

Tulsa Law Review

Volume 53 | Number 2

Winter 2018

Thank You, Mr. Madison

Jessica K. Lowe
jkl4h@eservices.virginia.edu

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Jessica K. Lowe, *Thank You, Mr. Madison*, 53 Tulsa L. Rev. 279 (2018).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol53/iss2/18>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

THANK YOU, MR. MADISON

Jessica K. Lowe*

JEREMY D. BAILEY, *JAMES MADISON AND CONSTITUTIONAL IMPERFECTION* (CAMBRIDGE UNIVERSITY PRESS 2015). PP. 181. HARDCOVER \$98.00. PAPERBACK \$30.99.

MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (OXFORD UNIVERSITY PRESS 2016). PP. 880. HARDCOVER \$39.95. PAPERBACK \$24.95.

INTRODUCTION

Alexander Hamilton may be fashionable these days, but according to two recent books, it is James Madison whom Americans should thank for—well, for just about everything. Michael Klarman's *The Framers' Coup* and Jeremy Bailey's *James Madison and Constitutional Imperfection* persuasively demonstrate Madison's centrality to the American constitutional tradition. They are very different books. Klarman's is a sweeping and much-needed narrative history of the entire founding period, from the troubles of the 1780s through the ratification of the first amendments to the Constitution. Bailey's is a work of political science, and focuses primarily on what came after—on the whole Madison, especially his later career—examining the difference between Madison and what has become known as “Madisonian Constitutionalism.” Both books provide critical additions to the multidisciplinary literature on the American founding, and in their own ways critique the idea of constitutional veneration.

THE FRAMERS' COUP

In *The Framers' Coup*, Michael Klarman tackles the constitutional history of the United States from the early 1780s—when Americans began to show dissatisfaction with the loose confederation created by the Articles of Confederation—through the final ratification of the Bill of Rights in 1791.¹ This is a daunting challenge. Klarman must meld

* University of Virginia School of Law. The author would like to thank Dirk Hartog, Cynthia Nicoletti, Peter Onuf, George Rutherglen, and Michael Klarman for their comments on this review. A presentation by Julia Mahoney in August 2017 helped to shape some of the following thoughts on *The Framers' Coup*, and the final portion of the essay was in part spurred by Annette Gordon-Reed's thought-provoking 2017 McCorkle Lecture at the University of Virginia School of Law, “Black Citizenship, Law, and the Founding.”

1. MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION*

events happening simultaneously in thirteen different states into a coherent narrative, while also attending to the details of the moment, details critically important both to the story itself and to constitutional law and history. For this reason, such a comprehensive history of the period is rare; even the late Pauline Maier's prize-winning work on ratification alone spanned almost 500 pages.² As a result, *The Framers' Coup*, which encompasses Maier's subject and much more, stretches to well over 800 pages, all well-used.

Klarman tells this important story masterfully. He opts for a lively but also exacting account that alternates between narrative and analysis. It begins by breathing new life into an old story: how paper money, Shays' Rebellion, and economic concerns in the states spurred the Philadelphia Convention.³ Klarman then moves to a marvelously detailed account of the Convention, keeping up the narrative pace by breaking the debates into topical sections and chapters.⁴ Next, like Maier, he takes the reader from one state ratification convention to another, highlighting contingency while also noting the factors that helped the Federalists win: canny decisions made by the Constitution's friends, as well as the structural advantages they enjoyed.⁵ Klarman then moves on to the first Congress, focusing especially on James Madison's determined push for amendments—not out of his own self-interest, but to keep promises made at the Virginia Convention and to Madison's own constituents.⁶ Finally, Klarman concludes the book with a meditation on the meaning of his narrative for today.⁷

In the process, Klarman makes basically three arguments. First, he argues that, since the founding itself, various participants in American politics have used the trope of the "sacred" Constitution to stifle debate and block change. He aims to demystify the Constitution, peeking behind the curtain to expose its flawed origins. What he finds is essentially a version of the thesis put forward by Charles Beard a hundred years ago: that the Constitution was a conservative counter-reaction meant to squelch populist economic measures of the 1780s, and spurred by the interests of the Framers—not by lofty political ideology.⁸ "It is hard to overstate," he argues, "the extent to which the state crises of tax and debt relief in the 1780s influenced the agenda of the Philadelphia Convention."⁹ Various arguments for the Constitution were "dressed up as if they were about political principle" but were, in Klarman's view, inspired by a wish to "suppress paper money emissions and debtor relief laws."¹⁰ Paper money, of course, was not new, but after the Revolution it took on new importance as the levels of specie in the country plummeted. Desperate debtors stopped courts and, occasionally, rioted.¹¹ Meanwhile, state legislatures

(2016).

2. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010).

3. KLARMAN, *supra* note 1, at 11–125.

4. *Id.* at 126–304.

5. *Id.* at 305–545.

6. *Id.* at 546–95.

7. *Id.* at 596–631.

8. *See* CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

9. KLARMAN, *supra* note 1, at 606.

10. *Id.* at 603.

11. *Id.* at 73–125.

passed measures to relieve the distress. According to Klarman, the delegates to the Philadelphia Convention “overwhelmingly saw relief legislation as craven capitulations by overly responsive state legislatures to the illegitimate demands of lazy and dissolute farmers.”¹² This opinion, Klarman argues, was starkly anti-democratic, and the Constitution they produced was out of step with the desires of most Americans.¹³

Second, Klarman focuses on an essential “how”: if the Constitution was so out of step with public opinion, how, he asks, were the Framers able to both produce it and then get it ratified?¹⁴ Here, Klarman contends that a confluence of factors led to an especially nationalist Philadelphia Convention. In every state except South Carolina, Klarman explains, delegates were chosen by the state legislatures; these legislatures picked prominent citizens who, because of their prominence, were statistically more likely to hold “relatively nationalist and antipopulist views.”¹⁵ Many had served in the Continental Army, often as staff to George Washington; they were well-educated and affluent, some extremely wealthy. Over half were lawyers, others were in finance, and almost all were substantial land owners.¹⁶ As George Mason observed to his son in the first days of the Convention, after a few “casual conversations” with his fellow delegates, he found them “disgusted with the unexpected evils we have experienced from the democratic principles of our governments”; this left Mason concerned the Convention’s proposals would “run into the opposite extreme.”¹⁷ To make matters worse, potential delegates who might have disagreed—men like Virginia’s Patrick Henry—did not seek appointment to the Convention or declined it.¹⁸ This was all made possible by the fact that Madison kept secret his plans for the Convention—plans for far-reaching changes to the national government, instead of minor alterations to the Articles.¹⁹ And, once he revealed his plans at the Convention, some disgruntled opponents decided to leave early, making the remaining pool of delegates even more nationalist.²⁰ The result was, Klarman argues, that the draft Constitution that emerged from Philadelphia was much more nationalist and anti-democratic—designed to squelch state relief measures—than the views of most Americans.²¹ Then, during the ratification stage, Federalists’ shrewd decisions (like postponing ratification votes in various states and offering the possibility of post-ratification amendments) combined with natural advantages (like the Federalist inclinations of most newspapers) to put the Federalists over the top, and make the Constitution the law of the land.²² “The Federalists had a lot of luck,” he concludes, “but they also made their own luck.”²³

12. *Id.* at 606.

13. *Id.* at 606–09.

14. KLARMAN, *supra* note 1, at xi.

15. *Id.* at 246.

16. *Id.* at 246–47.

17. *Id.* at 247.

18. *Id.* at 250.

19. KLARMAN, *supra* note 1, at 252–53.

20. *Id.* at 247–54.

21. *Id.* at 254–56.

22. *Id.* at 539–40.

23. *Id.* at 540.

But every good coup needs a leader, and here Klarman makes a case for the genius of the coup's architect, James Madison. Madison, Klarman concludes, "played a critical role at almost every stage."²⁴ In his depiction of Madison's pivotal role, Klarman is at his best. Madison, Klarman reports, "[a]lmost single-handedly shaped the Convention's initial agenda," and "persuaded his fellow Virginians to arrive early in Philadelphia" to coordinate a blueprint.²⁵ At the Convention itself, Madison was a frequent speaker. He then made "Herculean efforts" at the Richmond ratifying Convention, and finally "orchestrated and shaped—again almost singlehandedly—the Bill of Rights."²⁶ Determined to both keep his promise and to take control of the amendments themselves, thus showing good faith and keeping a firm hand on the process, Madison made sure amendments passed that would leave the government mostly intact, neutralizing the opposition.²⁷ Although some Anti-Federalists grumbled at this subterfuge, by the time he was finished "almost all" of the Constitution's opponents, Jefferson observed, had become supporters.²⁸ "Rarely if ever in American history," Klarman concludes, "has a single individual played such an instrumental role in an event as important as the nation's founding."²⁹ Within ten years, James Madison had, in a very real way, transformed America.

