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The Power of Rigor:

James Madison as a Persuasive Writer

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This article is the third in a planned series of articles about the writing qualities and habits of our most eloquent American Presidents.[1] *The focus of all the articles is on the lessons modern legal writers can learn from the Presidents. James Madison's rigor, in both his approach to problems and in his resulting written work, was famous; it was this rigor that contributed to the persuasiveness of his writing. Even though he was not a lawyer, Madison had all the best writing habits of a rigorous, and thus effective, lawyer. He considered his audience, he was prepared, and he was pragmatic. The coauthors of this article were captivated by the eloquent writing of "the great little Madison."*[2]

We lawyers promise to represent our clients with both competence[3] and diligence.[4] That means we will be thorough, prepared, and diligent. In essence, we will be rigorous. We will do our homework about our legal writing audience—the judges we want to persuade. We will assemble the strongest arguments available on behalf of our client. We will anticipate all our opponent's counterarguments, and we will have answers for those counterarguments. We will consider the practical consequences of our proposed solutions to legal problems. We will summarize our position

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1 The first article in the series explored Abraham Lincoln's use of brevity. Julie A. Oseid, *The Power of Brevity: Adopt Abraham Lincoln's Habits*, 6 J. ALWD 28 (2009). The second article analyzed Thomas Jefferson's use of the "wall of separation between church and state" metaphor. Julie A. Oseid, *The Power of Metaphor: Thomas Jefferson's "Wall of Separation between Church & State,"* 7 J. ALWD 123 (2010).

2 Conover Hunt-Jones, *Dolley and "the Great Little Madison"* (Am. Inst. of Architects Found., Inc. 1977) 1 (citing Allen C. Clark, *Life and Letters of Doll[e]y Madison* 1 (Wash. 1914) (Dolley Madison wrote to her friend Eliza Collins in 1794, "Aaron Burr says that the great little Madison has asked to be brought to see me this evening.")).

3 Model R. Prof. Conduct 1.1 (ABA 2010) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

4 Model R. Prof. Conduct 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

with eloquence and persuasion so that our readers agree that our position is the best possible solution.

Although it is difficult to capture those qualities of thoroughness, preparation, and diligence in one word, we have chosen the word "rigor."[5] Admittedly, we ask a lot of one five-letter word, and we hope that Madison, who was well aware of the importance of word choice, [6] would agree with our selection. The word "rigor" seems able to handle the challenge. Based on the Latin word meaning stiff,[7] "rigor" means "scrupulous accuracy" and "precision." [8] When used as an adjective—"rigorous"—the word means severely exact and precise as in "rigorous research."[9] It also means logically valid.[10] Of course, a rigorous approach to work does not always result in a rigorous product. But our focus here is one those occasions when a rigorous approach did result in writings that demonstrated that rigor—and could stand on their own as severely exact, precise, logical, and thorough.

To study effective rigor in writing, we have chosen the work of James Madison. His physical characteristics made him an unlikely candidate as a model for power and persuasiveness in communication. At 5'4" tall, Madison was the shortest of our Presidents.[11] He was shy, some say painfully so.[12] His speaking voice was weak.[13] He was physically frail, and

5 Other words may also accurately describe Madison's best writings. "Clarity" comes to mind. But in our minds, clarity is always the most prominent feature of persuasive writing. As Justice Antonin Scalia and Bryan A. Garner state, "One feature of a good style trumps all others . . . clarity." Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 107 (Thomson/West 2008). The qualities considered in these articles about the U.S. presidents, like brevity, effective use of metaphor, and rigor, all contribute to the clarity of the persuasive writing.

6 Madison himself knew the importance of word choice when he noted, "Perspicuity therefore requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them." *The Federalist*, No. 37 (James Madison) (reprinted in *James Madison, Writings* 194, 198 (Jack N. Rakove ed., Lib. Am. 1999) [hereinafter *James Madison, Writings*]). All references to *The Federalist* are to this edition.

7 *The Pocket Oxford Latin Dictionary (Latin-English)* (Oxford U. Press 2003) (available at http://www.oxfordreference.com/views/SEARCH_RESULTS.html?y=15&q=rigor%20&category=t131a&x=9&ssid=1188374616&scope=book&time=0.937957089019136 (subscription required) (accessed Jan. 10, 2011)). "Rigor mortis" means stiff joints and muscles after death. *The Concise Oxford English Dictionary* (Catherine Soanes & Angus Stevenson eds., 12th ed. Oxford U. Press 2008) (available at http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t23.e48471(subscription required) (accessed Jan. 10, 2011)).

8 *Webster's American Dictionary* 678 (2d College ed., Random H. 2000). Other definitions of "rigor" include rigidity, hardness, inflexibility, and severity. *See The Pocket Oxford Latin Dictionary*, *supra* n.7 (available at http://www.oxfordreference.com/views/SEARCH_RESULTS.html?y=15&q=rigor%20&category=t131a&x=9&ssid=1188374616&scope=book&time=0.937957089019136 (accessed Jan. 10, 2011)).

9 *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/rigor (accessed Jan. 10, 2011).

10 *Webster's American Dictionary*, *supra* n. 8, at 678. The antonyms listed for "rigor" are also informative, with "laxness" as the most informative for the way we use the word "rigor" in this article. *Merriam-Webster Dictionary*, *supra* n. 9.

11 Natl. Park Serv., U.S. Interior Dept., *Celebrating the American Presidency in America's National Parks*, http://www.nps.gov/pub_aff/pres/trivia.htm (accessed Feb. 14, 2011). Madison, at about 100 pounds, was also the lightest President. *Id.*

12 *See* Garry Wills, *James Madison* 5 (Times Bks. 2002) (Madison's "social relations were such that he did not even try to woo a woman until he was thirty-one, and then he chose an apparently easy target").

many thought he would not live past young adulthood.[14] Yet no less than Chief Justice John Marshall concluded that if eloquence—"the art of persuasion"—"includes persuasion by convincing, Mr. Madison was the most eloquent man I ever heard."[15] Madison showed enviable rigor in his preparation and work habits, perhaps in spite of his physical limitations. He did his homework. He took detailed notes during important events including his classes at Princeton and during the Constitutional Convention.[16] He thought of arguments and counterarguments. He puzzled out the logical conclusions and practical consequences of both those arguments and counterarguments. As for the written product that emerged, admittedly it was not always rigorous in the sense of containing tight analysis, logic, or syntax.[17] Madison's writings could be unformed, [18] workmanlike,[19] or sentimental.[20] But at his best, Madison's rigorous approach did produce rigorous content: writings that were precise, accurate, logical, anticipatory of other arguments, and persuasive. Fortunately for us Americans, his habit of rigor helped him develop some of the most significant political theories—and practical proposals—shaping our government.

Our thesis is that lawyers should emulate Madison, even though he was not a lawyer.[21] In the ironic way that history often plays out, he is (next to Abraham Lincoln) perhaps the most lawyer-like President in his writing habits and style. This likely resulted in part from his classical education, which included some study of law.[22] Some scholars suggest that his legal study was extensive.[23] He needed to know law to succeed as a landowner and political leader, but he never wanted to become a lawyer.[24]

13 Robert Allen Rutland, *The Presidency of James Madison* 2 (U. Press of Kan. 1990).

14 *See infra* nn. 75–77 and accompanying text.

15 Louis C. Schaedler, *James Madison, Literary Craftsman*, Wm. & Mary Q., 3d Ser., Vol. 3, No. 4, 515, 524 (Oct. 1946) (quoting Rives, *History of the Life and Times of James Madison*, II, 612*n*).

16 Ralph Ketcham, *James Madison* 30, 195 (U. Va. Press 1990).

17 Madison's First Inaugural has been called "unremarkable." Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* 139 (Norton 2005).

18 In college, Madison "fell into bad literary company" and wrote "in clumsy, scurrilous, boyish verses," but he abandoned that style and "was himself never again guilty of such bumptiousness." Schaedler, *supra* n. 15, at 517–18.

19 As "our best committeeman," much of Madison's writing necessarily reflected his legislative talent and ability to simply finish the necessary work. *See* Wills, *supra* n. 12, at 36.

20 Sometimes, when Madison was writing for the public, he descended "to the level of the popular." Schaedler, *supra* n. 15, at 521. Schaedler notes that, after writing *The Federalist*, Madison "finally succumbed to the rising popular taste for inflated, elephantine diction." *Id.* at 533.

21 *See America's Lawyer Presidents* 37 (Norman Gross ed., Nw. U. Press 2004) (noting that thirty-three of the fifty-five delegates to the Constitutional Convention were lawyers, but not the "Father of the Constitution"—James Madison).

22 *Id.*

23 For a fascinating article about Madison's study of law and a strong argument that he did perhaps study law in great depth, see Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 L. & Hist. Rev. 389 (2010).

24 Andrew Burstein & Nancy Isenberg, *Madison and Jefferson* 12 (Random H. 2010) ("[A]lthough [Madison] never had any intention of becoming an attorney, he began the study of law in late 1773.").

Madison was always "[c]ognizant of legal arguments"[25] and approached problems with a lawyer's mentality.[26] Madison wrote like an accomplished lawyer: he was thorough, he was prepared, he viewed each problem from every side, and he knew the answers to all the questions about his position before his opponents had even formulated those questions. Jack N. Rakove emphasizes, "Madison . . . dissect[ed] issues and alternatives with a rigor that even his opponents respected. When he was done briefing an issue, it was hard for anyone to avoid perceiving the problem in the terms he had used."[27] In sum, Madison's writing was lawyer-like in the very best sense of that word.

Other scholars have thoroughly analyzed Madison's writings; they dissect Madison's writings to determine his intent and beliefs in an effort to discern the underlying meaning of those critical works.[28] Our focus is different. We do not purport to offer new historical analysis of either Madison himself or of the Madison writings we review. Instead, the focus of this article is the importance of rigor, both in Madison's writings and in modern persuasive legal writing. When embarking on this project we had two goals. Our first goal was to discover what made Madison, at his very best, so persuasive. Our thesis is that Madison's rigor in the task of writing, and the resultant rigor evident in his work product, was the key to his persuasiveness. We consider why rigor is an essential quality in persuasive writing both as a habit and as a goal for our final written product. We give brief biographical information about Madison, with an emphasis on his writing habits. We analyze three of Madison's masterpieces–the *Memorial and Remonstrance Against Religious Assessments*, *Federalist #10*, and a letter to his longtime friend Thomas Jefferson analyzing the idea of the Bill of Rights.

