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A Faction of One:
Revisiting Madison's Notes on the
Constitutional Convention

**A FACTION OF ONE: REVISITING MADISON'S NOTES ON THE
CONSTITUTIONAL CONVENTION**

RUNNING HEAD: Revisiting Madison's *Notes*

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ABSTRACT

This Essay on *Madison's Hand: Revising the Constitutional Convention*, Mary Bilder's revisionist account (2016) of James Madison's Notes on the Constitutional Convention argues that her central thesis, which is that Madison substantially revised the Notes long after the Convention adjourned, is groundbreaking but will have no effect on constitutional law. *Madison's Hand* is groundbreaking because the book yields many powerful insights into the deliberations of the Convention and into the evolution of Madison's thought. Nevertheless, constitutional practice in the Supreme Court and among elite lawyers is so divorced from the Notes that even a dramatic shift in their interpretation will not disturb the evolution of judicial doctrine applying the text written in 1787.

INTRODUCTION

In the Broadway musical *Hamilton*, Aaron Burr sings with gusto about his ambition to be in “The Room Where It Happens” (Manuel-Miranda & McCarter 2016, 186). Constitutional lawyers and commentators feel like they were in the room where the Constitution happened mainly because of James Madison’s *Notes on the Debates of the Federal Convention of 1787*. Madison was a forceful presence in the Constitutional Convention, but his decision to keep the most detailed record of those secret deliberations is what gives his account a privileged position for understanding the text. Since their publication in 1840, the Notes have been cited in one form or another by over one hundred and fifty Supreme Court cases (Sirico 2011, 71) and become a mainstay of legal scholarship. A critical assumption behind these references is that Madison’s recollections present a relatively accurate story of what occurred in Independence Hall (Kesavan & Paulsen 2003, 1191-96).

Madison’s Hand, Mary Sarah Bilder’s new book on the Notes, challenges their objectivity through a detailed reconstruction of how Madison assembled them.¹ Some of Bilder’s findings are not surprising, such as the fact that Madison tended to emphasize his own speeches in the Notes and downplay those of the other delegates (59-60, 132). But there are more explosive disclosures in Bilder’s research. For instance, she finds that Madison wrote most of the Notes that document the last three weeks of the Convention two years after those debates occurred, which raises serious questions about the reliability of those sections (5). In addition, she presents considerable evidence

¹ Prior to Bilder, the only scholar who raised serious questions about Madison’s veracity was William Winslow Crosskey, who claimed decades ago that the Notes were “forged” in the 1820s (Bilder 2; Crosskey 1953, 1: 7-13).

that in 1789 and 1790 Madison removed some material from his Convention speeches and substituted other statements that were less controversial, including the insertion of comments critical of slavery that he probably did not make in 1787 (100-03, 188-89). Much of the sheer delight in reading *Madison's Hand* (at least for specialists) comes from following Bilder's careful detective work, including a painstaking review of the watermarks on the paper that Madison used in compiling the Notes, which helps prove that some of his revisions did not occur while the delegates were meeting (243-62). In recognition of this groundbreaking study, Columbia University gave Professor Bilder the Bancroft Prize, which is one of the most prestigious awards in the field of American history.

This essay explains why Madison's Notes matter for understanding the Constitution, what *Madison's Hand* reveals about them and their author, and how Bilder's analysis relates (or does not) to the future of constitutional law. While most legal elites read the Constitution through the lens of the Supreme Court's decisions applying the text, there is a vibrant community of what Sanford Levinson describes as "constitutional Protestants" who instead care more about the text much as evangelical Protestants do about the Bible (Levinson 1988, 29). For these readers, Madison's Notes (along with the essays that Madison wrote with Alexander Hamilton and John Jay that are now called *The Federalist*) are the equivalent of the four New Testament Gospels, but in the Constitution's case there is only one full account of how the sacred word was created. Consequently, any significant reinterpretation of the Notes is bound to be of great interest, which is reflected in the media coverage that Bilder's research received—quite a feat for an academic book (Barbash 2015).

