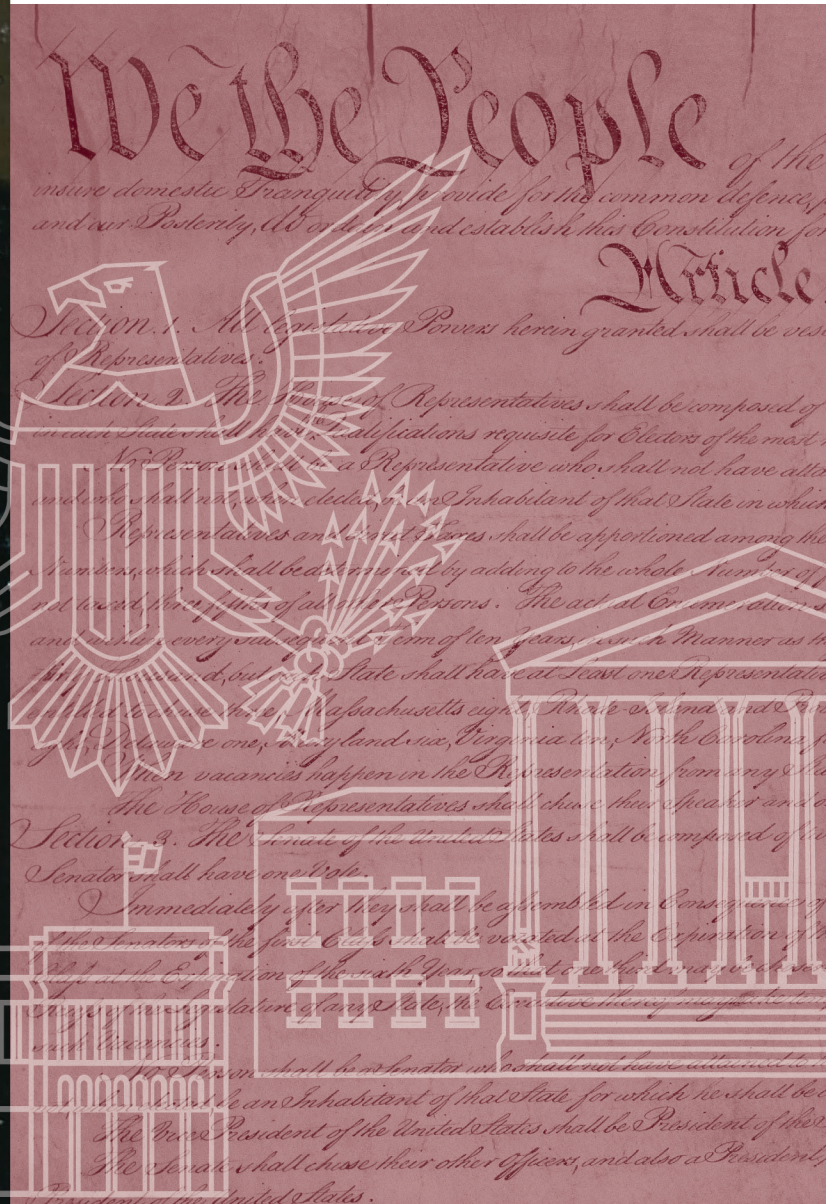


# A MADISONIAN CONSTITUTION FOR ALL

ESSAY SERIES



# TABLE OF CONTENTS

<b>INTRODUCTION: A MADISONIAN CONSTITUTION FOR ALL</b> BY MICHAEL GERHARDT AND JEFFREY ROSEN _____	03
<b>FROM A FIXED, LIMITED PRESIDENCY TO A LIVING, FLEXIBLE, BOUNDLESS PRESIDENCY</b> BY SAIKRISHNA BANGALORE PRAKASH _____	19
<b>THE CONSTITUTION, THE PRESIDENCY, AND PARTISAN DEMOCRACY: CONGRESS REVISES THE ELECTORAL COLLEGE, 1803-1804</b> BY SEAN WILENTZ _____	35
<b>REVISITING AND RESTORING MADISON’S AMERICAN CONGRESS</b> BY SARAH BINDER _____	45
<b>RECOVERING A MADISONIAN CONGRESS</b> BY DANIEL STID _____	57
<b>JAMES MADISON AND THE JUDICIAL POWER</b> BY JACK RAKOVE _____	70
<b>THE RELEVANCE AND IRRELEVANCE OF JAMES MADISON TO FAITHFUL CONSTITUTIONAL INTERPRETATION</b> BY MICHAEL STOKES PAULSEN _____	83
<b>MADISON’S AMERICA: DELIBERATIVE REPUBLICANISM, POLITICAL COMMUNICATION, &amp; THE SOVEREIGNTY OF PUBLIC OPINION</b> BY COLLEEN SHEEHAN _____	97
<b>‘THE ULTIMATE JUSTICE OF THE PEOPLE’ MADISON, PUBLIC OPINION AND THE INTERNET AGE</b> BY GREG WEINER _____	108

# INTRODUCTION: A MADISONIAN CONSTITUTION FOR ALL

BY MICHAEL GERHARDT AND JEFFREY ROSEN

## INTRODUCTION

The National Constitution Center is pleased to present the work of our bipartisan Commission: A Madison Constitution for All. Launched on Freedom Day in 2017, the Commission has brought together constitutional scholars, historians, and commentators from diverse perspectives to explore what James Madison would think of today's presidency, Congress, courts, and media, and how we can restore Madisonian values today. In the essays that follow, each of the eight scholars offer insightful analyses of the Madisonian Constitution, the developments that have undermined its objectives, and possible solutions for its resurrection.

The members of the Madison Commission agree on many significant themes—how Madison understood the objectives of the Constitution he helped to frame; how subsequent political, constitutional, and technological changes have challenged Madison's assumptions and assumptions; and possible ways to answer those challenges. And all eight scholars point to the distinctive mechanisms Madison helped to fashion that were designed to protect against mob rule and promote deliberation on the public good. Among these were the following:

- The concept of federalism itself—having the federal and state governments check each other;
- Limited responsibilities for the House of Representatives, the only aspect of the original constitutional system that allowed for direct election, and its dependence on the Senate to complete almost any action the House decides to initiate;
- The selection processes originally designed for senators and presidents, which depended on cooling mechanisms placed between them and the voting public at large;
- The idea of having factions check each other in the legislative process as a way to prevent any one of them from dominating the entire process;
- The proliferation of news outlets, which would help to educate the public about the most pressing issues of the day; and
- The concept of separation of powers, in which the branches of the federal government kept each other in check.

Our scholars also identify many problems undermining these various cooling mechanisms, which were designed to prevent factional tyranny and to promote careful, dispassionate deliberation on the public good. First, there have been dramatic advancements in technology, spreading information at speeds unthinkable to the Framers, technology that reinforces pre-existing views and allows people to avoid opinions unlike their own. Secondly, the rise and entrenchment of the two-party system has led to increased party polarization in Congress and across the rest of the federal government, including the presidency and the courts. Third, there have been expansions (due in



part to congressional acquiescence) in presidential domination of the federal system and the president's own obeisance to his political party in order to maintain power. Finally, geographical sorting has resulted in people who live closer to people who reinforce their views and farther from those who do not. These developments have helped to produce record levels of voting in Congress strictly along partisan lines, which has led in turn to the appointments of judges and justices who themselves end up voting at unprecedented levels along the party lines of the presidents who appointed them.

## I. OUR MADISONIAN CONSTITUTION

At the age of 26, James Madison played a critical role arguing for a constitutional convention to fix the problems with the Articles of Confederation. The Continental Congress had drafted the Articles of Confederation to serve as the governing document that defined the powers of the fledgling government of the United States immediately after it had declared its independence from Great Britain. Madison wrote one of the most extensive, persuasive essays on the "defects" in the articles. In "Vices of the Political System of the United States," Madison surveyed twelve "defects" in the Articles of Confederation, including the absence of an independent executive to oversee the administration of the laws.<sup>1</sup> Other deficiencies included the absence of a supreme court and a weak federal Congress that lacked the means if not the will to address social unrest, financial debt, and foreign attack. Madison is credited with persuading George Washington to chair the Constitutional Convention.

In May 1787, Madison was one of the first delegates to arrive in Philadelphia for the Constitutional Convention. The previous year he had surveyed the history of failed democracies. He wrote to Thomas Jefferson, who missed the Constitutional Convention while serving as America's representative in Paris, explaining that he was determined to help the convention avoid the fate of those "ancient and modern confederacies," which he thought had fallen prey to rule by demagogues and unruly mobs.<sup>2</sup> The colonists' experiences with the Articles of Confederation convinced Madison that the new country needed a strong national government, which he proposed to the Convention in the form of the Virginia Plan. His reading further convinced him that direct democracies – in which citizens made all the important decisions by majority vote – were destined to fail, because they were vulnerable to the public's uncontrollable passions.<sup>3</sup> In *The Federalist Papers*, written after the Constitution had been drafted, Madison argued, "In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason."<sup>4</sup> While the city-state Athens was renowned as a pure democracy, in which 6,000 of its citizens were required for a quorum, Madison believed that Athens' democracy was destined to fail: "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."<sup>5</sup> In 1787, the Continental Congress stood by helplessly, doing nothing, as populist rage in Massachusetts led to Shay's Rebellion, in which debt-ridden farmers revolted against the local governments controlled by their creditors.

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<sup>1</sup> James Madison, "Vices of the Political System of the United States, Apr. 1787," in *Selected Writings of James Madison*, ed. Ralph Ketcham (Indianapolis: Hackett Pub., 2006), 35–42.

<sup>2</sup> James Madison, *The Writings of James Madison Comprising His Public Papers and His Private Correspondence, Including Numerous Letters and Documents Now for the First Time Printed*, vol. II ed. Gaillard Hunt (New York: G.P. Putnam's Sons, 1901,) 369.

<sup>3</sup> See generally, Jeffrey Rosen, "America Is Living James Madison's Nightmare," *The Atlantic*, October 2018, <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/>.

<sup>4</sup> *The Federalist* No. 55 (James Madison or Alexander Hamilton).

<sup>5</sup> *The Federalist* No. 55.



Madison was far from alone in thinking that the new Constitution had to be framed in ways that guarded against impetuous mobs. In *Federalist* 10, he defined factions as groups “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.”<sup>6</sup> Both he and Alexander Hamilton, the author who wrote most of the essays in *The Federalist Papers*, believed that factions arose when public opinion formed too quickly and spread just as fast. But, Madison and Hamilton believed that factions could be checked if the public took the time to consider the long-term concerns rather than short-term gratification.

The Framers designed the Constitution to prevent factions from threatening individual liberty and making policy on the basis of self-interest rather than the public good. They gave the public no direct control over any part of the federal government. They distrusted direct democracy, which they believed would lead to mob rule, and therefore designed the American Constitution as a representative republic, in which the enlightened people chosen to run the government would serve the public good. The Framers also designed the Constitution with a series of cooling mechanisms to prevent intemperate decision-making. Under the new Constitution, the public directly elected only one chamber of the Congress, the House of Representatives, but the House did not have final say over anything (except for its own internal governance). The lawmaking process also required the Senate’s consent, as well as either the president’s signature or a supermajority of both Houses of Congress. Every state had equal representation in the Senate, whose members would be chosen by state legislatures rather than direct election by the people. The president was chosen by electors rather than direct election by the people. The distribution of powers among the branches was designed to ensure that no single branch could accumulate too much power. The further division of power between the federal government and state governments would ensure that none of the three branches of the federal government could ever claim to solely represent the people. They all did in some way, but each of the three branches kept the others in check.

Although many believed that democracy could not succeed in such a large country, Madison thought it was a good thing that the United States was destined to occupy a huge expanse of territory and therefore to be a large republic, not a small one, which could easily be taken over by a passionate faction. He explained, “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 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.”<sup>7</sup> Madison hoped that the large expanse of the United States and its sizeable population would make it difficult if not impossible for a passionate mob to take control of the entirety of the republic; the passions would likely defuse over time and space. Madison and Hamilton expected further among the most important safeguards against factional tyranny would be the “circulation of newspapers through the entire body of the people.”<sup>8</sup> Newspapers were almost all partisan in their orientation, but they were also the likeliest sources for the educated elite to express erudite opinions on the issues of the day. Through such publications, the public could be better informed about what they needed to know in order to become useful and responsible citizens.

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<sup>6</sup> *The Federalist* No. 10 (James Madison).

<sup>7</sup> *The Federalist* No. 10 (James Madison).

<sup>8</sup> *National Gazette*, Dec. 19, 1791.

Madison's contributions to shaping the drafting and ratification of the Constitution did not end with his service as a delegate to the Constitutional Convention. In his remarkable three decades of public service, Madison occupied several different positions in the federal government and participated in a number of momentous events in constitutional history. Three of these had especially noteworthy ramifications for American democracy; they are as important for understanding his contributions to the Constitution as his service as a delegate to the Constitutional Convention and as one of the anonymous authors of the *Federalist Papers*, which helped to secure public support for ratification.

The first occurred shortly after he became a member of the House of Representatives. In the Constitutional Convention, Madison had joined with a majority of the other Framers to oppose adding a bill of rights to the new Constitution. They thought a specific set of liberties protected from the federal government was unnecessary as long as the federal government had no express powers over such interests. Yet, Anti-Federalists opposed ratifying the Constitution in part because it lacked a bill of rights. They feared that unless the Constitution specified the set of individual liberties that the federal government could not abridge, the government might claim an unwarranted the power to threaten those liberties. Five states that ratified the Constitution included a list of amendments they wanted to include. In his first campaign for a seat in House—a race against James Monroe, an Anti-Federalist—Madison changed his mind on the necessity for a bill of rights and vowed he would fight for it if elected. Though the House blocked his first attempts to introduce a proposed bill of rights, Madison eventually secured the floor of the House on June 8, 1789. There he delivered a long speech explaining “my reasons why I think it proper to propose amendments, and state the amendments.”<sup>9</sup> He argued that considering his proposed amendments would allow for an important debate among those who ratified the Constitution and those who resisted because of fears of “aristocracy or despotism.” Madison argued that:

It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto distinguished . . . among whom are many respectable for their talents and patriotism, and respectable for the jealousy they have for their liberty, which, though mistaken in object, is honorable in its motive.<sup>10</sup>

He reminded the members of the House that, “There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of Federalism, if they were satisfied on one point. We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes and expressly declare the great rights of mankind secured under the constitution.”<sup>11</sup> Though Madison believed a bill of rights was unnecessary or even dangerous, he argued that the republican values on which the country and its Constitution had been founded demanded respect for the arguments and rights of other faithful, well-meaning citizens. In championing a bill of rights, he placed the interests of the republic over his own personal interests. The House, and later the Senate, agreed to send a dozen of the 19 amendments Madison proposed to the states. And over the course of the next two years, the states ratified ten of those amendments—the Bill of Rights we know today.

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<sup>9</sup> *Annals of Congress*, House of Representatives, 1st Cong., 1st Sess., 448.

<sup>10</sup> *Annals of Congress*, 1st Cong., 1st Sess., 449.

<sup>11</sup> *Annals of Congress*, 1st Cong., 1st Sess., 449.

Following a narrow vote in Congress, the bank's charter lapsed in 1811. The next year, war broke out with Great Britain. The nation's finances rapidly deteriorated as other nations pulled their capital out of the United States and the federal government was forced to rely on loans from the National Bank for its war funding. In 1814, Madison reluctantly agreed with his Treasury Secretary Alexander Dallas on the necessity for re-chartering the bank; but he withdrew his support once peace negotiations began in late 1814 and the imperative to secure loans to finance the war dissipated. However, the economy took a downturn in 1815, and the federal government could no longer rely on state banks to take up the slack left by a weakened national bank to reinvigorate the national economy. Dallas persuaded Madison to rethink his position on the National Bank, and in 1816 he signed the twenty-year charter that established the Second Bank of the United States. After leaving the presidency, Madison explained that, while he believed that the First Bank lacked a constitutional basis at its start, its constitutional legitimacy grew over time through political acceptance: "It had been carried into execution through a period of twenty years, with annual recognition . . . and with the entire acquiescence of all the local authorities, as well as of the nation at large."<sup>12</sup>

Madison's shift of position on the constitutionality of the national bank was a prime example of Madison's following the path he had laid out in *The Federalist Papers* for settling a question of constitutional meaning. In *Federalist 37*, he wrote, "All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."<sup>13</sup> In Madison's judgment, the constitutionality of the national bank had been properly "liquidated," or fixed through a series of presidential and congressional actions.

In the time between Madison's advocacy for a bill of rights and authorization of the chartering of the Second National Bank, Madison joined Jefferson in making another decision with significant ramifications for the future of the republic. In *Federalist 10*, Madison had warned that, "The latent causes of faction are . . . sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society."<sup>14</sup> He suggested that, "The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government."<sup>15</sup> He expected that the powers of factions could be diluted by bringing them into the government and then having them check each other. But by 1791, Madison had changed his mind and joined Jefferson in establishing the Democratic-Republican Party in opposition to the policies of the Washington administration, particularly its assumption of states' debts accrued during the Revolutionary War and the establishment of a national banking system embodied in the creation of the First National Bank.

In 1792, Madison acknowledged that, "in every political society, parties are unavoidable," that they were "the language of reason" and through their proliferation spread the spirit of "republicanism," and that parties should be made to be "mutual checks on each other."<sup>16</sup> Four years later, President Washington warned in his Farewell Address that factions in the form of political parties could rip the country apart. He declared, "I have already intimated to you the danger of Parties in the State, with particular reference to the founding of them on Geographical discriminations. Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the Spirit of Party, generally."<sup>17</sup>

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<sup>12</sup> "Madison's Letter on the Constitutionality of the Bank of the United States, June 25, 1831," in Jonathan Elliot and James Madison, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution: as Recommended by the General Convention at Philadelphia in 1787*, vol. 4 (Washington: Printed for the editor, 1836), 617.

<sup>13</sup> *The Federalist* No. 37 (James Madison).

<sup>14</sup> *The Federalist* No. 10 (James Madison).

<sup>15</sup> *The Federalist* No. 10.

<sup>16</sup> James Madison, "Parties," Jan. 23, 1792, in Philip B. Kurland, *The Founders Constitution* vol. 1 (Chicago: Univ. of Chicago Press, 1987), 15.

<sup>17</sup> George Washington, *Washington's Farewell Address: Delivered September 17th, 1796* (New York: D. Appleton and Co., 1861).



President Washington's warning fell largely on deaf ears. Once it took root, the two-party system has become increasingly entrenched in the United States, both at the national and state or local levels. The Democratic-Republican Party won a string of significant victories at the national level, with twenty-four straight years of control of the White House from Thomas Jefferson through James Monroe. The Jeffersonians also drove the Federalist Party, which had put John Adams into the White House for a single term, out of existence. In the first half of the nineteenth century, the Democratic-Republican Party transformed into the modern Democratic Party, while the opposing party took different names and shapes, beginning with the Whig Party in the 1830s and 1840s and eventually calling itself the Republican Party—whose candidate Abraham Lincoln won the presidency in 1860. Since after the Civil War, the two major parties of the Democrats and the Republicans have consistently dominated national politics and, in doing so, challenged the foundations of the Constitution that Madison helped to frame.

## II. CHALLENGES TO THE MADISONIAN CONSTITUTION

As members of the Madisonian Commission argue in the essays that follow, the Madisonian Constitution rested on several assumptions. Among these were the Framers' expectations about who, or what particular kinds of people, would lead the different branches of the federal government. In the Virginia ratifying convention, Madison explained that, "I go on the great republican principle, that the people with virtue and intelligence to select men [sic] of virtue and wisdom. Is there no virtue among us? If there not be, we are in a wretched situation. No theoretical checks—no form of government can render us secure."<sup>18</sup> The expectation was that there would be virtuous individuals who could "render" the nation "secure" against mob rule and all the destruction that came with it.<sup>19</sup>

Closely linked to its objective of ensuring the right kinds of people led each branch, the Madisonian Constitution was concerned with how people got into office. Madison and the other Framers who championed the Constitution had high expectations for the mechanisms set forth within it for selecting national leaders: direct, popular elections for the House; state legislatures for choosing senators; and presidents who were selected through the Electoral College and whose department heads or cabinet was to be chosen through requirements for presidential nominations and Senate confirmation. The Madisonian Constitution was further concerned with what people did once they got into office. Time and again, Madison stressed that the right kinds of people, once in office, would be inclined to focus on the public good and not just their own parochial, provincial, or personal interests.

As the Madisonian Commission convened for a workshop at the National Constitution Center in Philadelphia last November, our eight scholars identified a number of factors, individually or in combination, which complicated or impeded the Constitution's objectives after ratification. The most important objective was that elections bring into government the right kinds of people who would be focused on the public good. One obvious challenge to this objective was the rise and entrenchment of the two-party system. Madison understood that political parties could be dominated by or comprised of factions; once entrenched, those parties—or factions—would likely be disposed to nominate as candidates for the presidency or Congress people who are beholden or responsive to particular factions, not the general good of the public. Yet, Madison's expectation that the parties could keep themselves in check was largely borne out over the first several decades of the republic. In the 1820s and 1830s, the first political parties actually helped to constrain and temper impassioned or extreme impulses among the electorate by providing institutional frameworks that allowed for the unification of diverse economic and regional interests

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<sup>18</sup> James Madison, "Virginia Ratifying Convention, June 20, 1788," in *The Founders' Constitution* vol. 1 (Chicago: Univ. of Chicago Press, 1987), 13.

<sup>19</sup> Madison, Virginia Ratifying Convention.





through shared, broad reaching constitutional visions. As Princeton historian Sean Wilentz has noted, the most serious movements for constitutional and social change in the nineteenth century—from the abolition of slavery to the Progressive movement—were the products of strong and diverse political parties. To be sure, these movements did not come to fruition without significant outbreaks of violence and mayhem. However, the political parties attempted, although with only varied success, to defuse and to channel into constructive constitutional and political dialogue.

Whatever moderating effects political parties might have had in the aftermath of the Civil War were short-lived. In the twentieth century, those effects were ameliorated through a series of populist reforms, including the direct election of senators through the Seventeenth Amendment, the populist-ballot initiative, and direct primaries in presidential elections, which became widespread in the 1970s. More recently, geographical and political self-sorting have produced factions of voters who select representatives who are willing to support the party-line at all costs. Parties, in short, have expanded their control over both who is chosen for the highest federal offices and how they govern.

