The Long Founding Moment: Constitutional Duration and Transformation in the Early-Nineteenth-Century U.S.

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Introduction: The River of Letters.

In the late summer of 1826, seventy-five-year-old James Madison was enjoying an industrious retirement at his Virginia plantation, Montpelier, some twenty-five miles northeast of Charlottesville. A steady flow of visitors journeyed to the estate in the hope of an audience with the former president and his equally famous wife, Dolley. The Madisons entertained their friends and acquaintances with barbecues (“then at the height of their popularity,” Dolley Madison’s niece Mary Cutts later recalled), brimming punch bowls, and viewings of the “busts and prints,” which one guest from London noted “gave an English air to the dwelling, otherwise wholly Virginian.”

The household was run with “great regularity,” observed Harvard literature professor George Ticknor, who visited with his wife and their friend, the Massachusetts congressman and famed orator Daniel Webster. “We breakfasted at nine, dined about four, drank tea at seven, and went to bed at ten.” The four o’clock meal was taken in the sunflower-yellow dining room, Mrs. Madison having been greatly influenced by the vivid hues recently unearthed from the ruins of Pompeii. After dinner, Mr. Madison and the male guests typically passed “about an hour, after the cloth is removed, with a variety of wines of no mean quality.” The well and regularly fed guests could also look forward to their hostess sending to their rooms “a nice supper every night and a nice luncheon every forenoon.” From ten in the morning until three, visitors “rode, walked, or remained in our rooms, Mr. Madison and Mrs. Madison being then occupied.”

As was customary for many southern plantation houses of the period, successive generations had added new sections to the original core as the occupants’ funds and standing increased. Madison had expanded the house by adding northern and southern wings to the structure that his grandfather, Ambrose Madison, completed around 1764. In the final form of the house as James Madison knew it, the elder and younger generations’ wings of the first floor were connected by the public spaces: the entry, the art-lined drawing room with its formal woodwork, and a pair of passageways. The breakfasting, dining, and tea-taking took place in the dining room, which lay on James and Dolley’s side of the house, opposite the chambers belonging to James’s ninety-five-year-old mother, Nelly Conway Madison, who occupied the southern wing. Behind the dining room, accessed through a communicating door, was Madison’s study. Toward the end of his life, as he became increasingly frail, the study became his bedroom as well.

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1 Martineau, “Retrospect of Western Travel” (1838); Cutts, Memoir.
2 Ticknor, Life, Letters, and Journals of George Ticknor, 347.
The topics of discussion at Montpelier spanned the spacious horizons of Madison’s interests. Around the punch bowls and amid the busts and prints, conversation ranged from the work of the cleric and demographer Thomas Robert Malthus (Madison noted that Benjamin Franklin had anticipated the grim Malthusian connection between population growth and food supplies); to the healthy state of American religion in the absence of an established church; to the colonization movement’s calls for sending African Americans to Liberia.

Many guests to the “farm,” as the Madisons called their demesne, also remarked on the presence of slaves. “During all our conversations, one or another slave was perpetually coming to Mrs. Madison for the great bunch of keys,” the English social theorist Harriet Martineau noted after her 1835 visit. “[A]nd the attendance of others was no less indefatigable in my own apartment.”

In addition to drawing visitors, the Madisons’ country seat, five miles from Orange Court House and about 110 southwest of the contemporary boundaries of Washington City, also attracted letters. In modern political debates, Americans often ask, “What would Madison do?” In early-nineteenth-century America, the query was, “What does Madison think?” In 1826 one could still ask him directly, and many did. From the moment he left the presidency in March 1817 until his death in June 1836, Madison was besieged by letters—from protégés, members of Congress, traveling Europeans, Washington salonnières, astronomers, and vice presidents. He appeared not to mind, indeed to welcome, these epistolary knocks on the study door. And he wrote back.

As the last surviving member of the Philadelphia Convention and the author of the Constitution, Madison was sought for his views on the document’s meaning, its drafters’ intentions, and the details of the secret convention debates. His correspondents were interested in how these historical facts or theoretical positions might be applied to the dizzying changes that convulsed the nation. For America in 1826 was poised between potential versions of itself. On one side lay the exuberant optimism of a young commercial union flush with land and abuzz with trade, communication, and politicking. On the other side loomed division—between regions, economies, and views of the nation’s future—and existential crisis.

Even in retirement, Madison was very much at the center of this upheaval. A few weeks earlier, the deaths of John Adams and Thomas Jefferson on July 4—the fiftieth anniversary of the Declaration of Independence—had marked a mythic double ending to the founding epoch. Madison had assumed Jefferson’s former position as rector of the University of Virginia. In Washington, D.C., another Adams, John Quincy, served as president, with the mercurial John C. Calhoun as his vice president. In Madison’s study, the letters continued to pile up, their petitions for guidance growing in urgency. One letter in particular presented a problem that would bedevil Madison for the remaining years of his life, and his country for decades after that.

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3 Martineau, “Retrospect.”
That September, Madison docketed a letter that Martin Van Buren had written to him on August 30, 1826. Madison did not reply immediately.

