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THE CRITICAL MINUTE: RECORDING AND REMEMBERING EARLY AMERICAN POLITICAL THOUGHT

Robinson Woodward-Burns

MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (HARVARD UNIVERSITY PRESS 2017). PP.384. PAPERBACK \$22.50.

J. PATRICK MULLINS, *FATHER OF LIBERTY: JONATHAN MAYHEW AND THE PRINCIPLES OF THE AMERICAN REVOLUTION* (UNIVERSITY PRESS OF KANSAS 2017). PP.240. HARDCOVER \$37.50.

As a schoolboy, James Madison wrote, “There is a Critical Minute in every thing, & the master-piece of Good Conduct is to perceive it and take hold of it. If it is miss’d, chiefly in revolutions of State, ‘tis odds if it can be met with or perceived [sic] again.”¹ An older Madison met his “critical minute” as a delegate to the Constitutional Convention of 1787. Like other framers, he felt the novelty and gravity of the moment, taking fastidious notes during the Convention.² With ratification, Federalists and Jeffersonians immediately offered opposing interpretations of the new Constitution, and the partisan Madison, hoping to steer these debates, redrafted his records on the document’s framing and meaning. Mary Sarah Bilder’s *Madison’s Hand: Revising the Constitutional Convention* chronicles how Madison drafted his *Notes on the Debates in the Federal Convention of 1787* to shape

1. JAMES MADISON, COMMONPLACE BOOK, in 1 THE PAPERS OF JAMES MADISON 4 intro., 9 (Hutchinson & Rachal eds., 1962) (transcribing an excerpt from the Memoirs of the Cardinal de Retz).

2. Members of Pennsylvania’s 1776 Provincial Conference, in anticipation of selecting delegates to the state’s first constitutional convention, reminded voters of the rare “privilege of choosing deputies to form a government under which you are to live.” *Proceedings of the Provincial Conference*, in THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790: THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, AND THE COUNCIL OF CENSORS 41 (Harrisburg pub., 1825). More famously, Alexander Hamilton opened *The Federalist* by reminding New Yorkers charged with ratifying the proposed Constitution that “it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.” THE FEDERALIST NO. 1, at 1 (Alexander Hamilton) (Terence Ball ed., 2003).

these early conflicts and cement his public memory for centuries.³ In contrast to James Madison, Jonathan Mayhew, a Boston clergyman who guided the thought of a generation of younger Boston revolutionaries, has now largely been forgotten. His early death in 1766, just before the revolutionary moment, kept him from the larger projects of nation-building that elevated Madison's cohort to the public's eye. J. Patrick Mullins' *Father of Liberty: Jonathan Mayhew and the Principles of the American Revolution* aims to recover Mayhew's forgotten legacy.⁴ These two books might then be read as opposing stories on the preservation of early American political thought.

Madison's *Notes* have been profoundly influential. They shaped *The Federalist*, Max Farrand's definitive *Records of the Federal Convention*, and consequent decades of American constitutional interpretation. Farrand called the *Notes* the most complete and thus the "most important record of all" from the Convention, but he also warned that Madison's many later revisions "seriously impaired the value of his notes."⁵ The extent of revision has long been contested. Bilder enters this debate by demonstrating that during and after the Convention, Madison burnished the *Notes* for posterity, claiming authorship of other delegates' arguments for an extended commercial republic, checks and balances, and the abolition of slavery. Bilder convincingly shows that the *Notes* have been "revised to an even greater extent than has been recognized," skewing our understanding of Madison, the Convention, and the Constitution itself.⁶

Bilder backs this bold claim through meticulous research. Her book is extraordinarily thorough, to the point of tracking the manufacture, purchase, storage, and duplication of the paper on which Madison wrote his *Notes*, essays, and personal letters.⁷ She also traces the evolution and formalization of Madison's methods for notetaking, including his changing methods of shorthand and his uneven detail in recordkeeping. For example, his disciplined notes on the Committee of Detail's early August draft constitution gave way to "disjointed and uneven" recordkeeping the following week, mischaracterizing and skipping events. Madison tended to focus on speeches directed at himself or his ideas, diminished criticism of his ideas by others, skipped topics that bored him, erased passages and pasted over new ones, and redacted or replaced in the *Notes* at least four speeches he gave in late June.⁸ These inconsistencies do much to humanize the Madison of the Convention, who has often been described as an idealistic political philosopher or pragmatic powerbroker, but rarely as a man subject to streaks of boredom, vanity, and pettiness.⁹