Our second goal is simply to share Madison's story with lawyers who are looking for ways to increase the persuasiveness of their own writing. Madison's story will likely be familiar to many, but we hope that our focus on his rigor will bring new insight to that story. Any lawyer would consider Garrett Ward Sheldon's assessment of Madison as the highest

25 John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* 83 (U. Cal. Press 1998).

26 Joseph J. Ellis recognizes all of Madison's qualities, "Though he had the demeanor and disposition of a scholar, he had the mentality of a lawyer defending a client, which in this case was a fully empowered American nation-state." Joseph J. Ellis, *American Creation: Triumphs and Tragedies at the Founding of the Republic* 103 (Vintage Bks. 2007) [hereinafter Ellis, *American Creation*].

27 Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 37 (Vintage Bks. 1997) [hereinafter Rakove, *Original Meanings*].

28 Louis Schaedler points out that "Judgment of [Madison's] literary qualities is further confused by the fact that both the praise and the blame his style has received have been inspired by approval or disapproval of his political content rather than by literary judgment." Schaedler, *supra* n. 15, at 515.

compliment: "His was a learned, rigorous mind producing tightly reasoned, persuasively argued texts."[29] In the end, we hope that Madison's lead will inspire others to write with rigor.

I. The Importance of Rigor in Persuasive Legal Writing

Classical rhetoric was the first study of persuasion, and it still influences our modern understanding of effective persuasion.[30] Rhetoric, as understood by the classical teachers, meant "the use of language for persuasive purposes."[31] Classical rhetoric was essential in the Greco-Roman culture because individual citizens advocated for themselves in the courts, marketplace, forum, and church.[32] Classical rhetoricians emphasized the importance of three types of arguments: *ethos* (arguments based on the author or speaker's credibility), *pathos* (arguments based on emotion), and *logos* (arguments based on logic) in persuasion.[33] All three types of argument are important and intertwined.[34]

Madison studied many classical rhetoric works.[35] He knew the value of *logos*, *ethos*, and *pathos*. Madison was masterful in his use of logical arguments (*logos*);[36] one of his major opponents, Patrick Henry, was

29 Garrett Ward Sheldon, *The Political Philosophy of James Madison* 2 (Johns Hopkins U. Press 2001).

30 Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 9 (2d ed., Aspen Pub. 2008) ("[M]uch of the contemporary literature on persuasion is based on principles first explored by classical rhetoricians some 2500 years ago."). Michael H. Frost points out that most classical rhetoricians gave guidelines for oral advocacy, but that "their advice regarding how advocates can enhance their credibility applies just as much to written as to oral arguments." Michael H. Frost, *With Amici Like These: Cicero, Quintilian and the Importance of Stylistic Demeanor*, 6 J. ALWD 5, 13 (2006) [hereinafter *With Amici Like These*].

31 Edward P. J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* 15 (4th ed., Oxford U. Press 1999). Corbett and Connors further explain,

> Classical rhetoric was associated primarily with persuasive discourse. Its end was to convince or persuade an audience to think in a certain way or to act in a certain way. Later, the principles of rhetoric were extended to apply to informative or expository modes of discourse, but in the beginning, they were applied almost exclusively to the persuasive modes of discourse.

Id. at 16.

32 Smith, *supra* n. 30, at 9. This lasted from the fifth century B.C. to the fall of the Roman Empire in 410 A.D. During that 1000-year period, the most influential scholars and authors of the treatises on rhetoric were Aristotle (Greek, 384–322 B.C.), Cicero (Roman, 109–43 B.C.), and Quintilian (Roman, 35–395 A.D.). Michael H. Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* 2–3 (Ashgate Publg. Ltd. 2005) [hereinafter Frost, *Introduction to Classical Legal Rhetoric*]. Michael Frost further elaborates on this education in rhetoric:

> Although all Roman citizens did not complete the full course of study, many completed a substantial part of the ten-to-twelve-year rhetoric course . . . . Designed for use by all members of the educated classes, the rhetoric course included, among other things, detailed instructions for discovering and presenting legal arguments in almost any context and to almost any audience. A student's rhetorical education prepared him to meet all his public speaking obligations, especially his legal obligations.

Id. at 3.

33 *Id.* at 5.

34 Frost, *With Amici Like These*, *supra* n. 30, at 9.

35 *See infra* n. 69 and accompanying text.

36 *See* Rakove, *Original Meanings*, *supra* n. 27, at 56 (Madison knew that he would need reason, justice, and political savvy to succeed as a lawgiver at the Constitutional Convention).

masterful in his use of emotional arguments (*pathos*).[37] Although they do not describe it in terms of *ethos*, many historians believe that the quality that gave Madison the edge over Henry was *ethos*–Madison's credibility and character as displayed through his intelligence, rigor, and preparation. Garry Wills explains,

> Good as Henry was as an orator and debater, he was not a reflective or studious person, and he was up against a man [Madison] who had thought and debated and persuaded on this subject [the Constitution] through two years that sharpened all of Madison's analytical power and parliamentary deftness. The tiny David slew the mighty Goliath.[38]

Rigor—that quality of being intelligent, prepared, and thorough—is an important part of the author's *ethos* (credibility and character).[39] Aristotle offered some practical suggestions on how to increase credibility and character: "[T]here are three things that gain our belief, namely, intelligence, character, and good will."[40] Michael R. Smith, a contemporary rhetoric scholar, has analyzed exactly what intelligence, character, and goodwill mean in the persuasive legal writing context, and what specific traits help advocates prove they possess each of the qualities. Smith started with character and explained that legal writers "must demonstrate that they are of good moral character or at least that they are not of questionable moral character."[41] Traits proving that an advocate has the required moral character include truthfulness, candor, zeal, respect, and professionalism.[42] Character is an advocate's general moral makeup and personality; goodwill refers to the advocate's disposition about the specific issue at hand and those involved in the current case.[43] Advocates are

37 Patrick Henry's reputation as a formidable orator was sealed ten years before American independence when he "hurl[ed] his verbal thunderbolts at George III." Ellis, *American Creation*, *supra* n. 26, at 120. Many of Henry's opponents were frustrated by his emotional arguments, including Thomas Jefferson. Ellis notes,

> Jefferson was especially irritated by Henry's mesmerizing way with the spoken word, which he regarded as a crudely emotional appeal that ought not to defeat his own lyrical and logical prose. But so often it did. Jefferson explained to Madison that Henry's oratorical power was an inexplicable and unpredictable force of nature, like a hurricane, and the only thing to do when confronted by it was to "devoutly pray for his imminent death."

Id.

38 Wills, *supra* n. 12, at 36 (referring to the Virginia ratification convention of the Constitution).

39 Quintilian believed "the perfect orator is a good man speaking well." Frost, *Introduction to Classical Legal Rhetoric*, *supra* n. 32, at 69 (citing 2 Quintilian, *Institutio Oratoria* 9).

40 Aristotle, *The Rhetoric of Aristotle* 92 (Lane Cooper transl., Prentice-Hall, Inc. 1960).

41 Smith, *supra* n. 30, at 125. Justice Antonin Scalia and Bryan Garner also emphasize "the human proclivity to be more receptive to argument from a person who is both trusted and liked" because of the advocate's good character. Scalia & Garner, *supra* n. 5 at xxiii.

42 Smith, *supra* n. 30, at 126.

43 *Id.* at 143–44.

advised that goodwill suffers if an advocate acts with anger or malevolence.[44] The final quality, intelligence, reflects the human tendency to have more trust and confidence in a speaker who "knows what she is talking about."[45] An intelligent persuasive writer is informed, adept at legal research, organized, analytical, deliberate, empathetic toward the reader, practical, articulate, eloquent, detail oriented, and innovative.[46] A rigorous approach to persuasive writing, and a resultingly rigorous work product, will improve a lawyer's *ethos*.

Rigor is crucial in modern legal persuasion. Preparation is the key to successful lawyering.[47] Lawyers increase their credibility by appearing to be "intelligent and knowledgeable about the law and the case."[48] Judges are busy people who expect, and often rely on, lawyers to do the hard work of thoroughly researching, analyzing, and evaluating the legal issues before the court.[49] Justice Lewis F. Powell Jr.'s beliefs about the necessity of rigor in writing are instructive: "Clear writing, to him, meant clear thinking, and the rigor of writing to a high standard of clarity and simplicity helped ensure the integrity of the writer's analysis."[50] Kristen K. Robbins Tiscione recently reported the results of a comprehensive survey asking federal judges what they thought about lawyer's briefs.[51] Judges want to see more rigor in lawyer's legal analysis.[52] The list of specific comments shows that the judges are looking for someone with Madison's rigor, including his consideration of audience, thorough preparation, and practical thinking. One judge commented, "The bulk of briefs . . . lack thoroughness regarding legal analysis."[53] Another added, "Counsel tends to state what

44 *Id.* at 143. Smith points out that goodwill generally refers to an advocate's behavior in a particular case, while character generally refers to an advocate's general behavior. *Id.*

45 *Id.* at 147 (quoting Ronald J. Waicukauski, JoAnne Epps & Paul Mark Sandler, *Ethos and the Art of Argument*, 26 Litig. 31, 32 (1999)).

46 *Id.* at 148.

47 Nancy L. Schultz & Louis J. Sirico, Jr., *Legal Writing and Other Lawyering Skills* 310 (5th ed., Aspen Pub. 2010) ("The key to a successful oral argument is preparation."); Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. Rev., 229, 251 (2004) ("For a lawyer, the three most important things are preparation, preparation, and preparation.").

48 *Id.* at 72.

49 Richard K. Neumann Jr. notes,

> [I]n our system of litigation, the lawyers (and not the judges) frame the issues, develop the theories and arguments, and adduce the evidence. Judges are busy people who view any assertion skeptically and who must make many decisions in short periods of time. Thus, they need complete but concise arguments that can be quickly understood.

Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 317 (5th ed., Aspen Pub. 2005).

50 Judge T.S. Ellis, III, *In Memoriam: Lewis F. Powell, Jr.*, 112 Harv. L. Rev. 594, 595 (1999).

51 Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 Leg. Writing 257 (2002).

52 *Id.* at 269.

53 *Id.*

they think is sufficient, but often will not adequately discuss the various implications of the issues."[54] Yet another judge noted, "Most of the briefs . . . ignore or gloss over obvious weaknesses in their argument and fail to address the compelling counterpoints of the other side."[55] One frustrated judge even used "rigor" to describe the problem, "We often get the feeling . . . that the parties are satisfied simply to identify issues and leave the rigorous research and analysis to the court."[56]

This is not to suggest that exercising rigor *when* writing, or demonstrating rigor *in* writing, is easy. Quite the opposite: rigor requires very hard work.[57] Perhaps writing with rigor is the hardest work of all because the task of writing is itself so difficult. As sports journalist Red Smith quipped, "Writing is easy. You just sit at a typewriter until blood appears on your forehead."[58] Legal writing is challenging because good writing is good thinking.[59] Many who begin writing find that their ideas and arguments are not quite as developed and clear as they suspected before they put their pen to paper or their fingers to the keyboard. Legal writers must approach the task of writing with rigor because the rigor involved in putting ideas into words tests whether the writer's arguments are valid.[60] Yet the hard work will pay off.[61] Good writing may look easy, but "[i]t takes training and work and fair time to compose—all part of the lawyer's craft."[62] We lawyers are professional writers;[63] writing with rigor will increase the persuasiveness of our writing. For inspiration and guidance in writing with rigor, we consider the writings of Madison.