Van Buren was the senior senator from New York and the leader of the Albany Regency, a group of politicians who controlled New York politics and formed an influential bloc within the fragmented Democratic-Republican Party. The two men had corresponded a few months earlier—Van Buren had petitioned Madison for his views on the president’s constitutional authority in matters of foreign policy, on the expansion of the federal courts to the western territories, and other subjects—but now the ambitious senator was playing for higher stakes. Politely but unmistakably, he asked the former president to draft a constitutional amendment concerning federal funding for public works projects within the states—“internal improvements,” in the argot of the day. “If agreeable it would please me to have an amendment worded by yourself,” Van Buren wrote, “but it does not become me to be more particular.”

The particulars Van Buren sought did not, indeed, require further elaboration. Van Buren—who, in addition to leading the Albany Regency, was increasingly allied with Andrew Jackson’s brewing campaign for the presidency—was asking Madison to help the opponents of federally funded internal improvements block congressional action in that domain. The amendment Van Buren was fishing for would prohibit Congress from launching the enormous projects then under consideration: an expanded survey of potential commercial and military routes by the Army Corps of Engineers; the dredging of the Ohio and Mississippi rivers to remove sandbars and snags; and the construction of new roads within states to carry goods, passengers, and mail.

Again and again, Van Buren’s letter sounded the theme of emergency. Only an urgent and dire situation would have moved him to make such a request of the elderly Madison, given “the unreasonableness of taxing you in this way at this time of day.” But only a constitutional amendment could stop Congress from a disastrous expansion of legislative power. “There is not in my opinion,” Van Buren wrote, “any other matter so threatening to the confederacy as the pretensions of the Federal Government upon this subject, its past & probably future acts, & the collisions with State authorities which must unavoidably grow out of them.”

Van Buren portrayed the authority to fund and construct roads, canals, and turnpikes as a “most powerful, indeed irresistible [sic] engine.” By funding and building canal ditches and macadamized roads, Congress would draw the residents of the country’s riverine interior into ever-closer connection with the center of the growing national machine. The westerners would be satisfied because they could move their produce to eastern markets, purchase consumer goods, write and receive letters, read newspapers, and become more prosperous. They would also, Van Buren believed, become increasingly reliant on, and attached to, other regions of the Union. Indeed, as

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4 Van Buren to Madison, August 30, 1826.
they traded and corresponded, these residents of the interior would change the nature of the Union itself. They would expand it, they would commercialize it, and – as they settled territories that then joined the Union as states – send representatives back to the center to continue the transformation from within.

Yet even as the political benisons of union were channeled westward to win those westerners’ allegiance, Van Buren argued, the interests of the older, eastern regions were being systematically ignored. The fundamental values of the Union (or perhaps just those of the Democratic Party) were in danger of dilution as the president and Congress focused on the interior. Paradoxically, this transfer of resources and attention from center to periphery – from Washington to the Ohio River Valley – endangered the Union because it strengthened the federal government. The drive for internal improvements was nothing less than a partisan effort “to acquire the favour & secure the allegiance of portions of the union at the expense of those who having made the constitution know what it cost & what it is worth.” This, at least, was Van Buren’s argument to Madison.

A baleful imagery of industrialization pervaded Van Buren’s letter: federal power was an engine, wildly firing its pistons to the benefit of giddy western parvenus, while the diligent directors back east reaped little reward. Internal improvements were a tool of a party that sought to cement control over the federal government by doling out federal monies to the Union’s newest states. Meanwhile, the founding members – “those who having made the constitution know what it cost & what it is worth” – were left to wonder whether the government would protect their interests.

When he spoke of easterners, on the other hand, Van Buren employed the language of commerce: the older regions would bear the “expense” of improvement projects. The Northeast already had roads; the Erie Canal, completed in 1825, was a state project driven by Van Buren’s powerful rival, New York governor DeWitt Clinton; northern industry needed protection in the form of tariffs. The South, meanwhile, had fewer good roads and canals, but southerners nonetheless increasingly feared that the engine of federal power would bring with it the unwelcome cargo of additional slavery regulation. Southerners and westerners celebrated commerce but embraced a different vision of it from that of their northeastern contemporaries.

For Van Buren, internal improvements were the battleground for conflicts between East and West, North and South, old and new regions, the cost of union and the expense of expansion, and the practical scope of federal power over the channels and instrumentalities of commerce among the states. The debate over internal improvements therefore raised important, unsettled, and potentially destabilizing constitutional issues. But Van Buren was also a well-oiled politician who had earned the sobriquet “the Little Magician” for his success in establishing New York’s first a statewide political machine. He was eminently capable of finding opportunities for political advantage amid constitutional controversy. In writing to Madison, Van Buren was calling upon the formidable persuasive powers of the leading surviving founder both to solve a problem of federalism and to claim that founder’s imprimatur for the rapidly coalescing Jacksonian
Democratic Party. And so Van Buren availed himself of the nation’s expanding system of postal delivery to send his request to Madison.

Why Fear Internal Improvements?