Madison's Hand contains a wealth of details about the Constitutional Convention and its aftermath that are worth reading in their own right, but one important lesson of the book is that

Madison's ideas evolved during and after the deliberations *because* he wrote the Notes. In other words, the process of summarizing the speeches, reproducing the proposed language, and recording the motions in the Convention over several years led Madison to reflect more deeply about the substantive issues under discussion. As a result, his thinking became more sophisticated as the Constitution's ratification was debated in the states and as the document was put into operation during the First Congress. Bilder's most significant claim in this respect is that Madison's arguments in *Federalist #10*, which are now considered classic statements of political theory, ripened as he listened to the back-and-forth between the delegates and was not something that he had worked out completely beforehand (Bilder 6-7; Cooke 1961, 56-65). Another provocative insight from her close reading of the Notes is that fears that Virginia would dominate the new federal government influenced the deliberations more than the conventional wisdom that the small states were worried that "large states" would rule the United States (7-8) (Klarman 2016, 182-215). This insight may help explain why Madison's position on the appropriate scope of federal power shifted rather dramatically between the Convention and the First Congress, when his home state of Virginia lost control of national policy.

Madison's Hand will have a tremendous impact on constitutional history and on Madison's biographers, but the book will probably not change the application or theory of constitutional interpretation.² In part, this is because most of the people doing that crucial work are not constitutional Protestants; they are instead "constitutional Catholics" who care more about what the Supreme Court said about the text and about unwritten customs than they do about the text itself (Levinson, 29). Indeed, no Supreme Court case or significant extrajudicial writing with a

² Bilder takes no position on this latter issue, stating that she leaves "the significance for modern constitutional interpretation—largely to the reader" (Bilder 5).

normative goal relies on the Notes. In those sources, Madison's work is simply a tool that is used to support legal conclusions arrived at through other means. This is true even for "originalists" who argue that the text should be construed according to its original expected application (Balkin 2011, 7). While originalists argued into the 1980s that the intent of only the delegates in Philadelphia and in the state ratifying conventions was relevant for interpreting what was drafted in 1787, (Colby & Smith 2009, 248), today most originalists say that the understanding of the document by all Americans at the time is what counts, which means that the Notes need not be consulted at all (McGinnis & Rappaport 2009, 761). Thus, most lawyers and judges will probably keep on citing the Notes as if Bilder's book does not exist.

Section One of this essay discusses the unique role of the Notes in our constitutional culture and what *Madison's Hand* tells us about how (and for how long) they were edited. Section Two explores how the book enriches our understanding of Madison's interpretation of the Constitution and the jealousies that shaped the Convention. Finally, Section Three documents the negligible impact of the Notes on the Supreme Court and on academic theory, which suggests that Bilder's expose will have little effect on the law.

I. TO FORM A MORE PERFECT SET OF NOTES

One distinctive aspect of constitutional law is that its source can be viewed, as President Franklin D. Roosevelt once stated, "as a laymen's document and not a lawyer's contract" (Shesol 2010, 517). In part, this means that anyone can read the Constitution and form his or her own opinions about how the provisions should be interpreted in a way that is not possible for complex statutes, administrative regulations, or judicial opinions. As a result, there is always a clear "Protestant" path for criticizing Supreme Court decisions by appealing directly to the text or to the

sources surrounding the proposal and ratification of the Constitution in the 1780s.³ Those sources include the records that survive from the state conventions that considered the Framers' proposal (Maier 2010), the essays in *The Federalist* that were written to persuade New Yorkers to vote for the Constitution (Cooke 1961), and, of course, Madison's Notes on the Constitutional Convention.

What makes the Notes special is that they were supposedly written while the Constitutional Convention met rather than afterwards. Once the Constitution was made public, Madison and the other delegates became advocates either for or against the proposal, and thus what they said about its meaning then was skewed by that political reality.⁴ (Indeed, there were several times in which Madison's position during the ratification debates was different from his position in the Convention, especially on the authority of the states under the new government (Bilder, 165)). Even casual readers of the Notes can see that Madison did not create a verbatim transcript of everything that was discussed, and those who studied the Notes always knew that he made some edits to his draft and that other members of the Convention kept records that were sometimes at odds with Madison's, but this did not undermine confidence in the real-time veracity of his narrative.

While Bilder devotes much of the opening portions of her book to the general practice of keeping legislative diaries (19-27), and the particular manner in which Madison assembled his Notes during the early stages the Convention (49-69), *Madison's Hand* comes to life when the reader learns that large swaths of the Notes were written after the Constitution was *ratified*. Why

³ A similar tack can be taken for decisions based on the subsequent amendments to the Constitution, but those arguments cannot rely on Madison's Notes.

