

ESSAY REVIEW

The Historians Versus the Lawyers: James Madison, James Hutson, and the Doctrine of Original Intent

The Records of the Federal Convention of 1787. Edited by MAX FARRAND. (rev. ed., 4 vols., New Haven and London: Yale University Press, 1966, 1987. Vol. I: xxv, 606p. Proceedings. Vol. II: 667p. Proceedings, Constitution of the United States. Vol. III: 630p. Appendixes. Cloth, \$45.00 each; paper, \$13.95 each.)

Supplement to Max Farrand's The Records of the Federal Convention of 1787. Edited by JAMES H. HUTSON. (New Haven and London: Yale University Press, 1987. xxvi, 473p. Appendix, indexes. Cloth, \$45.00; paper, \$13.95.)

Of all the projects related to the bicentennial of the Constitution, James Hutson's compilation of a new supplement to Max Farrand's *The Records of the Federal Convention of 1787* (1911) is likely to remain the most durable and most useful to scholars. *The Supplement* replaces volume IV of *The Records*, which Farrand had added in 1937, and includes much new material found by Hutson, who is head of the Manuscripts Division of the Library of Congress, and his colleague Leonard Rapport over the past several years. It is now issued by Yale University Press along with a reprinting—in hard and soft covers—of the original Farrand volumes.¹

Max Farrand (1869-1945) taught first at Stanford and then, after a year at Cornell, at Yale from 1908 to 1925. Involved in the planning of the Huntington Library, Farrand became its first director from 1925 to 1941. His many articles and books focused largely on the framing and the Framers

¹ As of October 1987 hardcover copies were out of stock with no plans for reprinting.

of the Constitution. The work on *The Records* was done between 1902 and 1909, and three volumes were published in 1911. As Huston recently observed, "because of its comprehensive and meticulous scholarship, [the Farrand work] quickly supplanted all competing editions of Convention records."² In 1937, in association with the sesquicentennial of the Convention, one suspects, *The Records* was reprinted with the addition of a slim volume IV that included materials which had come to Farrand's attention since 1911. The whole set was reprinted in 1966 in a paperback edition.

Hutson has integrated the materials in Farrand's volume IV into the *Supplement*, which now constitutes a new volume IV. A list of the twenty-one amendments as of 1937 is omitted from the new volume, but this excision creates no problem for users. Of some concern is that Hutson also has omitted a list of errata in volumes I, II, and III that appeared in the old volume IV. Presumably he did so because the corrections were made in the new printing, but users of the 1911 edition (reprinted in 1923, 1927, and 1934) in association with the new *Supplement* will be unaware of the errors. Omitted, also, is Farrand's defense of his edition of Madison's "Notes" against claims by Gaillard Hunt, one of Hutson's predecessors at the Library of Congress, that Farrand had incorporated a number of misreadings which Hunt had corrected in his edition of *The Writings of James Madison* (1903) and his later edition of the *Notes* (1920). The differences between Farrand and Hunt are so minor as to justify Hutson's deletion of their explication at this time.³

Hutson has assembled a considerable amount and variety of material discovered since 1937, a process that Farrand anticipated and would be pleased to know has eventuated. As Hutson says about his own work, "The editor would not regret such an event, because it would mean that new material had been discovered that would enhance our understanding of the Constitution."⁴ Farrand included twelve documents in his volume IV, mostly revisions or additions to speeches made in the Convention found

² James H. Huston, "The Creation of the Constitution: The Integrity of the Documentary Record," *Texas Law Review* 65 (November 1986), 1.

³ Gaillard Hunt, *The Writings of James Madison* (9 vols., New York, 1900-1910), includes the "Notes" in volume IV (1903); Hunt and James Brown Scott, *The Debates in the Federal Convention of 1787 which Framed the Constitution of the United States of America. Reported by James Madison* (New York, 1920). Farrand points out that he left punctuation where Madison had it while Hunt moved it inside of quotation marks. "Almost all of the other differences between the texts are matters of punctuation, spelling, and capitalization, and are seldom of any significance." Max Farrand, ed., *The Records of the Federal Convention of 1787* (4 vols., New York, 1911-1937), 4:xi.