The book shows not only how Madison revised the *Notes*, but also why he did, contextualizing his drafting and revision in the nation's evolving political debates. The book moves chronologically, beginning with a general study of colonial legislators' letters and diaries in the 1760s and 1770s. While some early state constitutions required public

3. See MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015).

4. See J. PATRICK MULLINS, *FATHER OF LIBERTY: JONATHAN MAYHEW AND THE PRINCIPLES OF THE AMERICAN REVOLUTION* (2017).

5. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at vii (Max Farrand ed., 1911).

6. BILDER, *supra* note 3, at 2.

7. *Id.* at 39, 243–62.

8. *Id.* at 75, 80–81, 96, 101, 122, 189–92.

9. *Id.* at 49, 90.

hearings and publication of legislative minutes, the federal Convention was sworn to secrecy, and thus Madison initially wrote his *Notes* in code for Jefferson, abroad as foreign minister to France. Jefferson in turn perhaps influenced some of Madison's positions at the Convention, such as when Madison sought to preserve office-holding eligibility for those, like Jefferson, who might not reside in their legislative district.¹⁰

The *Notes*' ellipses are particularly interesting. Jefferson hovers unmentioned at the *Notes*' margins until the final chapter of Bilder's book, when he returns to American political life in the 1790s, using the *Notes* as evidence of a Hamiltonian plot to frame a monarchical executive and centralize power. Similarly, Madison only in passing recorded his own speeches, so his voice is implicit in the *Notes*, evident in his editorial choices, redactions, summaries, and even spellings and abbreviations. As Bilder's work demonstrates, the *Notes*' gaps are not shortcomings, but rather opportunities for interpretation.

Bilder's book extends beyond the Jefferson-Madison exchange, giving several useful insights on the Convention's coalitions and plans. She emphasizes some largely forgotten events, like Madison's failed proposal for a Council of Revision, a joint executive-judicial body for constitutional review.¹¹ State constitutions in Pennsylvania, Vermont, and New York established similar councils, but Bilder's history is a history of Madison and the *Notes*, and so necessarily misses some connections to broader events. Bilder also helps us rethink familiar stories on coalition-building. She suggests that on legislative design, Madison split with most other Virginians, undermining the canonical scholarly narrative that he headed the Virginia delegation.¹² Bilder also shows that Madison's plan for proportional representation in both houses, to be accomplished by counting slaves as full persons in one house, was a bid to join slave and large states into a winning coalition.¹³ While this particular measure failed, Madison remained unapologetic on his use of slavery as a bargaining tool.¹⁴

Bilder's assertion that "[t]he *Notes* were not an objective record of discussion but reflected Madison's inevitable distortions" becomes clearer as Madison rebuilt the *Notes* two years after the Convention.¹⁵ He took fewer notes on the Convention's later debates, and thus, for these sections, he later relied on his vague recollections and a copy he made of the official Convention journals, merging the documents in 1789 with an eye toward posterity.¹⁶ Occasionally he seemingly adopted the journals wholesale, later making slight modifications. He then altered the tone of his original *Notes* to match that of the more impartial and measured official journal.¹⁷

Bilder's account will likely persuade readers that the *Notes* are indeed an unreliable record of the Convention. The difficulty, however, may be convincing readers of the importance of the marginalia, redactions, additions, or, for example, of Madison's

10. *Id.* at 3–4, 129, 150.

11. BILDER, *supra* note 3, at 70–74.

12. *Id.* at 78, 120.

13. *Id.* at 108.

14. *Id.* at 115.

15. *Id.* at 70.