⁴ A contrary perspective is that what was said in public about the Constitution was more important than what was said privately because those were the arguments that the people considered when they voted for the delegates to the state ratification conventions and that the delegates in those conventions considered.

was that the case? Part of the answer is that during the final three weeks of the Convention Madison was either ill or too busy with the actual work of drafting the final text in committee to write a diary (141-53). Once the Convention adjourned, Madison plunged into the campaign to get the proposal ratified by the states, and shortly after that was elected to the First Congress and focused on getting the first set of constitutional amendments approved (154-176). Two years after the Convention ended, he finally returned to the unfinished portion of the Notes and completed them (179-201).⁵ To do that, he consulted the official journal that was in George Washington's possession, which contained a bare-bones list of the motions and votes in the Convention (182-83), and seemingly did his best to remember what occurred during those final weeks.

The flaws in this final section of the Notes should be obvious. First, Madison could not have accurately reconstructed complex debates two years after the fact almost entirely from memory. Second, his memory must have been colored by subsequent events, of which there were many related to the meaning of the Constitution by 1789. Third, his use of someone else's record to fill in the gap raises questions about just how reliable that record was. One response to these criticisms would concede that the last part of the Notes must be treated with great caution while maintaining that the rest remains above reproach.

Unfortunately, this fallback position is untenable because Madison also revised the rest of the manuscript in 1789 and 1790, and many of these changes were substantial. For example, he altered some of his speeches to delete or tone down controversial statements that he made (for

⁵ Bilder argues that Madison initially wrote the Notes for Thomas Jefferson, who was serving as the American Ambassador to France during the Convention (3). The circumstantial evidence for this claim has been challenged (Rakove 2016, 335-37), though one point in its favor is that Madison's revision of the Notes coincided with Jefferson's return to the United States.

instance, that the Senate should represent the wealthy) and include ideas that emerged from the ratification debates and the First Congress (198-200, 216-17). He also inserted personal comments critical of slavery that he did not write down during the Convention and which are remarkably similar to statements that Luther Martin made during the First Congress (188-89). And he made scores of smaller edits that conveyed a different impression of what occurred than what his original diary contained (184-98). In fact, Madison was still making changes decades later when the notes of Robert Yates, a delegate from New York who attended part of the Convention, were published in 1821 and evidently gave Madison pause about parts of his story (226-29). Thus, there is no significant segment of the Notes that remains in its original form as written by Madison during the Convention.

One example of how Madison's post-hoc edits inform our view of his changing mindset comes from his additions to the sections of the Notes on the judicial branch. In the first draft, Madison omitted much of the discussion on what became Article III of the Constitution, evidently because he was more interested in other questions (117-18). This ho-hum attitude continued into 1788, as Madison said little about the judiciary in *The Federalist* and left that discussion to Hamilton (Cooke 528-57). By 1789, though, Madison was a member of Congress working through how the federal courts should be organized in the First Judiciary Act. When he turned back to the Notes, he included many new comments about Article III, including a line explaining what is probably misnamed the "Madisonian Compromise," which gave Congress the discretion to create lower federal courts without mandating that this be done (Fallon 2010, 1060; Bilder 198-99). The final version of the Notes makes Madison's silence on the judiciary during the ratification debate puzzling, but the revisions clarify that his priorities just shifted in response to subsequent commentary on the Constitution.

Madison's motivation for making these wholesale changes is unclear, especially as he did not seem to have publication in mind when he made most of them.⁶ He did show the Notes to Jefferson in 1791 (Bilder 205), so perhaps he wanted to present a more polished version to his friend and mentor. Or Madison may have been concerned that one of the other delegates would leak some of his comments in the Convention to embarrass him when he made constitutional arguments, and hence wanted to create his own sanitized account to refute any damaging claims about what he said. Then there is the irresistible urge for creative people to tinker with and try to improve upon previous work, which puts Madison in the company of authors such as J.R.R. Tolkien (for *The Hobbit*) and artists such as George Lucas (for the first three *Star Wars* films).