In August 1826, as Van Buren tossed his letter into the stream flowing to Montpelier, Americans were consumed by the promise of commerce and the puzzle of concurrent power. Internal improvements were the physical, practical manifestations of these powerful constitutional forces. For decades, Americans had debated whether Congress possessed the power to encourage large-scale public works projects in the states. The case for such improvements emphasized their benefits to trade, development, and settlement in the interior of the country. And when early-nineteenth-century Americans thought of the interior, their minds turned to the Ohio Country, a region whose transformation from a remote edge of the British Empire to frontier of the new republic, and thence to statehood, mirrored that of the nation.

Portions of the territory around the Ohio River had been claimed as early as 1747 by the Ohio Company of Virginia, a Crown-chartered group of Virginia investors that included one Lee and two Washingtons. Other lands in the Ohio Country were held by Connecticut as part of its Western Reserve. In 1754, at the beginning of the conflict that became the global Seven Years’ War, the Ohio Company Washingtons’ younger half-brother George was sent by the lieutenant governor of Virginia on an ultimately successful mission to secure the Ohio Country for Britain, against the rival French. After the Treaty of Paris established Britain as the dominant imperial power in North America, the Ohio Company – now London-based and reorganized as the Grand Ohio Company, and counting among its members Benjamin Franklin – sought additional land grants from the Crown.

But the end of the war between empires was also the beginning of the political, legal, and economic conflict that ultimately erupted into a war within the British Empire itself. To pay for having defended the colonies in the Seven Years’ War, British officials demanded increasing revenue from them, which meant more stringent taxation and regulation. Many colonists, citing their rights as Englishmen and the authority of their local assemblies, resisted what they regarded as a heavier imperial yoke.

Yet again, the Ohio Country, with its waterways, rich land, and competing British North American and Indian territorial claims, lay at the center of the struggle. Another Treaty of Paris, this one signed in 1783, required Britain to cede the region north of the Ohio River. (His Majesty’s troops nevertheless lingered in the vicinity for another three decades, a trespass that fueled the War of 1812.) In Boston, an enterprising group of investors and ex-Continental Army officers met at the Bunch of Grapes Tavern in 1786 to form the Ohio Company of Associates, the first American entity to assert control over the Ohio Country. That loose imperial label, “Ohio Country,” gave way the following year to a formal congressional designation: the Territory North-West of the River Ohio – or Northwest Territory for short. The new Ohio Company quickly negotiated with the equally new but cash-poor Congress of the United States Confederation to buy 750,000
acres of Ohio land. In 1788, the Company sent settlers to establish the town of Marietta, in the county of Washington, at the junction of the Muskingum and Ohio rivers. It was the first permanent American settlement in the Territory.

The Ohio Territory was the battleground of empire and republic, the locus of settlement and commerce, and a typically nineteenth-century joint venture between public and private entities. Its legal and political status was anomalous. As a territory, it was a proto-state; Congress’s Northwest Ordinance of 1787 specified that it was never to be treated as a colony. Between 1787 and 1803, the Ohio Territory was the creature of, and entirely subject to, congressional control. The Constitution set forth in general terms the process for the transition from federal territory to state, and Congress supplied details in the Northwest Ordinance. In 1803, the State of Ohio was legislated into existence, assuming the special and quasi-sovereign status accorded to the Several States by the Constitution. A tract of land that had been federal, and before that the dominion of another state, became a state in its own right.

The new state and its boosters in Congress successfully argued for Ohio’s physical and commercial importance to the Union. In 1806, spades were raised on a great national road connecting the new state with the East Coast. Running from Cumberland, Maryland, through Ohio and Indiana to its western terminus at Vandalia, Illinois, the “Cumberland Road” was the product of state sovereignty as well as the drive to build interstate vectors. In 1808, Treasury Secretary Albert Gallatin issued a report calling for a federal program of internal improvements. Supporters such as John C. Calhoun (not yet a nullifier), Henry Clay, and other nationalist-minded Republicans pressed for federal funding, and in some cases actual federal construction, of roads and canals.

Many critics, however, while acknowledging the potential value of internal improvements, argued that they should be carried out by the states, not by Congress. Others feared that permitting federal power to enter the internal affairs of the states would lay down a pathway for future incursions and centralization, eroding local autonomy and endangering regional institutions such as slavery.

For one prominent critic, the perils of internal improvements were not only practical but constitutional. On March 3, 1817 – the last day of his presidency – James Madison vetoed a bill that would have funneled a $1.5 million federal revenue “bonus” into a new fund “for constructing roads and canals, and improving the navigation of watercourses.” The problem with the bill, as Madison saw it, was simple but fatal: the Constitution did not grant Congress the power to construct roads and canals or to improve watercourses. The father of the Constitution based his veto on “the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States.” A few weeks later, he boarded a Potomac River steamboat to begin his journey back to Montpelier.

Madison’s veto of the Bonus Bill confounded many observers. From the moment the first drafts leaked out of the Constitutional Convention until his death forty-nine years later, he was characterized – sometimes with approval, sometimes with suspicion – as a
nationalist at heart. But that same Madison was also the author of the Virginia Resolution of 1798, which argued that the states possessed the power to interpret the Constitution, even against the interpretations of Congress. For decades, scholars have dueled over the “James Madison problem” – did Madison take different and conflicting views of the scope of national power over the course of his life, or is there some central, consistent principle underlying his writings? But if in fact he held contradictory positions, it was not just a James Madison problem but an affliction he shared with many of his fellow citizens.

