanings of words) and even more obviously not purely invented, idiosyncratic, imaginative or individual readings that effectively substitute the will of the interpreter for the document being interpreted. Madison plainly allowed room for the use of specialized legal terms of art (including "ancient phraseology") or familiar idioms of the day, but that was completely consistent with his focus on the text's original meaning. That was simply what such terms would have been understood to mean by the people using and reading them at the time.

³⁷ Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, *Michigan Law Review* 101 (2003), 2706, 2739.

³⁸ "Letter to Thomas Ritchie (Dec. 27, 1821)" in *The Writings of James Madison, Volume 9*.

Third, and flowing from the notion that the Constitution's meaning is an objective meaning flowing from its original sense, not from individual views, Madison (fairly) consistently denied the direct and controlling relevance of Framers' subjective "original intent," as opposed to the text's objective linguistic meaning, in constitutional interpretation. Recall his 1796 statement that "whatever veneration might be entertained" for the men who framed the Constitution, "the sense of that body could never be regarded as an oracular guide in expounding the Constitution" since all they could do was draft a proposal.³⁹ A written text must "speak for itself," Madison wrote on one occasion, referring to the proper understanding of one of his own veto messages as president. The relevant intention of a text was to be gleaned from the public meaning of the words themselves. His private intention "cannot be substituted for" the intention revealed by "established rules of interpretation" of the text itself. Madison was not perfectly consistent about this in practice, of course: in some congressional debates he even appealed to his memory of what had transpired at the Constitutional Convention, whose records of debates were not public.⁴⁰ But he quickly repented of this practice and with reasonable consistency ever after he denied that the framers' subjective intentions played any important role in constitutional interpretation.⁴¹

Fourth, Madison consistently emphasized the logic of the Constitution's structure and overall design as relevant to its proper understanding. Madison did not make a special point of emphasizing this as a separate standard, or marker, in constitutional interpretation. But it is implicit in practically every one of his specific constitutional arguments. It is a central feature of the exposition of the Constitution in *The Federalist*. And it can be seen as simply an aspect of his commitment to the constitutional text: the text must be considered *as a whole* and understood in terms of its overall architecture as well as its specific provisions.

Fifth, and as already discussed at length above, Madison believed that the meaning of uncertain, ambiguous, or indefinite constitutional language could—under proper circumstances—be "liquidated" by a long, consistent, and settled practice resting on a universally agreed (or long-conceded) interpretation—even if that interpretation had once been vigorously contested. This second-order criterion, which for Madison came into play only if the original meaning of the text admitted of a genuinely uncertain range of meaning, exists in some limited tension with the other criteria Madison embraced and championed. But on the whole, it remains tolerably consistent with those criteria. Practice contrary to the Constitution cannot change the meaning of the Constitution; it can only establish, in sufficiently clear circumstances, which of two or more competing meanings of a term is the accepted one.

Finally, it is interesting to note what is *not* on Madison's list—and what, by implication, is excluded as improper. Nowhere does Madison endorse a principle that the Constitution's meaning changes; or that the understanding of the Constitution "evolves"; or that its meaning is determined or refashioned anew by successive generations. Each of these variations on the same theme is contrary to Madison's vision of what proper constitutional interpretation includes.

³⁹ Gales & Seaton, *Debates and Proceedings*, 776 (statement of Representative Madison).

⁴⁰ Richard Arnold, "How James Madison Interpreted the Constitution," in *New York University Law Review* 72 (1997), 267, 275

⁴¹ See generally Arnold, "How James Madison Interpreted the Constitution, 271-278. Perhaps in part for this reason, Madison delayed publication of his own magnificently detailed *Notes of Debates in the Federal Convention* until after his death in 1836. For consideration of the role that the Records of the Constitutional Convention, including Madison's *Notes*, legitimately might play nonetheless as evidence of constitutional meaning, see Vasani Kesavan and Michael Stokes Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," in *Georgetown Law Journal* 91 (2003), 1113.

CONCLUSION: RECOVERING A “MADISONIAN CONSTITUTION”?

Madison’s constitutional thought stands as a powerful critique of modern constitutional practice. It is but a small exaggeration to say that the loss of the Madisonian vision — and the substitution in its place of a practice under which the Supreme Court possesses essentially plenary and exclusive interpretive power, exercised according to whatever criteria the members of the Court think fit — accounts for nearly everything that ails our constitutional law today. We cede authority over the Constitution to the courts alone. We therefore place huge emphasis on who fills those judicial robes, raising too much the stakes of judicial appointments even as we lower the standards of faithful constitutional interpretation. We thereby create political turmoil over constitutional interpretation but on precisely the wrong terms. And we place too little reliance in the checks properly possessed by other actors within our constitutional system with which to counter the errors inflicted on our constitutional order by errant, arrogant, and arrogating judges.⁴²

Restoring a “Madisonian Constitution” for today is a reclamation project as it concerns the judicial power. Whether “We the People” are interested in undertaking such a project is a question both of politics and of constitutional principle: Do the people whose Constitution it is desire such a restoration and have the will and effective power to achieve it? At all events, the first step in such a process is understanding. Madison’s vision has much to say to today. That vision is not right just because it is Madison’s — Madison would not have thought such deference correct. Rather, that vision is largely right because of the first principles of the Constitution itself. Madison understood those principles well — even if he occasionally strayed from them. “We the People” should understand them, too.

⁴² Paulsen, *Checking the Court*.