Whatever the explanation for the edits is, *Madison's Hand* does not suggest that the Notes are fictional and should be discarded. Instead, the takeaway is that this treasured source should be treated just like any other diary or autobiography—skeptically. To some extent, the Notes can be cross-checked against the fragmentary records kept by the other delegates in Philadelphia, and Bilder makes use of those to point out that in one case Madison did not record one of his own speeches to the Convention (70-72). Thanks to her research on the differences between the first and final drafts of the Notes, readers can now also compare and contrast those manuscripts and draw their own conclusions about which one is more correct. People who refer to the Notes should now do so with more humility, understanding that what they are citing may represent only what may have been said rather than what was definitely said in the summer of 1787.

II. READING BETWEEN THE LINES

⁶ The prospect of publishing the Notes apparently did not come up until Jefferson suggested the idea in 1799 (Bilder 221-22). Madison's inclusion of skeptical comments about slavery is inexplicable, given that he was a slaveholder and that there was no reason to think that his failure to say anything critical of the practice in the Convention would matter when he made the changes.

What do we learn about the Constitution and about Madison from Bilder's analysis of the construction of the Notes? The first item that stands out is Bilder's claim that Madison's innovative arguments in *Federalist #10* were partly a product of his reflections on what was said by other delegates rather than a theory that he developed entirely on his own. Another is that Madison's support in the Convention for a strong national government was resisted in part because Virginia—his home state—was the largest state and thus would control the new government, which to some extent helps square the circle between Madison's nationalist and states'-rights views. Lastly, there are new insights about Madison's relationship with Alexander Hamilton and Hamilton's participation in the Convention.

The essays in *The Federalist* run a close second to the Notes for the title of the most important source for interpreting the original meaning of the Constitution, and Madison's contribution in *Federalist #10* is often singled out as the most important (Stewart 2015, 54). In that tract, Madison argued that a large republic would be better than a small one at preventing a "faction" (or what we might call a political party or a special interest group) from gaining control of the government (Cooke 56-57). Since a faction was inevitable in a free society, he wrote, the only practical remedy involved "controlling its effects" by making it difficult for any single faction "to concert and carry into effect schemes of oppression" (58-59). In a large nation this was easier to achieve because more voters made it "more difficult for unworthy candidates to practise [sic] with success the vicious arts, by which elections are too often carried," and because in a larger country "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 common motive exists, it will be more difficult for all who feel it to discover their own strength, and act in unison with each other" (63-64).

What was unclear until now was when Madison developed his theory of factions and what influence, if any, that thought had on the deliberations of the Convention or on the architecture of the Convention (Rakove 338-45). The Notes include references in at least one of Madison's speeches to the idea in *Federalist #10* that a large republic was superior, but there is no indication that the other delegates responded to what he was saying. This makes sense after Bilder explains that Madison included these points in his speeches only when he was revising them in 1789 and 1790 (199). The other delegates could not have responded because the statements were not made to them. Instead, *Madison's Hand* observes that Gouverneur Morris was the one who made the argument in Independence Hall about elections in a large country preventing factions from gaining undue influence (Bilder 117). The implication is that while Madison had given the issue some thought before the Convention (44), his analysis did not crystallize until afterwards.

Nevertheless, Bilder's most eye-opening observation about the Convention, which comes more from her fresh reading of the manuscript than from the revisions that Madison made, is that many of the divisions within that body may have resulted from the concern that Virginia would have too much power in the new national government.⁷ The standard story of the Constitution's formation is that there was a deep split between the large and small state delegations over how strong the national government would be and how Congress should be designed (Klarman 182-200). Eventually this deadlock was broken by the Connecticut Compromise, which based the House of Representatives on proportional representation, favoring the large states, and organized the Senate on state equality, favoring the small states (200-05). A fair conclusion from this version

⁷ In fairness, Bilder offers no direct evidence to support this theory, but as the text explains there are sound reasons for thinking that she is on the right track.

of history is that the Framers cared a great deal about state sovereignty and thus wove that into the Constitution's basic structure.

The initial draft of Madison's Notes, however, indicates that what really kept the small state delegations up at night was the thought that one large state—Virginia—would control the others (Bilder 50-51). This was not a groundless fear, as Virginia did wield the most influence initially, producing four of the first five presidents (Washington, Jefferson, Madison, and Monroe), the first powerful Chief Justice of the United States (John Marshall) along with many other leading figures in Congress and in the Executive Branch (Smith 1996).⁸ Virginia's power was a product of its large population, central location, and numerous slaves that gave the state extra representation in the House of Representatives and the Electoral College under the Constitution's Three-Fifths Clause.⁹ One convincing element of Bilder's interpretation is that the view that the large states had many powerful common interests of which the small states should have been wary was probably too abstract to generate a debate that threatened the dissolution of the Convention. There were some divisions between large states and small states leading up to the Convention, most notably over the disposition of the lands that various states claimed on the western frontier (Klarman 190-91), but on many issues (such as slavery) large and small states were internally divided. The idea that many states might have worried about a particular state running roughshod over them was more tangible.

