

JAMES MADISON: THE FOUNDING FATHER. By Robert Allen Rutland.¹ New York: Macmillan. 1987. Pp. 287. \$19.95.

JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS. By Robert J. Morgan.¹ New York: Greenwood Press. 1988. Pp. 217. \$39.95.

THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY. By Drew R. McCoy.¹ Cambridge and New York: Cambridge University Press. 1989. Pp. 386. \$29.95.

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In our time, James Madison has become the Framer For All Seasons. For Robert Rutland, in the first of the books reviewed here, Madison is *the* founding father. Leonard Levy, the dean of American constitutional historians, has suggested that Madison should "be remembered as the 'Father of the Bill of Rights' even more than the 'Father of the Constitution,'" a sentiment with which Robert J. Morgan, author of the second book noticed here, would certainly agree. And for Drew McCoy, our third author, Madison in the past "has been unjustly consigned to the shadow" of Jefferson, from which he needs to be removed forthwith. Intellectuals of the late nineteenth and early twentieth centuries had their fling with Hamilton, and the 1930s and 1940s saw the rise of the cult of Jefferson. But at the end of the century James Madison is our main man.

Madison was so often at the critical place at the critical time, and he worked very hard. He *did* so much: delegate from Orange County to the Virginia Convention that drafted that state's Constitution and its Declaration of Rights; service in the first Virginia assembly under the new Constitution; Virginia delegate to the Continental Congress in 1779. He returned to the Virginia general assembly in the middle 1780s to participate in the famous battle over the establishment of the Episcopal Church. He wrote and circulated the "Memorial and Remonstrance," and managed the passage of Jefferson's Statute for Religious Freedom. He was a Virginia delegate to the Annapolis convention in 1786 and elected

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the same year to the national Congress where he worked tirelessly for a convention to revise the Articles of Confederation. Once again a Virginia delegate, at the Great Convention he was the principal author of the Virginia Plan that established the terms of early deliberation. Tireless notetaker, frequent speaker, capable backstairs negotiator, Madison signed the draft and resumed his congressional seat in New York where, without breaking stride, he launched into intrigues for the ratification of the proposed Constitution and, with Alexander Hamilton and (in a minor role) John Jay, produced the essays that became *The Federalist*—the most important gloss ever written on the Constitution. He returned home to lead the forces of “Federalism” at the Virginia ratifying convention and was elected to serve in the first Congress under the new Constitution. He was the driving force in that body for the adoption of the Bill of Rights and drafter of much that eventually went to the states for ratification. Taking pen in 1793 as “Helvidius” he opposed his erstwhile collaborator, Alexander Hamilton (writing as “Pacificus”), in the first great public debate about the powers of the president in foreign affairs. And shortly after that he was deeply involved with Jefferson in the formation of the Republican party. In 1797 he briefly returned to private life (or, to be precise, tried it for the first time in his life), but the following year he was back in the thick of things opposing the Adams Federalists and preparing the Virginia Resolutions. He went on to serve as Jefferson’s Secretary of State and, finally, two terms as president himself. In his old age he emerged, as the last survivor of the Convention, to oppose the doctrine of nullification and to prepare his notes of the deliberations at Philadelphia for publication. And these are only the highlights.

It was a staggering performance both politically and intellectually, and these three new books quite properly celebrate that performance and afford valuable access to it for students of American constitutional development.

Professor Rutland’s book fills an important niche in the Madison literature by providing a highly readable, one-volume political biography. One of the premier Madison scholars of our time, and chief editor of the Madison papers, Rutland writes clearly, with a sure and (usually) balanced touch. His treatment of Madison’s role in the framing of the Bill of Rights is a bit cursory. And his discussion of the Virginia Resolutions focuses almost entirely on the Federalist evils which Madison was opposing, giving scant attention to the implications of the radical states-rights doctrine he was embracing. But these are forgivable shortcomings in a one-volume study.

Robert Morgan's book is of a different sort. It is an intellectual biography of Madison, which presents the great man as the consistent expositor throughout his brilliant career of a theory of republican government. The rediscovery in recent decades of "republicanism" in the revolutionary and constitutional periods has been one of the most interesting developments in the field of American political thought. But while useful in breaking the hold of a narrow Lockean contractarianism on our understanding of the constitutional founding, it is important to note that "republicanism" means many things to many men.³ Who, for instance, were the real carriers of the republican flame? The Anti-federalists with their concern for the little, local republics that could nurture virtue? Or the High Federalists with their steely insistence on leadership by the few of proven virtue? And what of the view that the clearest sense of the term republican in the founding period, the meaning, perhaps, for which the term should be reserved, was to denote a primary constitutional commitment to self-government—which simply excluded the possibility of other or mixed forms of governmental authority? It does not diminish Morgan's achievement in portraying Madison's republicanism to wish that he had been more sensitive to the ambiguity of his key term. Thus it is unclear, for instance, that the position on presidential power taken by "Helvidius" was necessarily more *republican* than that of "Pacificus." And the attempt to portray Madison as a consistent political thinker runs the risk of underestimating the importance of immediate political calculations in Madison's performance. Professor Morgan would have done well to meditate from time to time on the remark of Fisher Ames, quoted by Rutland, that Madison "is so much a Virginian . . ."⁴ These are, however, quibbles with an impressive performance.