16. BILDER, *supra* note 3, at 179–83.

17. *Id.* at 192–93.

misspelling Charles Pinckney's name "Pinkney."¹⁸ In the latter case, Bilder, through archival and secondary source research, shows this misspelling was likely a jab against Pinckney intended to share with Jefferson. When Madison revised the *Notes*, he corrected this.¹⁹

Lest the concern with marginalia and erasures seem insignificant, the point is not merely to recount the manuscript's evolution. The book has broad implications for reinterpreting Madison, the Convention, and the Constitution itself by highlighting Madison's habit of appropriating others' insights. For example, Madison in the *Notes* emphasized, and in later writings outright adopted, Gouverneur Morris' own arguments for "mutual check and mutual security" between the branches and for an extended republic that could scatter and divide factions. Noting this similarity of ideas, Bilder remains circumspect: "If Madison had not previously formulated his theory, the process of recording the speech advanced the process."²⁰ Bilder also notes Madison may have shared with Charles Pinckney a proposal that the legislature protect copyrights and ensure scientific and commercial innovation.²¹ Finally, with slavery increasingly unpopular in the years after the Convention, Madison seems to have credited to himself parts of Delegate Luther Martin's antislavery Convention speeches and adopted wholesale arguments for abolition that Franklin made to Congress in 1790. These appropriations and revisions in the *Notes* let Madison shift the blame for slavery from himself to the Georgia and South Carolina delegations.²² These examples thus suggest that Madison borrowed from other delegates his famous arguments for abolition, checks and balances, and an extended commercial republic. But with limited Convention records, it is difficult to establish which ideas are properly Madison's, and so Bilder shies from claiming that Madison intentionally stole these ideas. Focusing more on the *Notes* than on the arc of Madison's thought, these claims of borrowing are necessarily speculative. To separate Madison's arguments from those of other delegates is beyond the book's scope.

Bilder's final and most important claim is that Madison's *Notes*, being the most complete records of the Convention, shaped *The Federalist* and Farrand's *Records* and years of subsequent constitutional interpretation.²³ Madison's omissions and liberties have therefore narrowed our understanding of the Convention, of framers' intent, and thus of the Constitution itself. Bilder intentionally avoids interpreting how Madison's haphazard editorial choices guided consequent centuries of constitutional readings.²⁴ However, this is the book's most important point, and deserves consideration. In demonstrating, for example, that Madison erased in his *Notes* the Convention's original purpose of revising the Articles, Bilder shows how he finessed the Convention's aims.²⁵ Similarly, in the 1790s Madison and Jefferson selectively used and edited the *Notes* to rebut Hamilton's proposal to expand unenumerated congressional powers. This suggests that Madison was

18. *Id.* at 54.

19. *Id.* at 196.

20. *Id.* at 117.

21. BILDER, *supra* note 3, at 133

22. *Id.* at 199–200.

23. *Id.* at 158–65.

24. *Id.* at 5.

25. *Id.* at 52.

not wedded to a fixed idea of Convention delegates' aims. Paradoxically, in this case, respecting Madison requires dismissing the idea of a consistent framer's intent. Jefferson too showed skepticism for venerating the framing and Constitution, famously reminding Madison that "no society can make a perpetual constitution, or even a perpetual law."²⁶ Readers who wish to follow Madison and Jefferson in reimagining the *Notes* and the Convention can now do so themselves – in spring 2018 the Library of Congress released online high-resolution scans of the *Notes*.²⁷

While Madison and his *Notes* influenced centuries of American constitutional interpretation, the Boston clergyman Jonathan Mayhew, who died suddenly in 1766 at forty-five, missed the critical minute for Revolution and consequently faded into relative obscurity. But as J. Patrick Mullins' *Father of Liberty* convincingly demonstrates, Mayhew's sermons on the independence of the mind and the popular right to revolt long remained in the memory of John Adams, John Hancock, Paul Revere, James Otis, Jr., and a dozen other Boston revolutionaries. Adams, as Mullins notes, called Mayhew the source of "the principles and feelings which produced the Revolution." Mullins therefore aims to return Mayhew to the scholarly eye, and so demonstrate the broader influence of Enlightenment Anglo-American Protestantism on the American Revolution. As Mullins shows, "no clergyman in eighteenth-century America dared more, struggled more, and succeeded more in advancing the cause of liberty than Dr. Jonathan Mayhew."²⁸