⁸ The relocation of the national capital in 1800 to the Potomac River on Virginia's border is another example (Chernow 2010, 629-31).

⁹ See U.S. Const., art. I, § 2 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.")

If *Madison's Hand* is correct in this surmise, then two interesting implications follow. One is that state sovereignty as such was not as important in the Convention as the traditional narrative says (5). What was really at issue was the principle that one state should not have a stranglehold on the national government. State sovereignty was instead an argument crafted during the ratification debate to sell some of the reluctant states on the Constitution and explain the Senate in a more acceptable fashion. (One obvious point along these lines was that Virginia could not be persuaded to ratify the proposal with the argument that the plan was meant to restrict Virginia.) Given the subsequent importance of states'-rights in constitutional law, the thought that this proposition was not what the Framers had in mind at the beginning is telling.

The other implication of the "Stop Virginia" reading of the Notes relates to Madison's seemingly contradictory views about federal power. One confusing feature of Madison's long political career was his about-face from an ardent nationalist during the Convention into a Jeffersonian who argued against most of Treasury Secretary Hamilton's agenda in the name of federalism just a few years later (Chernow 2004, 251-52, 305-06). Bilder devotes significant attention to Madison's disdain for the state governments in 1787, noting that he actually toned down the strongest comments on this issue that he made in Philadelphia during his subsequent revisions of the Notes. For instance, at the Convention he went so far to suggest that no line could be drawn between federal and state authority and (according to another delegate) said that the states were not sovereign (Bilder 98-100). Indeed, Madison's pet idea at the Convention, which was never adopted, was that Congress should have the power to veto state legislation (77).

How did this nationalist turn into a leading champion of states'-rights during the First Congress? There are many plausible explanations. One hypothesis is that Jefferson's return from France in 1789 exerted a powerful intellectual pull on Madison and drove him away from his

earlier nationalism. Another is that Madison's decision to run for Congress from Virginia forced him to adopt a more parochial posture in response to his constituents. A third option is that Madison either did not foresee or did not approve of how his theories on national power would be applied by Hamilton and was driven to reconsider his ideas by his financial schemes. Or maybe Madison just changed his mind or cannot be reduced to a simplistic "nationalist" or "states'-rights" label.

Bilder's emphasis on Virginia's outsized role in 1787 opens up another possibility: Madison's nationalism and belief in states'-rights were in harmony only when he thought his state would be running the ship of state.¹⁰ At first this was what happened, as Washington became President with Madison serving as his chief advisor (Stewart 86). When Hamilton (a New Yorker) became the first among equals in the Cabinet, though, the danger of federal power intruding on Virginia's interests became a problem. Once his state was completely back in charge with Jefferson as President, a broad construction of federal authority became acceptable again for Secretary of State Madison (so long as it did not hurt Virginia) on matters such as the Louisiana Purchase. And President Madison himself ran a vigorous federal government and signed the Second Bank of the United States into law in 1816 after arguing against the constitutionality of the First Bank that Hamilton proposed in 1791 (Magliocca 2007, 8). Today we are familiar with the idea that politicians flip their positions depending on whether their party is in power or not, but during the early Republic state loyalties may have played a similar role.

Finally, those more familiar with the history of the Founding will find many gems in *Madison's Hand* about the controversies from that era. One of these subplots concerns Hamilton's

¹⁰ One objection to this thought is that Bilder writes that Madison acted as if he was unaware of how the fears of Virginia's future preeminence shaped the thinking of the other state delegations (78).