⁴ Hutson, *Supplement*, xix.

among papers of several of the Framers. Hutson has added excerpts from numerous letters of members of the Convention and a number of retrospective writings and reports of commentary by Framers written between 1788 and 1835 (the last being an extract from Madison's will), and two much later, but illuminating documents. He also has included the marginalia from each of the eighteen copies known to exist of the printed report of the Committee of Detail and many entries from Washington's diary that Farrand omitted. The *Supplement* also contains Robert Lansing's diary, notes by John Dickinson, and a few other items located since 1937 but published in the interim elsewhere.⁵

Best of all, Hutson has located and included a number of documents that are printed here for the first time ever. Among them are some brief notes of debates kept by Pierce Butler of South Carolina and Gunning Bedford of New Jersey. Hutson also discovered notes by Bedford that might be reports of someone else's speech, or might be notes for a speech that either he failed to give or Madison failed to report. It remains a document to be studied for what it might tell about the small-state position early in the Convention. Some previously unpublished retrospective letters by John Dickinson and William Samuel Johnson touch several issues. Dickinson's letter, written in 1802, is especially important for its assertion that the clear intention of the Convention was that presidential electors be chosen by the voters in the states, not by the legislatures. Such a position weakens some of the federalism previously thought to obtain in the Constitution because it diminishes the participation of the state governments and strengthens that of the people. Johnson's letter deals with the question of statehood for the territories to be carved out of the Louisiana Purchase. Reflecting the views of New Englanders who were generally opposed to such statehood, Johnson contends that it was the clear consensus of Convention members—though the matter was discussed only “out of doors”—that new territories were to be ruled like conquered lands. Johnson also provides nice insights into the interrelations among delegates. He says he always checked with his Connecticut colleagues before raising points on the floor, and he mentions “all the little parties of members” with whom he chatted. These most revealing letters feed controversy as well as illuminate questions of Framers' intent.

Farrand's principle of organization—collecting all items at the date to which they relate—determines the location of new items as well. Hutson

⁵ Donald Jackson and Dorothy Twohig, eds., *The Diaries of George Washington* (6 vols., Charlottesville, 1976-1979); Joseph R. Strayer, ed., *The Delegate from New York* (Princeton, 1939); and James H. Hutson, “John Dickinson at the Federal Constitutional Convention,” *William and Mary Quarterly* 40 (1983), 256-82.

reprints the "Index by Clauses of the Constitution" provided by Farrand in the 1937 edition and a new "General Index." In both of these indexes entries referring to Farrand's old volume IV are retained. Hutson wisely chose not to treat that work as a "non-volume" since the old volume IV is still on the shelves of many libraries. In all, Hutson's *Supplement* comes to 324 pages and Farrand's to 103 with fewer words per page. Purchasers of the new printing as a set will lose almost nothing by not having the old volume IV, but those who merely wish to update their old set can get everything they need by purchasing the new *Supplement* alone.

Though scholars will likely put the volumes to best use, the volumes also will be of considerable interest to lawyers and jurists who are concerned with the Framers' "original intent," a concern of which Hutson makes a good deal. Indeed, he has published an extended version of his "Introduction" in the *Texas Law Review*⁶ with an excellent concise survey of the recent—but pre-Bork hearings—legal literature regarding "originalism." If there is anything left of that badly battered theory of Constitutional interpretation, Hutson's analysis should bury it. The burden of his argument is that virtually all known records of the Convention, other than Madison's, were corrupted by editors marked more by their sloppiness and/or political motivation than by any concern for either accuracy or veracity. He demolishes any claim to reliability that Yates's "Notes" may have had by showing that the only extant complete version was thoroughly revamped by "Citizen" Edmond Genêt in an effort to promote the political aspirations of his father-in-law, George Clinton. Other delegates' notes were so fragmentary that, even if reliable, they leave Madison's "Notes" to "stand alone as the key to the Framers' intentions."⁷ But even Madison's "Notes," as accurate as he tried to make them, fail badly to serve as more than a hint of the Framers' intent on any but very fundamental principles. By Hutson's admittedly imprecise and even impressionistic, but nevertheless quite reasonable, calculations, Madison wrote down only 7 to 10 percent of what was said in the Philadelphia debates.⁸

The fulcrum for Hutson's argument supporting Madison's accuracy is the deservedly maligned theory of William W. Crosskey whose three-volume work⁹ asserts that Madison rewrote his notes after the fact, in order to

⁶ See above, note 2.