Third, Klarman concludes the book by asking what the interest-driven origins of the Constitution—the Framers' coup—should mean for today.³⁰ Here, Klarman gestures towards a program of constitutional change for our own time.³¹ In the final paragraph of the book, he provocatively references Thomas Jefferson, who famously suggested that constitutions should be revised for each new generation.³² Jefferson, Klarman reminds us, observed that "laws and institutions must go hand in hand with the progress of the human mind" and that constitutions should not be looked at "like the ark of the covenant, too sacred to be touched."³³ After all, no one in the eighteenth century thought the Constitution was perfect, Klarman asserts, and Madison especially recognized its flaws—not least because of the painful concessions he had been forced to make during the Convention itself.³⁴ One that particularly bothered him, and shaped ensuing debates, was equal state representation in the Senate.³⁵ The Convention had also eliminated Madison's proposed federal veto of state laws, another crushing blow.³⁶ In the end, the Constitution that

24. KLARMAN, *supra* note 1, at 596.

25. *Id.*

26. *Id.*

27. *Id.* at 594.

28. *Id.*

29. KLARMAN, *supra* note 1, at 597.

30. *Id.* at 10, 628–31.

31. *Id.* at 629–31.

32. *Id.* at 631. *See also* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 12 THE PAPERS OF JAMES MADISON: MARCH 1789–JANUARY 1790, at 382–88 (Charles F. Hobson & Robert A. Rutland eds., 1979).

33. KLARMAN, *supra* note 1, at 631.

34. *Id.* at 599–600.

35. *Id.* at 541.

36. *Id.* at 254.

emerged had plenty of problems, and Madison knew it.³⁷

But because the Constitution proved difficult to amend, Klarman explains, subsequent generations found other ways to stretch and modernize the document, usually through judicial interpretation.³⁸ Klarman strongly suggests that this is not enough to keep the Constitution consonant with modern needs. Instead, his problem is not only that the Constitution is imperfect, but also that it is, even worse in his view, an imperfect product of its own outdated time.³⁹ Not only were the Framers constrained by history and motivated by their interests even at the time of its inception, but they also “held certain values that are abhorrent to most Americans today.”⁴⁰ “How likely is it,” Klarman asks, “that people holding values so radically different from our own would have written a constitution that perfectly suits our needs today?”⁴¹

Although he stops short of calling for a new convention, Klarman’s Jefferson reference seems to gesture that way. The Framers staged a coup, Klarman concludes, but their coup—Madison’s coup—does not have to remain ours.⁴²

JAMES MADISON AND CONSTITUTIONAL IMPERFECTION

Klarman’s massive tome fits nicely with Jeremy Bailey’s slim and much more theoretical book, *James Madison and Constitutional Imperfection*. Here, Bailey tackles the problem of James Madison head-on from a political science perspective and reaches different conclusions from Klarman about Madison’s motivations and intentions. Although scholars tend to contrast Madison and Jefferson—using Jefferson to represent the view that “institutions should represent and embody the will of the people, and constitutional change should be frequent” and Madison to represent stability and veneration—Bailey argues that what has become known as “Madisonian Constitutionalism” does not fairly represent the views of James Madison himself.⁴³ According to Bailey, this distance between the man and the views he is known for stems from scholars’ focus on the founding, and their failure to look at the whole Madison, over the long span of his career.⁴⁴ The Madison of the founding was, Bailey cautions, concerned with practical politics—particularly, gaining ratification of the Constitution and avoiding a second convention.⁴⁵ His writings of that time, especially in *The Federalist*, reflect that goal.⁴⁶ However, when Madison’s whole career is considered, Bailey argues that what emerges is a pragmatic but principled thinker, one well aware of the limits of political science, who accepted the imperfection of the Constitution, cautioned against too much veneration of an imperfect document, and worked with Jefferson to make the imperfect

37. JEREMY D. BAILEY, *JAMES MADISON AND CONSTITUTIONAL IMPERFECTION* 7 (2015).

38. KLARMAN, *supra* note 1, at 622–27.

39. *Id.* at 628–30.

40. *Id.* at 630.

41. *Id.* at 631.

42. *Id.*

43. BAILEY, *supra* note 37, at 1–3.

44. *Id.* at 4–7.

45. *Id.* at 11.

46. *Id.* at 25–28.

Constitution more responsive to the people.⁴⁷ In short, Madison's actual constitutionalism was, like his government, mixed.⁴⁸