speech in the Convention stating that the President should serve for life unless removed by an impeachment conviction (Chernow 2004, 232). Hamilton later claimed that this did not reflect his views and was instead a political tactic designed to make the plan that Madison favored look more acceptable by comparison; an interpretation that the Notes can support (Bilder 92-94, 152, 213). But Madison's subsequent edits contradicted Hamilton's claim, as in the 1820s he added a comment that Hamilton's speech "delineated the Constitution which he would have wished proposed by the Convention" (231). Just as Madison edited the Notes to make himself look better, the facts suggest that he made revisions (or failed to make clarifying revisions) in order to make Hamilton look worse, which reflected the souring of their political relationship rather than an accurate picture of what occurred in Philadelphia. Madison's decision in this respect carried special weight because Hamilton's Convention speech (as recorded by Madison) may have helped convince Jefferson that the Treasury Secretary was a closet monarchist who threatened the Republic and may have exacerbated their conflict in Washington's Cabinet (213-14). Madison certainly did not go out of his way to correct this impression, and that could be because by that point his political interests as Jefferson's lieutenant were not served by doing so.

In sum, *Madison's Hand* sheds new light on one of the leading Founding Fathers and on the secret conversations that produced the Constitution. To what extent will these discoveries change the way the Supreme Court and legal scholars interpret the Constitution?

III. THE LIGHT FOOTPRINT OF THE NOTES

When Madison died in 1836, his will explained: "Considering the peculiarity and magnitude of the occasion which produced the convention at Philadelphia in 1787 . . . it is not an unreasonable inference that a careful and extended report of the proceedings of that body . . . by a member who was constant in his attendance will be particularly gratifying to the

people of the United States and to all who take an interest in the progress of political science and the cause of true liberty. It is my desire that the report as made by me should be published . . .” (Sirico, 63-64). In this section, I explore how the Supreme Court and constitutional theorists used his “careful and extended report,” and conclude that their references to the Notes are rarely—if ever—meaningful.¹¹ For the most part, citing the Notes is just a way for judges and lawyers to enhance their rhetoric surrounding a position rather than a way of arriving at that point of view. One reason why is that most judges and theorists are constitutional “Catholics” (or common-law attorneys) who are more interested in Supreme Court doctrine and norms than in the text (Strauss 2015). As a result, Bilder’s expose will probably have no noticeable effect on constitutional law, but is also unlikely to make references to the Notes any less useful as a symbol to confer legitimacy on a legal argument.

In 2011, Louis J. Sirico, Jr. published an exhaustive study on how the Supreme Court refers to the Constitutional Convention. The first appearance of Madison’s Notes there came in *Carpenter v. Pennsylvania* (1854), an insignificant tax case, but two years later they featured more prominently in the notorious case of *Dred Scott v. Sandford* (1857) (Sirico, 69-70). Three of the concurring and dissenting opinions in *Dred Scott* cited Madison Notes, with one of them supporting the majority’s decision that Congress could not prohibit slavery in the federal territories and two of them emphatically rejecting that view.¹² The fact that Justices on both sides of the

¹¹ Madison’s Notes are typically read as part of a broader collection of primary sources on the Constitutional Convention that were assembled in the early twentieth century by Professor Max Farrand (Farrand 1911). Bilder contends that a prior edition issued in 1900 is a more accurate reproduction of the Notes than Farrand’s version. (Bilder 237-38).

¹² See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 521-22 (1857) (Catron, J., concurring); *id.* at 536 (McLean, J., dissenting); *id.* at 609 (Curtis, J., dissenting). Justice

constitutional debate on slavery believed that the Notes could support their position is an indication that they bear an important hallmark of a canonical legal text, which is that they are so capacious that they can be read to stand for almost any plausible proposition (Greene 2011, 460-62). Indeed, if there is a pattern in Sirico's data set that is relevant for assessing the real-world impact of Bilder's book, (Sirico, 100-12), then the pattern is that in some of the Court's most controversial cases Justices on both sides cite the Notes in some form,¹³ though no important majority opinion did so until *Myers v. United States* (1926).¹⁴

Sirico's judgment after reviewing the record was that "the Court has rarely relied on the [Constitutional] Convention proceedings as the primary support for a holding" (78). That conclusion is consistent with the one reached decades ago by Jacobus tenBroek, a noted Fourteenth Amendment scholar who published a review of the Court's discussion of the Constitutional Convention (tenBroek 1938).¹⁵ tenBroek summed up his analysis as follows: "Cases in which the Court has relied on convention debates and proceedings as the main support of a doctrine previously established without reference to them are rare," and "[t]he cases in which the Court has

McLean's dissent quoted Madison's criticism of slavery that Bilder suggests was not something that he actually said during the Convention (Bilder, 188-89).