The debate over internal improvements continued to boil, in Washington and throughout the country, as territory and markets expanded westward. Madison’s successors as president for the most part echoed his conviction that internal improvements, though desirable, were not within the scope of the federal government’s power. In 1822, President James Monroe reversed his initial enthusiasm for internal improvements when he vetoed a bill to repair the Cumberland Road. To support his veto, Monroe drafted an essay that became a widely circulated sixty-page pamphlet. In Views of the President of the United States, on the Subject of Internal Improvements, he explained that he had rejected the Cumberland Road bill because he believed that it exceeded Congress’s authority. “A power to establish turnpikes with gates and tolls,” he argued, “and to enforce the collection of tolls by penalties, implies a power to adopt and execute a complete system of internal improvement.”

But Monroe’s veto was not the last word on the Cumberland Road. In the House of Representatives, a committee led by Henry St. George Tucker, scion of the venerable Virginia family of jurists, produced a widely published report that rejected the president’s constitutional analysis. The Tucker Report insisted that the Constitution gave Congress the power to fund and direct internal improvements programs with the consent of the affected states. “[T]he Constitution confers only a right of way,” the report noted. But given that “the rights of soil and jurisdiction remain exclusively with the States respectively, . . . there seems no sound objection to the improvement of roads with their assent.” The Constitution’s conferral to the federal government of a right of way meant that Congress could, at a minimum, appropriate funds for internal improvements. But the report took an even bolder position: Congress’s power, it maintained, extended beyond appropriation to construction. In other words, Tucker and his colleagues believed that Congress could do more than simply hand money to the states to build roads. It could also reach into the physical space of the states to build the roads, levy tolls, and post toll collectors – perhaps even over a state’s objections. The Constitution conferred a right of way, and Congress had the authority to cut canals and lay roads across that right of way in order to enable interstate commerce. Federal funds, federal builders, and federal toll collectors would follow.

At the heart of both Monroe’s change of mind and the Tucker Committee’s report lay an insoluble problem that the Constitution had created: the problem of concurrent power. The authority to build roads and canals was a power that both the states and the federal government possessed. States clearly had the authority to engage in public works projects, and the federal government had on occasion exercised such power as well –
most famously, in the case of the Cumberland Road. Yet the edges of this concurrent power were hazy. To say that internal improvements fell within the theoretical domain of both the states and Congress gave little guidance as to where any particular road or canal should be situated on the spectrum from local to central power.

Given these facts, was it sensible to view Ohio as a local and unitary entity, with its own local and unitary interests, separate from the interests of the Union? From its earliest moments, the Ohio Territory was integrally connected with the commerce of other colonies, and later with that of other states. In the early nineteenth century, however, “commerce” was coming to be viewed as a distinct category of human interaction and a regulatory terrain whose governance depended on whether it was contained within a single state or extended among multiple states. Commerce was at once a material fact and an abstraction. It was a concept that contemporaries created, and in turn it became the lens through which they understood law and politics. The fight over internal improvements, therefore, was really a fight about commerce and concurrent power. It was also a fight to control the legacy of the American founding.

Monroe’s pamphlet was never the most authoritative presidential word on the subject of internal improvements. That word had come from none other than Madison himself. In the 1820s and 1830s, commentators continued to parse and construe Madison’s Bonus Bill Veto to extract his guidance on the question. Martin Van Buren spoke for many of his fellow citizens when he asked for advice from Montpelier.

The generation that followed Madison was left to struggle with the founders’ ambivalence toward establishing a strong national government. The more they consulted the Constitution, the less clear the answers became. Yes, the text gave Congress the authority to regulate commerce among the states. But the power to build the roads and canals that would physically carry those goods was shared with the states – which were increasing in number, adding to many contemporaries’ sense that the union was subject to ineluctable centrifugal forces. Commerce seemed to bespeak a national economy, but control over the channels and instrumentalities of that economy had been distributed among the various sovereigns operating within the federal republic. And the source of this conflict was nothing less than the Constitution itself.

More concrete sources of dispute also fueled the conflict over internal improvements. The constitutional debates surrounding Ohio’s admission to the Union in 1803 were accompanied by controversy over the precise route that the promised road connecting Ohio to the Eastern Seaboard would take. The route that became the Cumberland Road resulted from a Senate committee’s choice of a middle route through Maryland, over rival plans advocating a northerly path through Pennsylvania or a southerly one through Virginia. Even after Monroe’s veto of the Cumberland Road bill, proposals circulated to extend the road westward to St. Louis, while others debated the feasibility of a southern national road terminating at New Orleans. As turnpikes gave way to canals, cities such as Baltimore and Philadelphia vied for the advantages associated with waterways like the Chesapeake & Delaware Canal, but they also feared being saddled with a disproportionate share of the costs, especially when faced with more
obvious and pressing local needs. Easterners complained that they were unfairly
burdened with the cost of western improvements, while westerners argued that they
derived few benefits from coastal public works projects such as harbors and lighthouses.