54 *Id.*

55 *Id.*

56 *Id.*

57 *See* Easton, *supra* n. 47, at 251 ("Your goal, though not always obtainable, should be to know more about your case than anyone else, especially opposing counsel. . . . [Y]ou can acquire that superior level of knowledge only through hard work.").

58 Ralph Keyes, *The Quote Verifier: Who Said What, Where, and When* 257 (Macmillan 2006). Bryan Garner advises law students and lawyers, "Start with the premise that writing well isn't easy. . . . [I]t takes hard work." Bryan A. Garner, *Legal Writing in Plain English* xvi (Univ. Chi. Press 2001).

59 Garner, *supra* n. 58, at xii ("[I]t is impossible to separate good writing from clear thinking."); *see also* Neumann, *supra* n. 49, at 60 ("[L]earning to write [like] a lawyer is another way to learn to think [like] a lawyer.") (quoting Terrill Pollman).

60 Dean and former Judge Donald Burnett explained,

> Through the discipline of putting an argument into words, we find out whether the argument is worth making. . . . Each issue is defined by a cluster of facts and governing legal principle. If you cannot articulate this nexus of law and fact, you do not yet have a grasp of the case.

Donald L. Burnett, Jr., *The Discipline of Clear Expression*, 32 Advoc. 8 (June 1989) (quoted in Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* xxv (5th ed., Aspen Pub. 2010)).

61 *Id.* at xvii (pointing out that because legal employers value writing ability over almost any other skill, a good writer will be more likely to get her desired job, get a quick promotion, and have career mobility).

62 Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 Thomas M. Cooley L. Rev. 1, 22 (1992).

63 Edwards, *supra* n. 60, at 1.

II. Madison's Biography

Madison was born on March 16, 1751, into a line of Virginians who had owned plantations for over a century.[64] He spent his youth in Orange County.[65] Although formal education was scarce in the middle of eighteenth-century Virginia, eleven-year-old Madison attended a school where he received a robust education in subjects such as logic, philosophy, mathematics, astronomy and French.[66] Under the direction of the Scottish-born Donald Robertson, this education was a compliment to Madison's intellectual eagerness in the context of an agrarian upbringing.[67]

At age eighteen Madison "broke ranks with Virginia tradition" and attended the College of New Jersey (now Princeton) instead of the College of William and Mary.[68] Madison was already familiar with the ancients and "fashionable" writers such as Swift, Addison, and Steele.[69] The Reverend John Witherspoon, a Scottish Presbyterian clergyman professing the value of the Scottish Enlightenment, and Princeton's president during Madison's attendance, "warned his students against imitation of any author," and counseled familiarity with the "excellences of all the best writers."[70] Developing a unique style from his scholarship helped prevent Madison from becoming another one of the "justly forgotten imitators of Addison and of Pope."[71]

Madison's scholarship was rigorous before, during, and after his time at Princeton, where he compressed three years of coursework into two and remained for an additional year of study.[72] Madison took detailed notes and composed his own 122-page compilation entitled *A Brief System of Logick*.[73] In his notes, he frequently referred to "miscellaneous reading." For Madison, "miscellaneous" meant delving into subjects such as chemistry and agriculture.[74]

Although Madison did not make a strong first impression, he always impressed anyone who had further contact with him that he was quite sickly.[75]

64 Wills, *supra* n. 12, at 11.

65 Hunt-Jones, *supra* n. 2, at 1.

66 Jack N. Rakove, *James Madison and the Creation of the American Republic* 3 (3d ed., Pearson Longman 2007) [hereinafter Rakove, *James Madison*].

67 Ketcham, *supra* n. 16, at 19; *see also* Rakove, *James Madison*, *supra* n. 66, at 9–11.

68 Hunt-Jones, *supra* n. 2, at 2.

69 Ketcham, *supra* n. 16, at 39.

70 Schaedler, *supra* n. 15, at 515.

71 *Id.* at 518.

72 Rakove, *James Madison*, *supra* n. 66, at 3; Ketcham, *supra* n. 16, at 28.

73 Ketcham, *supra* n. 16, at 32.

74 *Id.* at 519.

75 Madison's poor health included epileptic-like attacks. Wills, *supra* n. 12, at 6.

> In terms of physical appearance alone, few famous men have suffered more at the hands of observers than James Madison. Comments on his smallness, sickly nature, awkward manner, and sallow complexion abound in the historic record, and one harsh critic even compared him to a "country schoolmaster in mourning for one of his pupils whom he had whipped to death."[76]

Sickness kept Madison from travels or work when little else could. His delicate form was a reason for pause to some: "No one ever described a personal encounter with James Madison as an inspirational moment."[77] Yet his precarious physique and his social awkwardness were not indicative of his talents or the respect he commanded after a first impression. Frances Few, Representative Albert Gallatin's sister-in-law, noted, "'[A] few moments in his company and you lose sight of these defects and will see nothing but what pleases you—his eyes are penetrating . . . his smile charming . . . his conversation lively and interesting.'"[78] Louisa Catherine Adams, John Quincy Adams's wife, also found him "a *very* small man in *person*" but "a 'lively' and 'playful' conversationalist."[79] Alexander Hamilton "described Madison as 'a clever man' who was 'uncorrupted and incorruptible.'"[80]

Princeton was not only a place for Madison to grow in intellectual rigor and knowledge, but it also influenced his interests and convictions. Madison's time at Princeton exposed him to a setting in which religious freedom was not simply tolerated, but defended.[81] As a young adult he cared about religious freedom more than any political issue, perhaps because most of his classmates were Presbyterians and thus dissented from Virginia's officially established Anglican Church. In a letter written at age twenty-two to his closest college friend, Madison complained bitterly about the imprisonment of unlicensed Baptist preachers near his family's home. He spoke of the "diabolical Hell conceived principle of persecution" and added, "I have squabbled and scolded[,] abused and ridiculed about it so long, to so little purpose that I am without common patience."[82]

Madison's interest in religious liberty, combined with his eye for subtlety and precision, led him to successfully liberalize conscience protection in The Virginia Declaration of Rights. He was twenty-five when he was elected to the Virginia Convention and "demonstrated for the first

76 Hunt-Jones, *supra* n. 2, at 11.

77 Burstein & Isenberg, *supra* n. 24, at 470.

78 Ketcham, *supra* n. 16, at 476 (citing the *Diary of Frances Few, 1808–1809* (Ga. Dept. of Archives & History, Mar. 3, 1809).

79 Rutland, *supra* n. 13, at 21 (emphasis in original).

80 Rakove, *James Madison*, *supra* n. 66, at 104.

81 Wills, *supra* n. 12, at 16.

82 Ltr. from James Madison to William Bradford (Jan. 24, 1774), in *James Madison, Writings*, *supra* n. 6, at 5, 7. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution* 260 (Enlarged Ed., Harvard U. Press 1992).

time what would be his greatest strength in committee, prior preparation."[83] This, his first important public act, was centered on the meaning of a single word and its unspoken implications.[84] The removal of the word "toleration" from George Mason's original draft of the Declaration happened at Madison's suggestion.[85] Madison's suggested language that "all men are equally entitled to the free exercise of religion according to the dictates of conscience" was ultimately adopted.[86] Ralph Ketcham, Madison's chief biographer, noted,

> The change was crucial . . . because it made liberty of conscience a substantive right, the inalienable privilege of all men equally, rather than a dispensation conferred as a privilege by established authorities. Madison had made possible the complete liberty of belief or unbelief, and the utter separation of church and state.[87]

Madison's rigor during that Virginia Convention proved to be a lifelong, and formidable, quality. When writing to persuade, Madison achieved rigor through three habits: he considered his audience, he was always prepared, and he thought practically about real-world consequences.

A. Considering Audience

Madison always considered his audience. He knew exactly who was likely to read his writing, and he wrote to address their concerns.[88] He lined up rows of arguments and recapitulated them as he proceeded so that the audience would feel carried along to the inevitable conclusion. He thought of the objections his audience might raise, and he refuted those objections and counterarguments before the audience even had time to fully form them.[89] Further, he knew who the important decisionmakers would be when the most important political questions had to be decided. In many instances he went to extreme lengths to ensure that the group of decisionmakers included those sympathetic to his position. Most notably, he convinced George Washington to come out of retirement to join the Constitutional Convention.[90] Washington "happened to be the only man in America whose sheer prestige instantly transformed a lost cause [the Constitutional Convention] into a viable contender."[91] Madison, in his

83 Wills, *supra* n. 38, at 17.

84 Schaedler, *supra* n. 15, at 516.

85 Ketcham, *supra* n. 16, at 73.

86 Wills, *supra* n. 12, at 17–18.

87 *Id.*

88 See *infra* discussion on *Memorial and Remonstrance*, pt. III(A).

89 See *infra* discussion on *Federalist*, No. 10, pt. III(B).

90 Ellis, *American Creation*, *supra* n. 26, at 97–99.

91 *Id.* at 97.

habitual way, anticipated all of Washington's objections to representing Virginia at the convention and presented convincing arguments to counter all of Washington's concerns.[92] Madison did not stop there; he lobbied his fellow Virginia delegates to support his plan before the Constitutional Convention convened.[93]

B. Preparation

Madison was thoroughly prepared—indeed, he was typically the most prepared person in the room. Perhaps this was a result of his weakness as an orator.[94] Madison's voice was so soft that stenographers complained they could not hear him.[95] In contrast to the flamboyant oratorical styles of many other Virginia statesmen, "Madison stood out by being self-consciously inconspicuous. His style, in effect, was not to have one."[96] Madison did not like to improvise, and his thorough preparation meant that he rarely had to speak extemporaneously.[97] Joseph Ellis explains,

> [Madison was] always . . . the most fully prepared participant, the kind of frustrating opponent who always had more relevant information at his fingertips and who also somehow understood the logical implications of your argument better than you did."[98]
>
> If God was in the details, so the saying went, Madison was usually there to greet him upon arrival."[99]

Madison's habit of preparation served him very well in another way: he was ready when political issues ripened. Madison is commonly regarded as the "father of the Constitution." But the reason he was able to write so many constitutional provisions, or their first drafts, was because he had "steeped himself in constitutional issues" since age 22.[100]

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92 *Id.* at 98. ("Madison's response to this litany of protestations [from Washington] was the political equivalent of guerrilla warfare.").