As of today, electoral primaries conflate the right kinds of people for office with those who will serve the interests of faction. General elections appear to offer no more than a choice between the representatives of two factions, not necessarily a representative cross-section of the citizenry. Once in office, presidents find themselves almost immediately pressured to focus on their re-elections, which means pleasing the people who put them into office. As a result, presidents feel pressure to choose as their closest advisors or cabinet heads not the people who are most qualified or disposed to be concerned with the public good, but rather with keeping particular factions within the governing party happy.

For House members, direct election every two years intensifies their attachment to party or to the factions they must appease to be re-nominated by their parties and to stay in office. In one of his last public appearances, the late Justice Antonin Scalia suggested that the Seventeenth Amendment had transformed the Senate by altering the means for its election from state legislatures to direct election in their respective states. This transformation made senators more amenable to appeasing well-financed factions to ensure their continued nomination and election. As a result, the general elections for Senate, perhaps like those for the presidency and the House, now give voters a choice between the representatives of two factions. Once in office, House members and senators need party support more than ever to maintain their committee assignments and mount successful re-election campaigns. As a result, members of Congress have been increasingly disposed to conflate their own interests with those of their parties rather than serving the public good. Over the last few decades, this disposition is clearly reflected in the sharp increases in voting in Congress strictly along party lines. For instance, the defining congressional achievements of Barack Obama's presidency and, thus far, Donald Trump's presidency—the Affordable Care Act of 2010 and the Tax Cuts and Job Acts of 2017, respectively—were each passed with no votes from members of the minority party.

The rise in rigid partisanship has not been unique to the Congress. For example, the Electoral College, once thought to be a filter that allowed electors to make wise choices about who should become president, has largely failed in that mission as it fell under the control of the increasingly dominant political parties. Once in office, presidents, at least since Theodore Roosevelt and Woodrow Wilson, have insisted that their authority derives directly from the people. Theodore Roosevelt referred to his office as “a bully pulpit,” by which he meant a unique platform for advocating for his agenda directly to the American people. He further argued that the President functioned uniquely



as a “steward” doing whatever he could for the American people and limited only by his popular support rather than any of the literal constraints set forth in the Constitution.<sup>20</sup> Since the early twentieth century, presidents have moved in precisely the direction that Madison and the other Framers had hoped to avoid: They bypass Congress and the media to make emotional appeals directly to the American people.

Both the constitutional structure and the increasingly sharp partisan divide among the members of Congress and the American electorate have helped to make the presidency stronger. Concerned that Congress had the potential to become the most dangerous branch because of its potential to draw power into its “impetuous vortex,” Madison and the other Framers designed a constitution that makes lawmaking difficult.<sup>21</sup> The lawmaking process set forth in the Constitution is riddled with veto-gates or various points at which a bill may be impeded or precluded from becoming a law. The first step in the lawmaking process is to get a law approved in one chamber of Congress. But most efforts fall short, often before a bill can reach the floor. If a bill makes it to the floor, it may not receive a vote or a majority. If the bill is approved in one chamber, it must be approved in the other. Even after a law is passed by both chambers of Congress, it must be signed by the president or there must be at least two-thirds of each chamber agreeing to override a presidential veto. After that, the law still may be subject to judicial review along with possible complications in its implementation or its construction. In short, the Constitution provides many more chances for a law to fail than for it to prevail.

Though the Framers largely expected the executive and legislative branches to be on equal footing in the lawmaking process (or in the three areas in which the Senate has unilateral judgment<sup>22</sup>), it has not worked out that way. Over time, it has become apparent that, as a lawmaker, the president, not Congress, has the upper hand. If for whatever reason Congress is unable to legislate on a matter, its inactivity leaves a void that president can, and frequently do, move quickly to fill, achieving by executive fiat what he is unable to accomplish by legislation. Once the president has made his move by issuing an executive order or vetoing a bill, then Congress is highly unlikely to override what he has done. Although President Obama vetoed congressional enactments twenty times, Congress overrode only one of those vetoes, demonstrating the high threshold that the Constitution establishes for overriding presidential vetoes. Thus, even if Congress can act first on a matter, there is no guarantee that the will of Congress, as opposed to that of the president, will prevail.

The expanded power of political parties over the choices and activities of the leaders of the three branches has coincided with the erosion of other safeguards that Madison and other Framers had designed to create some distance between national leaders and popular majorities. One of the most important of these mechanisms is separation of powers. In *Federalist* 47, Madison contended that the accumulation of legislative, executive, and judicial powers in the hands of one body or person would be “the very definition of tyranny.”<sup>23</sup> In *Federalist* 51, he explained that “ambition must be made to counteract ambition” by “giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments from the others.”<sup>24</sup> He counterbalanced his concern for the

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<sup>20</sup> William F. Grover, *A Structural Critique of the American Presidency: The Carter and Reagan Years*, Dissertation (University of Massachusetts, Sept. 1987).

<sup>21</sup> *The Federalist* No. 48.

<sup>22</sup> The Constitution empowers the Senate alone to give its advice and consent to presidential nominations to courts and other high-ranking positions, to convict and remove from office someone who has been impeached by the House, and to ratify treaties by at least a two-thirds vote. Article II, Section 2, Clause 2, U.S. Const.

<sup>23</sup> *The Federalist* No. 47.

<sup>24</sup> *The Federalist* No. 51.

potential aggregation of powers with the observation that the practicalities of governance dictate that the legislative, executive, and judicial powers are not entirely separated, but rather blended. The separation of powers is not absolute, but “where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.”<sup>25</sup> Madison was largely concerned with the ability of each branch of government to check encroachments on its own powers by the others. Concerns about a possible breakdown in separation of powers might arise when a single faction controlled all three branches.

Whatever government does, the public is rarely given unfiltered news about it. Today, the filtering bias of media and other outlooks is far worse than it has been before, but it is not unprecedented. In Madison’s day, there were partisan newspapers rallying their respective bases and spreading opposition to the leaders and policies they did not like. Today, there are far more outlets that feed political prejudices. With countless news outlets to choose from, most people learn their facts from sources that align with their political and social views. That is not the kind of education Madison expected to help democracy thrive.

### III. THE ESSAYS OF THE MADISONIAN COMMISSION

In the eight essays that follow, members of the Madison Commission examine what James Madison would have made of our current presidency, Congress, courts, and media, and what we can do to resurrect Madisonian values of reason rather than passion in a polarized age.

In “From a Fixed, Limited Presidency to a Living, Flexible, Boundless Presidency,” Sai Prakash, of the University of Virginia Law School traces the development of the modern presidency. “Almost every decision within the Convention tilted towards an energetic executive,”<sup>26</sup> Prakash argues. On his reading, George Washington and other delegates resisted the trend in the colonies to create a relatively weak executive because of their fears of the British monarchy and royal governors. Designed to be energetic, independent, and effective, the presidency designed by the Framers had obvious limits, such as the requirements that presidents “had to execute the laws of Congress.” They also “had to honor congressional regulation of the army and navy,” and needed “consent of the Senate to make appointments and treaties”; they “depended upon Congress to create and fund executive offices and departments”; they “had to honor judicial judgments”; and they were obliged by oath to ““preserve, protect, and defend the Constitution.””<sup>27</sup> In the years after ratification, presidents expanded their powers to initiate and manage wars and to forge international agreements by means other than treaties. At the same time, Prakash argues, “Modern presidents have become less and less faithful executives. They are more prone to becoming lawmakers as they supplement, misconstrue, and flout” the laws made by Congress.<sup>28</sup> Prakash suggests that presidents have been able to absorb increased power over lawmaking because they have been able to take advantage of other factors: the “unity” in the executive branch, which enables the president to move more quickly and decisively than either of the other two branches; the “technical rules” limiting the extent to which judicial review can meaningful cabin the growth of executive power; and various changes in “conceptions of the office and transformations of society,” including presidents’ declarations of popular mandates to justify their claims of further power.<sup>29</sup>

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<sup>25</sup> *The Federalist* No. 47.

<sup>26</sup> Sai Prakash, “From a Fixed, Limited Presidency to a Living, Flexible, Boundless Presidency,” in *A Madisonian Constitution for All Essay Series* (Philadelphia, National Constitution Center, 2019), 19.

<sup>27</sup> Prakash, “From a Fixed, Limited Presidency,” 21-22.

<sup>28</sup> Prakash, “From a Fixed, Limited Presidency,” 25.

<sup>29</sup> Prakash, “From a Fixed, Limited Presidency,” 28-30.

Prakash suggests that those who view the growth of presidential power as more of a problem than a blessing can consider several possible fixes. Members of Congress can be “more willing to express their views on matters of constitutional import”; Congress could also create “a war powers act that cuts military spending upon the initiation of conflict”; and it could “adopt a strategy of grow and shrink,” “reduce delegations,” and “reexamine the offices that currently require advice and consent and do away with the obligation for those inferior offices where such consent seems a waste of time.”<sup>30</sup> While Prakash acknowledges that these solutions are imperfect, he concludes that at least “we can certainly expect more from” Congress “than we can from presidents who spoke of the regal pretensions of the incumbent while running for the office.”<sup>31</sup>

In “The Constitution, the Presidency, and Partisan Democracy: Congress Revises the Electoral College, 1803-1804,” Sean Wilentz of Princeton examines how political developments after ratification undermined the Madisonian Constitution by transforming the operations of the Electoral College and the Twelfth Amendment. He examines the origins of the Electoral College, which was designed to ensure that independent, enlightened men would make the final choices on who would be president, noting how “quickly after 1787 the Framers’ system [for selecting the president] gave way to partisan conflict, necessitating an important change in the Constitution [the Twelfth Amendment] less than a generation after the Constitution was ratified.”<sup>32</sup> Wilentz rejects the argument that the Electoral College was devised as a means to protect slavery, but sees it instead as a last-minute compromise to ensure that there would not be direct election of the president. The Framers provided that state legislatures would choose electors. But, Wilentz argues, “The political history of the Twelfth Amendment reveals how rapidly the Framers’ consensual conception of national politics proved inadequate to the realities of their own time. It illuminates how a very different conception of politics, rooted in partisanship and party organization fitfully supplanted what the Framers had originally envisaged” as the purpose of the Electoral College to safeguard against the mob’s choosing a president.<sup>33</sup> Partisan fighting made it impossible for the ideal of the Electoral College ever to be fully realized, and in the aftermath of the hotly contested presidential election of 1800, it needed fixing. The fix was the Twelfth Amendment, which was ratified in 1804 but not without considerable partisan bickering over its terms and implantation. Over the next few decades immediately after its ratification, partisan politics ensured that the Twelfth Amendment, in Wilentz’s view, “pushed the nation’s politics closer to the partisan majoritarianism that defined Jacksonian democracy” or what has become known as majoritarian rule.<sup>34</sup>

In “Revisiting and Restoring Madison’s American Congress,” Sarah Binder of George Washington University examines Madison’s view of Congress and considers whether and how the Congress Madison had envisioned could be restored. She emphasizes “two elements of Article I [that] are particularly important for distilling Madison’s plan for the new Congress.”<sup>35</sup> The first is Madison’s hope “that his constitutional system would channel lawmakers’ ambitions, creating incentives for to remain responsive to the broad political interests that sent them to Congress in the first place.”<sup>36</sup> The second was his expectation “that Congress would dominate the political system.”<sup>37</sup> Yet, Binder argues, the story of how these elements played out is more complex than commonly supposed. On the one hand, “Madison’s

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<sup>30</sup> Prakash, “From a Fixed, Limited Presidency,” 33-34.

<sup>31</sup> Prakash, “From a Fixed, Limited Presidency,” 34.

<sup>32</sup> Sean Wilentz, “The Constitution, the Presidency, and Partisan Democracy: Congress Revises the Electoral College, 1804,” in *A Madisonian Constitution for All Essay Series* (Philadelphia, National Constitution Center, 2019), 35.

<sup>33</sup> Wilentz, “The Constitution, the Presidency, and Partisan Democracy,” 35.

<sup>34</sup> Wilentz, “The Constitution, the Presidency, and Partisan Democracy,” 44.

<sup>35</sup> Sarah Binder, “Revisiting and Restoring Madison’s American Congress,” in *A Madisonian Constitution for All Essay Series* (Philadelphia, National Constitution Center, 2019), 45.

<sup>36</sup> Binder, “Revisiting and Restoring Madison’s American Congress,” 45.

<sup>37</sup> Binder, “Revisiting and Restoring Madison’s American Congress,” 45.

congressional vision was a stunning success.”<sup>38</sup> Binder argues that Congress, commonly supposed to be subject to gridlock, in fact “has played a preeminent role in driving and shaping historical change in the United States, and it remains the world’s longest lasting, popularly elected legislature.”<sup>39</sup> On the other hand, she acknowledges that the two party system may well have broken Congress, as it has produced “steadily rising legislative stalemate, limited oversight of the executive, lack of fiscal discipline, and excessive delegation to the executive and often the courts.”<sup>40</sup> Congress has failed “for some time to incubate, deliberate, and compromise on legislative solutions to major public programs,” she concludes, emphasizing “the degree of legislative deadlock in each Congress since the mid-1940s.”<sup>41</sup>

As for causes of this gridlock, Binder identifies party polarization. She also notes that “presidential subordination to Congress weakened with the rise of nationalized parties with presidents at the helm.”<sup>42</sup> The president become even stronger as Congress (often for partisan reasons) delegated more authority to the executive. Congress may have thought it could recapture the power it surrendered, but parties have not been able to muster the super-majorities necessary to overcome presidential vetoes of any efforts by Congress to recapture its lost authority. “Even if lawmakers ultimately find a way to get their institution back on track,” Binder concludes, “Congress’ difficulties have been costly—both to the fiscal health of the country and to citizens’ trust in government. The economy is regaining its footing, but regenerating public support for a Congress that barely reflects Madison’s ideal will likely prove much harder.”<sup>43</sup>

In “Recovering a Madisonian Congress,” Daniel Stid, Director of the Madison Initiative at the Hewlett Foundation, asks how we can restore “some of the powers [that Congress] ceded the executive”?<sup>44</sup> Stid reviews the various mechanisms that the Constitution designed to curb factional tyranny and to promote good government. Congress was essential to the Madisonian system, since it would “host and foster deliberation on what the federal government should do about important issues facing the nation” and would be not just “a check on executive power” but also become “the generative, law-making body in the new republican system of government.”<sup>45</sup> According to Madison’s vision, “It was only in Congress that the full sweep of ideas, agendas, interests and passions could be represented and reconciled, and it was only in Congress that the legislative alloys in which they would be combined could be forged and tempered.”<sup>46</sup> But, Stid recognizes that the “mischiefs of factions” have been “spiraling out of control” in Congress for many reasons, including the sharp rise in the political parties’ determination not just to get and keep power, but also not to cooperate with each other, as well as the presidency’s arrogation of power, and the abdication of congressional authority because of partisan and other reasons.<sup>47</sup>

Stid identifies “three potential paths forward” that could help to restore Congress as Madison had conceived of it.<sup>48</sup> First, we could “mitigate[e] the effects of factions, in particular polarization and hyper-partisanship, that too often work to inflame passions and grind things in Congress to a halt.”<sup>49</sup> “Ranked choice voting,” for example, could give

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<sup>38</sup> Binder, “Revisiting and Restoring Madison’s American Congress,” 50.

<sup>39</sup> Binder, “Revisiting and Restoring Madison’s American Congress,” 50.

<sup>40</sup> Binder, “Revisiting and Restoring Madison’s American Congress,” 50-51.

<sup>41</sup> Binder, “Revisiting and Restoring Madison’s American Congress,” 51.

<sup>42</sup> Binder, “Revisiting and Restoring Madison’s American Congress,” 53.

<sup>43</sup> Binder, “Revisiting and Restoring Madison’s American Congress,” 56.

<sup>44</sup> Daniel Stid, “Recovering a Madisonian Congress,” in *A Madisonian Constitution for All Essay Series* (Philadelphia, National Constitution Center, 2019), 67.

<sup>45</sup> Stid, “Recovering a Madisonian Congress,” 59-60.

<sup>46</sup> Stid, “Recovering a Madisonian Congress,” 60-61.

<sup>47</sup> Stid, “Recovering a Madisonian Congress,” 61.

<sup>48</sup> Stid, “Recovering a Madisonian Congress,” 66.

<sup>49</sup> Stid, “Recovering a Madisonian Congress,” 66.

“voters more choices and provides a finer-grained register of public opinion, ensures winning candidates are supported by a majority of voters, and – most importantly – gives candidates incentives to forego highly negative and partisan campaigns.”<sup>50</sup> Second, we could strengthen “Congress as an institution in our separation of powers system,” a solution that requires “procedural entrepreneurs” in Congress that are more interested in policy initiatives than partisan fidelity.<sup>51</sup> Third, citizens could “revitalize our understanding of the proper functioning of Congress and do our part to ensure that our representatives and senators reflect this understanding.”<sup>52</sup> Constitutional education, in short, must be undertaken to effect “reawakened citizen engagement with Congress.”<sup>53</sup>

Then there are the courts. In “James Madison and the Judicial Power,” Jack Rakove of Stanford examines Madison’s thinking about the legislative process and the Supreme Court’s role “in maintaining the stability of the entire federal system.”<sup>54</sup> Madison believed that the representation of different factions within Congress would help to dilute the power of any one; and their clashes in Congress, in the long run, would promote deliberation and compromise. He further hoped that the judiciary would be part of a council of revision that would keep both states and the Congress in check. When the Convention rejected his suggestions, Congress and the courts were left as the safeguards against the tyranny of factions. Madison hoped that experienced legislators in Congress would acquire knowledge about the public good. But experienced legislators proved elusive: as Rakove writes: “Even though the Constitution did not require it, rotation in office remained the pervasive practice until the late nineteenth century.”<sup>55</sup> “Indeed,” he writes, “nothing better indicates how much our political world differs from theirs than this basic disparity in the importance of incumbency.”<sup>56</sup> Rakove concludes by wondering whether adopting “Madison’s council of revision,” with judges as members, “would reduce and mitigate the constitutional storms that sometimes rage over legislation, as the post-enactment history of the Affordable Care Act illustrates so amply exemplifies.”<sup>57</sup>

In “The Irrelevance and Relevance of James Madison to Faithful Constitutional Interpretation,” Michael Paulsen of St. Thomas Law School addresses a different question about the American judiciary: the widespread consensus on the “exclusive discretion and judgment of courts, to be exercised in accordance with whatever criteria judges think are most appropriate.”<sup>58</sup> He argues that the consensus on both judicial supremacy and broad interpretive discretion of judges over constitutional interpretation are wrong. Madison himself understood the role of the judiciary differently. Paulsen argues that the Framers did not believe in judicial supremacy, but rather that in a system of separation of powers with no one branch possessing interpretive supremacy or superiority over the others; none being bound by the constitutional judgments of the others; and each using its powers independently “to check the others, in order to hold all accountable and keep the Constitution secure.”<sup>59</sup>

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<sup>50</sup> Stid, “Recovering a Madisonian Congress,” 66.

<sup>51</sup> Stid, “Recovering a Madisonian Congress,” 67.

<sup>52</sup> Stid, “Recovering a Madisonian Congress,” 69.

<sup>53</sup> Stid, “Recovering a Madisonian Congress,” 69.

<sup>54</sup> Jack Rakove, “James Madison and the Judicial Power,” in *A Madisonian Constitution for All Essay Series* (Philadelphia, National Constitution Center, 2019), 70.

<sup>55</sup> Rakove, “James Madison and the Judicial Power,” 75.

<sup>56</sup> Rakove, “James Madison and the Judicial Power,” 75.

<sup>57</sup> Rakove, “James Madison and the Judicial Power,” 81.

<sup>58</sup> Michael Stokes Paulsen, “James Madison and the Power of Constitutional Interpretation,” in *A Madisonian Constitution for All Essay Series* (Philadelphia, National Constitution Center, 2019), 83.

<sup>59</sup> Paulsen, “James Madison and the Power of Constitutional Interpretation,” 84.

On the question of constitutional interpretation, Paulsen notes that Madison and the other Framers did not envision authoritative interpreters engaging in a free-for-all in picking and choosing methodologies for interpreting the Constitution. Instead, Madison viewed the Constitution as having, on most matters, a fixed, static, determinate meaning. That meaning consisted of the common linguistic meaning of the words of the document (or, in some cases, the specialized meaning of a well-recognized term-of-art phrase): that is, “the meaning the Constitution’s words and phrases would have had to those using them at the time the document was adopted.”<sup>60</sup> Paulsen quotes with approval Madison’s declaration as a member of the House that, “As the instrument came from [the people,] [the Constitution] was nothing more than the draft of a plan, nothing but a dead letter, until life and validity was breathed into it by the voice of the people, speaking through the several State Conventions.”<sup>61</sup> For the terms of the Constitution that “had an uncertain or indefinite meaning, admitting of a range of plausible readings . . . Madison believed that a long, consistent and broadly accepted interpretation and practice might, over time, settle the understanding of such uncertain terms or phrases as a practical matter.”<sup>62</sup> While Paulsen concedes that Madison was not perfectly consistent over time in his constitutional views over the course of his long public career, he concludes that “he rarely if ever deviated from first principles as to *what properly counts*—and, equally important, what does not—in sound constitutional interpretation.”<sup>63</sup> Paulsen concludes by writing, “It is but a small exaggeration to say that the loss of the Madisonian vision — and the substitution in its place of a practice under which the Supreme Court possesses essentially plenary and exclusive interpretive power, exercised according to whatever criteria the members of the Court think fit — accounts for nearly everything that ails our constitutional law today,” and therefore, “restoring a ‘Madisonian Constitution’ for today is a reclamation project as it concerns the judicial power.”<sup>64</sup>

Finally, there is the media. In “Madison’s Deliberative Republicanism, Political Communication, & the Sovereignty of Public Opinion,” Colleen Sheehan of Villanova, shifts our focus toward Madison’s vision of “deliberative Republicanism” and how advancements in communication undermine Madison’s understanding of the place of public opinion at the federal level. The Madisonian Constitution sought not just to enable factions to keep each in check but also to ensure that representatives focused on the public good. As Sheehan describes the project, “To guard against personal ambition and the threat of governmental tyranny (i.e., minority faction), Madison endorsed a system of prudential devices, including institutional separation of powers, bicameralism, checks and balances, and federalism.”<sup>65</sup> These “inventions of prudence” are intended to “channel, check, and control the self-seeking personal motives of political office holders and thereby enable government to police itself.”<sup>66</sup> But, for Madison, “The primary control on the government . . . remains always with the people. In the final analysis, governmental decisions depend on the will of the society, or in other words, on the will of the majority.”<sup>67</sup> While Madison recognized that factions might find ways to communicate and shape the views of their respective members, he helped to devise a system whose “overall aim was not to stymie the will of the majority, but rather to place obstacles in the path of factions, including majority faction. At the same time, he sought to facilitate the development of a just society, or in other words, the reason of the public.”<sup>68</sup>

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<sup>60</sup> Paulsen, “James Madison and the Power of Constitutional Interpretation,” 85.