⁷ Hutson, *Supplement*, xxv-xxvi; Hutson, "Integrity of the Record," 9-12, 33.

⁸ Hutson, "Integrity of the Record," 34.

⁹ William W. Crosskey, *Politics and the Constitution in the History of the United States* (2 vols., Chicago, 1953). A third volume under the same title was completed after Crosskey's death by William Jeffrey and published in 1980.

further his own political objectives. Hutson's attack seems to overwork a dead issue. True, there are lawyers out there who make use of Crosskey's "evidence" for their own adversarial purposes. But no serious historian specializing in the field would credit Crosskey's theory that the Framers intended a comprehensive national system, despite Crosskey's imaginative and at times persuasive scholarship on particular points.¹⁰ No less an authority than Farrand concluded that "it is easily proved that, over thirty years after the Convention, [Madison] revised the manuscript and made many changes upon insufficient data, which seriously impaired the value of his notes."¹¹ Hutson agrees that changes were made years after 1787, but insists that they were intended to, and in most cases did, make Madison's record more accurate, not less so.¹²

James Madison is so much a scholars' kind of man that virtually the whole body of specialists on the early national era constitute today a fawning coterie promoting a cult of personality. Recent commentators with few exceptions write of Madison with a lack of skepticism uncharacteristic of scholarship. It was not always so. Debunkers during the money-mad 1920s tended to elevate Hamilton and denigrate Madison. Even Irving Brant wrote in 1937 that ". . . not one statement made by Madison after 1790 can be relied upon . . . [for] in later partisanship he denied his own [nationalist] work and that of his fellows."¹³ Brant later took up Madison as a life's work and wrote a six-volume biography of the man that becomes increasingly partisan with each succeeding volume. Recent commentators, with few exceptions, write of Madison with a lack of skepticism uncharacteristic of scholarship.

Madison was a man whose understanding of human nature was acute. He recognized that only with great difficulty could men—and then only a few of them—separate their own interests from those of the public. If modern psychology teaches anything, it is that the human capacity for self-deception is infinite. Why is it not reasonable—even essential—to suspect that whenever memory was to be relied upon, Madison put himself in a favorable light and put his adversaries in the worst? As Hutson points out, Madison's "own remarks at the Convention occupy a considerable portion

¹⁰ Political scientist S. Sidney Ulmer, also a focus of Hutson's attack, uses a Crosskeyite approach to promote the idea that Madison cheated Charles Pinckney out of credit for submitting an influential plan of a new government. See Ulmer, "Charles Pinckney: Father of the Constitution?" *South Carolina Law Quarterly* 10 (1958), 225-47; and Ulmer, "James Madison and the Pinckney Plan," *South Carolina Law Quarterly* 9 (1957), 415-44.

¹¹ Farrand, ed., *Records*, 1:vii. See also *ibid.*, 1:xviii, n. 20.

¹² Hutson, "Integrity of the Record," 31 and *passim*.

¹³ Irving Brant, *Storm Over the Constitution* (New York, 1936), 92.

of the notes, yet they cannot have been delivered as they are now recorded in print. Madison could not speak and record at the same time. Because he did not prepare his speeches in advance . . . dialog attributed to him [that is, which he attributed to himself] must have been composed after the day's proceedings. After a few hours reflection, Madison may have written a good deal more and a good deal that differed from what he said earlier."¹⁴ Can it be, after all, mere coincidence that Madison's "Notes" show that the delegate who spoke most often—and often most wisely—was Madison?¹⁵

If we grant, then, that Madison likely embellished his own speeches, we might then agree that he more fully reported those of others who agreed with him. Is it much of a step, then, to consider that perhaps he abbreviated, short-shrived, or even omitted speeches that contradicted his views or presented challenges to his domination of the proceedings? There is good reason to believe that he did. Without rehearsing in any detail the tortured story of the draft of a plan of government drawn up by Charles Pinckney of South Carolina in the days before the Convention and presented to it on May 29, it seems more than merely plausible that Madison deliberately, though perhaps unconsciously, failed to include an account of the plan of a man whom he personally disliked, distrusted, and disparaged as soon as the Convention was over.¹⁶ It was Madison himself who pointed out that notes made at the Convention ought not always be taken at face value. "Besides misapprehensions of the ear therefore," he wrote many years later, "the attention of the note taker wd naturally be warped, as far at least as, an upright mind could be warped, to an unfavorable understanding of what was said in opposition to the prejudices felt."¹⁷

¹⁴ Hutson, "Integrity of the Record," 35.