93 *Id.* at 108.

94 *Id.* at 101.

95 *Id.* at 100. The ratification debates in Virginia, in particular, frequently contain the notation that Madison spoke too low to be understood. *James Madison, Writings*, *supra* n. 6, at 354, 387, 390, 400; *see* Burstein & Isenberg, *supra* n. 24, at 179 (noting that Madison's voice was inaudible because he was recovering from a serious bout of illness).

96 Ellis, *American Creation*, *supra* n. 26, at 100.

97 Wills, *supra* n. 12, at 14 ("And he was methodical in preparing his responses to situations beforehand, which meant that he rarely had to improvise on the spot.").

98 Ellis, *American Creation*, *supra* n. 26, at 101.

99 Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* 54 (Vintage Bks 2000) [hereinafter Ellis, *Founding Brothers*].

100 Wills, *supra* n. 12, at 37. Burstein and Isenberg sum up the persuasive power that Madison had developed, through preparation and credibility, by the time of the first Congress:

> He never aimed to convince by harangue or bluster. He did not make loud, disapproving signs, and he rarely made exaggerated claims. . . . He concentrated his thoughts and spoke to influence. . . . Madison was all about note-taking, thinking through his points in advance. Since he had years in the state legislature and national congresses to his credit, and with a well-earned reputation for meticulousness and thoroughness, others allowed him to set the agenda.

Burstein & Isenberg, *supra* n. 24, at 191.

Madison worked hard, harder even than his hardworking contemporaries like Thomas Jefferson.[101] He valued the discipline his father exhibited on his Virginia plantation, and he lived his own life with discipline because he believed that discipline would prolong his life.[102] Madison's hard work began when he started thinking through a problem very early on. Part of that puzzling out of a problem happened while Madison took copious notes, a habit he practiced throughout his lifetime.[103] He became the "unofficial chronicler" of the Constitutional Convention.[104]

Madison's preparation and discipline took the form of a scholarly approach. When faced with a problem, he read, studied, considered all sides, and anticipated all arguments. He was a diligent scholar and "omnivorous reader."[105] Historians often describe Madison as having done his "homework."[106] The most famous example of Madison's research was the study of confederacies, ancient and modern, that he undertook in the spring of 1787 in an effort to develop solutions to the increasing chaos in the American states under the Articles of Confederation.[107] He had received a "literary cargo" of books on government from Jefferson, then in Paris, in 1786.[108] Historian Douglass Adair described Madison's work in the spring of 1787 "probably the most fruitful piece of scholarly research ever carried out by an American."[109] The research convinced him that the

101 *See* Noonan, *supra* n. 25, at 4 ("Overshadowed by Jefferson, Madison was the better workman.").

102 Wills, *supra* n. 12, at 14–15 (Wills explains, "Madison's lifelong admiration of his father's plantation regimen dovetailed with his own great need for personal discipline, based on concern for this health. . . . He lived to be eighty-five thanks to that regimen.").

103 Again, this may be attributed in part to his personality. A person who is uncomfortable interacting with others can avoid some of that interaction by furiously writing notes. Still, at least in some situations like during the Constitutional Convention, Madison knew that the notes would be valuable for American history. Sheldon, *supra* n. 29, at 53–54. Madison also had an intellectual curiosity about how governments were formed. Schaedler, *supra* n. 15, at 522 ("Madison's decision to keep a journal of the constitutional Convention was prompted partly by his scholarship and partly by his sense of the importance of the proceedings.").

104 Sheldon, *supra* n. 29, at 53. Sheldon explains Madison's notetaking process:

> Madison was the unofficial chronicler of the convention and chose a seat in the front of the meeting room, in the center, where he could hear every delegate speak. Using shorthand during the sessions, Madison would write out completely each day's debates within a day or two of having recorded them. . . . The result, *Debates in the Federal Convention*, was not published until fifty years later, when Congress authorized its release in 1840. In it, Madison had recorded all the arguments over every aspect of the U.S. Constitution as well as the sectional and philosophical sources of those arguments. His own comments at the convention, [were] recorded in the third person . . . .

Id. at 53–54.

105 *Id.* at 5.

106 *Id.* at 19.

107 *Id.* at 43.

108 Ltr. from James Madison to Thomas Jefferson (Mar. 18, 1786), in 2 *The Writings of James Madison: Comprising His Public Papers and His Private Correspondence* 224, 226 (Gaillard Hunt ed. 1910). Sheldon, *supra* n. 29, at 49. The books described "almost every historical experiment with federated and confederated governments, from ancient Greece to the medieval Holy Roman Empire to modern Swiss, Dutch, and German regimes." *Id.*

109 Douglas Adair, *Fame and the Founding Fathers* 134 (Trevor Colbourn ed., Norton 1974) (*quoted in* Wills, *supra* n. 12, at 26–27).

problems of confederacies of states were insurmountable, and it energized him to work at creating a central government that would act directly on the people rather than through the states.

C. Thinking Practically and Institutionally

Madison's persuasiveness also benefited from his habit of thinking through the practical consequences of ideas and how the ideas would need to be translated into institutions to be successful. This intellectual habit may have been encouraged by the Scottish "common sense" humanism that the Reverend Witherspoon taught at Princeton, which "became popular in late eighteenth-century America in large part because of its pragmatic outlook."[110] In the central example of Madison's translation of theory to practice, his study of confederacies—motivated by a practical desire to reform American government—led him to propose the structure of a new government that would act directly on the people and that would, at least in part, be directly elected. The Virginia Plan, of which he was the chief architect, became the basic structure for the Constitution, even though it was significantly changed along the way, and he was central to almost every major debate over the Constitution's provisions. Madison's *Federalist* writings, especially *No. 10* and *No. 51*, are viewed as classics of political theory.

> [But] [t]hese essays were not the work of an "ingenious theorist" toiling away in splendid isolation. . . . They were far more the product of experience and reflections on it . . . . Madison was an actor—indeed, more than—a thinker or writer, and his ideas grew out of his action. . . . His publications supporting the Constitution were not his chief political legacy. . . . That greater legacy was the Constitution, . . . [n]ot so much the text itself as the deliberations that made it possible.[111]

Like lawyers, Madison started with concrete rather than abstract goals and, like good lawyers, he thought in concrete terms, translating theories into practice.

His pragmatism showed even in his response to the major defeats he suffered in the Constitutional Convention: the rejection of his proposed congressional veto over state laws and the delegates' decisions that the Senate should represent each state equally rather than (as Madison advocated) by population and be elected by state legislatures rather than

110 Terance S. Morrow & Terence A. Morrow, *Common Sense Deliberative Practice: John Witherspoon, James Madison, and the U.S. Constitution*, 29 *Rhetoric Society* 25, 30 (1999).

111 Jack Rakove, *Revolutionaries* 344 (Houghton Mifflin Harcourt 2010) [hereinafter Rakove, *Revolutionaries*].

(as he advocated) by the House of Representatives. When his initial measures to restrict state power failed, Madison did not give up. "[R]ealizing that he would have to work with what he was given, he regrouped" and, for the remainder of the convention, sought to strengthen the power of other federal institutions besides the Senate, most notably the Presidency.[112] His dogged pragmatism led him to take the lead in producing a Constitution that achieved his basic goal—strengthening central government—even if several of its particulars disappointed him.

III. Madison's Rigor at Work

The elements of Madison's rigor at work are visible in documents concerning three achievements in which he was most influential: the adoption of religious liberty in Virginia, the original Constitution, and the Bill of Rights. Not every Madison writing habit outlined above (consideration of audience; preparation; and thinking practically and institutionally)[113] is present in the writings analyzed here. But each document shows multiple aspects of Madison's rigorous approach and the document's resulting contextual rigor. In the *Memorial and Remonstrance Against Religious Assessments*, Madison carefully thought of his audience and all counterarguments others might raise, explained the practical consequences of the proposed bill, and included many different, but well-developed arguments. Madison wrote *Federalist No. 10* only after years spent studying democracies, with a goal of drafting and defending the Constitution. He guided his audience to see that alternatives to an extensive republican government were not workable in the real world. He strengthened this appeal to readers by subtly reminding them of a small democracy's inherent faults, which helped convince them of his position. In his letter to Jefferson, Madison showed his rigor in considering all arguments both for and against the Bill of Rights, including the pragmatic consideration of what competing principle should, in the end, take precedence in light of the most pressing evil.

A. *Memorial and Remonstrance Against Religious Assessments*

Virginia made advances in religious freedom during the Revolution, enacting "free exercise of religion" in its Declaration of Rights over mere "toleration" at Madison's initiative.[114] It also eliminated preferential tax support for Anglican clergy in the late 1770s. But in 1784 Patrick Henry

112 Burstein & Isenberg, *supra* n. 24, at 161–62.

113 *See supra* pt. II.

114 *See supra* nn. 84–85 and accompanying text.

introduced a bill for a new state property tax "Establishing a Provision for Teachers of the Christian Religion."[115] More liberal than its predecessor, this tax would reimburse Christian ministers of all denominations; each taxpayer could designate which church should receive his payment.[116] Madison stemmed the bill's momentum by getting the vote in the House of Delegates delayed.[117] He then published the anonymous *Memorial and Remonstrance Against Religious Assessments* to persuade Virginia voters to pressure their legislators.[118] Voters signed both Madison's petition and others opposing the assessment bill, which was handily defeated.[119] From this success, Madison went on to convince the Virginia Assembly to pass Thomas Jefferson's Bill for Religious Freedom.[120]

The *Memorial and Remonstrance* is Madison's quintessential argument for religious liberty: for free exercise of religion according to individual conscience and for disestablishment of religion in the sense of ending not just government support for one faith, but government interference in religion generally. It is "probably the fullest and most thoughtful exposition of disestablishmentarian thinking at the time of the founding," one with "enduring appeal" for the cause of religious liberty.[121] In fifteen separately numbered paragraphs, each containing at least one argument, Madison set forth a case that was concise but also complete and rigorous.[122]

The *Memorial and Remonstrance* especially shows Madison's attention to his audience. He carefully considered what would persuade a range of Virginia voters that the assessment bill was a "dangerous abuse of power."[123] His first argument appealed to legal authority—that tax would violate the Virginia Declaration of Rights—which Madison quoted:

> Because we hold it for a fundamental and undeniable truth, "that religion or the duty which we owe to Our Creator and the manner of discharging

115 Noonan, *supra* n. 25, at 71. Henry was responding to "concern at the seeming decline in public virtue and religion" after the Revolutionary War. John A. Ragosta, *James Madison's Memorial and Remonstrance against Religious Assessments*, *Milestone Documents in American History* 212 (available at www.milestonedocuments.com (accessed Aug. 3, 2010)).