Mullins' broad, thorough archival research artfully reconstructs Mayhew's life, including his upbringing by his preacher father, his undergraduate reading lists and notes, his graduate examinations, and his first position preaching in Boston's West Church. The biography here gets into the weeds by parsing the difference between the many competing sects and congregations of eighteenth-century Boston Protestants, explaining how these inculcated in the young Mayhew some skepticism of orthodox institutions.²⁹ Readers uninitiated in this byzantine and fractious world would benefit from an explanation of the parties and the broader importance of the debates that shaped Mayhew.

Mayhew's compelling political thought emerges through his early sermons, which claimed that individuals, regardless of class, shared innate reason and moral sense. Borrowing from Locke's *Thoughts on Education* and *Essay Concerning Human Understanding* and adding a measure of Yankee temperance, Mayhew held that virtue consisted in rational, prudent decision-making.³⁰ And for Mayhew, moral reasoning was not merely a private concern, as reason moved individuals to public action, often in the face of received doctrine or law. Thus, freedom of conscience required freedom of action, or as Mullins puts it: "religious and civil liberty must rise or fall together."³¹ Mayhew, again echoing Locke, therefore thought it futile to compel faith, a belief which undergirded

26. Perhaps tellingly, Jefferson wrote this to Madison as he redrafted his notes. *Letters Written While in Europe (1784-1790)*, in 3 THE WRITINGS OF THOMAS JEFFERSON, 106 (Henry Augustine Washington ed., 1871).

27. *James Madison Papers: Subseries 5e: James Madison's Original Notes on Debates at the Federal Constitutional Convention, 1787*, LIBR. OF CONG., <https://www.loc.gov/item/mss31021x001/>.

28. MULLINS, *supra* note 4, at 3–4 (quoting Adams).

29. *Id.* at 31.

30. *Id.* at 71–74.

31. *Id.* at 39.

his understandings of liberty and authority.³²

Mayhew soon waded into Boston politics. Like many Bostonians, his resistance to the Crown began as a conflict with the colony's governor. Mayhew first estranged himself from Massachusetts' Governor Francis Bernard when he leaked to friends that Bernard had perhaps illegally accepted a paltry gift from visiting Indians, spurring a brief scandal among Boston's elites in December 1761. Bernard's imperious rebuttals signaled to Mayhew a quiet but growing despotism by the royal governor.³³ Mayhew was further unsettled when the bishop of Oxford attempted to establish an episcopate in Boston, spurring what Adams later called "close thinking on the authority of parliament over the colonies."³⁴

In this context, Mayhew addressed concerns on the right to revolution. Adopting Locke and Trenchard and Gordon, Mayhew held that government rests on a revocable contract.³⁵ According to Mayhew, popular obedience is only owed to rulers who serve God's ends in preserving the populace. When rulers – usually monarchs, per the Stuart example – "rob and ruin the public," the public has a right and duty to revolt, as directed by Parliament.³⁶ In conditioning the Crown's sovereignty on Parliament and the public, Mayhew revived familiar Whig arguments from the Glorious Revolution, as chronicled by Bernard Bailyn and Gordon Wood, among others. But Mayhew was wary of rebellion from Great Britain, and dying in 1766, never saw these principles enacted by American revolutionaries.³⁷

Mullins' main contributions are twofold. First, he shows how Mayhew's public sermons, and particularly his *Discourse Concerning Unlimited Submission*, introduced Country Party Whig thinking to a generation of Bostonian lawyers and legislators. Mullins thus poses Mayhew as the missing link between the Glorious Revolution and American Revolution. The book establishes that Mayhew was so widely read through New England and so furiously attacked in local newspapers that he redirected the intellectual currents of Revolutionary Boston. In John Adams' words, this "radical change in the principles, opinions, sentiments, and affections of the people, was the real American Revolution."³⁸ Mullins demonstrates Mayhew's influence in Boston with many other convincing Adams quotes. This point would be even stronger if Mullins looked beyond Adams' Boston circle, considering whether other American revolutionaries learned Whig theory from Mayhew, rather than directly from Locke and fellow Whig pamphleteers. Second, Mullins shows that Mayhew's *Discourse*, issued in 1750, opened in Boston debates over Whig thought during the relatively placid era of salutary neglect by Parliament and George II. These exchanges, situated around public memorials for Charles I and James II and around the abortive Jacobite rising of 1745, riled Boston well before Parliament reissued the contentious Navigation Acts of the 1760s, revealing deeper, older roots of Whig theory

32. *Id.* at 31–43.