<sup>61</sup> Paulsen, “James Madison and the Power of Constitutional Interpretation,” 87.

<sup>62</sup> Paulsen, “James Madison and the Power of Constitutional Interpretation,” 88.

<sup>63</sup> Paulsen, “James Madison and the Power of Constitutional Interpretation,” 94.

<sup>64</sup> Paulsen, “James Madison and the Power of Constitutional Interpretation,” 96.

<sup>65</sup> Colleen Sheehan, “Madison’s Deliberative Republicanism, Political Communication, & the Sovereignty of Public Opinion,” in *A Madisonian Constitution for All Essay Series* (Philadelphia, National Constitution Center, 2019), 99.

<sup>66</sup> Sheehan, “Madison’s Deliberative Republicanism,” 99.

<sup>67</sup> Sheehan, “Madison’s Deliberative Republicanism,” 99.

<sup>68</sup> Sheehan, “Madison’s Deliberative Republicanism,” 100.



To promote public reason, Sheehan argues, Madison's "goal . . . was to encourage the type of communicative activity that involves deliberation and results in the measured exchange of ideas about public matters."<sup>69</sup> His ultimate aim, Sheehan maintains, was "to establish the conditions in which a certain kind of majority can feasibly form and rule."<sup>70</sup> That ideal majority would be as large as humanly possible and would be informed and abide by "the settled opinion of the community."<sup>71</sup> As Sheehan explains further, "Once formed and settled, public opinion is the operational sovereign in free government."<sup>72</sup> Public opinion itself, if properly informed and shaped, becomes the ideal educator for the people. Sheehan acknowledges many problems have eroded the conditions that have eroded the creation of an informed, virtuous citizenry. These include the rise of "political partisanship" that has effectively "split" the country into two camps—"those who defend the Constitution and the principles of the Founding, including the idea of natural law and natural rights" and those who favor "evolving, inclusive egalitarianism, or its postmodern variant, which rejects natural law and the notion of human nature itself, in favor of social constructs, hierarchies of power, and identity politics."<sup>73</sup> Sheehan associates herself with the former camp, which she also considers to align with Madison's "aspirations for America [which] depended on the capacity of the people to govern themselves, which in turn depended on the willingness of the people to engage in deliberative processes with the aim to—and in the spirit of—finding common ground."<sup>74</sup>

In the last essay, "'The Ultimate Justice of the People': Madison, Public Opinion, and the Internet Age," Greg Weiner of Assumption College examines Madison's central assumptions about space and time in his conception of how public opinion would ideally form under the new Constitution. One assumption was that there would a spatial, or physical, separation between the public and their representatives in Congress, and another was that "public opinion would be sovereign, but it would form gradually."<sup>75</sup> Madison's scheme, as set forth in the Constitution, which Weiner, calls "temporal republicanism," was designed "to separate the formation of public opinion from the decision to act upon it with sufficient time for passions to dissipate."<sup>76</sup> According to Weiner, Madison expected that once in Congress, members would make "a rational calculation . . . to put long-term interests over immediate appetites."<sup>77</sup> And Madison's analysis of faction is rooted in moral objectivity. This is not to say everyone agrees on what is right, but Madison did appear to assume everyone operated in roughly the same universe of facts even if those facts yielded different conclusions.

Thus, Madison's hope that the public and Congress would engage in careful deliberation on the big questions of the day depended on relying on the cooling mechanisms of time and space to prevent citizens from acting immediately upon their passions. Instead, through interaction with people of differing views, they could thoughtfully debate the public good. But, as Weiner argues, "All of these assumptions are in tension with a media and technological environment that has accelerated communication and the formation of public opinion, erased the constitutional distance between representatives and constituents and between constituents and each other, [and] hardened factional

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<sup>69</sup> Sheehan, "Madison's Deliberative Republicanism," 100.

<sup>70</sup> Sheehan, "Madison's Deliberative Republicanism," 100.

<sup>71</sup> Sheehan, "Madison's Deliberative Republicanism," 100.

<sup>72</sup> Sheehan, "Madison's Deliberative Republicanism," 100.

<sup>73</sup> Sheehan, "Madison's Deliberative Republicanism," 104-105.

<sup>74</sup> Sheehan, "Madison's Deliberative Republicanism," 106.

<sup>75</sup> Greg Weiner, "'The Ultimate Justice of the People': Madison, Public Opinion and the Internet Age," in *A Madisonian Constitution for All Essay Series* (Philadelphia, National Constitution Center, 2019), 108.

<sup>76</sup> Weiner, "'The Ultimate Justice of the People,'" 109.

<sup>77</sup> Weiner, "'The Ultimate Justice of the People,'" 108.



alignments as consumers of media on all sides retreat into private and self-reinforcing realities.”<sup>78</sup> As a nation, we have, in other words, become not bigger but smaller, and more fragmented, a nation that is comprised of relatively isolated communities which are resistant to new or challenging information and, therefore, to cooperative deliberation in both the short- and long-term. The “effect of this segmentation is to allow media consumers to live in worlds of their own making, increasingly isolated from opposing views.”<sup>79</sup> This state of affairs is incapable of cultivating the kind of public reason which Madison hoped would guide the lawmaking process. His “particular concept of reason entailed the application of open minds to objective facts. If minds are never open, and facts are always fungible, Madisonian reason cannot operate. If all this is communicated at the speed of light, neither can Madison’s device for dissipating the passions.”<sup>80</sup> Like several other authors, Weiner concludes by emphasizing the importance of civic education.

## IV. THE ESSAYS OF THE MADISONIAN COMMISSION

As all contributors to the *Madisonian Constitution for All Essay Series* recognize, there are at least three kinds of solutions to the problems identified by the Madisonian Constitution. The first is to fix the extent to which websites and social media platforms have undermined public deliberation and discourse. Proposals for fixing these problems include: greater transparency, delaying publication of various kinds of content, or reducing the amount of some content available online. These and other proposed solutions run into two problems. The first is that the platforms themselves are private entities and, therefore, the solutions for improving what they do with respect to how they regulate content online must come from them, and not from the state or the public (unless, of course, the public can exercise influence over what they do through the market or regulation). The companies running the platforms must have the incentives to change. An ensuing complication or salvation, depending on your point of view is, of course, the First Amendment, which forbids the government from censoring hate speech or attempting to micro-manage the deliberations and discussions across the web—and these companies have their own First Amendments right to assert.

A second solution to the breaking down of the Madisonian Constitution may be found in one of the Constitution’s most important safeguards against the tyranny of the mob – the conception of federalism, or the relationship between the federal government and the states. Madison conceived of federalism as a significant bulwark against out-of-control popular majorities by enabling the federal government and the states to check each other. Justice Louis D. Brandeis famously described the states as “laboratories of democracy,” which are tinkering with—and frequently fighting over—providing easier (or more restrictive) access to voting, expanding (or opposing) nonpartisan primaries, pushing for (or opposing) greater transparency in campaign donations, and providing (or opposing) public funding of some campaigns.<sup>81</sup>

The third and most promising way to protect the fundamental ideals and objectives of the Madisonian Constitution is through constitutional education. The Framers believed that the fate of the republic depended on educating the citizenry. President George Washington urged Congress to create a national university in 1796. He declared, “A primary object of such a national institution should be the education of our youth in the science of government.”<sup>82</sup>

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<sup>78</sup> Weiner, “The Ultimate Justice of the People,” 109.

<sup>79</sup> Weiner, “The Ultimate Justice of the People,” 114.

<sup>80</sup> Weiner, “The Ultimate Justice of the People,” 115.

<sup>81</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

<sup>82</sup> George Washington, Eighth Annual Message, Dec. 7, 1796.



Drawing on his studies of ancient republics, which taught that broadly educating the citizenry was the best safeguard against “crafty and dangerous encroachments on the public liberty,” Madison favored having the rich subsidize education of the poor.<sup>83</sup> He believed it was indispensable for combating factions. In defense of the Kentucky legislature’s “Plan of Education embracing every Class of Citizens,” Madison wrote in 1822, “A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”<sup>84</sup> Subsequently, John Quincy Adams, Henry Clay and Abraham Lincoln were among those who defended the broadening and deepening of public education at both the federal and local levels.

At the National Constitution Center believe, we are committed to expanding constitutional education for all. The faithful implementation of the Madisonian Constitution depends on the ultimate sovereign, we the people, cultivating our faculties of reason by educating ourselves about the Constitution. The concept of virtue, which was important to Madison and the other Framers, required commitment to civil dialogue, to disagreeing without being disagreeable, and to working together on behalf of the public good.

A Madisonian Constitution for All depends on the whole people’s commitment to the enterprise of making government work on behalf of the public good, and that commitment requires rising to the challenges of becoming educated about the most pressing issues of the day. Madison was a partisan, but before that, he was a Founder, and before that, he was a student of constitutional history. Madison may not have been perfect in fulfilling the ambitions he set for himself, the country, and the Constitution. But his ambitions remain the inspiration and model for all Americans to follow in ensuring that the Constitution that Madison helped to create is more than what he called a “parchment barrier” against threats to liberty and public reason. Rather, it must be a code to live by and to inspire future generations to learn about as we strive together “to form a more perfect Union.”<sup>85</sup>

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<sup>83</sup> *Niles’ National Register*, vol. 23, 377.

<sup>84</sup> *Niles’ National Register*, vol. 23, 376-377.

<sup>85</sup> Preamble, U.S. Const.

# FROM A FIXED, LIMITED PRESIDENCY TO A LIVING, FLEXIBLE, BOUNDLESS PRESIDENCY

BY SAIKRISHNA BANGALORE PRAKASH<sup>1</sup>

## INTRODUCTION

Though James Madison is often deemed the father of the Constitution, he was something of a perplexed uncle when it came to Article II. On the eve of the Philadelphia Convention, he had apparently given little thought about the executive. In “Vices of the Political System of the United States,” Madison listed twelve “defects” of the Articles of Confederation. While noting the lack of sanctions for breaking national laws, he omitted the glaring absence of a vigorous, independent national executive. His April 1787 letter to George Washington, written a month before the Philadelphia Convention, sheds light on why: “I have scarcely ventured as yet to form my own opinion either of the manner in which [the national executive] ought to be constituted or of the authorities with which it ought to be clothed.” This was a bit of an overstatement, for as readers of Baron de Montesquieu’s *Spirit of the Laws* knows, an executive does what the label implies—it *executes* the law. In the eighteenth century, the word “executive” had a core meaning even if its margins were contested. For Madison to speak of an executive was to signal that he desired an entity tasked with implementing national laws. Even so, the letter reveals that despite his reputation for methodical preparation, Madison was unsure about which additional “authorities” might be vested with the executive.

## I. THE FOUNDERS’ FIXED, LIMITED PRESIDENCY

### A. THE CREATION OF AN ENERGETIC, FORMIDABLE EXECUTIVE

While certain Philadelphia delegates likely wielded more influence over the final contours of Article II—Gouverneur Morris of New York and James Wilson of Pennsylvania come to mind—the Article is best seen as the joint product of many minds. If victory has a thousand fathers, Article II was sired by perhaps fifty. In the end, not all endorsed its final form. Three delegates—Edmund Randolph, George Mason, and Luther Martin—pointedly criticized the formidable executive that emerged from the Convention.

They had ample cause. By the end of the Convention, the executive crystallized into an American version of European monarchies, one whose resemblance to the British monarchy could not be gainsaid. This republican, limited monarchy was hardly foreordained when the delegates first met in May 1787. Rather, the executive acquired power over the course of the Convention, a pattern of accretion that would become familiar to later generations of Americans.

Almost every decision within the Convention tilted towards an energetic executive. The delegates settled on a single executive and rejected a triumvirate, presumably because they agreed with those delegates who warned of violent dissensions and the diffusion of responsibility. After tussling for months over the vexatious question of selection, they finally settled on special presidential electors with a House backstop when no candidate received an electoral majority. This selection process, coupled with a

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<sup>1</sup> James Monroe Distinguished Professor of Law, Paul G. Mahoney Research Professor, Miller Center Senior Fellow, University of Virginia.

guaranteed salary, a lengthy tenure, and no term limits, yielded an independent executive, one not beholden to Congress.

In fact, the new executive—armed with a host of powers—would serve as a counterweight to Congress. The executive would wield a check on legislation in the form of the limited veto, the power of which has grown considerably as presidential confidence waxed over the centuries. Moreover, the president also had power to enforce the law, the ability to pardon all federal offenses, an interstitial authority over foreign affairs, command of the military, and direction of the executive bureaucracy. With respect to making appointments and treaties, the president would need the Senate's consent.

Why did the powers of the executive accrete over the course of the Convention? Blame George Washington, as well as the determined delegates who relentlessly pressed for a robust executive. Washington caused those fearful of a powerful executive to let down their guard. When delegates considered a unitary executive, they fixed upon Washington and were emboldened by the prospect that he would be the first president. Had he not proven that power could be entrusted to him by renouncing it at the end of the Revolution? Those favoring a robust executive rode this Washingtonian tailwind and stubbornly persisted in their views, even in the face of defeats. Under existing fundamental frameworks, including the state constitutions and the Articles of Confederation, Americans had gone too far in hobbling the executive. The reformers insisted that this mistake be avoided at all costs. Whereas plural, weak executives had been the norm, the new Constitution prized executive unity and vigor.

When Americans received the proposed Constitution, discerning minds peered behind the document's trappings to see that the presidency would be far more powerful than contemporaneous state executives, whom James Madison had denigrated as "cyphers." Rather, in the words of Edmund Randolph, in reading the Constitution the people beheld a "little monarch," imbued with more power than many of the crowned monarchies in Europe. Thomas Jefferson said the office was a "bad edition of a Polish King,"—hardly words of flattery. His aide said the Constitution would create a "mixed monarchy," for despite "the humble title of President," the office "would have greater powers than several monarchs have." Prominent Anti-federalists, like Patrick Henry and George Mason, carped that the presidency "squints toward monarchy" and that the Constitution would establish an "elective king." Some supporters of a strong executive rejoiced, with John Adams saying that the Constitution had created a "monarchical republic." Even foreigners saw the resemblance, with the Dutch Stadtholder saying that Americans had given themselves a "king, under the title of President."

The complaints generally flowed in one direction. "We the People" ratified the Constitution in the teeth of innumerable claims that the presidency would be too powerful and would be a monarch. In contrast, precious few complained that the presidency would be impotent or lethargic. The Constitution thus marked a sea change from 1776, when the signers of the Declaration indicted George III for kingly excess. In the Constitution, the Convention had constructed something scarcely different from what the nation had previously forsaken. America was to have, in many respects, a national government with a formidable executive.



The monarchical cast of the original presidency is utterly lost on modern readers of the Constitution. For many readers, the claim might seem downright bizarre. Article II never mentions a crown, a throne, or a fancy title. Our executive is elective, while monarchies seem invariably hereditary. America's executive is clearly limited, whereas monarchy brings to mind despotism—the arbitrary rule of one. Finally, America is a grand republic, one with a guarantee of a “republican form of government,” and hence—whatever else it is—it cannot be a monarchy.

But the Founders were more sophisticated when it came to monarchy. That generation knew that monarchs could be elective because many storied monarchies were, including the Papacy and the Holy Roman Emperor. They were also well aware that some governments—so-called mixed monarchies—had elements of both monarchy and republic. They could look behind the forms to see the substance. For instance, Baron de Montesquieu perceived that for all its regal frills, England was a “republic disguised under the form of a monarchy,” by which he meant a mixed monarchy. Inspired by the Baron, one might regard the American Constitution that as a mixed, limited monarchy veiled by the trappings of a thoroughly republican façade.

## B. ENERGETIC AND FORMIDABLE BUT ALSO LIMITED AND CHECKED

Indeed, it is vital to bear in mind that even with all this—the mixture of national, federal, republican, and monarchical elements—the Constitution still created a *limited, republican* monarchy. In interring the oft-told fairytale that the Framers crafted a weak executive, we must not swing to the other extreme. As powerful as the presidency was, it was clearly not meant to be all-powerful. There were plenty of constitutional restraints, some express and others implied.

First, presidents had to execute the laws of Congress, for they could not suspend or dispense the very statutes they were to take care to faithfully execute. Almost a century before the Constitution's creation, the English Bill of Rights firmly established that the executive could not suspend or dispense laws, as such a power came perilously close to a general authority to legislate. More generally, the English did not suppose that the Crown could (or should) make laws on its own. Instead, the Crown's checks on lawmaking came from the veto, the power to end a session of Parliament (and thereby terminate pending activity), and the routine use of influence to corrupt the independence of legislators. The duty to execute laws made primarily by others and the lack of a generic power to make laws went hand-in-hand and were bedrock features of all Anglo-American executives in the eighteenth century.

Second, and relatedly, presidents had to honor congressional regulation of the army and navy, for military command did not imply authority to start wars or to unilaterally govern and regulate the military. The office of “Commander-in-Chief,” an entirely familiar and commonplace position, merely encompassed command of a particular military unit and not autonomy to launch attacks on foreign nations. In fact, both England and America had hundreds of commanders in chief, each charged with commanding a particular component of the military and each barred from unilaterally plunging their nations into war. The Constitution merely granted the president the same sort of military command that generals had, except that the president was *ex officio* a general of generals and an admiral of admirals—a commander of all military units. That is why Alexander Hamilton said that the president would merely be the



“first General and Admiral.” With its express authority to “declare war” and to govern and regulate the armed forces, Congress could control the military and its Commander-in-Chief.

Third, Presidents generally required the consent of the Senate to make appointments and treaties, meaning that they could not unilaterally fill appointed offices or make significant international contracts. These were checks on traditional executive powers and were a nod to those that believed that a council ought to check the executive on certain vital matters. On these questions, the executive was plural rather than unitary, for the need to secure the Senate’s consent made the latter partly “executive,” a point not lost on early readers of the Constitution or on the Senate itself.

Fourth, presidents depended upon Congress to create and fund executive offices and departments, including the Army and Navy, since chief executives lack the constitutional authority to generate offices or endow them. That is why the first Congress created three early departments—Foreign Affairs, War, and Treasury—and supplied the staffing and pay for each. While the departmental names would sometimes change, and the number of departments and agencies has ballooned, Congress has maintained its monopolies over departmental structure and the purse. The power to create and fund the executive branch’s substructure has consistently given Congress leverage over the bureaucracy. While presidents may direct and remove executive officers, Congress makes the laws committed to the care of such officers and may expand or curb their authority, a useful means of signaling subordination and influencing behavior.

Fifth, presidents had to honor judicial judgments. At one time, the judicial power was but part of the executive, for both executed the law, albeit in different ways. But the English barred their kings from sitting in judgment and protected their most important judges from executive ouster. In this scheme, no one doubted that judges decided who prevailed in cases brought before them. This was true even when the government was a party as plaintiff, prosecutor, or defendant. This understanding of the executive’s relationship to the judiciary carried over to America and our Constitution. Unlike the English kings of old, American presidents could not decide cases. Cases were to be decided by judges, whose judgments the executive was to faithfully execute.

Finally, the Constitution enjoined the president to “preserve, protect, and defend the Constitution.” This unique oath, coupled with Article V’s amendment process, refutes any notion that presidents may amend the Constitution by other means. Unlike the English Constitution, which changes by practice and by legislative statutes, the American Constitution was meant to be impervious to both. Certainly, the president was not meant to be the instrument of its informal modification, much less its undoing.

### C. DEBATES AND DISCOMFORT ON THE BREADTH OF PRESIDENTIAL POWER

In the early years, a few contentious disputes arose about the peripheries of presidential power. In 1789, Representative James Madison read the grant of “executive power” as encompassing an entire class of related powers. Within this category, he argued, was a power to remove executive officers. In other words, the president had constitutional power, via the grant of executive power, to oust executives from office. Madison’s interpretation prevailed. In 1793, writing as “Helvidius,” Madison reiterated his earlier position about the Article II Vesting Clause. It granted authority, he said. Yet he simultaneously denied



that it encompassed foreign affairs authorities. Fears of the executive were growing and they no doubt influenced Madison's perspective.

The specter of an increasingly regal president loomed in the background, especially in Washington's second term. Though detractors were often reluctant to attack Washington directly, some carped that the presidency was slowly being monarchized. As Jefferson observed, the early fights over presidential power were in part about what type of government America had and what type it would have in the future:

"Where a constitution, like ours, wears a mixed aspect of monarchy and republicanism, it's citizens will naturally divide into two classes of sentiment, according as their tone of body or mind, their habits, connections, and callings induce them to wish to strengthen either the monarchical or the republican features of the constitution. Some will consider it as an elective monarchy . . . and therefore endeavor to lead towards that all the forms and principles of it's [sic] administration. Others will [view it] as an energetic republic."

## II. OUR LIVING, FLEXIBLE, BOUNDLESS PRESIDENCY

Since Washington's presidency, 43 more presidents have come and gone. Yet the underlying debate and disquiet continues unabated. As compared to the late eighteenth century, many may suppose that we have gone a quite a long way to reinforcing the Constitution's monarchical features. As a general matter, our modern system looks more and more like the English system of an unwritten, evolving, common law Constitution—what moderns call a "Living Constitution". The presidency has not been immune to these changes. In fact, it has been one of the Living Constitution's principle agents of informal amendment. The modern executive is at once more republican *and* more monarchical than the original presidency. If the Founders Presidency was meant to be fixed, our presidency is better described as a "Living Presidency," one whose contours are shifting over time, generally in a manner that expands the office.