Bailey frames his study by tackling this question: if Madison and Jefferson were so different, why were they lifelong allies?⁴⁹ He gets at this dilemma by looking at Madison's responses to the problem of constitutional imperfection.⁵⁰ Along the way, Bailey makes several fascinating points that press against conventional wisdom and demonstrate his mastery of the subject and the scholarly literature. First, he catalogues Madison's various approaches to veneration during his lifetime, as well as the instances where Madison endorsed a more Jeffersonian approach.⁵¹ Even as Madison famously argued in the *Federalist Papers* that constitutions required veneration, Bailey points out that he was also emphasizing the Constitution's imperfections and the reasons to be wary of too much veneration.⁵² Bailey's Madison has mixed feelings about constitutional veneration, which could promote stability, but also prevent important flaws from being fixed.⁵³ Second, Bailey dives into an extended discussion of Madison on representation and deliberation—on what a representative owed his people, direct representation or his own judgment—and again comes away with mixed results.⁵⁴ In his view, Madison both hoped for wise legislators and doubted their likelihood; he also seemed to assume that the public good that would arise out of deliberation would be consonant with the overall interest of the people.⁵⁵ His worries were not about majority interests overall, Bailey suggests, but about “impulsive majorities.”⁵⁶ Here and throughout the book, Bailey contends that Madison qualified his famous theory of the “extended republic”—that an extended republic would dilute factions—by admitting that such dilution did not hold in times of founding.⁵⁷

In the next several chapters, Bailey examines Madison's views on Jeffersonian “appeals to the people.”⁵⁸ Citing his previous work on Jefferson, Bailey posits that Jefferson's idea of the presidency encompassed ample presidential power, but of a particular sort.⁵⁹ Jefferson's presidential power had three qualities: first energy, but energy derived not from the Constitution (as Hamilton would have it) but from popular approval; second, executive prerogative that was “outside the Constitution,”⁶⁰ allowing actions that might not be specifically sanctioned by law, as long as they were sanctioned by public opinion; and third, a reliance on declarations of principle.⁶¹ According to Bailey, over time Madison came to support—although not completely endorse—these types of appeals to

47. *Id.* at 9–11, 171–74.

48. BAILEY, *supra* note 37, at 173.

49. *Id.* at 9–11.

50. *Id.* at 10–14.

51. *Id.* at 11, 15–37.

52. *Id.* at 35–37.

53. BAILEY, *supra* note 37, at 28–37.

54. *Id.* at 11, 38–58.

55. *Id.* at 54.

56. *Id.* at 49.

57. *Id.* at 34.

58. BAILEY, *supra* note 37, at 38–140.

59. *Id.* at 116.

60. *Id.* at 118.

61. *Id.* at 117–19.

the people.⁶² Bailey contends that as early as the Convention itself, changes to Madison's original plan for the new government, especially the Connecticut Compromise (which transformed the Senate into the body where states have equal representation) prompted Madison to retool his theories on the functions of the three branches.⁶³ By the time he was in Congress, Madison had begun—even before his break with Hamilton—to see the presidency as the branch that would be directly responsible to the people at large.⁶⁴ He also came around on the idea of a Bill of Rights to cement public opinion behind the Constitution, as well as to potentially provide some additional safeguards.⁶⁵ Then, in the 1790s, Madison turned with Jefferson to public opinion as an “extra-constitutional path of organized opposition.”⁶⁶ Bailey concludes that while Madison was less comfortable with such appeals to the people than Jefferson, he nonetheless accepted them as sometime solutions to constitutional imperfection. So scholars should not, Bailey cautions, overestimate or overemphasize Madison's affinity for stability.⁶⁷ As Bailey puts it, Madison “hitched the permanence of the imperfect Constitution—his Constitution—to a necessarily Jeffersonian future.”⁶⁸

But for Madison, appeals to the people were paired with something else—appeals to the history of the Philadelphia Convention.⁶⁹ In a particularly fascinating section, Bailey parses Madison's invocation throughout his life of the intent of the Convention, as well as how his notes of the Convention stacked up against versions left by other delegates.⁷⁰ Most importantly, Bailey argues that Madison's decision at the end of his life to prepare his notes for publication was a decision to prioritize the Philadelphia Convention over alternative sources for determining constitutional meaning—while also emphasizing the messy imperfection of the document itself.⁷¹

Overall, Bailey's thoughtful book highlights important developments that Klarman's story risks missing. For Bailey, Madison's theory was certainly informed by politics, interests, and expediencies, but it was not reducible to those. Madison may have over time been pragmatic, even ambivalent, about some of the principles that scholars have come to call “Madisonian Constitutionalism,” but that does not mean that he was unprincipled or without any motivation except interest. Here, Bailey is a good complement to Klarman, and perhaps does a better job of getting the sense of Madison's founding moment—with the context of all Madison's other moments—right.

FRAMERS' COUP OR FRAMERS' TRIUMPH?

What does it mean to acknowledge that Madison—and many of the Framers along with him—were motivated by a desire to suppress relief measures, particularly paper

62. *Id.* at 117–18.

63. BAILEY, *supra* note 37, at 65.

64. *Id.*

65. *Id.* at 82.

66. *Id.* at 89.

67. *Id.* at 11.

68. BAILEY, *supra* note 37, at 89.

69. *Id.* at 173.

70. *Id.* at 141–70.