116 Noonan, *supra* n. 25, at 72.

117 *Id.*

118 Rakove, *Original Meanings*, *supra* n. 27, at 310. "While the Memorial and Remonstrance is nominally addressed to the General Assembly of Virginia, the audience for Madison was the Virginia populace." Ragosta, *supra* n. 115, at 215.

119 The *Memorial and Remonstrance* had 1552 signatories. Noonan, *supra* n. 25, at 74.

120 Rakove, *Original Meanings*, *supra* n. 27, at 311.

121 Michael W. McConnell, John H. Garvey & Thomas C. Berg, *Religion and the Constitution* 49, 53 (2d ed., Aspen Pub. 2006).

122 The fact that the *Memorial and Remonstrance* was a legislative petition limited the length and depth of arguments Madison could make. *See* Schaedler, *supra* n. 15, at 522.

123 James Madison, *A Memorial and Remonstrance against Religious Assessments* preamble (1785) (reprinted in *James Madison, Writings*, *supra* note 6) [hereinafter Madison, *Memorial and Remonstrance*].

> it, can be directed only by reason and conviction, not by force or violence."[124]

Madison wanted voters to recognize the value of the rule of law and the dire consequences that could result if it were not respected. He reminded them that Americans had recently fought for freedom from an oppressive government,[125] and he echoed the revolutionary language:

> The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment . . . are Tyrants.[126]

Tyrannical governments, he later emphasized, have often used established religions.[127]

Madison had to appeal both to relatively secularized, rationalist Virginian leaders and to the growing evangelical sects of Baptists and Presbyterians, dominant in the state's center and west, whose chief concern was keeping the Christian faith vital and pure. He knew the Baptists would oppose the assessment bill, but Presbyterians were initially divided and a cause of concern.[128] His first paragraph spoke to both rationalists and evangelicals by upholding both "reason and conviction" and by setting forth clearly the proposition that religion was outside government's authority and the social compact:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe. . . .

124 *Id.* at ¶ 1.

125 Madison, *Memorial and Remonstrance*, *supra* n. 123, at ¶3; *see infra* n. 143 and accompanying text. Rakove notes the *Memorial and Remonstrance* "echoed the rhetoric of the earlier Revolutionary conflict, and thus evoked the conventional image of an ongoing struggle between the power of rulers and the liberties of the ruled." Rakove, *Original Meanings*, *supra* n. 27, at 42.

126 *Id.* at ¶ 2.

127 *Id.* at ¶ 8.

128 Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 Penn. St. L. Rev. 733, 751–52 (Virginia Baptists "vehemently opposed" the assessments bill); Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 144 (Oxford U. Press 1986) (describing Madison's anger at the Hanover Presbytery's 1784 support of the assessment bill).

> [E]very man who becomes a member of any particular Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign.[129]

The idea that religion lay outside government's cognizance could appeal both to the rationalist, for whom religion was a private matter, and the evangelical, for whom religious duties came first. Referring to the "Governor of the Universe" could appeal both to the deist, who believed that an impersonal God created the universe and then stepped aside, and to the evangelical, who believed that God directed the affairs of everyday life.

Madison appealed specifically to Christians. In one passage he warned all Christians, even those belonging to the current majority sects, that passage of the assessment bill could one day mean that their own sect would be persecuted:

> Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?[130]

He reminded Christians that the assessment bill would likely discourage the spread of Christianity:

> Instead of Levelling as far as possible every obstacle to the victorious progress of Truth [Christianity], the Bill with an ignoble and unchristian timidity would circumscribe it with a wall of defence against the encroachments of error.[131]

Perhaps resonating most with evangelicals was his argument "that ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation," producing "pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry, and persecution."[132]

129 Madison, *Memorial and Remonstrance*, *supra* n. 123, at ¶ 1. Noonan points out that Madison remained consistent in this belief that the right of conscience was not surrendered to the state, "It was his consistent, coherent, bold position. If Mr. Madison had been a lawyer, it would be questioned as a lawyer's too close reading of language." Noonan, *supra* n. 25, at 83.

130 Madison, *Memorial and Remonstrance*, *supra* n. 123, at ¶ 3.

131 *Id.* at ¶ 12 (adding that by discouraging nonbelievers from coming to Virginia, the tax would discourage them from seeing "the light of [revelation]") (brackets in original). Madison believed that the entanglement between religion and government would inhibit religion's growth. He explained this belief to Edward Everett: "[A] connexion between [government and religion] is injurious to both; that there are causes in the human breast, which ensure the perpetuity of religion without the aid of the law." He gave specific examples, including the thriving of the Episcopal Church in Virginia after it was no longer supported by the state, and concluded, "This proves rather more than, that the law is not necessary to the support of religion." Ltr. from James Madison to Edward Everett (Mar. 19, 1823), in *James Madison, Writings*, *supra* n. 6, at 796.

132 Madison, *Memorial and Remonstrance*, *supra* n. 123, at ¶ 7. Madison was thinking, among other things, of "[t]he decadent and truncated religion of the Anglican establishment, which suppressed lively, vital Christianity." Sheldon, *supra* n. 29, at 33.

With these concerns for the health of religion, Madison interwove concerns about the health of government and society. Most passionately, he warned that state interventions into religion had historically caused violence and suffering:

> Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all differences in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. . . . [If] we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly.[133]

He warned that the bill would undermine civic equality—the "equal title to the free exercise of Religion"[134] for non-Christians as well as Christians—and that by undermining America's promise of religious freedom, the bill would discourage immigration:

> Because the proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens.[135]

For the same reasons, it would trigger emigration.[136] Madison also suggested another civic danger: that laws "obnoxious to a great proportion of citizens, tend to enervate the laws in general."[137] And he threw in a procedural objection based on the lack of fair representation in the Assembly, a particular complaint of voters in the underrepresented western part of Virginia.[138] Until Virginia had a democratic representation system, the proposed assessment bill could not represent the will of the people that the legislature had claimed to seek.[139] At the end of the argument, he returned to the theme of tyranny, warning that the principle underlying the bill would authorize the legislature to "swallow up the Executive and Judiciary Powers of the State" and "sweep away all our fundamental rights."[140]

The sheer number of arguments also demonstrates Madison's habit of thoroughly preparing with rigor. Judge John T. Noonan Jr. groups the

133 *Id.* at ¶ 11.

134 *Id.* at ¶ 4.

135 *Id.* at ¶ 9.

136 *Id.* at ¶ 10.

137 *Id.* at ¶ 13.

138 Ragosta, *supra* n. 115, at 215.

139 Madison, *Memorial and Remonstrance*, *supra* n. 123, at ¶ 14.

140 *Id.* at ¶ 15.

arguments into theological (seven arguments), civic (ten arguments), and historical (two arguments)[141] and concludes that this topical arrangement "illustrates most graphically the nature and range of the considerations driving him."[142] Much of the "enduring appeal" of *Memorial and Remonstrance* comes because "it draws on such a broad range of disestablishmentarian thought."[143]

One might object to all these arguments on the ground that Madison was making a mountain out of a molehill: the assessment was small and, in a state where practically every citizen was Christian, highly ecumenical. Madison anticipated that objection early in the document, with one of the single best constructed arguments for constitutional vigilance in small matters:

> [I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.[144]

He concluded the paragraph with the famous image that "the same authority which can force a citizen to contribute three pence only" for an establishment "may force him to conform to any other establishment in all cases whatsoever."[145]

This paragraph is rigorous in anticipating and confronting a counter-argument. It is worth taking a moment, however, to note another aspect that could be called rigorous: its lean and powerful style. The sentence, "The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents" captures briskly what Eugene Volokh has labeled one of the "mechanisms of the slippery slope": a law that is enacted based on narrow justifications might later be seen "as endorsing a much broader principle" or power.[146] Madison's sentence describing government usurpation rushes by quickly,

141 Noonan, *supra* n. 25, at 72–74.

142 *Id.* at 72.

143 McConnell et al., *supra* n.121, at 53. Madison was also typically rigorous in thinking early about the issue, making notes in opposition to the bill as soon as it was introduced. Noonan, *supra* n. 25, at 61–64, 72.

144 Madison, *Memorial and Remonstrance*, *supra* n. 123, at ¶ 3; *see also id.* at ¶ 9 ("Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.").

145 *Id.* at ¶ 3.

146 Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026, 1089 (2003).

packed with meaning that one must study in order to comprehend. Its style therefore reinforces and dramatizes the warnings that he makes: that the assessment bill could rush through to enactment because it seemed innocuous and that it had to be scrutinized with suspicion for the precedent it would set. Like much great writing, the sentence has power because its form reinforces its substantive claims.

In passages like this, the *Memorial and Remonstrance* soars with eloquence.[147] As a general matter, Madison's detailed-oriented approach, its "studied distinctions and qualifications," did not lend itself to great phrasemaking like that of his friend Jefferson.[148] Sometimes, as in his first inaugural address as President, Madison was practically incomprehensible.[149] But he produced many elegant, eloquent phrases. For example, in just two paragraphs on separation of powers in *Federalist No. 51*, we find "Ambition must be made to counteract ambition," "If men were angels, no government would be necessary," and "th[e] policy of supplying by opposite and rival interests, the defect of better motives."[150] The *Memorial and Remonstrance* too is filled with memorable phrases—"It is proper to take alarm at the first experiment on our liberties," and "Torrents of blood have been spilt in the old world"—and is worth reading in full.

The *Memorial and Remonstrance* was only one petition against the assessment bill; the evangelicals who provided most of the opposition presented petitions with more signatures.[151] Much of Madison's distinctive contribution came in legislative maneuvering and organization. But the elegance and comprehensiveness of his document has given it lasting effect. Today's Supreme Court cites it again and again[152] not just because of Madison's status as the First Amendment's prime mover, but because of the power of his rigorous arguments.

147 Eloquence sometimes results from a rigorous approach to writing, but most importantly it is another valuable writing quality. The point of this article is that we can learn from Madison's rigor; but while we are studying him, we can also learn from those passages of his that are eloquent.

148 Rakove, *Revolutionaries*, *supra* n. 111, at 341 ("Jefferson . . . wrote more vividly, concisely, directly. Madison by contrast had a deserved reputation for prudence and thoughtfulness.").

149 *See* Wilentz, *supra* n. 17, at 139 (Madison "mumbled through an unremarkable inauguration address").