We have nothing like an absolute monarchy. And though we thrice have had sons follow their fathers into the office, we do not have a hereditary monarchy. Yet no one doubts that presidential powers have accreted over time. Where the office was weak, it is now strong. Where it was strong, it is stronger still. Some of these practical, informal amendments to Article II are somewhat familiar. Others are so much a part of the fabric of the modern presidency that we can scarcely make out that features of the original presidency have been amended and tossed aside. We have forgotten so much of the past that we cannot make out all the modern additions to the office.

### A. THE RISE OF THE COMMANDER-IN-CHIEF

Like our burgeoning military, which has ballooned from a thousand soldiers to more than a million men and women in arms, the President's military authority has swollen with the times. Via the alchemy of practice—in this case the repeated violation of constitutional norms—the President has acquired something of a camouflage "gloss" to his executive power, meaning additional authority over the armed forces.



The Commander in Chief has advanced on two related fronts. One relates to the initiation of war. The most infamous violation of existing norms was Harry Truman's "police action" in Korea, when the president asserted that no congressional authorization was necessary because, after all, there was no war on the Korean peninsula. That Truman would commandeer Congress's constitutional authority to wage (declare) war within just a decade of Congress declaring war against six nations in World War II, each of whom had declared war first and were thus aggressors, reflects either mendacity or massive ignorance on his part.

From this unprecedented police action sprung forth a monumental, unwritten amendment to our Constitution. Since Korea, presidents have started wars, large and small, in Grenada, Kosovo, Bosnia, Libya, and a host of other nations. Even when presidents have gone to Congress, they often went merely to consult, insisting that legislative approval was superfluous. Welcome, yes, but entirely unnecessary. As things stand now, executive branch lawyers debate whether presidents have acquired the power to begin messy ground wars. While some such lawyers (joined by allies in Congress) assert that the president can start any sort of war he wishes, lawyers in Democratic administrations have denied that the practice goes so far. The presidency has only acquired a power to start limited wars, they insist. But this conclusion is somewhat shaky given that the Korean War, the most famous war without congressional authorization, was a grueling, horrific ground war with thousands of U.S. casualties. If practice is the yardstick, as many executive branch lawyers insist, the Korean War helps establish that presidents can wage whatever war they wish, meaning that the last 70 years of practice have transferred the declare-war power, root and branch, to the president.

The second military innovation arises from executive insistence that Congress cannot micromanage the armed forces. This claim would come as a shock to the Founders, for Congress expressly enjoys broad constitutional power to make rules governing and regulating the armed forces. Moreover, early Congresses actually exercised such power to determine by law where and how the enemy might be attacked. For instance, such regulation was pervasive during America's Quasi-War with France. During the presidency of John Adams, Congress specified which enemy vessels could be targeted and where they could be attacked. Neither Adams, nor George Washington, nor anyone else uttered any constitutional qualms. Today, commanders in chief routinely declare far less intrusive congressional restrictions unconstitutional and refuse to honor them. Our politicians have utterly forgotten that the original Constitution granted Congress almost plenary authority over the military.

## B. THE PRESIDENT AND FOREIGN AFFAIRS

With respect to the broader category of foreign relations, the changes have been less noticeable, in part because Americans pay less attention to the external realm and also because the original allocation of foreign affairs power was always a little more obscure. The biggest transformation is the president's power to bypass the Treaty Clause. The Clause requires the president to secure a two-thirds vote of the Senate before ratifying a treaty. Under the original Constitution, treaties encompassed significant, long-term contracts in which the United States pledged its honor to another nation. This was a functional definition, one that did not turn on terminology. For instance, a president could not evade the Treaty Clause by calling an international contract an "Agreement" or an "Accord." Whatever the label, major, durable, international contracts were treaties.





In the 1930s, however, Franklin D. Roosevelt helped marginalize the Treaty Clause. He made treaties after securing consent via ordinary legislation passed by Congress. Initially, the textual hook was Congress's power to regulate commerce, a power that no one at the Founding supposed encompassed authority to conclude commercial treaties or the power to enable the president to evade the Treaty Clause. Defenders of the innovation claimed that because Congress had the power to regulate foreign commerce, Congress could authorize the President to make international agreements and bypass the Treaty Clause's requirement of super-majoritarian Senate consent.

Ever since, presidents have utilized this scheme—the so-called “congressional-executive” agreement—to bypass the Senate's treaty check. Whenever the president invokes the congressional-executive agreement option, a majority of Senators often favors the international agreement and, crucially, also understands that a two-thirds majority cannot be mustered. In that context, a treaty backed by a majority of both chambers is preferable to no treaty at all. Put another way, Senate majorities essentially choose to ignore the constitutional check of the Senate minority that would block the passage of a treaty but cannot block the enactment of a congressional-executive agreement.

While passing legislation is hardly a walk in the park, it is generally easier than obtaining a two-thirds majority in the Senate. Moreover, the President essentially has an option to choose whatever route he considers more likely to deliver results. He can pursue the Senate's consent to making a treaty by securing a two-thirds majority in that chamber. Alternatively, he can make a treaty by a congressional-executive agreement, i.e., with the concurrence of a simple majority of both chambers. Indeed, other than perhaps embarrassment, nothing prevents the President from selecting one path, and if that proves inhospitable, taking up the other. That has happened once, when, after the Senate rejected a treaty, the President later secured the majoritarian consent of Congress.

There are Senators who have said that certain international agreements (typically arms control) must be made under the Treaty Clause. But why the Treaty Clause supplies a particular monopoly over such agreements is never quite made clear. It may well be that these Senators are attempting to revive their institution's special role in foreign affairs, a position eroded by the sidelining of the Treaty Clause.

As to the routine conduct of foreign affairs, modern presidents have become increasingly assertive, claiming that Congress must give them a free hand. According to executive branch lawyers, Congress cannot, via substantive legislation or appropriations, hogtie presidents by disestablishing State Department delegations or cutting funding. At the extreme, this way of thinking suggests that the President is entitled to a foreign affairs bureaucracy and funding of his own choosing, without regard to congressional priorities. Expect future presidents to continue to push the envelope in this area by objecting to congressional micromanagement in foreign affairs.

### C. EXECUTION OF THE LAWS

When it comes to the presidency's principle function—execution of the laws—we are in the midst of a fundamental overhaul. Modern presidents have become less and less faithful executives. They are more prone to becoming lawmakers as they supplement, misconstrue, or flout laws.



Congress's confident grants of broad lawmaking power to executive agencies are a central example. All too often, Congress endows an agency with the broadest of mandates—legislate in the public good—over some subject, be it trade or the environment. Congress delegates freely because it values flexibility, lacks expertise, and seeks to escape responsibility for onerous regulatory burdens. Whatever the reasons for particular delegations, the resulting executive rules are nothing less than federal laws made by means other than bicameralism and presentment. Each of us must obey them on pain of fines or imprisonment. Because executive agencies labor under the president's direction, in practice and in law, their rulemaking powers are essentially his.

Even when there is no formal grant of rulemaking authority, under "*Chevron* deference," executive agencies receive deference for their reasonable interpretations of the statutes committed to their care.<sup>2</sup> Such deference to agencies sometimes inspires tendentious interpretations that help advance the policies of the incumbent president. In particular, rather than seeking the *best* interpretation of ambiguous text—something expected of a faithful executive—*Chevron* deference encourages agencies to discover (or manufacture) ambiguity, vagueness, and uncertainty. After all, the greater the ambiguity, vagueness, and uncertainty in a statute, the greater the array of reasonable readings that the statute will bear, and the greater the chance that the executive can successfully latch on to one that advances its particular policies.

The most interesting feature of unfaithful execution—spurious interpretation of the laws—is more exceptional and more infrequent. It tends to arise when the president feels deeply invested in a matter. During the Great Recession, President George W. Bush used a statute appropriating funds for the bailout of "financial institutions" to rescue General Motors and Chrysler. No plausible reading of the statute permitted the treatment of automobile manufacturers as if they were financial institutions. Moreover, though the House had approved a separate auto bailout, the Senate did not. Despite acknowledging that Congress had not passed an auto bailout bill, the President announced that the "executive branch [would] step in" and supply the funds anyway.

More recently, President Donald J. Trump has signaled a willingness to dismantle the Affordable Care Act (the ACA) *administratively*, something that seems far removed from faithful execution. However much discretion the Act conveys to the executive, it surely does not grant the president the unilateral right to wield that discretion in a way that emasculates the Act. Yet the President has boasted that rather than repealing the ACA, "I think we may be better off the way we're doing it, piece by piece, ObamaCare is just being wiped out." If a judge boasted of wiping out a congressional act via a judicial decision, many would be scandalized. Executive repeal should be no less disreputable. In fact, it is becoming more respectable.

But faithless execution may sometimes arise from *too deep a commitment to a particular law*. For instance, the ACA authorized federal payments to insurers but did not provide an appropriation to actually pay them. The appropriation was to come later. This scheme was in keeping with the norm that granting legal authority to a governmental entity does not automatically supply the funds necessary to exercise the authority. That is why Congress often passes annual authorization bills that are separate from the annual appropriations bills. Recognizing that the ACA supplied no appropriation, the Obama administration

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<sup>2</sup>This "*Chevron* deference" stems from a famous 1984 Supreme Court case, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837.

publicly approached Congress for a new appropriation to make the payments to the insurance companies. But the Republican Congress balked. Upon realizing that there would be no appropriation, the administration repudiated its earlier position and implausibly asserted that the ACA itself appropriated the necessary funds and that no further appropriation was necessary. The administration's intense desire to prop up the ACA led to a direct violation of the constitutional rule that no funds can be taken out of the Treasury except by virtue of a law.

More examples abound, but the point is made. The executive will twist and turn Congress's laws to further its principle agenda items, stooping to misread statutes and making a hash of them. Fortunately, because presidents do not typically have hundreds of prized goals, the temptation to play statutory games is not ever present. This means that with respect to many matters, the executive remains a faithful executor of congressional commands. In particular, where the executive has no policy disagreements with the law and faces no external pressure to evade its strictures, relatively faithful execution will follow as a matter of course. This saves legal and political resources for the (mis)interpretational fights that actually matter to the executive.

#### **D. THE EXECUTIVE AS AN AGENT OF INFORMAL CONSTITUTIONAL CHANGE**

The final significant evolution has been the executive's willingness to be an agent of informal constitutional change. As noted earlier, the president's express duty to "preserve" the Constitution would seem to bar presidential attempts to alter it. More precisely, the presidential oath, fairly read, seems to reject the idea that presidents could amend the Constitution by repeatedly contravening it.

Nevertheless, the executive has embraced this tactic in theory and in practice. The assumption of congressional war powers, the evasion of limits on the president's command of foreign affairs, and the assumption of lawmaking authority all bespeak a willingness to alter the Constitution via practice. Presidents no longer preserve the Constitution intact. Rather they preserve what they please and despoil the rest.

The executive branch admits as much. In executive branch legal opinions authored by the Department of Justice's Office of Legal Counsel, executive lawyers across several administrations have argued that repeated practice puts a "gloss on executive power." This argument suggests that, through historical practice, the president can acquire constitutional powers not previously his. Indeed, these opinions make frequent reference to historical practices as being important, if not dispositive.

The executive branch's embrace of historical practice as a means of amending the Constitution generates interesting implications. First, perhaps the president does nothing wrong in trying to change the Constitution, whatever his oath might imply. After all, it is hard to fault presidents for trying to change the Constitution via an accepted means—in this case, practice. Second, and more importantly, no power is off limits or forbidden. With diligent violations of the existing legal order, the presidency may acquire any power, whether granted to the federal government or not. In this sense, Article II comes to resemble a floor to presidential power and certainly not a constitutional ceiling. The presidency is not something fixed, but whatever a series of presidents make of it.



Let's be clear. Presidents, by and large, are not Holmesian bad men, as much as partisans of the opposite party might suppose. They do not become more irresponsible or willful upon becoming the president. Nor are they unusually ambitious and power hungry. They are like all highly successful American politicians, with drives related to reelection, policies, and posterity. They want to get things done and be remembered as in the same league as George Washington and Abraham Lincoln.

### III. HOW PRESIDENTS REWRITE OUR CONSTITUTION

Presidents are best understood as playing a game. Most of the time, they play this game per the rules (either as they seem or as their advisers explain them), with the cards they are dealt. The issue is that presidents have many more cards than the other players and that the rules tilt the game in their favor.

Which cards and rules explain the president's ability to rewrite Article II and thereby alter the constitutional contours of his office? Some are perhaps the unintended features of the original Constitution itself, while others reflect changes in practice and conceptions that the Founders never contemplated.

#### A. EXPLOITING ORIGINAL FEATURES OF THE PRESIDENCY

To begin with, consider the structural features of the three branches. Unity in the executive branch conduces to "decision, activity, secrecy, and dispatch," as Alexander Hamilton famously wrote. But unity also proves incredibly advantageous in any contest or dispute amongst the branches. It is far easier for the executive to pursue ever-greater authority because presidents can ignore, sideline, or fire dissenters within their branch. That is to say, the president has an easier time generating internal unity.

In contrast, the other two branches, both of whom are supposed to check a grasping president, are fractured by their sheer multiplicity. Congress literally has a cast of hundreds divided across two chambers. The congressional horde has a distinct collective-action disadvantage in attempts to restrain the one executive. Furthermore, almost all decisions designed to curb the executive must be presented to the president. In the past, presidents have wielded the veto to restrain those who seek to restrain them. The only consequential check on the presidency that cannot be vetoed is impeachment. But impeachments require a two-thirds supermajority in the Senate to convict, a high threshold that has rendered successful impeachments a rarity.

The courts are also divided, with the judicial power dispersed among hundreds of federal judges. Even the Supreme Court's considerable authority is split amongst nine justices, meaning that five must unite to take action. Moreover, the courts are profoundly passive instruments of opposition, for they must wait for third parties to bring a proper case. Finally, the courts have declared that some questions are "non-justiciable" meaning that the courts will not resolve them. For example, questions about the constitutional war powers of the presidency are outside the purview of the courts. As a result, the courts cannot check every executive usurpation.

The singular advantages and perils of unity were understood from the beginning. Edmund Randolph, the seventh Governor of Virginia, warned the Constitutional Convention that a single executive was the "foetus of a monarchy," for the executive would eventually strive, strain, and push for more power. For this reason, Randolph unsuccessfully sought a triumvirate. The Convention rejected the idea,



presumably concluding that a triumvirate would struggle and perhaps end in a despotism of one, just as the clashes between the first triumvirate -- Pompey, Marcus Crassus, and Julius Caesar — eventually lead to the Ceaser’s domination of the Roman empire.

Though he lost on the question, Randolph was absolutely right that the choice of unity was pregnant with consequences. While none of what has come to pass was inevitable, the accumulation of executive power certainly became more probable under a unitary executive. A sole executive can be more aggressive, nimble, secretive, and resolute in the advancement of the presidency’s interests. And our unitary executive has proven to be all that and more.

Second, consider the text of Article II and the problem of constitutional drift. While I have sketched what I take to be the original Constitution of the executive, the passage of time unquestionably has eroded those meanings. Many unfamiliar with English and early American understandings might read Article II and perhaps be struck by its many possibilities. What is a Commander in Chief? Perhaps it is whatever the president makes of the office. Or perhaps it gives the president an unrestrained command of the armed forces. For that matter, what is the “executive power?”

Charles C. Thach — author of *The Creation of the Presidency, 1775-1789: A Study of Constitutional History* — long ago said the Vesting Clause of Article II stands as a constitutional “joker,” ready to be cited as a legal basis for any executive action not otherwise traceable to some more specific clause. This prospect has not waned over time. Executive privilege, emergency authority, suspension of the privilege of the writ, the taking of private property in time of war — all of these pretensions and more might be accommodated by the Vesting Clause.

Article II could have constrained as well as authorized. Imagine an Article II, Section 5 that specifically restricted presidential power to check a runaway presidency, somewhat mirroring Article I, Section 9. For instance: “The executive shall never take funds out of the Treasury except by virtue of law passed by Congress;” “The executive shall never wage war except by virtue of law;” “The executive shall never make treaties or similar agreements except with the consent of the Senate.” History supplies famous examples of legislatures enacting similar limitations on executives. The English Bill of Rights contains many such enactments, most prominently its bars on executive suspensions and dispensations. State constitutions likewise limited executive authority by imposing specific prohibitions. While Article I, Section 9 and the Bill of Rights apply to the executive and therefore limit it, their rules are generally not meant to deal with the peculiar phenomena of executive overreach.

Third, as noted earlier, judicial review of executive action is limited by technical rules. For instance, judicial review of the executive’s excesses has always been asymmetrical. Actions harming an individual are reviewable, but actions benefitting an individual are often not, even when they are illegal. Why? The Constitution, through the case or controversy requirement, and associated justiciability doctrines, has long been thought to limit the circumstances under which judges may exercise their judicial power. Because of such constraints, the courts cannot consider the merits of all assertions that the president has violated the Constitution, laws, or treaties of the United States. While the courts have expanded the frontiers of judicial review, they have not gone so far as to make all executive action reviewable.



## B. CAPITALIZING ON CHANGED CONCEPTIONS OF THE PRESIDENCY

Additionally, how we today conceive of the office and transformations of society also help account for the ascent of the presidency. In particular, consider four: the advent of the popular mandate; the influence of political parties; the willingness of Congress to fund a vast bureaucracy; and the ascent of living constitutionalism. These factors cannot be laid at the feet of the Founders (unless we wish to censure them for their lack of foresight), but they create the context against which the executive has grown more powerful over the centuries.

The presidency's popular mandate arose from changes in electoral selection in the decades following ratification. The Constitution's system of presidential electors was established, in part, to ensure that men of wisdom and experience, using their independent judgment, would select presidents from amongst the most suitable candidates. How these electors would be chosen was left to the state legislatures. Initially, some states used popular elections to select their electors while other state legislatures appointed the electors themselves. This slowly morphed into a nationwide system of popular elections for presidential electors. For our purposes, what is most important is that the discretion the founders envisioned vanished rather quickly as electors became bound to nascent political parties. Indeed, shortly after the Constitution's framing, electors were expected to vote for their party's nominee and not to exercise their judgment. This made the election of the president seem the choice of the people, especially when the party candidates were known to the people prior to their casting of votes for electors.

Andrew Jackson was the first president to claim that he represented the people of the United States. Recognizing that this spin would add to the luster and power of the presidency, Whigs like Daniel Webster and Henry Clay denounced the claim. The people did not vote for a president, but for electors, they pointed out. Besides, if the president was representative of the entire people of the United States, he would be the only such person in government and would soon become its master, if not master of the people themselves. Jackson's vision prevailed, for observers routinely say that the president uniquely represents the entire people of the United States.

As presidents started to develop policy agendas of their own, it soon became commonplace to assert that their election came with a popular mandate to implement their agendas. Essentially, this meant that the "people" had chosen a policy agenda and wanted the rest of the government to implement it or get out of the way. These claims to a popular mandate tended to be made by allies of the president. But even critics of the notion know that it exerts a powerful appeal.

With the people at his back, the president can apply pressure on all rival institutions, but especially Congress. The same wind or gale force that ushers in a new president may also be used to oust those who refuse to join his policy reformation. Not every congressman will bend to the president. But the president, especially during his honeymoon, has a better chance of seeing his agenda enacted because, after all, the people have spoken and endorsed the man *and* his policy platform.

As the above discussion suggests, political parties not only helped transform presidential contests into meticulously planned campaigns, but they have also had the effect of weakening cross-branch



restraints. James Madison said that “ambition must be made to counteract ambition,” meaning that the branches must be constructed in such a way that they feel bound to advance their own interests. But he failed to predict the rise of political parties and the dampening effects they would have on cross-branch competition. Political parties create ties that bind across the branches. Democratic members of Congress are often loath to closely monitor or check, much less attack, a president of the same party. And Republican legislators generally are not in the habit of censuring their standard-bearer. Essentially, presidents and legislators often rise above their station and see the other ties—ideological in this case—that bind them together.

Moreover, these ties sometimes mean that gratifying one man’s ambition (say the president’s) may simultaneously *promote* the ambitions of another in a different branch (say a committee chair). The policy and personal aspirations of presidents and members of Congress from the same party are often best served by cooperating to promote the joint agenda as reflected in a party platform. Rather than being a rival, the president is often part of the same team.

While party ties will temper the willingness of presidents to criticize legislators of the same party, in practice it seems more likely that these legislators will feel far more constrained in faulting presidents of the same party. The president is perceived as a party’s principal leader. As such, party men and women in Congress will have a harder time censuring him because they are far more likely to be viewed as malcontents or Quislings. In contrast, presidents can reprimand party leaders without the same fear because, at least in part, they come to embody the party and cannot be attacked for disloyalty to themselves.

Hence the persistence of political parties, while useful in many ways, has the effect of weakening Congress and strengthening the president, at least in interbranch disputes. Because every Congress is, in the words of Abraham Lincoln, a “House Divided,” legislators find standing up to the president rather difficult.

There is another way in which Congress helps fuel presidential ambition. Congress funds the very executive institutions that aid the president to advance his policy agenda and simultaneously expand the presidency. For example, Congress supplies a host of aides that assist the president in exercising his powers. The Executive Office of the President is the central nervous system of the modern presidency, with offices like the Office of Management and Budget, the Domestic Policy Council, and the National Security Council. This vast presidential staff of almost 2000 gives presidents the practical ability to monitor and curb the departments. This cadre of elite personnel, composed of political and civil service appointees, both advances the president’s agenda and also works to delay, hinder, and obstruct bureaucratic initiatives contrary his agenda.

It is hard to overstate the significance of this dedicated staff. A single man, even with the backing of the people and his party, cannot possibly supervise even the upper echelon within the executive departments, what to speak of the two million-plus federal bureaucracy. There is simply too much going on within the bowels of the departments. With this staff, many of whom endorse the president’s agenda, presidents can do much of consequence, for these aides act as a force multiplier of executive power. Officials during the Reagan administration used to say that “personnel is policy,” meaning that if you had the right personnel, you could ensure the right sorts of policy. That is especially true of those closest to the president, who can then monitor those in the departments. There is little doubt that the



modern presidency would be a shadow of its familiar self were it not for the congressional funding of presidential personnel.