71. *Id.* at 170.

money? That they were so motivated, at least in part, is practically incontrovertible. As Bailey notes, in 1821 even Madison admitted that worries over Shays' Rebellion had led the delegates to create, in Madison's words, a "higher toned system than was perhaps warranted."⁷² But recognizing that interests shaped the Constitution is one thing; arguing that the document, and the Framers' intentions, is reducible to those interests is another. It is here that Klarman goes too far.

Towards the book's end, Klarman makes explicit his argument that the political theory of the Constitution was essentially a sham. "[P]ositions that were driven by interest were," he argues, "often dressed up as if they were about political principle."⁷³ For instance, Klarman contends, the Constitution's advocates talked about judicial review protecting against government excesses, but "to the extent the Founders were thinking about judicial review at all, they mostly conceived of it as another check on . . . relief legislation."⁷⁴ And popular sovereignty? That too was a post-hoc justification, since despite their "professed devotion," elsewhere "their deep distrust of the people was evident."⁷⁵ Even Madison's famous theory of the extended republic, his signature contribution to political science, was according to Klarman "in fact mainly inspired by his wish to design a system that would suppress paper money emissions and debtor relief laws."⁷⁶

Madison and the Founders certainly had interests. But interests and principles are not mutually exclusive – having one's own ox gored can shed light on larger flaws in a system or potential injustices. For instance, Madison was certainly concerned about paper money, but also famously concerned about minority rights more broadly. As Klarman relates, during the fight in the 1780s over Congress's attempt to cede navigation of the Mississippi River to Spain, Madison worried that "the majority in every community can despoil and enslave the minority of individuals."⁷⁷ And even Madison's concern about economic measures and debt relief tracked, to some extent, traditional worries about democratic pitfalls: after all, Montesquieu had cautioned that democracy had two excesses to avoid—"the spirit of inequality, which leads to aristocracy or monarchy, and the spirit of extreme equality."⁷⁸

In Klarman's haste to demonstrate the disingenuousness of the Framers' arguments, he occasionally neglects critical context. For instance, Klarman argues that the Framers were mainly interested in judicial review only as a method for stopping relief laws.⁷⁹ But in Madison's Virginia, judicial review had come to the fore several years earlier in 1782, in a case that had nothing to do with paper money: the *Case of the Prisoners*, a criminal case that involved a conflict between the state's constitution and its treason act.⁸⁰ In that

72. *Id.* at ix.

73. KLARMAN, *supra* note 1, at 603.

74. *Id.* at 607.

75. *Id.* at 608.

76. *Id.* at 603.

77. *Id.* at 132.

78. 1 CHARLES DE SECONDAT & BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 120 (Thomas Nugent trans., F.B. Rothman rev. ed. 1991) (1749).

79. KLARMAN, *supra* note 1, at 607.

80. *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782).

case, Attorney General Edmund Randolph (who would later introduce the Virginia Plan at the Constitutional Convention), the prisoners' counsel, and the amici had all generally agreed: if a law conflicted with the Virginia constitution, it was the court's responsibility to declare the law "null and void."⁸¹ The Virginia Court of Appeals ultimately decided the case on other grounds, but the judges' opinions – especially that of Philadelphia Convention delegate George Wythe, law teacher to most Virginia lawyers – announced their support of this judicial duty.⁸² And, when the Virginia delegates talked about judicial review at the Philadelphia Convention, Madison even used the same language that the lawyers had used in the *Case of the Prisoners*: that judges would declare laws violating the Constitution "null and void."⁸³ To argue that the Virginians invoking judicial review at the Convention had newly settled on the practice merely to vindicate their economic goals requires overlooking the context in which they lived and the complexity of the ideas they brought with them to Philadelphia.⁸⁴ Judicial review was part of a larger evolving idea of what it meant to have republican government with a written constitution—not something primarily drawn on in order to suppress relief legislation.

The scholarly debate between ideology and interest in the American founding is an old one and need not be rehearsed here.⁸⁵ But Madison and his fellow Framers existed in a specific legal and conceptual world, and in 1788, it was one undergoing rapid change. As John Adams had famously exulted to Wythe at the Revolution's beginning, it was "a time when the greatest lawgivers of antiquity would have wished to live."⁸⁶ Or, as Thomas Paine put it, it was a chance "to begin the world over again."⁸⁷ By this, Adams and Paine meant the chance to begin a nation, a "republic," from scratch. But, in beginning the world again, how was one to discover what worked? One answer was theory—the political writers and classical theorists whom they read over and over, and the ideas of republicanism that, as Bernard Bailyn and Gordon Wood so beautifully unearthed a half-century ago, structured how the Revolutionary generation saw their world.⁸⁸ These ideas framed their fears about republican government's possibilities and its pitfalls, about what to foster and what to avoid. And along with theory there was also practice: both what Madison and men like him had become used to during the colonial period, and their experiences after Independence—especially how new laws and state governmental arrangements worked, or did not work, day after day, law after law, case after case.