150 *Federalist*, No. 51 (James Madison) (reprinted in *James Madison, Writings*, *supra* n. 6, at 294, 295) (hereinafter *Federalist*, No. 51].

151 Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Leg. Iss. 313, 345 (1996) ("[T]he single most common petition, with more than twice as many signatures as the *Memorial and Remonstrance*, came from evangelical Christians of unidentified affiliation.").

152 The *Memorial and Remonstrance* has been cited in thirty-two Supreme Court cases on religious liberty from 1947 to the present, including the vast majority of the Court's Establishment Clause cases. It is reprinted in full as an appendix to the dissent in the first modern Establishment Clause case, *Everson v. Board of Education*, 330 U.S. 1, 63–72 (1947) (appendix to dissent of Rutledge, J.). It is quoted for authority and persuasiveness by majority opinions and dissents, and by proponents of both sides on current issues. *Compare e.g. Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 854–58 (1995) (Thomas, J., concurring) *with e.g. id.* at 868–74 (Souter, J., dissenting) (debating whether *Memorial and Remonstrance*'s principles would permit state university subsidies for student publications to extend to a student religious publication).

B. *Federalist No. 10*

Undoubtedly, Madison's most famous writing is No. 10 of *The Federalist*, which "has been called the 'most often anthologized, taught, studied, and remembered' of all American political writing."[153] It was the distillation of Madison's effort over several years to understand the weaknesses of American government and to design and enact a better alternative.

The immediate context for *The Federalist* was the ratification process after the Constitutional Convention, in which Madison had played a pervasive role. Proponents of the new Constitution and Union had to convince States that their best interest lay in surrendering some powers to a national government and sharing others. Several "states, or groups within states, saw no need, in terms of the matters then facing them, for a stronger central government."[154] Alexander Hamilton and John Jay approached Madison and asked him to help draft a series of essays to tout the Constitution's merit.[155] Most of the essays were published in great haste—so great, Madison recalled, that there was "seldom time for even a perusal of the pieces by any but the writer before they were wanted at the press, and sometimes hardly by the writer himself."[156]

Federalist No. 10's famous argument is that an extensive republic—like the new federal government—is the most effective form of government to provide for liberty and neutralize self-interest and oppression. Madison reversed "[t]he conventional assumption, most famously articulated by Montesquieu, . . . that republics worked best in small geographic areas, where elected representatives remained close to the interests of the citizens,"[157] who in turn acted with civic-mindedness because they identified closely with the polity. Madison's experience with chaotic and squabbling state governments in the 1780s convinced him this assumption was wrong. In *Federalist No. 10*, and a series of writings leading to it, he "reversed the conventional logic."[158] No advantage of the new union, the essay began, "deserves to be more accurately developed than its tendency to break and control the violence of faction": the instability, conflict, and oppression in popular governments.[159] He defined faction as "a number of

153 Michael I. Meyerson, *Liberty's Blueprint* 163 (Basic Bks. 2008) (quoting Albert Furtwangler, *The Authority of Publius: A Reading of the Federalist* 112 (Cornell U. Press 1984)).

154 Ketcham, *supra* n. 16, at 237.

155 *Id.* at 239.

156 Ltr. from James Madison to Thomas Jefferson (Aug. 10, 1788), in *The Writings of James Madison* vol. 5 (Gaillard Hunt ed., G.P. Putnam's Sons 1904) (available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1937&chapter=118843&layout=html&Itemid=27); *see also Detached Memorandum*, in *James Madison, Writings*, *supra* n. 6, at 769 (Madison recalls, "In the beginning it was the practice of the writers, of A.H. & J.M. particularly to communicate each to the other, their respective papers before they were sent to the press. This was rendered so inconvenient, by the shortness of the time allowed, that is was dispensed with.").

157 Ellis, *American Creation*, *supra* n. 26, at 105.

158 *Id.*

159 *Federalist*, No. 10 (James Madison) (reprinted in *James Madison, Writings*, *supra* n. 6, at 160) [hereinafter *Federalist*, No. 10].

citizens, whether amounting to majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[160] The first significant move was to define factions to include majorities—indeed, to identify majority oppression as the greatest danger under popular governments, since minorities seeking to oppress others would be quashed, in a democracy or republic, by majority rule.[161]

Madison then argued that faction would be better controlled in a republic (a representative system) than in a direct democracy, and in a large rather than a small republic. Representatives could "refine and enlarge" the views of the popular majority, and a large republic would be more conducive to electing worthy representatives.[162] But Madison quickly passed from the virtue of legislators to the "principa[l] [reason] which renders factious combinations less to be dreaded" in a large republic:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; . . . the more frequently will a majority be found of the same party; and . . . the more easily will concert and execute their plans of oppression. Extend the sphere, and 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 a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.[163]

A single religious sect, or a group advocating "paper money," "an abolition of debts," or "any other improper or wicked project"—Madison showed his economic and class perspective here—would be more likely to be checked when decisionmaking was at the national level.[164] "In the extent and structure of the union, therefore, we behold a republican remedy for the diseases most incident to republican government."[165]

Before identifying the power of rigor in *Federalist No. 10*, we should acknowledge that the essay's immediate effect was limited. *The Federalist*

160 *Id.* at 161.

161 "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." *Id.* at 163.

162 Madison argued that worthier candidates would be elected in a large republic because the representatives in such a republic would be more distant from factions and because the larger electorates in a large republic would be less subject to the "vicious arts" of unworthy candidates. *Id.* at 165.

163 *Id.* at 166.

164 *Id.* at 167.

165 *Id.*

as a whole had "little impact on the struggle for ratification."[166] Moreover, *No. 10*'s specific argument was not picked up, or perhaps even understood, by many others at the time.[167] Indeed, Madison's belief in the structural advantages of the federal over state governments led him to make proposals that were rejected. He strenuously advocated that the Senate should have the power to veto state laws "in all cases whatsoever."[168] When he introduced what became the Bill of Rights—restrictions on the federal government—he included a proposal to bar states from violating rights of conscience, the press, or jury trial. That proposal, he argued, would be "the most valuable amendment on the whole list."[169] Both efforts failed; Madison was far more nationalistic at the time than most citizens or political leaders.

But *Federalist No. 10* remains worth studying. Its features of rigor characterized Madison's entire project of drafting and defending the Constitution, and those features are worth emulating. He achieved a huge amount, even if it was not everything he wanted. Moreover, eventually Madison's insight about the dangers of local majorities became embodied in the Constitution through the Fourteenth Amendment, which restricted state action, and its incorporation of the Bill of Rights against state government.[170]

The first feature of rigor in *Federalist No. 10* is preparation: it reflects years of study and analysis, refined in stages. It was not written under the same severe time pressure as later contributions, but if it had been Madison would have been ready anyway. Many of earlier works illustrate Madison's preparation for the content of *Federalist No. 10*. After reading through the "literary cargo" from Jefferson in the winter of 1786, Madison drafted "Notes on Ancient and Modern Confederacies" and then a memorandum outline of "Vices of the Political Systems of the United States."[171] The "Vices" is "one of those rare documents in the history of political theory in which one can literally observe an original thinker forge his major discovery."[172] It catalogued the problems within and among the state governments under the Articles of Confederation—selfish parochial interests, disorganization, inadequate foreign relationships, and the internal oppression of minorities[173]—and led him to conclude the problems could be cured only by a central government that acted inde-

166 Rakove, *James Madison*, *supra* n. 66, at 87.

167 *See e.g.* Larry Kramer, *Madison's Audience*, 112 Harv. L. Rev. 611 (1999).

168 *See* Rakove, *James Madison*, *supra* n. 66, at 58–59 (describing this as "his most radical conclusion").

169 James Madison, Remarks in Congress (Aug. 17, 1789), in *James Madison, Writings*, *supra* n. 6, at 470.

170 Rakove, *James Madison*, *supra* n. 66, at 233.

171 Sheldon, *supra* n. 29, at 49.

172 Rakove, *James Madison*, *supra* n. 66, at 52.

173 *Id.* at 50.

pendent of the states. It also included, in effect, a draft version of Madison's argument for an extended republic, suggesting that "an enlargement of the sphere [might] lessen the insecurity of private rights" because "[t]he Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other."[174] By this time, April 1787, Madison had helped lead the charge for a convention to tackle the problems of the Articles, and he went to the Convention in May "intent on seizing the initiative from the opening moments."[175] He arrived in Philadelphia nine days before the scheduled opening, "the first on the scene from any state other than the host," to have still more time to prepare.[176]

What Madison did not do in "Vices," but did do in *Federalist No. 10*, was add another level of rigor: addressing and countering alternatives to an extensive republic that opponents of a new union would raise. He drafted *No. 10* in a tight structure, presenting, at each stage of his argument, a dichotomy of possible solutions. First, Madison stated that faction can be dealt with "either by removing its causes" or "by controlling its effects."[177] To achieve the first solution, removing faction's causes, "[t]here are again two methods: the one, by destroying the liberty" to disagree, and "the other, by giving to every citizen the same opinions, the same passions, and the same interests."[178] But the former is "worse than the disease," since liberty "is essential to political life," and "[t]he second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed."[179] Faction's causes cannot be removed; only its effects can be controlled. With this, Madison eliminated a slew of potential alternatives to a republican form of government. The essay continues to present dichotomies between a republican government and direct democracy, and between large and small republics.

This writing technique of creating and analyzing dichotomies, as Michael Meyerson has noted, "can be linked directly to a methodology for reasoning first introduced by Plato" in his dialogues *The Sophist* and *The Statesman*.[180] That technique has been described as "an elaborate tree-like

174 James Madison, *Vices of the Political System of the United States* (Apr. 17871), in *James Madison, Writings*, *supra* n. 6, at 78–79.

175 Rakove, *James Madison*, *supra* n. 66, at 49.

176 *Id.* at 62.

177 *Federalist*, No. 10, *supra* n. 159, at 161.

178 *Id.*

179 *Id.*

180 Meyerson, *supra* n. 153, at 166.

system of roads" where "at each fork [readers] must choose which branch to take."[181] Using this method, Madison anticipates and answers counter-arguments by presenting alternative possibilities to a large republic. He subtly yet forcefully guides his reader to his conclusion by presenting and answering alternative solutions.