¹⁵ The editors of Madison's papers say he spoke more than 200 different times at the Convention—that is, he recorded himself as speaking more than 200 different times. He was at the same time keeping the notes which form the basis of our understanding of the Convention and his part in it. Robert A. Rutland and Charles F. Hobson, eds., *The Papers of James Madison* (15 vols. to date, Chicago, 1977-), 10:9.

¹⁶ For an account of Pinckney's draft, see Charles C. Nott, *The Mystery of the Pinckney Draft* (New York, 1908). An equally partisan view of the matter is presented by S. Sidney Ulmer, note 10 above. For more scholarly approaches, see J. Franklin Jameson, "Portions of Charles Pinckney's Plan for a Constitution," *American Historical Review* 8 (1903), 509-13; and Andrew C. McLaughlin, "Sketch of Charles Pinckney's Plan for a Constitution, 1787," *American Historical Review* 9 (1904), 735-65. The full text of the draft is in Farrand, ed., *Records*, 4:604-9. Washington wrote Madison in October 1787 that "Mr. C. Pinckney is unwilling . . . to loose any fame that can be acquired by the publication of his sentiments," to which Madison agreed that Pinckney "could have no motive but the appetite for expected praise." Rutland and Hobson, eds., *Papers of James Madison*, 10:204, 225.

¹⁷ Quoted in Hutson, "The Integrity of the Record," 12, n. 71.

Madison, one of the least pragmatic, most doctrinaire men at the Convention, held to a plan of government built on a theoretical construction as tightly logical as the Deacons's Masterpiece. He was the last holdout, for instance, for proportional representation and a congressional veto of state legislation, losing the support finally of even his own Virginia delegation. His prejudices—those of a committed intellectual whose reason was a dominating characteristic—were many and profound. One does not have to be a Crosskeyite to treat Madison's "Notes" the way any trained historian normally treats anyone else's notes. It is not necessary to believe that Madison willfully altered his notes to be skeptical of their purity and freedom from the human tendency to report events from one's own perspective, with all the prejudices, blind spots, and defenses which form the character of all humanity. One can accept Hutson's statement that the manuscript record that Madison left at his death was a "faithful account of what he recorded at the Convention in 1787" without granting the editor's claim that "Madison's notes, then, *stand alone* as the key to the Framers' intentions."¹⁸

Hutson himself concludes his commentary on the jurisprudence of original intention—so much of which rides on the documents he has so meticulously edited—by stating that he "will be satisfied if lawyers, judges, historians, and legal scholars are reminded, as they periodically need to be, that the mere fact that a record is in print does not make it reliable."¹⁹ That the principal documentary clue to the Framers' intentions represents not more than 10 percent of what they said on the Convention floor and nothing at all of what they said to each other in private (more than half their waking day), and all reported by a committed nationalist outside the mainstream of Convention thought, ought to cause all of us to begin to expand greatly the universe of documents upon which to base any inferences about original intent.²⁰ That there was an intent—or fifty-five, or sixteen hundred intents, or more—cannot be questioned. That it is knowable in any greater detail than its most general terms should be clear by now to anyone who has studied the matter. The work of James Hutson, and his assistant Leonard

¹⁸ *Ibid.*, 32, 33. Emphasis added.

¹⁹ *Ibid.*, 39.

²⁰ That the completed document was not at all what Madison had intended in June is made clear by his statement to Thomas Jefferson that the Constitution would "neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts against the state governments." Rutland and Hobson, eds., *Papers of James Madison*, 10:205.

Rapport, will make the whole process of study easier and in the end more accurate as well.²¹

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²¹ There were fifty-five delegates who were at the Convention at one time or another. Generally accepted estimates give 1,600 as the number of men involved in the various state ratifying conventions.