Drew McCoy, in a highly original and important book, focuses on the last twenty years of Madison's life—"The period between his retirement from public office in March 1817 and his death on June 28, 1836." In these years, Madison truly played the role of senior statesman of the Republic. He left office buoyed by a swell of national affection and approval; he corresponded voluminously and a steady stream of distinguished pilgrims made the trip to Montpelier; and he came out of retirement in 1829-30 to perform valuable service at the convention charged with revising the Constitution of Virginia.

3. Especially good on these difficulties is Fallon, *What is Republicanism, and Is it Worth Recovering?*, 102 HARV. L. REV. 1695 (1989).

4. Ames to William Tudor, March 3, 1790.

In my opinion, McCoy stretches too far to put a better face on Madison's presidency than most commentators have done. To say of a war-president, as McCoy does, that he had a great civil liberties record and did no violence to separation of powers is certainly to say something, but it may be doubted that this makes any sort of historic amends for the irresolution, the toleration of incompetent subordinates in the prosecution of the war (a Secretary of the Navy often passed out at his desk by midday), and the failure to rally a deeply divided country in a sustained fashion. Today the War of 1812 is often viewed as a kind of footling affair, a conflict blundered into, with American aims ill-defined and the decisive battle fought after a peace agreement had been concluded. In fact, the young Republic was at mortal risk—still surrounded by Britain, Spain, and France, all variously capable of projecting power into the "new world," and by sometimes hostile Indian tribes. In every way "Mr. Madison's War" deserves to be considered a Second American War of Independence, and it was a very near thing.

On Madison's political thought, however, McCoy is at his best, drawing out the more subtle aspects of Madison's republicanism. "Madison found serious fault," for instance, "with the underlying logic of Jefferson's theory of generational relationships." And while

Madison would surely have been uncomfortable with the comparison, there is a striking affinity between his ideas and the spirit of Edmund Burke's famous definition of society, offered a year later, as "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."

At the Virginia constitutional convention in December 1830, facing a potentially destructive clash of interests between the eastern and western parts of the state, Madison insisted on the importance of building "stability" into "the basis and structure of the Government itself." As McCoy puts it:

Madison once again became "Publius," fearful of unrestrained majoritarian democracy: "In Republics, the great danger is, that the majority may not sufficiently respect the rights of the minority."

These may have been Madison's "declining years," but intellectually they are among the most interesting of an heroic intellectual life.

But in all this quite proper celebration of Madison there is, I think, one cause for concern. When we have the Father of the Constitution, and the Father of the Bill of Rights, and *the* Founding Father, who did the drafting, kept the notes, and wrote the commentary, there is danger that laborers in the vineyard of constitutional construction will accept Madison's personal views as an

adequate guide to the meaning of particular constitutional provisions. Examples of this occur, for instance, in the jurisprudence of the Supreme Court dealing with the religion clauses of the first amendment.⁵ Important as Madison was to the founding, it is equally important to keep in mind how often, with respect to things he wanted badly, *he lost*. In fact, the record of “James Madison, Loser” moves in revealing counterpoint to the triumphal cadences of his career. Consider:

1. At the Virginia convention in 1776 the young Madison attempted an amendment of George Mason’s draft of the clause dealing with religious freedom. This would have immunized religiously motivated behavior from legal regulation up to the point at which “the existence of the State be manifestly endangered.” Cooler heads prevailed, and as Michael Malbin has written, such a radical conception of free exercise was not to emerge again in American constitutional thought until the middle of the twentieth century.⁶

2. In the cruel July days at the Convention, Madison suffered the staggering loss of his national veto over acts of the states (and with it, the extreme nationalist vision which he brought to the Convention and tirelessly advanced). As Rutland puts it, “Madison was forced to settle for something far less than what he yearned for” The Virginia nationalist intellectual was taken to school by Professors Sherman and Patterson.

3. Madison was forced to make significant rhetorical concessions to Anti-federalist sensibilities—that is, to the force of decentralization within the political culture—in various numbers of *The Federalist*. The disappointed nationalist was now required to give ground in print and thus to further legitimate the decentralization he (then) so disregarded.⁷

4. While Madison’s enthusiasm for a federal Bill of Rights was hardly unbridled (in one mood he thought it a “nauseous project” forced on him by political circumstance)⁸ there were several initiatives, dear to his heart, on which he lost: for instance, his pro-

5. The *locus classicus* of this approach is Justice Black’s opinion of the court in *Everson v. Board of Educ.*, 330 U.S. 1, 12-15 (1947). For examples in the academic literature see PFEFFER, *CHURCH STATE AND FREEDOM* 133-150 (1953); and LEVY, *THE ESTABLISHMENT CLAUSE* 91-119 (1986). On the extent of Justice Black’s reliance on Madison see Van Patten, *In the End is the Beginning: An Inquiry Into the Meaning of the Religion Clauses*, 27 ST. LOUIS U.L.J. 1 (1983).