Relatedly, Congress regularly funds attorneys who see it as their mission to defend the presidency, both the institution and its particular occupants. Both within and without the Executive Office of the President are a small cohort of expert attorneys that, year in and year out, dedicate themselves to, among other things, preserving and expanding presidential power. The most famous of these offices are the Office of Legal Counsel and the White House Counsel's Office, but other legal advisory units serve similar functions.

These lawyers provide counsel, both oral and written, on a whole host of issues, including the president's constitutional prerogatives. On questions of presidential power, these lawyers perhaps conceive themselves as not expanding executive power but instead merely illuminating its reach and confines. Yet no one should doubt that these lawyers generally tend to favor presidential power. Because these lawyers labor in the executive branch, it is hardly surprising that their opinions often endorse expansive readings of presidential power. Every lawyer tends to see a matter from the client's perspective. Over time, new opinions often advance the notions found in previous opinions, resulting in presidential power creep. Even when law seems to stand in the way, these attorneys try to be creative and find a legal workaround that allows presidents to at least partially advance their agendas. Without the assistance of these lawyers, modern presidents could not so easily expand executive power.

The final element of the rise of presidential power is the ascent of the theory of living constitutionalism. Living constitutionalism posits that the meaning of the Constitution ought to change over time. Absent such change, we would be bound to benighted understandings from centuries ago, a prospect that would make the Constitution brittle and might hasten its collapse. The idea perhaps has its greatest pull with respect to individual rights, where many believe that faithfully following outdated conceptions would require us to abandon many rights that we have come to cherish. For many, living constitutionalism is attractive precisely because it offers progress and a means of circumventing Article V's impossibly difficult amendment process.

Once one embraces the idea of living constitutionalism, however, the door opens to living presidentialism. Because changes in the living constitution arise through changes in conceptions and practices, presidents are rather well positioned to effect those changes. By speaking to the public, presidents can start a new dialogue about the need for constitutional change or join an existing conversation and spur it forward. More importantly, presidents have the ability to adopt practices that advance new constitutional conceptions, both with respect to individual rights and governmental structure.

In the area of presidential power, the presidents are obviously best equipped to create new conceptions and practices that advance the presidency's institutional interests and the peculiar interests of the incumbent. In war powers, presidents have seized authority by unilaterally using force without congressional approval. In foreign affairs, presidents likewise can act repeatedly to create "facts on the ground" and then cite those practices as a basis for a change in constitutional conceptions. Finally, with respect to execution of the laws, executives have repeatedly adopted dubious readings of statutes only to claim after the fact that a new understanding of a statute has emerged from these practices. These dubious





readings can take an expansive form or a narrow one, either finding authority where there is none or minimizing some statutory restriction. Either way, the laws that the president must faithfully execute can become protean in the hands of the executive.

## IV. THE FUTURE OF THE EXECUTIVE

Yesterday's presidency is different than today's, and the only thing that can be confidently predicted is that the presidency tomorrow will be different as well. Saying that some act is unconstitutional or illegal today in no way implies that it will be so in the future. Change is the only constant.

### A. VIEWS ON THE LIVING PRESIDENCY

Is the living presidency a bug or a feature? There is a tendency to lament it as a bug, even among those who generally favor a living constitution. For instance, many liberals lament the rise of presidential war powers, and are eager to trumpet and celebrate the wisdom of the Founders' Constitution. But if Congress should not be tied to a "horse and buggy" conception of the Commerce Clause, as Franklin D. Roosevelt insisted, why should presidents be tethered to a "quill and cannon" conception of presidential powers?

Moreover, if undemocratic courts can update our Constitution by reference to perceived changes in social mores—say with respect to abortion or the death penalty—why should not presidents update Article II to reflect America's superpower status and their own far greater standing in our republican experiment? If we have more international interests in this day and age, can we be beholden to a sluggish, bicameral process before we use force? If the President best represents the people, there is no one better to update our laws and Constitution, particularly Article II, than the only representative of the entire people of the United States. If living constitutionalism is a welcome, even needed feature of our current age, the living presidency is a feature of the mutable system that we have designed.

### B. SOLUTIONS TO CURB THE MODERN PRESIDENCY

For those who believe that the Living Presidency is a bug, what can be done to limit or eliminate this bug? Here are five fixes. I do not claim that their adoption would solve all perceived problems with the presidency. Each involves Congress and, as such, each requires a branch that is currently at a disadvantage to struggle to overcome it. I do not suggest that Congress will take these measures, but only that it can do so and that their adoption will help curb the executive.

First, the chambers of Congress should be more willing to express their views on matters of constitutional import. In the past, chambers have censured presidents, most prominently Andrew Jackson and James Polk. Such resolutions are a good idea, for they allow the chambers to express their views without actually trying to impeach and remove. By lowering the stakes, it makes the weapon more usable. Congress could lower the stakes further by opining about presidential power without reference to any particular president. For instance, at the outset of a Congress, the chambers could pass resolutions that express their views about executive privilege, executive wars, or executive practice without referring to any particular dispute. This depersonalizes the resolution and makes resolutions less partisan. Even better, pass a



series of resolutions several months before a presidential election, when no one knows who will serve as the next president.

Second, create a war powers resolution that cuts military spending upon the initiation of conflict. For instance, Congress might provide that should the president start a war, defense spending is automatically cut by three-quarters from the existing appropriation. Such an automatic rule would be constitutional because everyone admits that Congress controls the federal fisc. The rule would have the effect of forcing presidents to secure congressional approval before (or immediately after) each significant initiation of force because without such approval, the funds (and therefore the mission) would peter out.

Third, adopt a strategy of grow and shrink. In the name of economy, Congress has kept its staff small. But it cannot keep up with the massive presidential bureaucracy if it adopts a policy of severe economy. Congress should have a sizable bureaucracy of its own that will help it monitor the executive. In conjunction with this approach, Congress should carefully monitor the president's lawyers and aides and pare them back. One may well suppose that more presidential aides yields more presidential mischief.

Fourth, reduce delegations to the executive. In particular, Congress should curb its reliance upon broad delegations of legislative power to its institutional rival. It can do this by authorizing executive agencies to draft regulations, packaging several of them together for a floor vote, privileging the package by preventing amendments, and then legislatively adopting them as law. To preserve flexibility, these regulations can be given a shelf life of no more than four years. This would force reconsideration of regulations and ensure some measure of responsiveness to changing electoral politics.

Fifth, Congress should rationalize advice and consent. In particular, it should reexamine the offices that currently require advice and consent and do away with the obligation for those inferior offices where such consent seems a waste of time. For instance, the Senate need not be involved in advice and consent for many military positions, or for that matter, many civilian undersecretaries. Congress can then redirect attention to those positions that currently lack a Senate check. The White House Chief of Staff, the White House Counsel, the National Security Adviser—these and dozens of other important offices currently lack Senate consent. Yet these offices are often more important than several cabinet posts and are certainly more significant than the many deputy and undersecretaries that must receive the Senate's consent. The Senate checks matters, because Senators often extract promises from candidates and these oaths have the effect of constraining the president.

None of these will answer all the hopes of those who believe that the Living Presidency is a bug. Though Congress will never cease to let us down, we can certainly expect more from it than we can from presidents who spoke of the regal pretensions of the incumbent while running for the office. A funny thing often happens once a candidate enters the Oval Office. His reforming zeal dissipates as he realizes that his promises to curb the office no longer check someone else's power but rather his own. In contrast, most members of Congress hope to stay in the institution for a long time and many may realize that their authority generally waxes to the extent that the presidency is curbed. Although ambition does not always curb ambition, it is far more likely to do so than a system where the principal constraint on the presidency is its own institutional humility. In recent decades, that has been in rather short supply.



# THE CONSTITUTION, THE PRESIDENCY, AND PARTISAN DEMOCRACY: CONGRESS REVISES THE ELECTORAL COLLEGE, 1803-1804

BY SEAN WILENTZ

## INTRODUCTION

Hardly anything about the modern presidency would have failed to jolt James Madison and the other Framers, but one thing that would not have surprised them is the rough-and-tumble politics surrounding presidential elections. To be sure, in 1787, the Constitutional Convention designed a lofty, disinterested executive, insulated from popular passions and party strife, in which a high-minded, virtuous president would be chosen by similarly high-minded, virtuous electors. But we misconstrue the Founding if we stop there. What is important to remember is how quickly after 1787 the Framers' system gave way to partisan conflict, necessitating an important change in the Constitution less than a generation after the Constitution was ratified.

As early as 1792, the first glimmering of party divisions began to threaten the Framers' ideal system. Eight years later, presidential politics divided the country so severely that there was serious talk of armed confrontation. In 1804, the ratification of the Twelfth Amendment made the rules governing the selection of the president friendlier to party politics, in ways the Framers could scarcely have imagined in 1787 but then made perfect sense—at least to James Madison and his Democratic-Republican allies.

To be sure, the mechanisms that the Framers installed in 1787-88 to filter talent, to secure the public good, and to enhance national harmony—above all the Electoral College—survived the emergence of party politics, as they survive today. In the wake of recent events, including two elections in which the electoral system thwarted the popular will, these mechanisms have come under intense criticism as dangerously antiquated.<sup>1</sup> Yet this is hardly the first time Americans have seriously questioned the Framers' system for choosing the president. To gain our bearings amid the current clamor, it is important to recall and reflect upon that long history, beginning with the first and, thus far, only successful effort to amend the Framers' electoral system.

The political history of the Twelfth Amendment reveals how rapidly the Framers' consensual conception of national politics proved inadequate to the realities of their own time. It illuminates how a very different conception of politics, rooted in partisanship and party organization, fitfully supplanted what the Framers had originally envisaged. It shows how genuine philosophical differences were always entangled with what today look like battles for partisan advantage. And it highlights an irony of unintended consequences: although the Framers regarded partisanship with horror, they wrote a Constitution which could not suppress it; and soon enough the nation ratified an amendment which all but enshrined partisan conflict in electing the president.

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<sup>1</sup> See, for example, "Time to End the Electoral College," *New York Times*, Dec. 19, 2016, <https://www.nytimes.com/2016/12/19/opinion/time-to-end-the-electoral-college.html>.

## THE FRAMERS' DESIGN

When they assembled at the Constitutional Convention in 1787, the Framers were as divided over how the new nation's executive ought to be chosen as they were over how much authority the executive ought to have. Some of the ablest and most influential delegates, including James Madison, James Wilson, and Gouverneur Morris, spoke in favor of direct election of the president, "by the people at large," in Morris's words, "by the freeholders of the Country."<sup>2</sup> But the majority of the convention rejected direct election on the presumption that, as Elbridge Gerry asserted, "the people are uninformed, and would be misled by a few designing men."<sup>3</sup> On two separate occasions, the Framers crushed proposals for direct popular election of the president.

Who, then, would select the president if not the people at large? In their early deliberations on the presidency, and then, after a brief interruption, nearly until the Convention's conclusion, a majority of the delegates favored making Congress the electors, a proposal dogged by criticisms that it would render the executive too subservient to the legislature. Some delegates favored that the state legislatures instead of Congress do the choosing; others offered different plans. In July, the Convention briefly scrapped the congressional mode in favor of the elements of what would prove to be the winning alternative: what would become known as the Electoral College. Five days later, the majority switched back to having Congress choose the president, but a dispute arose over procedures, so it was left to a special Committee of Eleven to come up with an agreeable compromise in the waning days of the Convention. Only at the very last minute did the Convention agree to the Committee's recommendation to return to an electoral system, apportioned according to each state's combined representation in the Senate and the House.<sup>4</sup>

A compromise between direct popular election and election by the Congress, the electoral system supposedly had the advantage, as Alexander Hamilton claimed in *Federalist* 68, of relying on "the sense of the people" while placing the "immediate election" in the hands of men "most likely to possess the information and discernment requisite to such complicated negotiations."<sup>5</sup> How those men would be chosen, the Framers left entirely up to the state legislatures. Each elector would cast two votes; the highest vote-getter, should he receive a majority, would be named president and the second highest would be vice president. Popular sovereignty would be sustained, small states and large states would get a share of power, and the final decision would be left to electors possessed of what James Madison once called "liberality or light"—or, as John Jay observed, "those men only who have become the most distinguished by their abilities and virtue."<sup>6</sup>

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<sup>2</sup> Max Farrand, ed., *The Records of the Federal Convention of 1787* (1911; 4 vols., New Haven, 1966), II, 29.

<sup>3</sup> Farrand, *Records of the Federal Convention*, 57.

<sup>4</sup> A reliable summary of the convention's deliberations on selecting the president appears in Neal R. Peirce and Lawrence D. Longley, *The People's President: The Electoral College in American History and the Direct Vote Alternative* (1968; New Haven, 1981), 10-30. In addition to Peirce and Longley's standard work on the Electoral College, I am grateful to two other studies: John J. Turner, "The Twelfth Amendment and the First American Party System," *The Historian*, 35 (1973): 221-37; and Joshua D. Hawley, "The Transformative Twelfth Amendment," *William & Mary Law Review*, 55 (2014):1501-89.

<sup>5</sup> The *Federalist* No. 68.

<sup>6</sup> Letter from James Madison to George Washington, Dec. 9, 1785, <https://founders.archives.gov/documents/Madison/01-08-02-0228>; The *Federalist* No. 64.



In *Federalist* 68 Hamilton asserted that the Convention's electoral system was "almost the only part of the [Constitution], of any consequence, which has escaped without serious censure." In fact, at least some Anti-Federalist critics wondered whether it was necessary or rational, as the Kentuckian "Republicus" wrote, "that the sacred rights of mankind should thus dwindle down to Electors of electors, and those again electors of other electors." But Hamilton was basically correct: the electoral scheme was met with general satisfaction at the Philadelphia convention and encountered virtually no resistance in the state ratifying conventions.<sup>7</sup>

The reason there was no greater controversy, as Andrew Shankman has concisely explained, had to do with prevailing late-eighteenth century presumptions that "the public good emerged from a coherent set of values."<sup>8</sup> Most citizens, the majority of the Framers believed, lacked the learning and the disinterested virtue required to ascertain what the public good actually was. Without guidance from a relatively small group of talented men, popular sovereignty would degenerate into selfishness, corruption, and, inevitably, oligarchic ruin. The Electoral College would stand, above all, as a bulwark against the exploitation of popular passions by designing would-be aristocrats and demagogues. Most delegates to the state ratifying conventions evidently agreed.

There was little doubt that George Washington would be chosen as the first president, which he was in 1789, winning nearly twice as many electoral votes as the majority required to prevail. The real contest was over who would receive the second highest number of votes and thus, according to the Constitution, be named the vice president. John Adams won the post handily, gathering nearly as many votes as the rest of the field combined. The process was less than democratic—only four states permitted the voters to choose the electors—and it was also messy: the New York legislature argued so long about procedures that the state lost its vote completely. Yet the election, with its lack of party alignments, unfolded largely in line with the Framers' expectations. It would be the last one to do so.

To be sure, President Washington was re-elected in 1792, this time unanimously; and Vice President Adams also kept his seat, receiving a larger percentage of the electors' votes than in 1789. But there were also audible rumblings of discontent with the administration's policies, especially over Secretary of the Treasury Hamilton's financial program. In state and local as well as national politics, struggles had begun between what one critic of the administration called "the Treasury department and the republican interest."<sup>9</sup> Although no one would challenge the great Washington, Adams was a more convenient target. Formal parties had yet to appear, but dissenting electors, chiefly from New York and Virginia, rallied behind a handpicked favorite, New York Governor George Clinton, to put pressure on his administration by in effect challenging Adams for the second spot. It was an early signal of a brewing crisis, not just for the Washington administration but for the electoral system—a crisis that would be shaped by the vagaries of the system itself.

That system's design did foresee a future beyond the great unifying figure of George Washington. Once the republic was established, the Framers had reckoned, many worthy figures would gain support from around the country for the presidency, in which case it was likely that no one notable would garner an outright electoral majority. In a concession to the smaller states—and as a surviving element of earlier proposal to make Congress the immediate

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<sup>7</sup> *Kentucky Gazette*, Mar. 1, 1788.

<sup>8</sup> Andrew Shankman, "What Were the Founders Thinking When They Created the Electoral College?," History News Network, <https://historynewsnetwork.org/article/164514>.

<sup>9</sup> Letter from John Beckley to James Madison, Sept. 10, 1792, <https://founders.archives.gov/documents/Madison/01-14-02-0326>. On the election of 1792, see Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800* (New York, 1995).

electors—the Convention had approved a plan, outlined in Article II Section 1 of the Constitution—whereby, in the absence of an absolute majority, the election would move to the House of Representatives, with each state receiving a single vote. In a further concession, the original Constitution stipulated that the House would consider the top five vote-getters, on the presumption that the vote would be widely diffused. Although there were quibbles and compromises, the shape of the system fit well with antiparty republican assumptions: if the indirect electoral system, serving as a restraint and filter on popular passions, could not produce a president, then the Electoral College would serve as another filter, reducing the field to a few well-vetted men.

None of this would work, however, if stronger party interests emerged, as they did, fiercely, during Washington's second term, over foreign as well as domestic policy. And so, in what historian Jeffrey Pasley has called the "absolutely seminal" election of 1796, the more formally organized parties began making a hash of the electoral system.<sup>10</sup> As Pasley demonstrates, the campaign and the results established what would be a pattern in presidential elections for decades to come, pitting New England against the South with the middle states as the battleground states, holding the balance of power. The election also established, Pasley observes, "the basic ideological dynamic of a democratic, rights-spreading American 'left' arrayed against a conservative social-order protecting 'right.'"<sup>11</sup> But the electoral system became so tangled in these developments that, among other unforeseen mishaps, it might very well have elected as president someone who was meant to be a runner-up.

## THE DESIGN UNRAVELS

As Washington had announced his retirement and Vice President Adams emerged as his anointed successor, Jefferson took his rightful place as the candidate of the emerging Democratic-Republican opposition. Formal party alignments had solidified—a caucus of opposition congressmen selected Jefferson—which further undermined the Framers' presumption that dispassionate, enlightened men would select a man with similar traits. Yet if the parties were emerging, they were yet to become disciplined independent bodies, at least with regard to selecting the president. In combination with the Constitution's double-balloting system, it was a recipe for chaos.

The chief Federalist candidate besides Adams—supposedly destined to be Adams' Vice President—was Thomas Pinckney, a respected diplomat and former governor of South Carolina. Ideally, Adams and Pinckney would both receive more votes than Jefferson, and Adams more than Pinckney. But there was also support among the Federalists for six other candidates, including Pinckney's cousin, Charles Cotesworth Pinckney, who had briefly served as Adams's minister to France. Building on the Virginia-New York axis from 1792, Jefferson's chief supporters' this time backed Aaron Burr over George Clinton, but Clinton also had his supporters as did Samuel Adams of Massachusetts.

Historians are still untangling the mess that resulted and the scheming that lay behind it. Although Federalists electors generally voted for Thomas Pinckney along with Adams, twenty-one of them, almost all in New England, preferred another candidate. The Democratic-Republicans were even less united; although Burr won a majority of their votes, fifteen electors, mostly Virginians, preferred Samuel Adams, while all eight South Carolinians, plus one Pennsylvanian, voted for Jefferson and Pinckney. North Carolina gave eleven of its twenty-five votes to Jefferson, but scattered the rest among six candidates. Adams won the presidency barely, with one vote more than the required majority—but all of the New England electors had, as they might have been expected to do, voted for Pinckney as well as Adams, Pinckney would have been elected instead. In what retrospectively looks like the election's

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<sup>10</sup> Jeffrey L. Pasley, *The First Presidential Contest: 1796 and the Founding of American Democracy* (Lawrence, KS, 2013).

<sup>11</sup> Pasley, *The First Presidential Contest*, 10.



signal anomaly, Jefferson received the second highest total of electoral votes, making him, and not Thomas Pinckney, John Adams's vice president.<sup>12</sup>

The anomaly did not, to be sure, look so terrible at the time, at least not to Thomas Jefferson, who regarded Adams, despite their soured relations in recent years, as the surest barrier among the Federalists against the man he truly feared would ruin the republic, Alexander Hamilton. "I am his junior in life," Jefferson graciously said of Adams in a letter to Madison, "his junior in Congress, his junior in the diplomatic line, his junior lately in our civil government." Adams, also putting the best face on the situation, cited his "ancient friendship" with Jefferson.<sup>13</sup>

Beyond personal connections, acceptance of the peculiar outcome revealed a stubborn attachment across the political spectrum to an ideal of a politics free of party strife, regardless of how illusory that ideal was proving to be. The divisions of the day were undeniable, but few political leaders could shed their aversion for permanently organized autonomous parties. "Altho' I shun politics as much as I can and wish to avoid them altogether," the Federalist George Cabot complained to an associate, "yet you see I use the terms *us* and *we*, for I am made one of the '*damned Faction*' by the opinions I am known to maintain."<sup>14</sup>

Each side, moreover, regarded the other not as a legitimate opponent but a threat to the republic itself—the Jeffersonians viewing the Federalists as "monocrats," the Federalists deeming the Jeffersonians dangerous "Jacobins." Both sides assumed that, once its opponents were vanquished, the nation could return to something closer to what the Framers had foreseen. What one historian has described as an ambivalence that bordered on schizophrenia restrained a full rejection of lofty consensual republicanism in favor of continuing partisan conflict.<sup>15</sup>

Yet that ambivalence became increasingly difficult to sustain, as the vicious politics of the late 1790s shattered hopes of accord between Adams's supporters and Jefferson's. Some in the growing Democratic-Republican opposition began claiming that Adams had owed his election to a perversion of the people's will, due to the haphazard system of appointing electors: "Accident alone gave Adams the presidency," one New York newspaper declared early in 1798.<sup>16</sup> The bitter controversies of the ensuing two years would bring those partisan divisions to a head, with powerful repercussions for the electoral system.