But practice and interest are not necessarily the same thing. Madison and the other Framers were certainly informed in practice by their *experience* of the 1780s; they worried

81. See JESSICA K. LOWE, *MURDER IN THE SHENANDOAH: MAKING LAW SOVEREIGN IN REVOLUTIONARY VIRGINIA* (forthcoming 2018). "Null and void" is from St. George Tucker's argument to the court. See 3 ST. GEORGE TUCKER'S LAW REPORTS AND SELECTED PAPERS, at 1742–45 (Charles F. Hobson ed., 2013). The judges in *Caton* used variously "nullity," *Caton*, 8 Va. at 17, "void," *id.* at 20, or other similar formulations.

82. *Caton*, 8 Va. at 8.

83. KLARMAN, *supra* note 1, at 161.

84. *Id.* at 159–60.

85. See Gordon S. Wood, *Rhetoric and Reality in the American Revolution*, 23 WM. & MARY Q. 3 (1966).

86. JOHN ADAMS, *THOUGHTS ON GOVERNMENT* (1776), *reprinted in* 4 PAPERS OF JOHN ADAMS 65, 93 (Robert J. Taylor ed., 1979).

87. THOMAS PAINE, *COMMON SENSE* 113 (Isaac Kramnick ed., Penguin Books 1976) (1776).

88. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969).

about how paper money and other economic issues, including commerce, were unfolding after the war. But characterizing this worry, drawn from experience, as merely about their economic interests undersells the danger that they saw. After all, it looked to many like states' paper money emissions and debtor relief measures were not about relief at all – but instead about abolishing debt in general. As Virginia lawyer (and later Jeffersonian judge) St. George Tucker complained in 1780, “Last May or rather last July, a silver dollar was worth forty paper ones by act of the Assembly. We have since found the Philosopher’s Stone, and by a mere breath of Hocus Pocus, a paper dollar is now worth,” legally, he meant, “as much as a silver one, for the man who is or has been in debt for their twenty years. But,” he continued, “stranger to tell, no sooner is the bill transferred from debtor to creditor but it becomes paper again, and worth but the eighteenth part of what he received it for.”⁸⁹ Although he would have misgivings about the Constitution, Tucker’s dry humor still reflected the frustration of the men who felt that these currency measures effectively redistributed property. And Virginia attorney William Grayson, later a staunch Anti-Federalist, lamented, “The Antients were surely men of more candor than We are; . . . They contended openly for an abolition of debts . . . while we strive as hard for the same thing under the decent and specious pretense of a circulating medium.”⁹⁰

With Shays’ Rebellion, the crisis reached a fever pitch. But it was not just about the rebellion itself – about the closed courts, or the obstructed tax collectors, although that was bad enough. It was also about, as Klarman perceptively argues, the upheaval that followed. The Massachusetts government initially indicted the rebels on charges of treason and sedition, among others, but the rebels then turned quickly—and successfully—to electoral politics.⁹¹ In 1787, seventy-one percent of the seats in the Massachusetts House of Representatives changed hands, and many of the newly elected representatives were, Klarman reports, “insurgents or their sympathizers.”⁹² Pardons and concessions followed. The sudden change was enough to give whiplash to some worried elites and creditors.⁹³ As Washington’s private secretary, Tobias Lear, observed to a Massachusetts friend, “What frenzy can have seized upon the people of your state to induce them to aim at an establishment of those principles by law, which, but a few days ago, they were opposing by arms?”⁹⁴

From a vantage point of 200 years later, the farmers’ triumph at the polls seems like a success story for democratic politics. But the quick change seemed, as Klarman notes, to threaten the rule of law and the stability necessary to a functioning society.⁹⁵ Did it? While the farmers’ grievances were real and echoed across the country, that does not mean that their solutions—more paper money and debt relief—were ultimately the right ones. The Framers and their supporters looked instead to a stronger central government, one better able to facilitate commerce and credit. They seemed at least to be partially

89. Letter from St. George Tucker to John Page (Feb. 27, 1780) (on file with the Tulsa Law Review).

90. WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 58 (2007). *See also* LOWE, *supra* note 81.

91. KLARMAN, *supra* note 1, at 92.

92. *Id.* at 95–98.

93. *Id.* at 95–99.

94. *Id.* at 95–98.