Federalist No. 10 is also rigorous because it is practical: focused on the consequences of proposals and on how they will work in the real, rather than an ideal, world. Clashes of interests are inevitable, because "[t]he latent causes of faction are sown in the nature of man," in "the connection . . . between his reason and his self-love."[182] And "[i]t is in vain to say, that enlightened statesman will be able to adjust these clashing interests" for the public good. "Enlightened statesmen will not always be at the helm."[183] Madison, unlike many of his peers who were preoccupied with ideals about man's virtue, took an arguably realistic view of man's nature.[184] He looked to the structure and scope of the proposed republic to mitigate the negative effects on human nature. He did the same in *Federalist No. 51*, on the separation of powers, in which he argued that the natural human tendency to seek power meant that "[a]mbition must be made to counter ambition," and therefore the different branches must be not only separated but each armed with the power to "be a check on the other."[185]

The final section of *Federalist No. 10* focuses on how to control majority faction by controlling its effects. There, Madison conceives of two methods to achieve this end: first, to prevent a majority from ever having the same passion or interest; or, second, to disable a majority sharing a passion or interest "by their number and local situation."[186] Unlike the possible ways to suppress the causes of majority faction, Madison does not question the practicability or wisdom of these two ways to control the effects. Rather, accepting them, he demonstrates their legitimacy by showing how an extensive republic can achieve them, and he thereby legitimizes the extensive republic.

Before doing so, however, Madison shows how a pure democracy[187] cannot control the effects of majority faction: "A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the government itself; and there

181 *Id.* (quoting Mary Louise Gill, *Method and Metaphysics in Plato's "Sophist and Statesman,"* in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta, ed., Winter 2005)).

182 *Federalist*, No. 10, *supra* n. 159, at 161.

183 *Id.* at 163.

184 The well-known theologian Reinhold Niebuhr commended Madison: "[Madison] had no hope of resolving [social] conflicts by simple prudence. With the realists of every age he knew how intimately man's reason is related to his interests." Reinhold Niebuhr, *The Irony of American History* 98 (Scribner's 1952) (citing *Federalist*, No. 10, *supra* n. 159).

185 *Federalist*, No. 10, *supra* n. 159, at 290.

186 *Id.* at 164.

187 Madison wrote, "a pure democracy, by which I mean a society, consisting of a small number of citizens, who assemble and administer the government in person . . . ." *Id.*

is nothing to check the inducements to sacrifice the weaker party or obnoxious individual."[188] Within a pure democracy, which would necessarily be small, passions would spread like a fire and consume a majority. Under such circumstances, when "the impulse and the opportunity be suffered to coincide," Madison warns, "neither moral nor religious means can be relied upon as an adequate control."[189] With a propensity to be consumed by passion and no means to limit such a majority, Madison concludes that a pure democracy "can admit no cure for the mischiefs of faction."

To read Madison's attack on pure democracy in *No. 10* within the political context of the eighteenth century should give pause to the trained eye.[190] Most everyone in Madison's time was already fully aware of pure democracy's inherent faults and impracticability. Madison's strategy, Paul Peterson argues, was the fruit of thoughtful consideration about his audience: "The reason Madison discusses pure democracy is that ultimately his reader will see that the defects of pure democracy [which he would likely concede] are also the defects of a small republic."[191] Because Madison's readers had a strong rational and emotional attachment to small republics, they might not have been open to seeing their defects if he had not started with a pure democracy.[192] The conventional wisdom of the time, based on Montesquieu and Aristotle, held that a republic needed to be small to preserve the common good.[193] Antifederalists, opposed to ratification, argued that an extensive republic "[could not] be governed on democratic principles," but required despotism.[194] Madison knew that his audience needed to be eased into a discussion of the defects of what they held dear. He first juxtaposed pure democracy and representative government, and then showed that a small republic was subject to the same ills that everyone perceived in pure democracy.

Madison gives three asserted deficiencies of a small, versus a large, republic. Two of them involve the greater difficulty of finding enlightened representatives.[195] The third, the "principa[l]" difference, most directly connects a small republic to the accepted flaws of pure democracy, and Madison's phrasing bears repeating:

188 *Id.*

189 *Id.*

190 *See* Paul Peterson, *The Rhetorical Design and Theoretical Teaching of* Federalist *No. 10*, 17 Pol. Science Reviewer 193, 206 (1987).

191 *Id.* at 206.

192 *Id.* at 207.

193 *See id.* at 195.

194 *Id.* at 196 (quoting "Centinel," in *The Antifederalists* (Cecilia Kenyon ed., Bobbs-Merrill Co. 1966)).

195 *See Federalist*, No. 10, *supra* n. 159, at 164.

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the individuals composing a majority, and the smaller the compass within which they are placed, the more easily they will concert and execute their plans of oppression.[196]

With this marvelously, rigorously constructed sentence, Madison draws the chain of reasoning especially tightly: note how each step in the argument begins with a repetition of the conclusion of the previous step. Having maneuvered his readers methodically into this position, Madison then springs the trap on those readers who opposed democracy but favored a small republic: "Hence it clearly appears, that the same advantage, which a republic has over a democracy, . . . is enjoyed by a large over a small republic—is enjoyed by the union over the states composing it."[197]

Madison's method here was far more cunning and tactful in the light of his audience than was Hamilton making the same point in *No. 9*:

> The opponents of the plan proposed have, with great assiduity, cited and circulated the observations of Montesquieu on the necessity of a contracted territory for a republican government. But they seem not to have been appraised of the sentiments of that great man expressed in another part of his work, nor to have adverted to the consequences of the principle to which they subscribe with such ready acquiescence.[198]

Hamilton continues by observing that Montesquieu had republics in mind that were already far smaller than many in existence among the States: "Neither Virginia, Massachusetts, Pennsylvania, New York, [nor] North Carolina can by any means be compared with the models from which he reasoned and to which the terms of his description apply."[199] Although Hamilton's point was valid, and was not even addressed by Madison in *No. 10*, Hamilton's bluntness in a hostile environment may be part of why *No. 10* stands out as the principal federalist document arguing for an extended republic. Indeed, throughout the two essays Madison wrote more subtly than Hamilton: "Madison's [introduction] suggested a subject for exploration and discussion," drawing the reader in; "Hamilton's introduction stated a proposition to be proved."[200]

196 *Id.* at 166.

197 *Id.*

198 *Federalist*, No. 9 (Alexander Hamilton) (reprinted in *The Federalist Papers* 41 (Clinton Rossiter ed., Mentor 1961)).

199 *Id.*

200 Schaedler, *supra* n. 15, at 527.

And so Madison carried his reader to the conclusion—with several good lessons for persuasive writing. First, through a rigorous examination of different alternatives, he created the impression that he was covering every conceivable one. This is in part because he did cover many bases, and in part because he increased his credibility (*ethos*) by doing so. Because of this, even if there are still more directions in which the reader might go, the reader experiences the text as if there is not. Second, Madison carefully considered his audience's sensitivities in favor of small republics, the object of his attack. He eased and led readers into supporting his position, rather than lambasting them with a series of blunt assaults. Bernard Bailyn, acknowledging that Madison was not the only federalist arguing for an extended republic, reflected that "[t]he difference between Madison and the other federalist writers who tackled the problem of size lay not in the point of the arguments but in the style and quality of argumentation. No other writer had Madison's cogency, penetration, knowledge, and range."[201] This rigor could only be the fruit of forethought and enabled him to address well the needs of his audience.

C. Madison to Jefferson on the Bill of Rights

One of Madison's many letters to Thomas Jefferson is a third example of Madison's rigor. Their thirty-year collaboration—"the most successful political partnership in American history," Joseph Ellis calls it[202]—produced religious disestablishment in Virginia, mobilized opposition to the Alien and Sedition Acts of 1798, and led to Jefferson's election as President over John Adams in 1800 and ultimately the demise of the Federalist Party. By the early 1790s, Madison had turned fearful of federal power as it was being exercised by Alexander Hamilton and had joined Jefferson in political war against Hamilton's centralist program. Usually Jefferson was the general, and Madison the lieutenant who drafted documents or tried to outmaneuver the Federalists in the legislature.[203] But the letter comes from 1788, the earlier period of the Constitution's creation and ratification: "Madison's most singularly creative moment,"[204] when he was driving the nation's agenda and Jefferson was far away as ambassador in Paris. The subject was the Bill of Rights, enacted as the first ten amendments to the Constitution, for which Madison played as central a role as he had with the original document.

201 Bailyn, *supra* n. 82, at 368.

202 Ellis, *Founding Brothers*, *supra* n. 99, at 172.

203 *Id.* ("Jefferson was the grand strategist, Madison the agile tactician.").

204 *Id.*

Several of Madison's important letters to Jefferson over the years showed rigor in their attention to detail and their pragmatism. Although Madison often followed Jefferson's lead, he also frequently moderated Jefferson's extreme or impractical visions by subjecting them to lawyer-like analysis. For example, when Jefferson floated the idea that every constitution, law, and debt should expire after nineteen years—based on his famous dictum that "the earth belongs to the living and not to the dead"[205]—Madison rebuffed it, as politely as he could manage, "as not in *all* respects compatible with the course of human affairs."[206] He argued that, in both practice and theory, the "uncertainty" the measure would create would "subver[t] the foundations of civil society."[207] Madison's response exemplifies, as a recent dual biography of the two men remarks, how he "was predisposed to a structure that bent but did not break. No matter the issue, he always sought to uphold the usefulness of civil institutions."[208]

On a more pressing, practical issue, when Jefferson and Madison drafted protests by state legislatures against the Alien and Sedition Acts, Madison was careful to choose more-measured language than Jefferson to characterize a state's right to challenge unconstitutional federal laws. Precision in word choice is central to the effectiveness of rigorous writing. Careful phrasing anticipates the effect of words on the audience and bolsters one's argument by anticipating the practical effect of arguments in future cases.[209] Madison was careful in drafting his resolutions of protest. Jefferson's Kentucky Resolutions asserted the right of any single state to formally "nullify" such laws;[210] Madison's Virginia Resolutions invited other states to join as group to "interpose for arresting the progress of the evil."[211] Madison's terms were both "gentler" and "intentionally ambiguous"—to "interpose" meant "to mediate" a dispute, but it did not explain exactly how the states would intervene[212]—and this allowed him to challenge federal power without proposing, as Jefferson had, the chaotic course of allowing each state to refuse to follow federal law. Madison also was careful, unlike Jefferson, to include an argument that the antisedition law violated First Amendment freedoms of speech and press—thereby appealing to the supremacy of federal law rather than attacking it.[213]

205 Ltr. from Thomas Jefferson to James Madison (Sept. 6, 1789), in *Thomas Jefferson, Writings* 959, 963 (Merrill D. Peterson ed., Lib. Am. 1984).

206 Ltr. from James Madison to Thomas Jefferson (Feb. 4, 1790), in *James Madison, Writings*, *supra* n. 6, at 473, 474.

207 *Id.* at 476.

208 Burstein & Isenberg, *supra* n. 24, at 207.

209 *See supra* nn. 88–93, 110–12 and accompanying text.