*The Law and Politics of Commerce.*

The conflict over internal improvements presaged the bursting forth of a political
realignment. Outside Nashville, at the Hermitage, Andrew Jackson was assembling a
group of close advisors who he hoped would help him win the presidency in 1828. The
election of 1824 had ended with no candidate having won a majority of electoral votes,
although Jackson had won the most popular votes. Following the never-before-used
procedures set forth in the Twelfth Amendment, the election was decided by the House of
Representatives. The House elected John Quincy Adams in what Jackson’s supporters
termed a “corrupt bargain” between Quincy Adams and Henry Clay, who became
secretary of state. Jackson resigned from the Senate in 1825 and returned to his
plantation to plot his next campaign. While Quincy Adams governed in Washington,
Jackson was an alternative center of gravity in the Old Southwest, gathering his forces
and winning new allies.

The ugly election continued to reverberate throughout Quincy Adams’s
presidency. Jackson’s supporters deployed the full force of his celebrity as the victorious
general of the Battle of New Orleans, commemorated in the popular tune “The Hunters of
Kentucky.” The song’s alternative title, “Half Horse and Half Alligator,” helped to create
the icon of “old Hickory Jackson,” even as the miasmic lyrics inflamed partisan, state,
and national fevers:

> But Jackson he was wide awake,
> And was not scar’d at trifles,
> For well he knew what aim we take,
> With our Kentucky rifles:
> So he led us down by Cypress swamp,
> The ground was low and mucky;
> There stood John Bull in martial pomp,
> And here was old Kentucky.

The Supreme Court, meanwhile, was becoming increasingly focused on questions
of commerce. In a series of important and controversial cases, the Court under Chief
Justice John Marshall announced a broad vision of the federal government’s power to
regulate interstate commerce. These decisions put the full force of the Constitution
behind a commercial union. Even if the scope of Congress’s authority to build internal
improvements was subject to debate, the Court’s message was clear: the commerce
power was one of the few specific powers that the Constitution placed in Congress’s
hands. By the founders’ design, commerce among the states was a national issue.

Commerce included intermediaries such as banks in addition to actual trade
across state lines. In 1819, the Court held in *McCulloch v. Maryland* that Congress had
the power to establish the Second Bank of the United States, and that Maryland’s attempt to tax the Bank out of existence was unconstitutional. The authority to create the Bank, Marshall wrote, emanated from a set of enumerated congressional powers that included the powers “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.” Moreover, Marshall held, the establishment of the Bank by Congress was an act of the entire Union that could not be thwarted by the will of a single state, even if the states did share with the federal government the power to levy taxes. The commerce power was clearly at stake in McCulloch – after all, the Bank’s raison d’être was to regulate the flow of currency and stabilize the nation’s economy. Yet the Court’s decision turned on a holistic reading of Article I of the Constitution, which set forth Congress’s powers, rather than on a specific definition of “commerce.”

That definition came five years later, in Gibbons v. Ogden, a dispute between rival steamboat companies plying the waters of New York Harbor. Again Marshall wrote for a unanimous Court; again he took an expansive view of federal power to regulate – and, implicitly, to encourage – commerce that moved between states. In his decision in Gibbons, Marshall rejected the argument that Aaron Ogden’s charter from the New York legislature amounted to a monopoly that blocked Thomas Gibbons’s competing company from running its boats between Manhattan and Elizabethtown, New Jersey. Commerce, Marshall wrote, could not be reduced to “traffic, to buying and selling, or the interchange of commodities.” On the contrary: “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse,” and therefore it “comprehends navigation” – that is, the operation of vessels between ports (here, in different states).

The Court’s decisions demonstrate how important the definition of commerce was becoming to Americans. Observers throughout the nation endorsed commerce and proudly argued that their own occupation – whether millworker, mine owner, or plantation proprietor – contributed to its forward march. “Commerce” was a term of constitutional art, yet it was also a potent talisman, a kind of article of faith, that captured people’s hopes and fears about their own and their nation’s destiny in a time of dramatic political, economic, and technological changes. Early-nineteenth-century Americans confronted challenges their forbears had not contemplated: the growth of industrial capitalism; a series of recessions, which they called “panics”; westward expansion; claims for political equality by women and African Americans; and the mounting sectional dispute over slavery. Beyond American shores, the French Revolution and the Haitian Revolution gave urgency to radical claims of equality that had been present, but muted, at the American Revolution. New technologies such as the cotton gin and the railroad swelled production and transportation capacities. New economic and financial institutions such as the Bank of the United States, the growth of credit, and the expansion of trade further enmeshed the United States in global commercial networks. New territories joined the old colonies to stretch the nation’s physical space, beginning with the Louisiana Purchase of 1803, which doubled the territory of the United States. New political parties shouted in pamphlets and dominated the hustings, dismaying some observers and causing others to call for the franchise to be thrown open.
Language reflected these changes. The founders had often used metaphors from Newtonian physics. The “centrifugal tendency” of the states; the “orbit within which such systems . . . revolve”; the “infinite divisibility of a finite thing, extending even to the minutest atom” – these scientific locutions illustrate the late-eighteenth-century sense that a good constitution should replicate the natural order.