The near-debacle of 1796 did provoke some efforts at constitutional reform. Almost immediately after the final electoral votes were tallied, the South Carolina Federalist William Loughton Smith introduced a resolution in the House in favor of an amendment requiring each elector to cast one vote for president and one for vice president. Smith said that he desired nothing more than to make sure the system "would carry into effect the real intention of the Electors."<sup>17</sup> He may also have had political motives: an ardently pro-slavery Federalist, Smith would have been frustrated, first, that his fellow proslavery South Carolina Federalist Pinckney had been thwarted; and second, that

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<sup>12</sup> There were numerous other anomalies in 1796. New Hampshire, for example, adopted a system of statewide popular voting for electors, on a general ticket instead of by district, but when no elector candidate won an absolute majority, the legislature chose the electors instead. One Pennsylvania elector, meanwhile, although chosen as a Federalist elector, voted for Jefferson.

<sup>13</sup> Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York, 2005), 75.

<sup>14</sup> Letter from George Cabot to Rufus King, Aug. 9, 1800 (cited in J.J. Turner, "The Twelfth Amendment and the First American Party System," Vol. 35, No. 2 (Feb. 1973), 228-29).

<sup>15</sup> Turner, "Twelfth Amendment," 228.

<sup>16</sup> *New York Diary*, Feb. 15, 1798 (cited by Neale R. Peirce and Lawrence D. Longley, *The People's President: The Electoral College in America and the Direct Vote Alternative* (Yale University Press: 1981), 36.

<sup>17</sup> Annals of Congress, 4th Cong., 2nd sess., House, 1824.



the new administration would be headed formally by a New England Federalist and a Virginia Republican considered by many slaveholders as unreliable in the matter of slavery. But Congress took no action on Smith's proposal; nor did it follow up on similar proposals advanced in the Senate in 1798 and in the House in 1799.<sup>18</sup> Inaction created the conditions for a genuine crisis at the next presidential contest.

The election of 1800 loomed as a confusing as well as a bitter showdown, with party organization more sophisticated than ever, but with the electoral system still unreformed. Jefferson would later call it the "revolution of 1800 . . . as real a revolution in the principles of our government as that of '76 was in its form."<sup>19</sup> It would also usher in, if not revolution, then a major institutional reform in presidential politics.

Unlike the three presidential elections that preceded it, the contest, which extended into 1801, is familiar to most readers acquainted with American history. Party discipline had tightened, and at least among the Federalist electors, it was perfect: all of them voted for President Adams and all but one voted for the president's running mate, Charles Cotesworth Pinckney to make sure Adams would come out on top. But the Democratic-Republicans were imperfect, as one elector failed to do his duty and throw away his second vote, causing Vice President Jefferson and his repeat informal running mate, Aaron Burr, to tie. As Jefferson and Burr received more votes than their opponents, the House of Representatives was left to decide between the two candidates of the same party. After considerable behind-the-scenes maneuvering and thirty-six House ballots, Jefferson won. By now, though, it had become clear to many that the Electoral College, with its dual vote system, needed fixing.

## **PARTISAN DEMOCRACY AND THE TWELFTH AMENDMENT**

Calls for a constitutional amendment came fast and forcefully, beginning with resolutions passed by the New York legislature in 1801 and 1802. In May 1802, the House approved an amendment by the required two-thirds majority only to see it barely fall short in the Senate. The matter then lay dormant until the first session of the Eighth Congress in October 1803, when the advocates for reform, consisting now entirely of Democratic-Republicans, hoped that Jeffersonian gains in the 1802 midterm congressional elections would assure them a two-thirds majority in both houses.

By the time the issue actually came before Congress, partisan divisions had deepened even further. In winning the so-called revolution of 1800, Jefferson had expected not to enshrine party politics but to suppress once and for all of the extreme elements that had poisoned the Federalists with anti-republican ideas and programs. "To restore that harmony which our predecessors so wickedly made it their object to break up," the new president wrote to one ally, "to render us again one people, acting as one nation, should be the object of every patriot."<sup>20</sup> This was the purport of the famous section of Jefferson's inaugural address so often misconstrued as a call for unanimity—"we are all republicans, we are all federalists." In fact, Jefferson's subtext was that the so-called High Federalists attached to Hamilton, the true sources of party strife, were outside the pale and had to be rejected once and for all; instead, he hoped, honorable moderate Federalists could join with Republicans in what we might today call a vital center. He held on to that plan through the early months of his administration, then realized it was no more than self-defeating wishful thinking.

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<sup>18</sup> Peirce and Longley, *People's President*, 42.

<sup>19</sup> Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (W.W. Norton & Co., 2006), 97.

<sup>20</sup> Letter from Jefferson to Thomas McKean, July 24, 1801, available at <https://founders.archives.gov/documents/Jefferson/01-34-02-0477>.





The Federalist leadership and most of its rank and file around the country not only spurned Jefferson's olive branch; they declared that his election had been irregular and was unworthy of respect. Federalists in Congress made it their objective to thwart him at every turn, including his appointments to patronage posts and the federal judiciary. By December 1801, some Federalists editors were calling for Jefferson's impeachment, on the flimsy grounds that his involvement in settling some of the cases instigated by the Federalists' notorious Sedition Act amounted to a high crime against the Constitution.

Reconciliation was impossible, Jefferson decided, with opponents who regarded his administration as illegitimate. Writing to his attorney general Levi Lincoln as the tallies from the 1802 congressional elections were being announced, Jefferson allowed as how he had once thought that the Federalists "would come over to us by degrees," but as their leaders had proved intransigent extremists, the only choice that remained was "to sink federalism into an abyss from which there shall be no resurrection for it."<sup>21</sup> Reforming the Electoral College, although necessary in light of the recent confusion, would also help in the sinking.

Opposition to the proposed amendment came in part from representatives of the smaller states who feared that it would diminish the likelihood of the House having to settle the presidency due to an electoral tie, as in 1800—a system which, under the Constitution, gave each state equal voting power. The smaller states also expressed concern that the proposed changes gave presidential candidates from the larger states a strong advantage. But as the debates and votes over the amendment showed, the real division over electoral reform was deeply partisan.

On October 17, 1803, the very first day of the Eighth Congress, John Dawson, a Virginia Republican, offered a resolution to the House to amend the Constitution so that electors would designate one candidate for president and one for vice president. Four days later, the New York Republican DeWitt Clinton proposed a separate resolution in the Senate. During the debates, Federalists raised numerous issues connected to the balance of power in presidential elections, some of them rooted in sectional concerns. Two New England Federalists, for example, Seth Hastings and Samuel Thatcher of Massachusetts, in quick succession raised the issue of the Three-Fifths Clause and how it gave the slaveholding states an extra number of seats in the Electoral College. These objections, though, were isolated rhetorical gestures, made in passing; and like other well-documented contemporaneous attacks on the Three-Fifths Clause they stemmed from partisan calculation that outlasted no doubt sincere but less than strenuous antislavery convictions.<sup>22</sup>

More commonly, Federalists favored rejecting the proposed amendment on the grounds, first, that an end to dual voting would prevent any Federalist from assuming the vice presidency as Jefferson had in 1796; second, that it would demote the vice presidency from an independently elected official to an appendage of party; and third,

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<sup>21</sup> Letter from Thomas Jefferson to Levi Lincoln, Oct. 25, 1802, <https://founders.archives.gov/documents/Jefferson/01-38-02-0513>.

<sup>22</sup> Annals of Cong., 8th Cong., 1st sess., House, 535, 538. Akhil Amar has argued that when Congress failed to redress Thatcher's complaint, and failed to get rid of the Electoral College in favor of direct election of the president, the electoral "system's proslavery bias was visible to all—an open and festering wound in the American body politic." Yet his argument elides how neither Hastings nor Thatcher seriously bid their colleagues to drop the Twelfth Amendment in favor of abolishing the three-fifths clause; indeed, Hastings asked only that the issue be taken up in 1808, when the Congress would also be able to abolish U.S. participation in the Atlantic slave trade. Thatcher went on to speak at length against the amendment, never returning to the three-fifths clause or slavery. Moreover, as we shall see, there was virtually no support in Congress for scrapping the Electoral College, let alone to substitute direct election, for reasons that had nothing to do with slavery or the three-fifths clause. Apart from some snippets taken out of context, there is no evidence to back Amar's contention that the Electoral College was "purposefully redesigned in 1803-04 to bolster the slaveholding South," and a good deal of evidence to refute it. Akhil Amar, "The Inaugural Abraham Lincoln Lecture on Constitutional Law: Electoral College Reform, Lincoln-Style," *Northwestern University Law Review*, 112 (2017):63-81, quotations on 64, 70.



more broadly, that encouraging the naming of executive tickets, would make running for the presidency a thoroughly political and dangerously democratic exercise. The amendment, as James Hillhouse of Connecticut put it, proposed “to persuade the people that there is only one man of correct politics in the United States.”<sup>23</sup> Hillhouse’s Connecticut colleague Uriah Tracy asked the Senate, “If the gentlemen wish to shake the Constitution to pieces, if majorities must decide everything, why not go at once to a simple democracy?”<sup>24</sup>

The amendment’s Democratic-Republican advocates made no bones either about the amendment’s demotion of the vice presidency or about their own larger democratic intentions. As Samuel Smith of Delaware declared, while the amendment was designed “to guard against intrigue and corruption,” it also aimed “to place the choice in the power of the people.”<sup>25</sup> At one level, these claims were as genuine as they were transformative: because the Democratic-Republicans truly considered the Federalists an illegitimate minority faction, amending the Constitution in order to impede them permanently from regaining power would be the same thing as heeding the people’s voice and securing the republic. Still, the Jeffersonians’ defense also affirmed their opponents’ claims that, as one critic put it, a determination to keep “the people called Federalists” from winning the vice presidency was “in truth . . . the pivot upon which the whole turns.”<sup>26</sup>

President Jefferson himself was candid about the partisan political aims behind the amendment, and how they jibed with, as he saw it, securing the will of the majority. Shortly after the measure went to the states, Jefferson told his Pennsylvania ally Thomas McKean that the “great opposition is and will be made by federalists,” who “know that if it prevails, neither a President. Or Vice President can never be made but by a fair vote of the majority of the nation, of which they are not.”<sup>27</sup> The Georgia Democratic-Republican James Jackson was even blunter: “Never will there be a Federal President or Vice President again elected, to the end of time; if there should ever be any other chosen out of the line of the present politics, it must be from some new sect, which assuming the principles of the republicans, may succeed by carrying their zeal for liberty further.”<sup>28</sup>

Notably, neither the Democratic-Republicans nor the Federalists displayed any interest in abolishing the electoral system and returning to the idea, rejected by the Framers in 1787, of direct election of the president. One lonely voice, the Virginia Democratic-Republican John Clopton, did describe as “a defect in the fundamental principles of our Government” the absence of “plain and simple modes of immediate election by the people” in every part of the national government except the House.” But Clopton recognized that neither the Republicans nor the Federalists in Congress were interested in the “transmutation of a fundamental principle”—that is, the principle, endorsed by a majority of the Framers, that unmediated direct election of the president would be vulnerable to demagogic incitement of uninformed voters.<sup>29</sup> Even Democratic-Republicans, with their widened majoritarianism, weren’t prepared to go that far.

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<sup>23</sup> Annals of Cong., 8th Cong., 2nd sess., Senate, 190.

<sup>24</sup> Annals of Cong., 8th Cong., 2nd sess., Senate, 206.

<sup>25</sup> Annals of Cong., 8th Cong., 2nd sess., Senate 123.

<sup>26</sup> Annals of Cong., 8th Cong., 1st sess., House, 87.

<sup>27</sup> Letter from Thomas Jefferson to Thomas McKean, Jan. 27, 1804, <https://founders.archives.gov/documents/Jefferson/01-42-02-0266>.

<sup>28</sup> Annals of Cong., 8th Cong., 1st sess., Senate, 158.

<sup>29</sup> Annals of Cong., 8th Cong., 1st sess., House, 422-23. Clopton represented the 13th district of Virginia, a part of the state heavily invested in slavery. That he should have been the only member to express, even in passing, a preference for direct voting further discredits claims that by affirming the Electoral College in 1803-04, the Congress purposefully bolstered the slaveholding South.



In December, both Houses considered modified versions of the resolutions before them. The Senate passed its version, along almost absolute party lines, with a bare two-thirds of the members present; the House approved the Senate's version, also along party lines and also with a bare two-thirds majority. The proposed amendment then quickly won approval from the states and in June 1804, New Hampshire provided the final vote required to ratify—just in time for the 1804 election.

As it happened, the amendment proved superfluous to the outcome in 1804, as Jefferson and his running mate, George Clinton, crushed their Federalist opponents, carrying every state in New England except Connecticut. And although James Jackson's prediction came true—no Federalist was ever again elected president or vice-president—the Jeffersonians' hegemony over the coming decades rested on more than the redesign of the Electoral College. Still, in combination with state-by-state reforms which the amendment helped encourage—above all the shift from legislative to statewide popular election of electors and the adoption of general ticket voting instead of voting by district—the partisan campaign to sink the Federalists had lasting repercussions.

## **“OURS IS A COUNTRY OF POLITICIANS”**

Although the Federalists did not crumple as rapidly as Jefferson might have hoped, the rapid decline of their party after the War of 1812 ushered in the one-party period in national politics known as the Era of Good Feelings. The presidential election in 1820 was barely a contest at all: every candidate was a Democratic-Republican; the victor, the incumbent James Monroe, received all but one of the 232 electoral ballots cast, while his designated running mate, Daniel Tompkins, received all but fourteen. Although the election was conducted under the electoral rules revised in 1804, and although the Virginian Monroe had little of George Washington's majesty, the outcome came closer to matching that of 1789 than that of the seven intervening elections. In terms of party organization, the difference between a no-party system and a one-party system turned out to be negligible: with the outcome a foregone conclusion, the turnout for the congressional caucus was so pathetic that the group actually declined to make a formal nomination, leaving Monroe and Tompkins to win by default.

But intense national political conflict would resume in the long aftermath of the Panic of 1819 and the Missouri crisis of 1819-21; and with conflict came a return of vigorous national parties. The four-way presidential contest of 1824 brought a crisis of legitimacy far more severe than that in 1800, in the form of the notorious (if merely alleged) “Corrupt Bargain” between John Quincy Adams and Henry Clay that elevated Adams to the White House—even though Adams had lagged behind Andrew Jackson in both the popular and electoral vote. Thereafter, a determined and successful effort led by Martin Van Buren reinstated an updated version of the two-party competition of the Jeffersonian years, this time with no ambivalence about the desirability of political parties as a vehicle for democratic politics.

There was considerable intellectual, as well as political, distance between what the Jeffersonians intended the Twelfth Amendment to accomplish and the full-fledged professional parties and two-party system that emerged in the 1820s and 1830s, and that have lasted (despite the death of one party, the Whigs, and its replacement by another, the Republicans) to our own time. Yet it was possible for at least one informed observer, a Federalist senator from Delaware, Samuel White, to foresee what the Twelfth Amendment would eventually encourage.

White was a genuine conservative who worried about tampering with the electoral system before it had received “a fair experiment.” The impasse of 1800-01 had certainly caused distress, but the fears, he averred, proved, “groundless; in the end, the people were satisfied and here the thing ended.” White also worried about the potential for



mischief were the double-voting system to be dropped: with only four candidates in serious contention, he claimed, the inducement of those men and their friends “to exercise intrigue, bribery, and corruption” would be more than redoubled. But White saw even broader dire implications in the proposed amendment. “The United States,” he declared, “are now divided, and will probably continue so, into two great political parties.” By compelling those parties to discipline themselves even further and openly name an executive ticket for election, the amendment would make an unfortunate situation far worse.

“Ours is a county of politicians,” White remarked, “and from the nature of our Government must continue so;”

every member of society feels such a portion of interest in the affairs of the nation; be his lot humble or exalted, be his sentiments right or wrong, he expresses them, as he is entitled to do, with freedom; but is it abroad in the country that the most important measures of the Government are to be matured and decided upon? Is it in private circles, in caucuses, in clubs, in coffee-houses, streets, and bar-rooms, that the great Constitutional questions are to be settled? And are we convened here but to register the crude decrees of such assemblages?<sup>30</sup>

To White, it was “we,” the detached, worthy elected officials who should decide the great questions of the day, not the people out of doors, the habitués of taverns and coffee houses, the party men in party caucuses and party clubs. Yet that is precisely the direction where American politics was headed, and the Twelfth Amendment would help make it so.

White’s Democratic-Republican adversaries may not have foreseen the triumph of the kinds of popular partisan politics as he did (although they would have regarded those politics with far less fear); they certainly did not anticipate the kind of professional and permanent party that Martin Van Buren would build to elect Andrew Jackson to the White House in 1828. But beyond their more narrow partisan aims, the Democratic-Republicans acknowledged—indeed, proclaimed—that the Twelfth Amendment would change the very character of the presidency, moving away from the esteemed detached man of virtue the Framers had envisaged to a political figure who embodied the popular majority. “Is it better that the people—a fair majority of the popular principle—should elect Executive power;” John Taylor of Virginia asked the Senate, “or that a minor faction should be enabled to embarrass and defeat the judgment and will of the majority?”<sup>31</sup> There was still ground to travel, but the Twelfth Amendment pushed the nation’s politics closer to the partisan majoritarianism that defined Jacksonian democracy.

## CONCLUSION

All of which leaves a large irony as well as parallels to consider amid the turmoil created by our own recent political history. One set of parallels is political. The reaction, for example, of the Republican congressional minority to the election of Barack Obama in 2008, which led directly to the outcome in 2016, at least bears resemblance to the Federalist minority’s reaction to Thomas Jefferson’s election in 1800. The other parallels are constitutional as well as political: above all, the idea of reforming, and perhaps more than reforming, the Electoral College in order to unfetter “a fair majority of the popular principle” is an old one, nearly as old as the country itself. The irony, wherein may lie the greatest lesson, is that in the case of the Twelfth Amendment, democratic reform came about not with a turn toward our gentler selves and the suppression of partisanship, as one hears so often prescribed today; it came about from the cunning, unapologetic exercise of partisan politics to overcome a zealous faction that could not admit defeat. It was not what the Framers had in mind in 1787, but it was what their Constitution bequeathed, to the point where that their Constitution quickly needed changing.

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<sup>30</sup> Annals of Cong., 8<sup>th</sup> Cong., 1<sup>st</sup> sess. Senate, 141-43.

<sup>31</sup> Annals of Cong., 8<sup>th</sup> Cong., 1<sup>st</sup> sess. Senate, 183.



# REVISITING AND RESTORING MADISON'S AMERICAN CONGRESS

BY SARAH BINDER

Looking westward to Virginia's Blue Ridge Mountains from his Montpelier library, James Madison in 1787 drafted the Virginia Plan—the proposal he would bring to the summer's Constitutional Convention in Philadelphia. Long after ratification of the Constitution—and after the Du Pont family had suffocated Montpelier in pink stucco—preservationists returned to Montpelier to restore Madison's home. Tough to say the same for the U.S. Congress, the institutional lynchpin of Madison's constitutional plan. True, Congress has proved an enduring political institution as Madison surely intended. But Congress today often misses the Madisonian mark. The rise of nationalized and now ideologically polarized parties challenges Madison's constitutional vision: Lawmakers today are more often partisans first, legislators second. In this paper, I explore Madison's congressional vision, review key forces that have complicated Madison's expectations, and consider whether and how Congress's power might (ever) be restored.

## MADISON'S CONGRESSIONAL VISION

Madison embedded Congress in a broader political system that dispersed constitutional powers to separate branches of government, but also forced the branches to share in the exercise of many of their powers. In that sense, it is difficult to isolate Madison's expectations for Congress apart from his broader constitutional vision. Still, two elements of Article 1 are particularly important for distilling Madison's plan for the new Congress. First, Madison believed (or hoped) that his constitutional system would channel lawmakers' ambitions, creating incentives for legislators to remain responsive to the broad political interests that sent them to Congress in the first place. Second, Madison expected that Congress would dominate the political system: Article 1 amassed significant political authority in the legislature, empowering new national majorities to solve public problems. To be sure, these two dimensions of Madison's Congress are neither easily nor readily separated. But as I explore below, together they form the backbone of Madison's vision for the new Congress.

## CHANNELING AMBITION

As political scientist Charles Stewart has observed, Article I—which established the blueprint for Congress—was fairly prescriptive, encompassing more than half of the constitutional text.<sup>1</sup> But as Stewart reminds us, Madison understood that the Constitutional text would not enforce itself. As Madison wrote in *Federalist* 48, “a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”<sup>2</sup> In short, assigning dozens of critical constitutional responsibilities and powers to Congress did not guarantee that lawmakers would faithfully deploy them.

Instead, Madison believed that creating competing power centers within the political system would compel politicians to compromise: They would otherwise be unable to secure favored policy outcomes as they required

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<sup>1</sup> Charles Stewart III, “Congress and the Constitutional System,” in *The Legislative Branch*, Paul J. Quirk and Sarah A. Binder, eds. (New York: Oxford University Press, 2005), 4-5.

<sup>2</sup> “Federalist 48,” Avalon Project. *The Federalist Papers*, [http://avalon.law.yale.edu/18th\\_century/fed48.asp](http://avalon.law.yale.edu/18th_century/fed48.asp) [Oct. 4, 2018].



agreement of the other chamber and the president. In perhaps the most frequently quoted line from the *Federalist Papers*, Madison observed that “Ambition must be made to counteract ambition. The interest of the man must be connected to the constitutional rights of the place.” By focusing on political ambition (reinforced by frequent popular elections for House members), Madison suggested that the Constitution would channel lawmakers’ natural political impulses—both against one another and collectively against the president.

Madison was significantly less clear about how politicians’ interests would be fused to their constitutional rights as members of Congress. Left unstated was the mechanism that would secure lawmakers’ loyalty to the Congress. Historian Jack Rakove points out this ambiguity, noting that even in *Federalist* 51 Madison says little about how such attachments would form. Madison, Rakove reminds us, does suggest that senators and the president may find common cause in the exercise of their shared powers over diplomacy and nominations to check an overly ambitious House.<sup>3</sup> In that sense, ambition might indeed counter-act ambition. Madison more generally seemed to believe that juxtaposing political ambitions within Congress and between the branches would encourage lawmakers to protect Congress’s constitutional responsibilities. Who else in a system that separated powers within and across the branches would have an incentive to protect or exploit pivotal congressional powers?