210 Thomas Jefferson, *Draft of the Kentucky Resolutions* (before 4 Oct. 1798), in *Thomas Jefferson, Writings*, *supra* n. 205, at 450.

211 Va. Res. Against the Alien and Sedition Acts (Dec. 21, 1798), in *James Madison, Writings*, *supra* n. 6, at 589.

212 Burstein & Isenberg, *supra* n. 24, at 340.

213 *See* Ellis, *Founding Brothers*, *supra* n. 99, at 200.

Shortly thereafter, in a face-to-face meeting, he talked Jefferson out of circulating ideas about the right of states to secede from the Union—a step whose consequences Madison would always regard as too dire.[214]

Madison's letter on the Bill of Rights came ten years earlier, on October 17, 1788, when he wrote from New York to tell Jefferson about the newly ratified Constitution and the amendments being proposed to it. Madison's position on a Bill of Rights was evolving. Along with other defenders of the Constitution, he had at first claimed such provisions would be unnecessary and perhaps even counterproductive: "Can the general government exercise any power not delegated to it?" he had asked Virginia's ratifying convention. "If an enumeration be made of our rights, will it not be implied, that everything omitted, is given to the general government?"[215] Once some states had ratified the Constitution without a bill of rights, he adamantly opposed Virginia or other states making their ratification conditional on amendments, which would trigger a whole new process.[216]

After ratification, Madison began to consider the possibility of a Bill of Rights, partly because it would help reconcile some of the Constitution's opponents and skeptics to the new system, and partly because he began to see benefits in it. Eventually, with his typical industry, he would become the prime mover behind the Bill of Rights.[217] His October 1788 letter to Jefferson shows his thought in transition, as he listed systematically the considerations for and against amendments. "My own opinion has always been in favor of a bill of rights," he said, because "it might be of use" provided it were drafted carefully; but he had "never thought [its] omission a material defect, nor been anxious to supply it . . . for any other reason than that it is anxiously desired by others."[218] He set forth four reasons against amendments, three of which reiterated the earlier points that federal powers were already limited by enumeration and that the rights explicitly adopted would be too narrow.

His final negative argument, made in much more detail, was that bills of rights had proven ineffective when they were most needed: "Repeated violations of these parchment barriers have been committed by over-

214 *See* Burstein & Isenberg, supra n. 24, at 345; Rakove, *James Madison*, *supra* n. 66, at 153; Ellis, *Founding Brothers*, *supra* n. 99, at 200 & n. 65.

215 James Madison, Speech in the Virginia Ratifying Convention on Ratification and Amendments (June 24, 1788), in *James Madison, Writings*, *supra* n. 6, at 405.

216 *Id.*

217 Ellis, *Founding Brothers*, *supra* n. 99, at 53 (after leading the campaign for the Constitution, Madison, "to top it off, . . . drafted and ushered the Bill of Rights through the first Congress"); *see also* Paul Finkleman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 S. Ct. Rev. 301 (1990) (describing Madison's evolution and efforts).

218 Ltr. from James Madison to Thomas Jefferson (Oct. 17, 1788), in *James Madison, Writings*, *supra* n. 6, at 418, 420.

bearing majorities in every State."[219] For example, he said, the religious-assessment bill would have passed in Virginia, despite the state's Declaration of Rights, had the majority not been turned against it.[220] Madison was still driven by his flash of insight that the majority could be more dangerous than a "usurping" set of rulers:

> In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.[221]

Where the tyranny was the popular majority, rather than a few rulers, bills of rights would have limited value because "the tyrannical will . . . is not to be controuled by the dread of an appeal to any force within the community."[222] This was why Madison thought the greatest threat to rights came from states, where a faction could more easily make a majority, and why he sought the congressional veto over state laws.

Nevertheless, Madison listed two arguments for a bill of rights, beyond the fact that many honorable citizens wanted it. First, "political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government" and might begin to moderate the majority: "as they become incorporated with the national sentiment, [they may] counteract the impulses of interest and passion."[223] Second, although the danger of oppression usually flowed from "interested majorities," "there may be occasions" when it would flow from "usurping" rulers, and in such cases "a bill of rights will be a good ground for an appeal to the sense of the community."[224] This was Madison's sober, balanced case for a bill of rights.

Madison's concern about the ineffectiveness of "parchment barriers" had an obvious answer, which Jefferson pointed out when he replied in March 1789. "You omit one [argument in favor of a bill of rights] that has great weight with me; the legal check which it puts into the hand of the judiciary."[225] Majorities would not have their way as long as the Constitution was applied by judges insulated from electoral pressure. For some reason Madison had ignored the power of judicial review in limiting majorities, perhaps because he had focused so on his idea of a congres-

219 *Id.* at 420.

220 *Id.*

221 *Id.* at 421 (emphasis in original).

222 *Id.*

223 *Id.* at 422.

224 *Id.*

225 Ltr. from Thomas Jefferson to James Madison (Mar. 15, 1789), in *Thomas Jefferson, Writings*, *supra* n. 205, at 943.

sional veto over state laws. But Madison accepted the point, and when he introduced the bill of rights in Congress in June 1789, he argued that it would have "a salutary effect" because "independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights," resisting "every assumption of power in the legislative or executive."[226]

The letter to Jefferson is therefore only a way station toward Madison's final position on the Bill of Rights. When he introduced the proposals in June, he showed his typical rigor—in the sense of thoroughness—by making a speech accumulating multiple arguments, including the fact that the judiciary would enforce the provisions and that many respectable citizens wanted them.[227] The letter to Jefferson is also important, however, for a more general reason related to rigor in thought. It expresses Madison's pragmatism: his lawyer-like commitment to assess particular circumstances, to recognize that evils may come from different sources and that the right response depends on judging where the greater threat lies at a given time. He suggested that his own focus on majority tyranny came from seeing the problems of popular government in America, while Jefferson's fear of usurping rulers came from living in monarchical France:

> Wherever the real power in a Government lies, there is the danger of oppression. [The danger of majority tyranny] is probably more strongly impressed on my mind by facts, and reflections suggested by them, than on yours which has contemplated abuses of power issuing from a very different quarter.[228]

Later in the letter, Madison worried that the danger in the America of the 1780s was not too much government, but too little:

> Power when it has attained a certain degree of energy and independence goes on generally to further degrees. But when below that degree, the direct tendency is further degrees of relaxation, until the abuses of liberty beget a sudden transition to an undue degree of power. . . . [I]n the latter sense only is [the danger of government power] in my opinion applicable to the Governments in America. It is a melancholy reflection that liberty should be equally exposed to danger whether the Government have too much or too little power, and that the line which

226 James Madison, *Speech in Congress Proposing Constitutional Amendments* (June 8, 1789), in *James Madison, Writings*, *supra* n. 6, at 437, 449.

227 *Id.*

228 *Id.* at 421.

> divides these extremes should be so inaccurately defined by experience.[229]

The sense of precarious balance between liberty and order echoes his statement in *Federalist No. 51* that "the great difficulty in government lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself."[230] Striking the balance, he suggests, involves good judgment and strenuous—rigorous—attention to detail and circumstances.

Madison shifted his judgments throughout his life. He later joined Jefferson in believing passionately that the greatest threats in America came from ruling cabals (led by Hamilton) rather than the people, and from the federal government rather than the states. Some observers, then, and in the years since, have found his positions irreconcilable under any principle—a product, perhaps, of his desire to protect Virginia's interests, particularly its ability to continue slavery, from whatever threatened them at the moment. But in his old age, Madison wrote several letters against Southern doctrines of secession, nullification, and disregard of federal-court decisions: he defended the Union while still emphasizing that federal power was limited.[231]

In any event, whether Madison's judgments were wrong or excessive at various times, his writing points to one of the public servant's crucial tasks: to consider competing principles and judge which is more applicable, or consider competing evils and judge which is more pressing, in a given situation. To carry out that task effectively, the public servant must employ rigor. Anthony Kronman has written of the ideal "lawyer–statesman" who combines public-spiritedness with the common-law skill of "practical wisdom": a "subtle and discriminating sense of how the (often conflicting) generalities of legal doctrine should be applied in particular disputes."[232] The "subtle and discriminating" approach to disputes is essentially the same as the "studied distinctions and qualifications"[233] that Madison the founding statesman made. He drew subtle distinctions not for their own sakes, but in order to manage the difficult choices between liberty and order, between central and local power,

229 *Id.* at 422.

230 *Federalist*, No. 51, *supra* n. 150, at 294, 295.

231 *See e.g.* Ltr. from James Madison to Edward Everett (Aug. 28, 1830), in *James Madison, Writings*, *supra* n. 6, at 842, 847 ("[I]t is perfectly consistent with the concession of this power to the Supreme Court . . . to maintain that the power has not always been rightly exercised."); *id.* at 850 (nullification); Ltr. from James Madison to Nicolas P. Trist, *id.* at 861; Ltr. from James Madison to William Cabell Rives, *id.* at 863.

232 Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 21 (Harv. U. Press 1995).

233 Rakove, *Revolutionaries*, *supra* n. 111, at 341.

between popular government and minority rights. Lawyers, too, in the more typical tasks of representing or advising clients, must judge which course of action follows the principles that are most applicable and avoids the harms that are most dangerous or immediate. Making those fine judgments calls for rigorous, precise distinctions, in thought and in writing. Lawyers can therefore benefit from absorbing the best writings, and emulating the habits, of the founder who paid lawyerly attention to detail precisely because he recognized the challenge of making legal and political decisions in a complex world.

Conclusion: Follow Madison's Lead and Be Rigorous

Madison's life should be a source of encouragement to lawyers who think they lack physical presence or personal charisma. "The great little Madison" overcame those limitations to become one of the most influential public figures in American history. He did so, like all successful professionals, by relying on and cultivating his distinctive strengths. He had an analytical mind that he cultivated to see and clearly express arguments, counterarguments, and distinctions. He had, despite poor health, an appetite for work that he cultivated in order to out-prepare others. And he had a sensitivity to surrounding circumstances that he cultivated to address his audience's concerns and to envision the practical consequences of various actions. The key habits of Madison that lawyers should emulate—attention to audience, careful preparation, and attention to consequences—are difficult to summarize in one concept, but we believe that "rigor" best fits the bill. Rigor in this sense can make a lawyer forceful who lacks other qualities. Madison, unprepossessing and soft-speaking, was still eloquent. Remember the verdict of Chief Justice Marshall: "If [eloquence] includes persuasion by convincing, Mr. Madison was the most eloquent man I ever heard."[234]

234 Schaedler, *supra* n. 15, at 524 (quoting Rives, *History of the Life and Times of James Madison*, II, 612*n*).