By 1826, however, Madison’s successors had a less astronomical, more terrestrial and industrial worldview. If the founders strove to be cosmologists, their nineteenth-century heirs aimed to be engineers, mastering the industrial arts and channeling the forces of nature. Waterways became canals; dirt and rock became turnpikes; prairie became plat and township; streams drove mills and factories. Science, Justice Joseph Story told an audience gathered in Harvard’s Holden Chapel in 1830, “has escaped from the closet, and become an habitual accompaniment of every department of life. . . . It seems a very spirit of all work, assuming all shapes, and figuring out all sorts of wonders, in that epitome of a world, a factory.”

Montpelier Responds.

Madison wrote back to Van Buren on September 20th. He noted in his first paragraph that Van Buren’s letter “has been longer unanswered than I could have wished” but that “the delay has been unavoidable.” Moreover, the subject did not lend itself to a quick answer but instead “invited more of development, than successive occurrences calling off my attention, have permitted.” He then noted that he considered Van Buren’s request “a private one, as you will be pleased to regard the answer to it.” According to the complex norms of nineteenth-century correspondence, this statement meant that Madison did not wish his letter to be tendered to a friendly newspaper editor for republication, a common destination for letters written by statesmen in their official capacities. What is less clear is whether Madison intended, or perhaps knew without explicitly acknowledging, that Van Buren would share the letter’s contents with his new political ally Andrew Jackson.

Madison’s reply delivered what Van Buren had requested, insofar as it offered various options for potential amendments. But if the senator hoped for a few brief phrases that could be dropped into the Constitution, he had consulted the wrong founder. Madison offered an array of structural mechanisms that he maintained would solve the deep constitutional problem of internal improvements. He sketched four options: (1) a practical division of power, with the appropriations power residing in Congress and the power to construct the projects remaining with the states; (2) a formal amendment granting Congress the power to fund internal improvements; (3) a formal amendment granting Congress an even broader power over internal improvements (meaning construction as well as funding); or (4) a substantial reworking of several existing clauses granting powers to Congress.

Among these options, Madison preferred a formal amendment, which he suggested would “obviate the unconstitutional precedent” of recent decades’ policies while nevertheless acknowledging that the “constructive authority” of Congress had
increased in that period. If Van Buren had expected Madison to supply him with a draft amendment prohibiting any congressional action on internal improvements, he must have been disappointed. For Madison’s lengthy reply made clear that the problem of internal improvements could not be so easily fixed, even by the author of the Constitution.

Van Buren did not respond to Madison’s observations on the constitutionality of internal improvements for more than five months. In the intervening time, the two statesmen did have a few brief exchanges, including one in which Van Buren forwarded the Tucker Committee’s report dissenting from Monroe’s veto of the Cumberland Road bill. But it was not until March of 1827 that Van Buren thanked Madison for the views contained in his letter from the previous September. From the Senate chamber, Van Buren wrote, “I am not certain whether I did what I intended to do last fall – that is to make my sincere acknowledgments to you for your kindness in relation to my request.” Van Buren justified his tardiness by pointing to a political climate that had become unfavorable to pressing the issue of internal improvements. “I have thought it advisable to leave the matter until the next session, at the commencement of which I shall enter in earnest upon the Subject.” But Van Buren was ever an opportunist. In the very next sentence following his belated thanks, he invited Madison to write if he could “conveniently say any thing to me that will be of service.” In his reply, Madison silently declined this invitation. But he did commend Van Buren for his judgment on the key issue of a constitutional amendment. “You did well I think in postponing the attempt to amend the phraseology of the Constitution, on a point essentially affecting its operative character,” Madison wrote. “The State of the political Atmosphere did not promise that discussion and decision on the pure merits of such an amendment, which ought to be desired.”

Despite Van Buren’s discretion, the slow burn of internal improvements continued. His position in the Senate made Van Buren a central figure in the growing Jacksonian movement, which had made important gains in Congress in the mid-term election of 1826. Jackson was not an enemy of internal improvements; on the contrary, he understood that many of his supporters, especially those in the West, viewed roads and canals as the price the federal government owed them for their efforts in settling far-flung territories. Many of his followers in Virginia and elsewhere in the Old South, however, viewed internal improvements as an unwarranted extension of federal power with few offsetting benefits. When he took office in March 1829, therefore, Jackson was still seeking remedies to the intractable, divisive problem of internal improvements. In his inaugural address, Jackson mentioned two possible solutions: direct monetary grants to the states according to representation, or a constitutional amendment. Van Buren, now secretary of state, amplified his appeals to Madison for guidance.

The crisis came in the spring of 1830, when Jackson vetoed a bill authorizing the federal government to purchase stock in the Maysville, Washington, Paris, and Lexington Turnpike Road Company, which was to build a seventy-mile stretch of road connecting the Ohio River with Lexington, Kentucky. The road was located entirely within Kentucky, although its supporters argued that it was a vital link between the Cumberland Road in the north and the Tennessee River in the south. In his veto message, Jackson
identified two problems with the bill: first, it was an unconstitutional exercise of the appropriations power; second, it was an unconstitutional extension of federal power into the local domain of the states. Either was fatal to the bill. To support the appropriations point, Jackson cited Madison’s veto of the Bonus Bill in 1817.