33. MULLINS, *supra* note 4, at 102–17.

34. *Id.* at 149 (quoting Adams).

35. *Id.* at 39, 78.

36. *Id.* at 55.

37. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1972); MULLINS, *supra* note 4, at 158.

38. MULLINS, *supra* note 4, at 44 (quoting Adams).

than normally considered.

Finally, Mullins' book echoes Louis Hartz's old contention that Revolutionary-era Americans sought Lockean intellectual and personal liberty.³⁹ For Mayhew, political authority derived from popular consent, which individuals could withdraw to liberate themselves from domination. This contractarian view might clash with the experience of Boston slaves or local Indians. Mullins for example notes that eastern Massachusetts was "sparsely populated by Wampanoag Indians," but largely leaves this history of genocide and domination to other authors.⁴⁰ Similarly, chattel slavery is essentially absent from the book, though the practice deeply troubled other contemporary moral sense theologians like Thomas Clarkson, Anthony Benezet, and later Thomas Wentworth Higginson and Ralph Waldo Emerson.⁴¹ Slavery is instead primarily addressed through Mayhew's Whig republican concern that colonists were slaves to arbitrary royal administration,⁴² suggesting that Mayhew perhaps cannot address the era's broader concerns with chattel slavery.⁴³ Necessarily limited to Mayhew, the work tells us much about Mayhew and his 1750 and 1760s Boston admirers but less about other fights for liberty in Revolutionary-era America.

Perhaps this is the limitation of studying a figure like Mayhew, who died before the Revolution and Founding, and so never engaged in the grander nation-building of the federal framers. Mayhew missed the critical minute, and so has unfortunately been largely forgotten in the study of American political thought. Mullins' thorough and insightful work fixes this oversight.

In contrast, we remember Madison not only because he lived during the Revolution and Convention's critical minute, but also because he afterward was able to shape and polish his legacy through the *Notes*. And while he edited the *Notes* even late in his life, his propensity to borrow and modify others' ideas appeared much earlier. The critical minute quote, now widely cited as Madison's, was originally penned by the French archbishop Cardinal de Retz. Madison rephrased it slightly and entered it in his own copybook at age eight.⁴⁴ Madison's political genius was not merely in living and mastering his critical minute at the Convention, but also reliving and revising that moment for decades more. Now, thanks to Bilder's work on Madison and Mullins' on Mayhew, we can much better understand the legacy of each thinker.

39. See LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955).

40. Mullins shows that Mayhew, "the son of a missionary to the Indians," believed in "a moral duty to save the Indians" and in western colonial expansion. MULLINS, *supra* note 4, at 20. However, Mayhew may have also recognized an Indian right to land possession. The book would do well to further consider Mayhew's role in white settler colonialism.

41. Mullins does note that Mayhew argued for converting black slaves to Protestantism. MULLINS, *supra* note 4, at 127.

42. *Id.* at 160–61.

43. As Barnor Hesse shows, many—though not all—republican theorists of liberty were troublingly unconcerned with chattel slavery. See Barnor Hesse, *Escaping Liberty: Western Hegemony, Black Fugitivity*, 42 *POL. THEORY* 288 (2014).

44. See JEAN FRANÇOIS PAUL DE GONDI, *MEMOIRS OF THE CARDINAL DE RETZ* 101 (1896); MADISON, *supra* note 1, at 9; MICHAEL SIGNER, *BECOMING MADISON: THE EXTRAORDINARY ORIGINS OF THE LEAST LIKELY FOUNDING FATHER* (2015); BILDER, *supra* note 3, at 151.