That said, such an interpretation of what Madison likely meant by connecting men’s interests to the constitutional rights of the place risks misunderstanding Madison’s intent. As constitutional scholar Larry Kramer thoughtfully explains, Madison surely did not expect lawmakers to prioritize their institution over their political interests: “Even without political parties, why would anyone expect legislators to object to Presidential action they agreed with and supported?”<sup>4</sup> Rather, Kramer advises, we should interpret Madison’s twin focus on ambition and institutions as a statement about how the design of the Constitution would facilitate sound lawmaking: “These differences in how officials were chosen and to whom they were accountable mattered, because they meant that members of the different governments and of different departments within these governments would have different political interests and agendas.”<sup>5</sup> The challenge to making the Constitution work—meaning that it would ensure and protect popular control in a representative government—would be to harness these competing political interests to the constitutional authorities divided between and across the branches.

## EMPOWERING NATIONAL MAJORITIES

Counter-balancing political ambitions served another purpose as well. Madison believed that counter-poising politicians’ ambitions would not only empower the new national government, but also limit how powerful government could become. A focus on fostering energy and action within the legislative branch contrasts sharply with perhaps the most commonly believed wisdom about the Constitution: That Madison bequeathed us a political system designed not to work. According to this view, fear of a powerful executive led Madison and many of his colleagues at the Constitutional Convention to appreciate—even prefer—governmental stalemate. Indeed, at times scholars have argued that the Framers purposefully designed the Constitution to guarantee gridlock and gave Congress a starring role in that assignment. Separating powers into disparate branches, dividing authority between national and state

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<sup>3</sup> See Jack Rakove, “James Madison’s Political Thought: The Ideas of An Acting Politician,” in *A Companion to James Madison and James Monroe*, First Edition, Stuart Leibiger, ed., (New York: John Wiley & Sons, Inc., 2013).

<sup>4</sup> Larry D. Kramer, “‘The Interest of the Man’: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy,” 41 *Val. U. L. Rev.* 697 (2007), 726.

<sup>5</sup> Kramer, “The Interest of the Man,” 735.



governments, and empowering each of these separate institutions to check the others—political observers often hold up these features of the Constitution as evidence of the framers’ preference for stalemate. Deadlock, in this view, is the natural if not intended consequence of Madison’s constitutional plan.

What’s more, proponents of this view often suggest that gridlock signals the *health* of the Madisonian system. “Gridlock,” said the late Bill Frenzel (a Republican member of the House of Representatives from Minnesota), “is the best thing since indoor plumbing.”<sup>6</sup> Why? Frenzel offered a constitutional defense: The tendency towards gridlock is “a natural gift the Framers of our Constitution gave us so that the country would not be subjected to policy swings resulting from the whimsy of the public.” To the extent that the Madisonian system thwarts well-intended efforts to generate legislative action, that was a feature—not a bug—of Madison’s design.

Political scientists offer constitutional diagnoses as well. Writing in the 1960s to urge revitalization of the Democratic party and its leadership, James MacGregor Burns argued that we “underestimate the extent to which our system was designed for deadlock and inaction.” Burns squarely blamed Madison, whom Burns accused of “believ[ing] in a government of sharply limited powers. His efforts at Philadelphia were intended more to thwart popular majorities in the states from passing laws for their own ends than to empower national majorities to pass laws for *their* ends.”<sup>7</sup> Emphasizing the ways in which power sharing across institutions thwarted legislative majorities, these scholars suggest that Madison today would in fact appreciate the rising incidence of deadlock in America’s Congress.

Political scientist Charles Jones offers a competing, important, and often overlooked interpretation of the Framers’ intent:

It is worth remembering that the Founders were seeking to devise a working government. They did, of course, have fears about tyranny and thereby sought protection through competing legitimacies. But the point was not solely to stop the bad from happening; it was to permit the good, or even the middling, to occur as well.<sup>8</sup>

This alternative view suggests that the Founders sought a strong national government that could govern. The result was an “intricate balance between limiting government and infusing it with energy.”<sup>9</sup> Rather than viewing policy deadlock as the goal of Madison’s constitutional vision, we might better think of frequent policy deadlock as an *unintended* consequence.

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<sup>6</sup> Bill Frenzel, “The System is Self-Correcting,” in *Back to Gridlock: Governance in the Clinton Years*, James L. Sundquist, ed. (Washington, D.C.: The Brookings Institution, 1995), 105.

<sup>7</sup> James MacGregor Burns, *The Deadlock of Democracy* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1963), 22.

<sup>8</sup> Charles O. Jones, “A Way of Life and Law: Presidential Address to the American Political Science Association,” *American Political Science Review* 89(1) 1995, 3.

<sup>9</sup> James A. Morone, *The Democratic Wish: Popular Participation and the Limits of American Government*, Revised edition (New Haven: Yale University Press, 1998), 336.



## OVERCOMING GOVERNMENT GRIDLOCK

So what did Madison expect from his constitutional design? The inadequacies of the Articles of Confederation and political instability in the states that occurred under a variety of constitutional forms were foremost in Madison's and the Framers' minds.<sup>10</sup> Madison and Alexander Hamilton believed that the impotence of the government under the Articles of Confederation Congress threatened the future of the new union. Indeed, they used the first half of the *Federalist* papers to explain the flaws of the existing government. These included a requirement for oversized majorities or unanimous support to enact the most important policies, contributing to the Confederation Congress's failure to raise adequate revenue, command support from the states, protect commercial interests, support troops, and secure western expansion.<sup>11</sup>

Albeit with well-noted exception, delegates to the Constitutional Convention largely agreed with Madison and Hamilton's goal of a more centralized government.<sup>12</sup> They agreed in principle that the new union would require a much stronger national government, what Hamilton in *Federalist* 1 called "an enlightened zeal for the energy and efficiency of government." Or as Madison summarized later in *Federalist* 37, both stability and energy were critical to good government.

Skeptics might point to the doctrine at the heart of the Constitution, the separation of powers, as evidence that Madison and his colleagues sought to hamstring the new government. To be sure, scholars typically portray the division of power between the legislative, executive, and judicial branches as a mechanism chosen by the framers to check or limit federal power. The separation of powers in this view restrains policy makers, thus encouraging stalemate instead of policy change. "It has not been an easy constitution with which to make policy quickly and to govern efficiently," scholar Clinton Rossiter observed in the 1960s, "which is exactly the kind of constitution the framers intended it to be. The gaps that separate the executive from the legislature . . . have often been as discouraging to men of good will as to men of corrupt intent."<sup>13</sup>

Consider a competing interpretation of the separation of powers. As Gordon Wood observed in studying the origins of the Constitution, the separation of powers had a unique meaning for the new nation: "When Americans in 1776 spoke of keeping the several parts of the government separate and distinct, they were primarily thinking of insulating the judiciary and particularly the legislature from executive manipulation."<sup>14</sup> Rather than seeking to limit legislative capacity, the framers believed that the separation of powers could protect the autonomy of the judicial

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<sup>10</sup> Numerous scholars have tackled the political and intellectual currents leading to the Constitutional Convention. For comprehensive treatments see, among others, Terence Ball and J.G.A. Pocock, *Conceptual Change and the Constitution* (Lawrence, KS: University of Kansas Press, 1988); Lance Banning, *The Sacred Fire of Liberty* (Cornell University Press, 1995); Forrest McDonald, *Novus Ordo Seclorum* (Lawrence, KS: University of Kansas Press, 1985); Jack A. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), and Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (New York: W.W. Norton, 1969). On the institutional dilemmas engendered by the structure of the Confederation Congress, see Calvin C. Jillson and Rick K. Wilson, *Congressional Dynamics: Structure, Coordination, and Choice in the First American Congress, 1774-1789* (Stanford: Stanford University Press, 1994).

<sup>11</sup> See Rakove, *Original Meanings*, chapters 1, 2.

<sup>12</sup> John R. Roche, "The Founding Fathers: A Reform Caucus in Action," *American Political Science Review*, vol. 55, no. 4 (December, 1961); Isaac Kramnick, *Introduction to The Federalist Papers, By Alexander Hamilton, John Jay, and James Madison* (New York: Penguin Books, 1987); and Frances E. Lee and Bruce Oppenheimer, *Sizing Up the Senate* (University of Chicago Press, 1999), chapter 2.

<sup>13</sup> Clinton Rossiter, *Parties and Politics in America* (Ithaca: Cornell University Press, 1960), as cited in James L. Sundquist, "Needed: A Political Theory for the New Era of Coalition Government in the United States," *Political Science Quarterly* 103(4) (1988-1989), 620.

<sup>14</sup> Wood, *The Creation of the American Republic*, 57.



and legislative branches. The experience of royal governors intervening in the affairs of the colonial legislatures shaped such early American views about the separation of powers. Interestingly, after independence a decade later, the problem was reversed. Now, limiting legislative encroachment over executive responsibilities was central to the framers' views about the separation of powers. Creating and protecting an executive separate from the legislature was critical to ensuring both legislative and administrative capacity in the new government.<sup>15</sup>

Note as well that the Framers did not detail the rules of the Congress in the Constitution. Instead, they delegated the rule making power to the House and Senate in Article 1, Section 5. Conspicuously absent from the Constitution—beyond the two-thirds vote required to ratify treaties, expel lawmakers, and impeach presidents and others—were the supermajority rules that often stalemated the Continental Congress. Nor did the members of the first House or Senate create rules that strongly limited the power of simple majorities to pass legislation.<sup>16</sup> Why did the Framers leave the choice of legislative rules to lawmakers? One view is that the framers had already designed the Constitution to make it prone to gridlock. If so, detailing procedural constraints on legislative majorities in the Constitution would have been unnecessary. The Constitution already featured staggered selection of senators and different electoral bases and terms of office for House and Senate members. What further constraints on lawmaking could be necessary?

But what if Madison and colleagues wanted to create a stronger and more efficient national legislature? If so, they might have avoided hamstringing the new Congress with the types of rules that had encumbered previous legislatures. Granted, we can never be sure why something did not happen. But we know for sure that both Hamilton and Madison opposed supermajority legislative requirements prescribed by the Articles of Confederation. Both men wrote explicitly about the dangers of limiting the powers of simple majorities. For example, consider Madison's point in *Federalist* 58:

It has been said that more than a majority ought to have been required for a quorum, and in particular cases, if not in all, more than a majority for a decision. That some advantages might have resulted from such a precaution, cannot be denied . . . But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would no longer be the majority that would rule; the power would be transferred to the minority.

Madison clearly felt compelled to defend the Framers' decision not to impose supermajority requirements. The passage suggests that the Framers' silence in the Constitution about internal legislative procedures cannot simply be interpreted as a sign that the Framers believed procedural restraints unnecessary.

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<sup>15</sup> Similar interpretations of the separation of powers have been suggested by Louis Fisher, *President and Congress: Power and Policy* (New York: Free Press, 1972), Chap. 1 and Appendix; Hugh Hecl, "What Has Happened to the Separation of Powers?," in Bradford O. Wilson and Peter W. Schramm, eds. *Separation of Powers and Good Government* (Boston: Rowman & Littlefield Publishers, Inc., 1994); Michael Malbin, "Was Divided Government Really Such a Big Problem?" in Wilson and Schramm, eds. *Separation of Powers and Good Government*; and Garry Wills, *A Necessary Evil* (New York: Simon and Schuster, 1999).

<sup>16</sup> Not until 1806 was the "previous question motion" eliminated in the Senate, a rule that could have been used by a simple majority to cut off debate. That rule change made possible unlimited debate, or the filibuster as it became to be known later in the nineteenth century. On the origins of the filibuster, see Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* (Brookings Institution Press, 1997).

In *Federalist 22*, Hamilton also attacked the structure of the Continental Congress, criticizing its rules that required a two-thirds vote of the states to pass legislation regarding revenue, spending, or military matters:

The necessity of unanimity in public bodies, or of something approaching towards it, has been founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of government, and to substitute the pleasure, caprice or artifices of an insignificant, turbulent or corrupt junto, to the regular deliberations and decisions of a respectable majority.

Madison and Hamilton, in short, rejected writing for the new Constitution those institutional rules that had fostered stalemate in the old Congress—suggesting that the Framers at least sought to avoid some of the procedural traps that so often led to deadlock under the Articles of Confederation.

Revisiting the political context in which the constitutional delegates worked suggests that we temper our conventional interpretation of Madison’s congressional vision. In well-known ways, draftsmen of the Constitution sought to check and thus restrain governmental power, seeking to prevent the new government from sliding into tyranny. At the same time, opposition from Anti-Federalists during the ratification campaign gave Madison and the Federalists incentives to emphasize how power would be restrained—not enhanced—under the new Constitution. Regardless of the ratification campaign, Madison’s views about early Americans’ experiments with national legislatures surely limited his interest in hamstringing Congress’s governing capacity. Madison favored refining public opinion through representatives in Congress, but surely also sought to create a Congress that could spearhead solutions to national crises and public problems.

## MADISON’S CONGRESS TODAY

What would Madison think of Congress today? In many ways, Madison’s congressional vision was a stunning success. Congress has played a preeminent role in driving and shaping historical change in the U.S., and it remains the world’s longest lasting, popularly elected legislature. And as congressional scholar David Mayhew suggests in new work, *The Imprint of Congress*, Congress has often played a central role in steering America’s emergence as a global economic and political powerhouse across thirteen “transnational impulses” that recur across history and the world. Granted, Congress’s role has changed over time—sometimes it leads, other times it constrains the president, and still other times it watches more like a mere bystander. Even if eclipsed by a more politically powerful president by the turn of the twentieth century, Congress was the preeminent branch for much of the nation’s first century under the Constitution.<sup>17</sup> Moreover, in today’s more polarized times, lawmakers do still spearhead significant policy change. In this view, Madison might be pleased with what he would see: His vision for Congress took root early and successfully.

That is the more positive view of how Madison would react to his handiwork. A rival view surely holds weight: Madison would be deeply depressed at what he would find on Capitol Hill. From this perspective, Congress never had a chance. The emergence of nationalized political parties by the early nineteenth century set in motion trends that undermined Madison’s vision for the Congress. The result today is a willfully weak Congress: steadily rising

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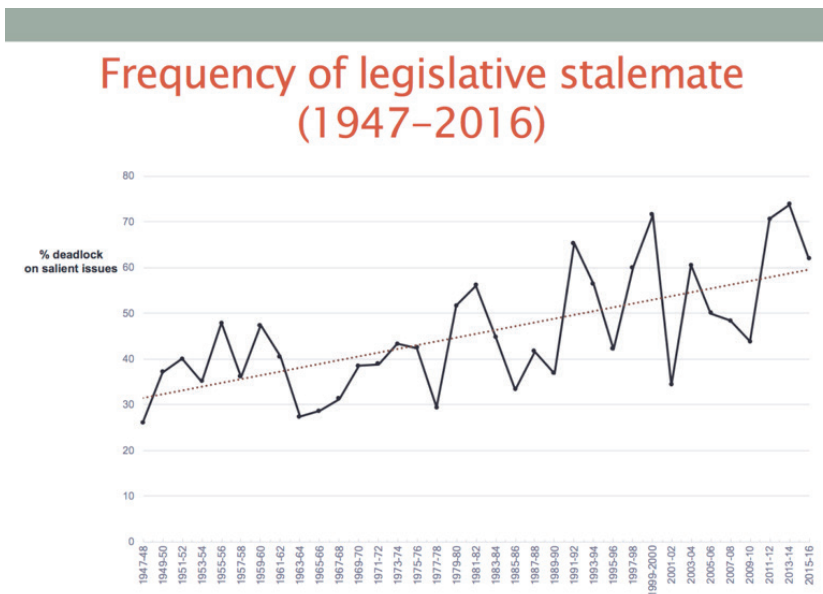
<sup>17</sup> On the change from congressional to presidential dominance, see Joseph Cooper, “From Congressional to Presidential Preeminence: Power and Politics in Late Nineteenth Century America and Today,” in *Congress Reconsidered*, 8th ed., Lawrence Dodd and Bruce I. Oppenheimer, Eds. (Washington, DC: CQ Press, 2005).



legislative stalemate, limited oversight of the executive, lack of fiscal discipline, and excessive delegation to the executive and ultimately the courts. In fewer words, Madison might view Congress today as the “broken branch.”<sup>18</sup>

Regardless of where we believe Congress rests on the spectrum between optimistic and dire views of its performance, Congress has struggled for some time to incubate, deliberate, and compromise on legislative solutions to major public problems. Consider, for instance, the following figure that captures the degree of legislative stalemate over the long postwar period. Typically, we measure congressional performance by counting up the number of landmark laws that Congress and the president enact in any given Congress.<sup>19</sup> But if we want to know the degree to which Congress and the president stalemate on key issues, we also have to take account of the major issues that lawmakers *fail* to successfully address. In other words, rather than judge Congress only by what it does, consider as well what it *could* have done. To be sure, legislative inaction can reflect real, irreconcilable differences within Congress or across the branches. Moreover, if the parties disagree about whether an issue is actually a problem, it is no wonder they disagree on solutions. Still, neither party seems terribly pleased by inaction: Republicans who want to pare back regulations or Democrats desiring to stem global warming need a functional Congress to advance their agendas.

With that context, the measure below shows the degree of legislative deadlock in each Congress since the mid 1940s: What proportion of big ticket issues on the national agenda did Congress and the president fail to address?<sup>20</sup>



<sup>18</sup> Among the many studies of these trends, see Sarah A. Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* (Washington, DC: Brookings Institution Press, 2003), Douglas L. Kriner and Eric Schickler, *Investigating the President: Congressional Check on Presidential Power* (Princeton, NJ: Princeton University Press, 2017), and Thomas Mann and Norman Ornstein, *The Broken Branch: How Congress is Failing America and How to Get it Back on Track* (New York: Oxford University Press, 2008).

<sup>19</sup> The exemplar study in this vein is David Mayhew, *Divided We Govern* (New Haven, CT: Yale University Press, 1991).

<sup>20</sup> Details on measurement appear in Binder, *Stalemate*, chapter 3. For a more current treatment, see Sarah Binder, “The Dysfunctional Congress,” *Annual Review of Political Science* 18 (May): 85-101.

Three trends stand out. First, more of Congress's agenda ends in stalemate today than it did decades ago. The steady upward climb in the percentage of issues in deadlock confirms perceptions that Congress struggles more to legislate today than it did in the past. Second, in its two highest periods of deadlock (after the first two years of the Clinton and Obama presidencies), Congress faltered on nearly three-quarters of its agenda. Most recently, stalemated issues include reforming immigration law, lowering the cost of health care and prescription drugs, stemming global warming, trimming future entitlement spending, investing in the nation's infrastructure and so forth. Third, although the long-term trend suggests ever rising deadlock, some important variation stands out in Congress's postwar record. Mostly significantly, until recently, unified party control had packed a small punch: Congress has historically been more productive in periods of unified than divided party control. But as ideological disagreements and sheer partisan team play have risen during the past decade, single party control no longer seems a silver bullet for fostering major policy change.

Why do these empirical patterns matter? As Jack Rakove reminds us, Madison believed that legislatures' primary purpose was to wield legal authority, not merely to check an overbearing executive.<sup>21</sup> Madison and the Framers endowed the Congress with significant legislative tools and powers. Moreover, Madison expected the Congress to serve as the fulcrum of power within the broader political system. But Congress's difficulty resolving major problems—coupled with decades of delegating authority over trade, foreign affairs, national defense and other issues to the executive—suggests that Congress struggles to perform that role. Add in the meager record of congressional oversight of the president in periods of unified party control, and it seems reasonable to conclude that Madison's Article I vision and expectations have fared poorly over the longer term.

## WHAT WENT WRONG

Mono-causal theories in American politics are rare. Certainly multiple forces have contributed to Congress's contemporary governing difficulty. Nevertheless, one key historical development in the U.S. stands out: The evolution of political parties—first inside the legislature, later amidst an expanding electorate—undermined Madison's legislative vision in key ways. First, the emergence of national parties challenged Madison's scheme of counter-poising politicians' ambitions. Second, over a longer period of time, presidents became the natural leaders of these new parties, which encouraged lawmakers to cede significant statutory and other powers to the presidency. Third, heightened partisanship at the end of the nineteenth century and again at the end of the twentieth—intensified divisions between the parties and complicated the formation of large bipartisan majorities necessary to get much done in Washington. Collectively, these three trends undermined Madison's original congressional vision and have contributed to persistent and debilitating bouts of deadlock in the American Congress.

The Framers' hostility to political parties is well known. As Madison's studies had convinced him, the key problem undermining most democracies historically had been the emergence of a tyrannous majority. Madison explained in *Federalist* 10 that the design of the new Constitution would guard against the emergence of such majorities. His plan took advantage of the great diversity of opinions and interests—economic, social, and political—inherent in an “extended republic” like the new United States: “Extend the sphere and you take in a greater variety of parties and interests.”<sup>22</sup> As Larry Kramer reminds us, Madison was not opposed to popular majorities.<sup>23</sup> But he believed

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<sup>21</sup> See Jack Rakove, “James Madison's Political Thought: The Ideas of An Acting Politician,” in *A Companion to James Madison and James Monroe*, First Edition, Stuart Leibiger, ed., (New York: John Wiley & Sons, Inc., 2013).

<sup>22</sup> “Federalist 10,” Avalon Project, *The Federalist Papers*, [http://avalon.law.yale.edu/18th\\_century/fed10.asp](http://avalon.law.yale.edu/18th_century/fed10.asp) [Oct. 6, 2018].

<sup>23</sup> Kramer, *op cit*.



that large districts and an extended republic would ensure that *factious* majorities could not rule: The only persons who could in theory get elected in large House districts should have been those with the greatest public appeal. Madison counted on members of the House and Senate coming to Congress dedicated to pursuing the interests of their constituencies, rather than the interests of a party.

As became clear within the first few Congresses, Madison miscalculated how integral organized factions would become to lawmakers in both chambers. Granted, the early parties that formed in Congress were hardly parties by today's standards: Given how small and selective state electorates were at the time, these proto-parties organized politics within the Congress but not outside.<sup>24</sup> Only as states began to extend suffrage beyond property-holding elites did politicians begin to realize how robust parties could be instrumental for mobilizing voters behind prominent or promising presidential candidates. As political scientist John Aldrich has argued, full-fledged political parties solved key problems of politics: They made winning, durable coalitions possible inside Congress, cued voters about competing party policy promises, and turned out voters at election time.