Van Buren, who later claimed that he had drafted the Maysville Road veto message, immediately sent a copy to Madison. Madison’s reply was both rapid and definite. The current administration had “not rightly conceived the intention of J. M. in his Veto in 1817 on the Bill relating to Internal Improvements,” he observed. Jackson’s veto message had relied on Madison’s veto message for the point that some appropriations for internal improvements might be permitted. But Madison insisted that he had intended “to deny to Congress, as well the appropriating power, as the executing and jurisdictional branches of it.” Jackson’s veto message had mischaracterized the reasoning in Madison’s veto message. Jackson’s reliance on the authority of the founders was therefore flawed.

A lengthy reply, by turns sheepish and bold, followed from Van Buren. First, the apologies: Van Buren stated that he had shown Madison’s letter to Jackson, “who requests me to express his regret that he has misconceived your intentions in regard to your veto.” The president also wished Madison to know that he will correct the error in “informal conversations,” and that he stands ready to offer “a more formal correction” if Madison would like. Van Buren then reiterated his by-now familiar request for guidance from Madison. “I am deeply sensible of the necessity of repose to one of your advanced age,” he wrote, “but deriving confidence from your ready acquiescence in my wishes on a former occasion, I venture to intrude once more upon your retirement.”

Again Madison replied. On the substantive issue of internal improvements, he offered a few responses to Van Buren’s queries. In a letter of July 5, Madison noted that he had “never considered the powers claimed for Congress over Roads & Canals, as within the grants of the Constitution.” Yet he nevertheless believed that such projects were “justly ranked among the greatest advantages and best evidences of good Govt.,” and that they also had the benefit of “binding the several parts of the Union more firmly together.” Taken together, those two propositions pointed toward a constitutional amendment. But again, Madison declined to offer any language for an amendment.

Instead, Madison discussed matters of interpretation. Ignoring Van Buren’s repeated entreaties (July 30, 1830: “If you have any choice as to the course which may be pursued by the President, in regard to the misconstruction of your Veto . . . I wish you had intimated it”), Madison insisted that his own views in 1817 could not possibly control the meaning of a text drafted in 1817 but interpreted in 1830. Madison distinguished among several elements: his own sense of words’ meaning; the language of the veto message; and the meaning that later readers attached to those words. “I am aware that the document must speak for itself, and that that intention can not be substituted for the established rules of interpretation,” he wrote. “Whether the language employed duly conveyed the meaning of which J. M. retains the consciousness, is a question on which he does not presume to judge for others.”
Van Buren continued to request Madison’s guidance over the next several months, and Madison continued to put him off, politely. “I do not find that I can add any thing material to what is said in my letter of July 5, or in former ones,” Madison wrote in October 1830. Over the final six years of his life, Madison occasionally exchanged letters with Van Buren, but the letters were brief and transactional on both sides.

After corresponding with the sole remaining founder about internal improvements for four years, perhaps Van Buren had amassed all the authority he needed to advise Jackson and then to chart his own path to the presidency. The debates over internal improvements continued for decades, but they were increasingly subsumed by other important controversies touching on commerce and concurrent power – in particular, slavery. Madison would not live to see these debates. But with his acknowledgment of the limits of his ability to control the meaning of his own words, he had given Van Buren permission to begin to break free from the founders.

For the final nineteen years of his life, from his post at Montpelier, Madison studied a nation in transformation. Through his letters and conversations with visitors, he inserted himself into the turmoil of early-nineteenth-century America, tutoring a younger generation of American writers, statesmen, and intellectuals. Amid mounting political and social chaos, he grew increasingly important as a symbol of a founding consensus that seemed ever more fragile – and that might have existed only through the lens of nostalgia. The knee breeches and wigs of the Revolutionaries reassured their betroubled, Romantically disheveled, squabbling offspring. Early-nineteenth-century Americans were avid producers and consumers of emotional effusions about the organic power of nature, but they longed for the mathematical precision of the Founders’ hand-wrought system of governance. They looked to Madison, the artisan of the Constitution, for instruction on how to operate the machinery they had inherited.