95. *Id.* at 93.

vindicated when, as Klarman notes, the nation's post-ratification economy took a boost.⁹⁶ By the early 1790s, most Americans professed themselves satisfied with their new Constitution.⁹⁷ And to the extent that flaws emerged later in the decade, in 1800, Madison and Jefferson would channel democratic dissatisfaction through the electoral process, in their second "revolution."

Were the Framers elitist? Certainly. On that, Klarman makes a convincing case. But that does not mean they were necessarily wrong, at least not in everything. As Klarman admits, as the states considered the Constitution in 1788, chaos loomed. "Had the Constitutional Convention dissolved in contentiousness," he concedes, "or the Constitution not been ratified, the prospects of the Confederation surviving would have been even grimmer than had no fundamental reform of the Articles been attempted in the first place."⁹⁸ In fact, as one delegate observed, had the Convention just dissolved, "the dissolution of the union of states seemed inevitable."⁹⁹ Hamilton worried about civil war and Virginia's Edmund Randolph, who would vacillate on the Constitution but ultimately became its advocate, also predicted that if ratification failed, "the union will be dissolved, the dogs of war will break loose, and anarchy and discord will complete the ruin of this country."¹⁰⁰ In Klarman's opinion, the adoption of the Constitution may also have forestalled a more drastic turn towards monarchy. Instead, "republican government—albeit of a less populist variety—was preserved, and so was the union."¹⁰¹

So maybe, instead of lamenting the Framers' coup, we should say thank you, James Madison. And in that vein, we might take two more lessons from America's wily, bookish, and determined founding father. First, pushing back against a trend in constitutional history that focuses on history from "below," Klarman reminds the reader that agency from "above" can also matter a great deal. Despite Klarman's Beardian premise, Madison the villain emerges (inadvertently) as something of a hero. He faced an uphill battle against public opinion and populist chaos, and managed to fashion a government that has lasted over two hundred years—and was incidentally sturdy enough to endure the Civil War and other moments of great constitutional upheaval. In this, Madison reminds us that careful observation, deep study, persuasive argument, and dogged organizing have the power to change even resistant public opinion.

Also, although Klarman voices his concern about a Constitution that continues to bind Americans despite its "inconsistency with modern democratic norms," Madison's example provides an important caution about realizing the boundaries between the ideal and the possible.¹⁰² At the end of his book, Klarman identifies himself with what Bailey would call the "Jeffersonian" position—that constitutions should be frequently adjusted along with changing generations.¹⁰³ And while Klarman's book provides an admirable brief against too much constitutional veneration, it also provides a fairly convincing, if

96. KLARMAN, *supra* note 1, at 620.

97. *Id.* at 594.

98. *Id.* at 598.

99. *Id.*

100. *Id.*

101. KLARMAN, *supra* note 1, at 599.

102. *Id.* at 10.

103. *Id.* at 10, 624.

unintentional, argument against the extremes of Jefferson's view. As both Klarman and Bailey emphasize, Madison barely managed to achieve the compromise that became the Constitution, and by 1788 he had one great fear: a second convention.¹⁰⁴ After managing to pull a workable, albeit imperfect, document from the grips of the first meeting in Philadelphia, Madison poured his formidable powers into achieving ratification, convinced that arriving at any consensus in a second convention (as proposed by some) would be virtually impossible.¹⁰⁵ As Bailey explains, Madison had also decided that while an extended confederacy might dilute faction, in the founding stage, factions were at their worst.¹⁰⁶ A second convention, he determined, would be "dangerous."¹⁰⁷ It would "give a loose to human opinions" which "must be as various and irreconcilable concerning theories of Government, as doctrines of religion."¹⁰⁸ So Madison took his Constitution, imperfect as it was, and focused on making it better—cementing its acceptability in the eyes of a majority of the populace and on proposing amendments. He then worked with Jefferson to make the government more responsive to the people.

Madison ultimately decided both that an imperfect Constitution was better than none, and that there were ways to improve it. Today, America still has Madison's imperfect Constitution—perhaps made more perfect by some developments in history, less perfect by others and by the passage of time. Klarman suggests, in a subtle way, that it might be time for a new Constitution. But does such productive consensus really appear likely—or wise—in the divisive politics of the early twenty-first century? Here, a Hamiltonian solution might (ironically for an essay about Madison) be instructive. Not Hamiltonian in the 1790s sense, but in the sense of the popular twenty-first century musical: a reappropriation of America's founding to seize the many things that it *does* have to say to twenty-first century America.¹⁰⁹ And there are many, even in the Constitution itself: among others, the affirmation of government by the people (however flawed and limited); a faith in the importance of republicanism, and the critical need for its preservation in a hostile world; the genius of checks and balances; and the provisions of the Bill of Rights, which, though again limited and a product of its time, also contains many essential safeguards with deep roots in Anglo-American legal history. Such appreciation can offer reverence without ossification; a limited sacralization without textual deification. After all, as Alexis de Tocqueville famously observed, the Constitution and the language of law are central not just to the workings of the government, but to American cultural identity. "Scarcely any political question," Tocqueville noted, "arises in the United States that is not resolved, sooner or later, into a judicial question."¹¹⁰ This legal/constitutional glue offers cohesiveness in an otherwise diverse and cacophonous society: "the ideas, and even the language, peculiar to judicial proceedings" seep down into daily life, with lawyers and judges, through workings of the common law and judicial review, becoming key figures, essentially the priests of the American constitutional order,

104. *Id.* at 463; BAILEY, *supra* note 37, at 26.