¹³ Examples include *Knox v. Lee* (1871) (upholding the constitutionality of certain forms of paper money); *Home Building & Loan Association v. Blaisdell* (1934) (upholding broad state authority to provide debt relief in spite of the Constitution's Contracts Clause), *Buckley v. Valeo* (1976) (creating the basic constitutional framework for campaign finance regulation), *Morrison v. Olson* (1988) (rejecting a challenge to the Independent Counsel Act), and *U.S. Term Limits, Inc. v. Thornton* (1995) (holding that states may not impose term limits on their members of Congress) (Sirico, 88-96, 100-12).

¹⁴ See *Myers v. United States*, 272 U.S. 52 (1926) (affirming presidential authority to dismiss members of the Executive Branch).

¹⁵ Tenbroek's *The Antislavery Origins of the Fourteenth Amendment* (1951) was one of the first books to grasp the modern interpretation of that text.

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used convention debates and proceedings to affirm a conclusion which apparently, and sometimes assertedly, rests chiefly on other grounds are numerous” (tenBroek, 441, 443). My own review of the cases that Sirico and tenBroek gathered confirms their results.

One caveat to these assessments is that the Notes may exclude some false readings of the Constitution from consideration. For example, there were proposals made in the Convention that were rejected—sometimes more than once according to Madison’s account (Bilder, 71-74). In that instance, maintaining that the defeated idea represents the correct interpretation of the text is difficult. Put another way, the legal profession internalizes part of what the Notes recount and treats them as final judgments on constitutional meaning. Serious cases are not brought to the Supreme Court challenging these understandings. Accordingly, this aspect of the Notes’ influence would not show up in a review of the Court’s opinions, but that influence also evaporates when the Justices tackle the vast majority of questions where the Notes do not provide a clear answer.

Since the Notes are not determinative in Supreme Court cases, a book casting doubt on Madison’s handiwork will not change anything there, but why are the Notes not determinative if they are so important in understanding the Constitution? The best answer is that most Justices and attorneys in constitutional cases focus on Supreme Court precedent rather than on the text or on the commentary about the text in the Convention or during the ratification debate.¹⁶ Part of the reason that the Justices behave in this way is that they have an institutional incentive to promote the authority of their own cases, and the lawyers who argue before them must take that into account in writing their briefs. It is also fair to say that the 1787 Constitution and the Notes do not speak

¹⁶ I cannot say that all lawyers and constitutional scholars take this view, but in my view those who do not are too few in number and influence to change doctrine or institutional practices based on what they may learn from *Madison’s Hand*.

to many contemporary constitutional issues (consider recent divisive questions such as same-sex marriage, abortion, or campaign finance regulation), and thus professionals are forced to rely heavily on judicial precedent to fill that void.

A deeper explanation for the hollow influence of the Notes rests with the way that lawyers are trained and the nature of their typical work. Students learn constitutional law almost exclusively by reading Supreme Court cases and in many—maybe most—other courses where the emphasis is on case law. (Even advanced constitutional law classes tend to focus on cases, though there is the occasional exception.¹⁷) When attorneys are confronted with constitutional questions, they almost always do so in the context of applying judicial precedent before lower court judges who must apply that precedent. Only in exceptional circumstances would a lawyer argue a case where there are no pertinent judicial authorities or argue before the United States Supreme Court, where the Justices have the latitude to give greater weight to sources such as Madison’s Notes or *The Federalist*. Consequently, the lifelong habits of the profession are inconsistent with giving the Notes the kind of practical power that Bilder’s analysis could undermine.

A somewhat more challenging question is whether the Justices or the lawyers arguing before them might start citing the Notes less frequently because their reliability is now less certain, but the answer is probably no. The Constitutional Convention will always be a watershed in American law, and thus the symbolic value of finding a quote or a point from the Notes that is helpful in a brief or in an opinion will remain irresistible at least in some cases. If the other side in a case wants to do the same, then criticizing the Notes themselves will be counterproductive.

¹⁷ One could make the inside-baseball argument that students who attend Harvard Law School tend to take a more Catholic view of the Constitution while those who go to Yale often take a more Protestant perspective. I mention this because a disproportionate percentage of law professors, elite lawyers, and judges (including all of the Justices following the retirement of Justice Stevens in 2010) come from these two law schools.