6. MALBIN, *THE SUPREME COURT AND THE DEFINITION OF RELIGION* 97-100 (1973).

7. See Yarbrough, *Rethinking “The Federalists’ View of Federalist”*, 15 *PUBLIUS* 31 (1985).

8. Hutson, *The Drafting of the Bill of Rights: Madison’s “Nauseous Project” Reexamined*, 3 *BENCHMARK* 390 (November-December, 1987).

posal of a constitutionally mandated conscientious exemption from the military service for religious objectors; and his effort to extend certain of the proposed strictures ("equal right of conscience, freedom of the press") to the states. Both ideas were distinctly Madisonian and both were rebuffed.

5. Of his early constitutional debates with Hamilton, it must be said that Madison was the loser—in the obvious sense that the main line of American constitutional development, from the mid-1790s on, generally bore out Hamilton rather than Madison. *McCulloch v. Maryland*⁹ rejected Madison's views on the constitutionality of the Bank of the United States, and it understates the case to say that the successive utterances of the Supreme Court over the decades on presidential power or in foreign affairs would have been more to the liking of "Pacificus" than "Helvidius."

6. Consider also Madison's ultimate abandonment (for no other word will really do) of his early, ardent nationalism. While it may be true that by later clarification of the 1798 Virginia Resolutions Madison exculpated himself from the charge of justifying nullification,¹⁰ the theory of the Constitution that he and Jefferson advanced that year, which had the states, *qua* states, creating the union, surely contributed to the intellectual and rhetorical reserves upon which the nullifiers later drew, much to Madison's embarrassment.

7. Bowing to dominant opinion, Madison issued Thanksgiving Day proclamations as President even though he believed them to be improper and confided his private views to a kind of "memo for the record" in later life.¹¹

Finally, it is worth reflecting on the fact that many of the ideas which most powerfully draw contemporary intellectuals to James Madison—his expansive early nationalism, his libertarianism, and his secularism—were matters on which he either flip-flopped or was defeated, or both. Today we love him for his scorning of decentralization as a political value, for his solicitude for individual conscience as against the decisions of the political community, and for his preference for strict separation between religion and the public order. But these were all beliefs that put him outside the mainstream of his time.

One may contend that in these respects and others (even, perhaps, in his views on executive power in foreign affairs) Madison

9. 17 U.S. 316 (4 Wheat.) (1819).

10. Cary, *James Madison on Federalism: The Search for Abiding Principles*, 3 BENCH-MARK 27, 49-51 (January-April, 1987).

11. Fleet, *Madison's "Detached Memoranda"*, 3 WM. & MARY O. 534 (1946).

was simply a prophet before his time, the value of whose insights we are only now coming to appreciate. But one cannot argue this and argue *at the same time* that Madison is an altogether reliable guide to the shared understandings of his time—in other words, to the original meaning of the Constitution.

We should remind ourselves that no one's views, not even those of *the* founding father, can be said to represent and reflect what was agreed to in particular constitutional provisions. And the scholar and the constitutional interpreter want, precisely, to know *what was held in common*. We want to know how the words and concepts that were used in constructing constitutional provisions were understood by *the generality* of politically active persons who used them and debated them. The ideas and beliefs of a James Madison or a James Wilson (or a John Bingham) are valuable in helping us to draw an intellectual map of a piece of our constitutional past, but their views must never be confused with the map itself. Madison without Patrick Henry, Richard Henry Lee, William Patterson, George Washington, John Adams, and Fisher Ames, is a tinkling symbol—sometimes one with a sweet clear note, perhaps, and always audible in the score, but not uniquely carrying the meaning of the score itself.

THE SUPREME COURT AND JUDICIAL CHOICE: THE ROLE OF PROVISIONAL REVIEW IN A DEMOCRACY. By Paul R. Dimond.¹ Ann Arbor, Michigan: University of Michigan Press. 1989. Pp. vi, 163. \$27.50.

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As history so painfully reminds us, nations that have not discovered an institutional means of accommodating that abiding tension between popular rule and limited government court political instability, a condition which inevitably leads to the degradation of the constitutional order and the loss of democracy. In the American system judicial review has been the primary mechanism for preserving the symmetry of the constitutional structure, as it has enabled the Supreme Court to resolve power conflicts between the states and the nation, as well as between the president and Congress, and to validate and refine the individual rights guaranteed by the Constitution. Even after two hundred years of practice, how-

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