But the chief surviving founder was himself plagued by anxiety and pessimism about the future of the United States. At the time that Madison and Van Buren exchanged letters, the legacy of the Constitutional Convention was a subject of intense public controversy, sparked by the posthumous publication in 1821 of Robert Yates’s *Secret Proceedings and Debates of the Convention Assembled at Philadelphia in the Year 1787*. Yates had briefly served as a member of the New York delegation to the Constitutional Convention before he and his colleague John Lansing, Jr., walked out in protest against what they viewed as the convention’s overly expansive interpretation of its brief to revise the Articles of Confederation. (Their departure left as New York’s sole representative Alexander Hamilton, who had no such qualms about the scope of the convention’s remit.) The *Secret Proceedings* were the first record of the convention to be published, and they were eagerly devoured by the reading and politicking public. As part of the debate stirred by their publication, Madison found himself charged with advocating a “consolidated,” or centralized, national government. The portrayal of Madison as a crypto-, or even brazen, nationalist continued to resurface throughout the 1820s and 1830s, increasing in vehemence whenever states’ rights arguments swelled on the floor of Congress.
In the late 1820s, Madison’s letters were filled with discussions of the founders’ attitudes toward commerce. In one, he cited the records of the First Congress as evidence that the founders had indeed intended to give the federal government the power to foster interstate commerce, broadly construed. “The Debates contain the most ample proof that Manufactures were as much an object as revenue,” he wrote, and “that the power was not questioned by a single member, & that the use of it was expressly proposed not only by northern members; but particularly by those from Virga. & S.C.” The South Carolina nullifiers might insist that authority over both commerce and the Constitution was shared between the states and the federal government, but the elderly Madison challenged those claims with founding-era documentary evidence. Watching his own comments from four decades before become fodder for the current day’s incendiary debate drove Madison to his desk.

Defending his personal legacy was only part of his motivation. He also wrote to instruct his successors on what he had always considered the fundamental question of American government: the structure of the Union. Madison is often portrayed as a theoretical scientist of politics, but he was also a practical mechanic, sleeves rolled up, tinkering in the works. For him, structure was not an arid set of design sketches but a model of interlocking wheels, cogs, and pistons. Practical questions about enforcement (can the federal government use force to coerce the states into paying taxes?), hierarchy (should Congress or the Supreme Court stop states from passing parochial and self-serving laws?), and ends (how does one determine whether Congress has the power to establish a national bank?) always, for Madison, turned on the fundamental design of the government. The most pressing issue, as he saw it, was the debate over the nature of the Union: was it a nation, with a shared set of interests and values, or a collection of states that jealously guarded their borders and powers? He was well aware that the window in which he could speak to the public was closing.

Madison’s letters suggest that he also wrote with a third goal in mind: to prepare the next generation of Americans to think for themselves in a proper constitutional mode. The brashness of the interbellum generation alternated with a filiopietism that drove them constantly to look over their shoulders at their founding forbears. Madison sought to liberate them from this dependency. And so he sidestepped Van Buren’s offer to seize the drafter’s pen again.

American Interbellum: 1815 – 1861.

Commerce and concurrent power were crucial battlegrounds on which interbellum law and politics were contested. Between the end of the War of 1812, in 1815, and the beginning of the Civil War in 1861, the struggle to define the Union was fought around those two themes.

In 1815, President Madison led a nation of eighteen states that still feared invasion and partition by the great European imperial powers, and that was still making the choice between becoming a manufacturing or an agrarian republic. Robert Fulton’s
steamboat *New Orleans* had made its maiden voyage just four years earlier, from Pittsburgh to the city for which it was named. The Bank of the United States was buffeted by near-fatal attacks of taxation by Maryland and Ohio. Congress had not yet taken up the issue of where slavery would be permitted or prohibited within the lands gained through the Louisiana Purchase. Americans in 1815 could tell themselves they were still living in the founders’ republic.

By 1861, the twin swells of commerce and concurrent power threatened to overtop the levees created by Madison’s Constitution. As the United States mobilized for war, the soldiers of the Union Army – known as “Federals” – boarded trains that carried them and their New Haven-manufactured Spencer repeating rifles along the nation’s 28,900 miles of track. Kansas, the thirty-fourth state, had joined the Union that January after seven years of bloodshed over the state’s boundaries, the status of slavery within its borders, and the larger issue of who would decide such questions – the federal government or the people of the state.

This great constitutional conflict was not only an issue of southern sectionalism versus northern nationalism. During his presidency, Madison had witnessed existential threats to the Union from five New England states that opposed the War of 1812 – “Mr. Madison’s War,” as they called it. These states sent delegates to the Hartford Convention, where they discussed secession and conducted informal negotiations with Great Britain. In the late 1820s, South Carolinians – some of them citing Madison’s own Virginia Resolution of 1798 – claimed a right to “interpose” their own constitutional judgment against that of the federal government. Dubbed “nullification” by critics, the doctrine permitted state legislatures to refuse to enforce federal law. The federal law in question in this case was a protective tariff. Advocates of interposition, including the sitting vice president of the United States, John C. Calhoun, argued that the mechanism proceeded directly from the Constitution itself. The South Carolinians argued that the day-to-day operation of American federalism gave the states a role in federal lawmaking. This principle, they insisted, was not counter-constitutional but rather constitutionally required.

Meanwhile, the territorial mass of the Union was unfurling. The nation was still tethered to the Atlantic coast, but its peripheries made increasingly loud assertions of their distinctiveness, indispensability, and power. As the nation spread northwest and southwest, the founders’ constitutional regime followed. But the precise allocation of power between center and periphery on which that regime depended had not been settled by the founders, in theory or in practice. The federal republic of the late eighteenth century had been held together by the thin filaments of commerce and an unstable commitment to concurrent power, both constitutionally derived. But as those filaments frayed, so also did the fractured consensus over the nature of the Union.