105. BAILEY, *supra* note 37, at 38.

106. *Id.* at 34.

107. *Id.* at 26.

108. *Id.* at 27.

109. LIN-MANUEL MIRANDA, *HAMILTON: AN AMERICAN MUSICAL* (2015).

110. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (P. Bradley ed., 1945).

with law functioning as the national language.¹¹¹

Reappropriating the past is not, of course, a new move. It is the solution of Abraham Lincoln's Gettysburg Address, reclaiming the nation as "conceived in liberty" and "dedicated to the proposition that all men are created equal."¹¹² It is Martin Luther King Jr.'s passionate assertion in his "I Have a Dream" speech that the Declaration of Independence provided a "promissory note" for "life, liberty, and the pursuit of happiness."¹¹³ And it is Frederick Douglass's refusal to concede, in opposition to both the Garrisonians and the Southern apologists, that the Constitution was a pro-slavery document: "I would act for the abolition of slavery though the government," he insisted, "not over its ruins."¹¹⁴

These were shrewd rhetorical moves, meant—in a way that resonates with America's common law heritage—to claim a prior precedent for a current need. This kind of reclamation also recognizes the conflicted nature of the Constitution, which Klarman lays out so beautifully in his chapter on the Constitution and slavery.¹¹⁵ The Constitution, he argues, had a dual nature. "In a sense," he concludes, "the delegates were drafting two separate constitutions," pro-slavery and anti-slavery.¹¹⁶ Similarly, the Constitution was and is also many other conflicting things—liberating and regressive, open-ended and definite, outdated and astoundingly relevant.

Maybe desacralization, at least in the strong sense, is not the answer in these troubled times. Americans' reverence for the founding provides a kind of shared glue, a common narrative, for the nation. This is, of course, also a problem, given the way that, as Klarman lays out, that narrative has been used at various points in American history. But perhaps the solution to that could be, like Douglass, not to cede the ground, but to find a way to enthusiastically reclaim it.

CONCLUSION

In the end, however, maybe what Klarman is actually looking for is less the full Jeffersonian tumult of an ever-updated Constitution, and instead what Bailey describes as the solution of the real Madison: worried about "veneration standing in the way of necessary reform" and hoping to meld popular responsiveness with practicality and stability.¹¹⁷ This Madisonianism is "an imperfect blend of contingency and compromise," one that keeps the Constitution in place while looking for other ways to be responsive to

111. *Id.* at 288–90. Thanks to Annette Gordon-Reed for bringing Tocqueville back to my mind at her November 9, 2017 McCorkle Lecture at the University of Virginia School of Law, "Black Citizenship, Law, and the Founding." This lecture broached the topic of societal cohesion, and what provides it, and provoked some of the thoughts that follow.

112. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865*, at 536, 536 (Don E. Fehrenbacher ed., 1989).

113. Martin Luther King Jr., I Have A Dream, Speech Delivered at the Lincoln Memorial (Aug. 28, 1963), reprinted in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING JR.* 217, 218 (James M. Washington ed., 1986).

114. Frederick Douglass, The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery? (Mar. 26, 1860), reprinted in *2 PHILIP S. FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 467–80 (1950).

115. KLARMAN, *supra* note 1, at 257–304.

116. *Id.* at 265.

117. BAILEY, *supra* note 37, at 136.

the people of an ever-changing nation.¹¹⁸

After surveying both authors' accounts of Madison's founding trials, readers can start to think about their own solutions to Madison's problem—the problem of constitutional imperfection. In this, both Klarman and Bailey have greatly expanded the material on which they can rely.

118. *Id.* at 170–71. Of course, in Bailey's view, the liberal judicial construction described by Klarman would not be part of Madison's proposed solution, since Madison rejected such construction in favor of the "intention of the Founders." *Id.* at 173. Bailey seems to suggest the possibility of the use of such intention without conflating it with veneration and without it preventing the Constitution from, in other ways, being updated by popular will. *Id.* at 114–40 (discussing Jefferson's appeals to the people as a solution for constitutional imperfection).