Deleted: current Supreme Court

Deleted: institutions

Moreover, experienced attorneys or judges understand that an extended back-and-forth on whether a particular portion of the Notes is accurate would be unwise given that those references probably will not sway anyone in the first place.

Madison's Notes are just as superfluous, though decorative, in the academic realm. Virtually all constitutional commentators use his record from time to time, but there is no influential theoretical or normative claim that needs the Notes. Once again, there are probably some arguments that simply are not made in scholarship because they were emphatically rejected by the Convention as described by the Notes, but that represents a small part of the universe of constitutional discourse. Still, there is no reason to believe that law professors who think history is relevant to constitutional interpretation will abandon the Notes any more than lawyers or judges will. Scholars may be more careful about how they cite these materials, but the lure of using what may have been said or done in the Convention to support a point or argument will still be hard to resist.

Some readers may wonder about those who believe that the Constitution should be interpreted according to its original meaning, but even that jurisprudential school can survive without the Notes. When Robert Bork first suggested what people now call originalism in 1971, he expressed that idea in terms of "specific values that text or history show the framers actually to have intended" (Bork 1971, 17). If "the framers" are defined as only the delegates at the Constitutional Convention during the summer of 1787, then Madison's description of those meetings would be indispensable. There is no reason, though, to define the Framers so narrowly. After all, state ratifying conventions were required to turn the Constitution into law, and hence the participants in those debates could also be considered Framers, especially as some of them (like Madison and Hamilton) were delegates both in Independence Hall and in their home state

conventions.¹⁸ Furthermore, those state delegates were elected after a raucous public debate about the Convention's proposal, (Maier 2010) and therefore those voters can also be considered part of the framing process.

Accordingly, during the 1980s originalists began expanding their horizons to say that the "original public meaning" of a constitutional provision was the pertinent interpretive standard.¹⁹ Justice Antonin Scalia was an intellectual leader of this movement, and he once explained that originalists seek "the original meaning of the text, not what the original draftsmen intended" (Colby & Smith, 249). Uncovering the original meaning of the 1787 Constitution opens the door to a wide variety of sources, including legal treatises, dictionaries, newspaper columns, anonymous pamphlets, and private letters. Under this approach, Madison's Notes lose their authoritative monopoly and, indeed, suffer from the drawback that they were not known to the public when the Constitution was ratified.²⁰ If the Notes are not essential for those who care deeply about what was said in 1787-1788, then they are certainly not for those who consider them only one of the relevant sources for interpreting the text (Bobbitt 1991, 12-13). Accordingly, Bilder's revisionism does not strike a blow against originalism or any other important constitutional theory.

¹⁸ See U.S. Const., art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

¹⁹ This view applies to all parts of the Constitution, including the amendments ratified after 1787 or any future amendments.

²⁰ The secrecy of the Notes does not mean that they are irrelevant to original public meaning. Madison was a delegate to the Virginia ratifying convention, and many of the other delegates in Philadelphia who were described (imperfectly) in the Notes also served in the state conventions, so one can say that the Notes are a partial record of a relevant portion of the original public meaning (Kesavan & Paulsen, 1118-20).

In sum, *Madison's Hand* will not change constitutional law or normative scholarship because there is no indication that Madison's Notes affirmatively influence the substance of Supreme Court decisions or academic theory. There is, one might say, a significant gap between the rhetoric and reality in some parts of constitutional discourse that the use of the Notes exemplifies.

CONCLUSION

In the classic British television comedy series *Yes, Prime Minister*, the Cabinet Secretary once remarked that: "The purpose of minutes is not to record events: it is to protect people." *Madison's Hand* demonstrates that part of the Virginian's motivation in extensively editing his Notes was to protect his political profile and his historical reputation. But we should forgive him this minor vice. There is so much that we do not know about our constitutional past because the participants chose not to leave a time capsule for posterity.²¹ Madison's decision to do otherwise—warts and all—enables all Americans to engage with the Constitution and appreciate the scope of what was accomplished in 1787 in a way that none of the Framers could.

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²¹ One example is the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment and was the functional equivalent of the Constitutional Convention after the Civil War. The Journal of those secret deliberations is extremely sparse (Kendrick 1914), which means that scholars are often left to guess about what these leaders were trying to accomplish.

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