The development of national parties was problematic for Madison's vision for Congress. As Charles Stewart argues, lawmakers began to come to Washington "predisposed to cooperate with their co-partisans and resist the opposition."<sup>25</sup> What's more, lawmakers gradually came to lean on presidents—especially from their own party—for policy leadership in Washington. Rather than pursuing the interest that elected them in the first place, legislators' loyalties were increasingly to their parties. By failing to anticipate the twin rise of nationalized parties and expanded electorates, Madison underestimated how difficult it would be to keep power dispersed within the new political system. Parties provided bridges between the separate branches and created distinct walkways for each of what would much later become the Democratic and Republican parties.

The emergence of nationalized parties—with all but popularly elected presidents at the helm—also posed a challenge to Madison's vision of Congress as the linchpin of the political system. As Stewart points out, the only real formal tool presidents held under the Constitution was the veto power. For any other resources—"money, troops, patronage"—presidents had to turn to Congress.<sup>26</sup> But presidential subordination to Congress weakened with the rise of nationalized parties with presidents at the helm. The power to command public attention—fleetingly in the nineteenth century and more permanently in the twentieth—created political leverage that Madison likely did not anticipate. Coupled with the rise of nationalized, electorally-based parties over the course of the nineteenth century, presidents—not lawmakers—emerged in the early 1900s as the preeminent leaders of their parties and a national government.

Congress was no innocent bystander in the development of presidential power. In fact, lawmakers aided and abetted it, and sometimes instigated it. Bouts of delegation and institutional building within the executive branch and the White House occurred over matters of war and budgets, most visibly during the Great Depression in the 1930s and in the ensuing run up and aftermath of World War II. Indeed, Congress created the "national security state"—including a permanent standing army and an enormous national intelligence apparatus. These delegations of power were in effect zero sum moves: Lawmakers were happy to cede power to popular presidents and ride their coattails to re-election. Conceptually, Congress delegated power with the threat that they could recoup it.

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<sup>24</sup> On the institutional development of parties in and outside of Congress, see John H. Aldrich, *Why Parties? A Second Look* (Chicago, IL: University of Chicago Press, 2011).

<sup>25</sup> Stewart, "Congress and the Constitutional System," 3.

<sup>26</sup> Stewart, "Congress and the Constitutional System," 24.

But apart from a short-lived period of congressional resurgence in the 1970s, over the long-term Congress has empowered presidents and exercised uneven oversight over how presidents deploy those powers.<sup>27</sup>

Today's presidents—electorally and institutionally empowered—drive nationalized politics and policymaking in a deeply partisan environment. Today's political parties are more polarized ideologically and more electorally competitive than they have been since the end of the nineteenth century.<sup>28</sup> What's more, politics is increasingly nationalized, putting to pasture the maxim that “all politics is local.”<sup>29</sup> Scholars debate what precisely our measures of partisan polarization capture. One camp emphasizes the emergence of ideologically sorted parties into liberal and conservative camps in the aftermath of the civil rights revolution in the mid 1960s that allowed a robust Republican party to take root in the previously one-party, Democratic South. Others argue that polarization extends beyond questions of ideology to capture the growth of rival partisan teams: Your team is for it, so mine is against it.<sup>30</sup> Both notions capture polarization at the elite level and belatedly and increasingly across the electorate. And both help to explain why Madison's vision for Congress as the driver of policy and defender of its interests has not fared well, particularly in modern times.

Perhaps most importantly, the roots of Congress's decline predate the Donald Trump presidency. To be sure, America's constitutional order might seem particularly fragile under Trump's visceral style of politics, his often dismissive attitudes about the rule of law, his demonization of opponents, and the Republican Congress's unwillingness to investigate controversial Trump administration policies and personnel.<sup>31</sup> But nationalized political parties took root in American politics nearly two centuries ago. Congress long ago endowed the president with enormous institutional resources and power. The public long ago turned to presidents as the preeminent leaders of the American political system. And the current incarnation of partisan polarization has been on the rise at least since the early 1990s. In short, lawmakers' ambitions seem hitched to their presidents' goals and only sometimes attend to the “Constitutional rights of the place.”

## HOPE FOR MADISON'S CONGRESS?

Reformers are unlikely to resurrect Madison's vision for Congress. After more than two centuries of American political development that have made presidents the most pivotal actors in a highly partisan polity, the Madisonian ship has sailed. As political scientist E.E. Schattschneider famously wrote more than a half-century ago, “the political parties created democracy and . . . modern democracy is unthinkable save in terms of parties.”<sup>32</sup> Only parties, Schattschneider argued, could provide the sort of majoritarian organization necessary to fairly contest elections

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<sup>27</sup> On the politics of Congress's 1970s resurgence, see James Sundquist, *The Decline and Resurgence of Congress* (Washington, D.C.: The Brookings Institution, 1981).

<sup>28</sup> On the rise of polarized parties, see Nolan McCarty, Keith Poole, and Howard Rosenthal, *Polarized America* (Cambridge, MA: MIT Press, 2006). On the political impact of electoral competitiveness, see Frances E. Lee, *Insecure Majorities* (Chicago, IL: Univ. of Chicago Press, 2016).

<sup>29</sup> On the nationalization of American politics, see Daniel Hopkins, *The Increasingly United States: How and Why American Behavior Nationalized* (Chicago, IL: University of Chicago Press, 2018).

<sup>30</sup> Lee, *Insecure Majorities*.

<sup>31</sup> The track record of the Republican Congress's willingness to challenge Trump's prescriptions and policies deserves a full-fledged study of its own. Certainly some issues did provoke varying degrees of Congressional pushback. A bipartisan Congress imposed sanctions on Russia for meddling in the 2016 election. Republican senators pressed the administration to limit the imposition of tariffs that hurt the agricultural economy. As of this writing, Congress has refused to fund the administration's proposed wall along the South western border. And GOP and Democratic leaders threatened to curtail the administration's “zero tolerance” strategy of separating immigrant families at the border. Still, Republicans undertook little if any oversight of these and other equally controversial matters during Trump's first two years in office.

<sup>32</sup> E.E. Schattschneider, *Party Government* (Chicago: Holt, Rinehart and Winston, 1942), 1.

in a democratic society. Absent parties, factions would mobilize on behalf of narrowly drawn, biased sets of interests. Madison certainly saw the benefit to such a system of countervailing factions. But with the benefit of hindsight, Madison's constitutional scheme to guard against tyrannous majority factions seems anachronistic.

True, the intensity of partisanship could dissipate over coming generations. Lowering the partisan temperature could make it easier for future parties to resolve major policy problems by creating broader constituencies for compromise within each party. But it seems difficult to imagine a wholesale reversion to congressional preeminence envisioned by Madison. Nor are states ever likely to provide the sort of counterweight to national ambition and power prized by Thomas Jefferson and the Anti-Federalists at the Founding. Most accounts of subnational politics today emphasize how nationalized parties now dominate politics that play out at the state level.<sup>33</sup>

That does not mean that reformers should abandon efforts to make Congress work better. The challenge is figuring out what sorts of reforms—changes to the rules of the game, bolstering legislative capacity, or generating greater political will to solve public problems—are likely to be the most fruitful.<sup>34</sup> Of these three targets, improving legislative capacity is probably the easiest. True, lawmakers do sometimes resist informational resources on the grounds that they amplify the agendas of the opposition party. Republican cuts to staff in committees and the Congress's research arms starting in the 1990s seemed in part designed to undermine the resources that Democrats had relied on during the long tenure in power. But *in principle*, augmenting legislative resources—given declines in policy experts within the standing congressional committees and legislative support agencies such as the Congressional Budget Office—should not be too politically difficult.

The other targets are much harder. Consider first the task of revamping institutional rules or practices of Congress. Politicians typically choose rules that they believe will help them to achieve their most preferred outcomes. And rules often develop unanticipated consequences that run counter to the intentions of reformers. That means that the best laid plans of reformers will get little traction if they fail to serve the intertwined policy and political goals of lawmakers. For example, many experts argue that the congressional budgeting process is broken. Designed for the politics of the 1970s, it now often fails to achieve its goals of rationalizing the budgeting process and bolstering Congress's role in meeting the country's fiscal needs.<sup>35</sup> And we can gin up reasonable, tractable reforms of budgeting rules and practices. But for reform to succeed, lawmakers need to be convinced that the changes will help them to secure their own goals. Reform for reform's sake is rarely a clarion call in Congress. That said, significant turnover in Congress in recent years could generate pressure on leaders for reform, perhaps pushing the parties to adopt new ways of budgeting.

Similarly, absent sufficient electoral motivation for lawmakers to overcome legislative stalemate, deadlock is likely to be a recurring and feature of congressional politics. Only when lawmakers personally feel that a deadlocked Congress costs them electorally are they likely to advocate reforms to make the institution function better. Until then, lawmakers will surely continue to “run for Congress by running against it”—Richard Fenno's electoral trope that captures lawmakers' proclivity for deflecting blame for a dysfunctional Congress.<sup>36</sup>

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<sup>33</sup> On the nationalization of state politics, see Hopkins, *The Increasingly United States*, and Steven Rogers, “National Forces in State Legislative Elections,” *The Annals of the American Academy of Political and Social Science*, 667 (1) 207–225.

<sup>34</sup> This approach leaves to election law experts potential changes to electoral and campaign finance laws outside of Congress.

<sup>35</sup> Molly E. Reynolds, “This is why the Congressional budget process is broken,” *The Washington Post*, October 27, 2017, [https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/27/this-is-why-the-congressional-budget-process-is-broken/?utm\\_term=.379e3e639edf](https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/27/this-is-why-the-congressional-budget-process-is-broken/?utm_term=.379e3e639edf). Congress created a bipartisan panel to propose budget reforms, with recommendations due by November 28, 2018.

<sup>36</sup> See Richard F. Fenno, Jr., *Homestyle: House Members in Their Districts*. (Longman, 1978).

Rather than propose reforms that aim to reduce polarization, we might instead try to adapt current modes of legislating to a highly polarized environment. This means finding ways to facilitate compromise when there is no ideological sweet spot on which partisans can agree. As Frances Lee and I detail in earlier work, rather than construing legislative deal making as “zero-sum,” a more productive approach conceptualizes deal making as positive sum.<sup>37</sup> We can think of this approach as enlarging, rather than dividing, a fixed size policy pie. The goal is to move Congress towards “win-win” deal making: both parties secure their most preferred outcomes rather than giving the dominant party what it wants at the other party’s loss.

Consider the following example from a 2013 bipartisan Senate agreement to reform the nation’s immigration laws.<sup>38</sup> Democrats secured a path to citizenship for undocumented persons, Republicans obtained vastly increased spending on border security, and business and agricultural lobbies agreed to visa and guest worker programs. Granted, the House failed to act. But the process by which senators reached a bipartisan deal—including working to understand the top priorities of other party, closing the doors temporarily at the start of the process to facilitate a deal—suggests a template for reaching agreement on at least some of today’s contentious issues. The model has also worked reasonably well since 2013 when the two parties have run up against stringent spending caps enforced by the Budget Control Act: On three occasions, party and budget committee leaders orchestrated spending deals to avoid automatic, across-the-board cuts.

Of course, some issues will be impervious to change in the short term. First of all, the parties do not always agree whether or not an issue constitutes a problem that calls for a solution. Democratic and Republican disagreements about global warming are a case in point. So long as Republicans dispute whether global warming is caused by human activity, there is little chance that Republicans will enter policy negotiations over solutions. Second, for bargaining to take place on any issue, both parties have to believe that they will pay an electoral cost for refusing to negotiate. House Republican opponents of immigration reform pushed their leaders in 2013, for example, to ignore the Senate’s immigration deal: Republican rank and file—and thus their leaders—saw little electoral reward for joining Democrats at the bargaining table for a set of reforms opposed by their largely white, conservative constituent base.

In such a polarized environment, congressional politics often plays out in messaging battles between the parties rather than in any sort of deliberative process on Capitol Hill. Those battles make it extraordinarily difficult to get the parties to negotiate over most of the big ticket items on Congress’s agenda. To be sure, all the attention to deadlock on the most controversial issues risks losing sight of more incremental, bipartisan policy change that often takes place out of the media’s spotlight. But on the major problems facing the country today, blaming the other party for inaction often plays better with the party base than casting controversial votes that accommodate the other party’s interests.

That leaves us with a national legislature plagued by low legislative capacity and halting political will to tackle tough problems. Half measures, second bests, and just-in-time legislating are the new norm: Electoral, partisan, and institutional barriers often limit Congress’s capacity for more than lowest-common-denominator deals. Even if lawmakers ultimately find a way to get their institution back on track, Congress’s difficulties have been costly—both to the fiscal health of the country and to citizens’ trust in government. The economy is regaining its footing. Regenerating public support for a Congress that barely reflects Madison’s ideal will likely prove much harder.

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<sup>37</sup> Sarah A. Binder and Frances E. Lee, “Making Deals in Congress,” in *Solutions to Political Polarization in America*, Nathaniel Persily, ed. (New York: Cambridge University Press, 2015).

<sup>38</sup> See also Ryan Lizza, “Getting to Maybe,” *The New Yorker*, June 24, 2003  
<https://www.newyorker.com/magazine/2013/06/24/getting-to-maybe>.





# RECOVERING A MADISONIAN CONGRESS

BY DANIEL STID

The American people are fed up with Congress. Over the past eight years, the public's approval for the institution as tracked in recurring Gallup surveys has been mired in the 10 to 20 percent range, prompting the late Senator John McCain's quip that the only supporters he and his colleagues had left were paid staffers and blood relatives. To be sure, Congress has long been the institution where the things citizens like least about politics—namely, partisan fights, unseemly haggling, and convoluted procedures—take place out in the open.<sup>1</sup> But Americans have grown especially frustrated with Congress in recent years, marked by historical levels of polarization, tribalism, and gridlock in the institution. In the most prominent instances when Congress has managed to act, it has done so on strict partisan lines. Neither of the two most important pieces of legislation in this period, the Patient Protection and Affordable Care Act of 2010, and the Tax Cuts and Jobs Act of 2017, garnered the vote of a single legislator from the minority party on final passage. No wonder only one in five Americans approve of what is meant to be the people's branch of their government.

To put the widespread disapproval of Congress in context, we turn to James Madison. In addition to being the father of our Constitution, Madison is also seen as the father of our Congress. He served with mounting frustration in its predecessor, the Continental Congress, trying and failing to strengthen its power to act on behalf of the nation during the Revolutionary War. Later he helped lead the push for the Constitutional Convention in Philadelphia, where he was the architect of the initial proposal for a new national government anchored in a revitalized Congress. After the convention, Madison emerged as the leading champion of the proposed Congress through his landmark essays in *The Federalist Papers* during the fight for ratification. Madison then helped get Congress up and running, serving as a leader in the House of Representatives during the first four Congresses. What was Madison's vision for the first branch of our government? How and why has this vision become imperiled today? What could we do to help Congress recover at least some of the institutional virtues and contributions that Madison envisioned for it?

## I. MADISON'S VISION FOR CONGRESS

Madison worked to establish a Congress that would simultaneously prevent bad things from happening and enable good things to happen. With respect to prevention, Madison wanted a Congress that would control the effects of what he termed "the mischiefs of faction," and to keep the governmental powers that the Founders had intentionally separated across the three branches from being consolidated in any one branch. At the same time, Madison wanted to foster deliberation in Congress, and to empower the first branch of government to make laws for the nation on matters that required encompassing and authoritative policy settlements.

### A. CONTROLLING THE MISCHIEFS OF FACTION

Madison famously elaborated his views on the problem of faction and solutions for it in *Federalist* 10. He defined a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other

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<sup>1</sup> John R. Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes Toward American Political Institutions* (New York: Cambridge University Press, 1995).



citizens, or to the permanent and aggregate interests of the community.” Given the requirements of liberty and the vagaries of human nature, it was impossible to eliminate the causes of faction. Nor would “enlightened statesmen” be able “to adjust these clashing interests, and render them all subservient to the public good.” Such statesmen would not always be around, and even when they were, they could not easily gauge and resolve the conflicts between competing interests and parties. Minority factions were unfortunate, but they would generally be checked by the “republican principle” in which the government makes decisions through majority rule. However, this solution did not solve the thornier problem of majority factions.

Here is where the Congress making laws for the large republic that Madison and his colleagues were proposing came in to play. In contrast to a “pure democracy” in which the people take part in government and rule themselves—a form of government which Madison argued was invariably prone to majority factions—a republic is characterized by a “scheme of representation” in which the citizens choose their law-makers and hold them accountable through elections. Representation allows republics to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, who may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”

The large republic proposed in the Constitution was unprecedented in its size and diversity. Opponents argued that it was too big to survive: republican governments had to be homogenous and therefore small to flourish. Madison turned their argument around by noting that the larger the size of the republic, the larger the chance of having representation capable of controlling the negative effects of majority factions. In a large republic, there are more “fit characters” for voters to choose from, and there are more voters electing them. Both factors combine to increase the odds that those “who possess the most attractive merit and the most diffusive and established characters” would be elected to Congress.

More broadly, a large republic mitigates against majority factions by making it harder for them to form and coordinate activities that undermine individual rights or the public good. “Extend the sphere and you take in a greater variety of parties and interests.” But here too the proposed solution only made it “less probable” that majority factions would take hold—there was no guarantee. Practically speaking, the greater diversity of factions would have to be taken in and represented, weighed, balanced, and modulated—or not—in Congress. The extended sphere that was Madison’s boldest innovation would thus depend on the absorptive capacity of Congress if it was to make good on his claim that the proposed Constitution embodied a “a republican remedy for the diseases most incident to republican government.”

## B. PRESERVING THE SEPARATION OF POWERS

Madison also assumed that Congress would play an integral role in preserving the separation of powers, an arrangement deemed essential for good government by the Constitution’s supporters and opponents alike. Madison argued in *Federalist* 51 that the formal and complete separation of the legislative, executive, and judicial branches that many were calling for would be insufficient to prevent the “gradual concentration of the several powers in the same department.” The more practical solution was “giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachments of the others . . . Ambition must be made to counteract ambition. The interests of the man must be connected with the constitutional rights of the place.” A dynamic system of checks and balances was necessary to



ensure the government controlled itself. Of course, in a republican system of government “a dependence on the people,” one that would be expressed most directly and frequently through elections to the House of Representatives, would be the primary means of control, “but experience has taught mankind the necessity of auxiliary precautions.”

Madison’s assumptions about the role that Congress would play in preserving the separation of powers can easily be overlooked because he was focused on another problem — that Congress would be too powerful and threaten the other branches of government. He observed that “in republican government, the legislative authority necessary predominates” given its closer proximity to the people. Most of the American states, as they framed their constitutions during the Revolutionary War, had sought to check the executive high-handedness of the sort that George III and his colonial governors had displayed. In Madison’s view, many state constitutions had over-corrected, producing legislatures that in turn proceeded to usurp powers of the other branches.

A key goal of the proposed Constitution was to guard against Congress encroaching on the other branches. The Founders sought to do this in part by dividing Congress into two chambers, each with different sizes, constituencies, modes of election, and terms to ensure that it would be harder for them to act in concert. The Founders also sought to fortify the executive and judicial branches, so that they could check Congress. The tenure of executive and judicial officeholders did not depend on congressional approval. The executive and judicial branches were also equipped to counter Congress through the president’s veto power and the judiciary’s role of interpreting and passing judgment on the constitutionality of laws made by Congress.

These and other such fortifications notwithstanding, the Constitution also invested Congress with a formidable set of defenses. The Senate could confirm presidential nominations to the executive and judicial branches. Congress could override presidential vetoes of legislation, and it could change the size, structure, and jurisdiction of the federal judiciary. If warranted, Congress could impeach and convict presidents and judges, thereby removing them from office. In sum, if members of Congress failed to ward off encroachments from the other branches, it would not be because they lacked the “necessary constitutional means” to do so.

Given Madison’s arguments in *Federalist* Nos. 10 and 51, it is possible to view his plan for Congress as designed to prevent bad things from happening. But this interpretation only gives half of the picture. Madison and the Founders also sought to establish branches of government that would supply essential virtues: energy in the executive, impartiality in the judiciary, and — most relevant for our purposes — deliberation in the legislature.<sup>2</sup>

## C. SETTING THE STAGE FOR DELIBERATION

Madison had wanted Congress to be the institution to host and to foster deliberation on what the federal government should do about important issues facing the nation. This is fitting since Congress is the branch closest to the people on account of its modes of election, it has the power to make laws that bind and tax citizens, and it includes a diversity of people and perspectives needed to represent and deliberate on behalf of a large and diverse nation

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<sup>2</sup> David Epstein, *The Political Theory of the Federalist* (Chicago: University of Chicago Press, 1984), especially pp. 147-197.



Opponents of the Constitution were suspicious of what they saw as the unduly small size and long terms of the proposed Congress, in particular for the House of Representatives—the chamber directly elected by the people. They wanted a larger, more numerous House to better mirror the different elements in society, and one-year terms to keep the legislators on a short leash—consistent with the then-common maxim, “Tyranny begins where annual elections end.” But Madison and his colleagues wanted to strike a balance, both in the number of legislators and the length of their terms. Madison reasoned that the number had to be sufficient to provide the requisite diversity of voices for the purposes of representation, but not so extensive that it would lead to a mob-like cacophony. And the terms of office had to provide for the recurring accountability needed in a republic, but also the tenure lawmakers needed to learn about, debate, and resolve the issues at hand without having to constantly look over their shoulders. Madison argued that the House, as structured, promoted republicanism and deliberation.<sup>3</sup>

The Senate, in which the states would have equal representation, would provide for even more stable and thoughtful deliberations by dint of its smaller membership, larger constituencies, indirect election, and staggered six-year terms. In *Federalist 63*, Madison proposed that the Senate would defend the people against “their own temporary errors and delusions” and ultimately enable the “cool and deliberate sense of the community” to prevail. In combination with the House, the Senate would ensure that Congress represented both short and long-term perspectives and—given the need for laws to be approved in both chambers—would ensure that considerations from both time horizons were duly reflected in the legislative deliberations and majority rule of the new national government.<sup>4</sup>

## D. LEGISLATING FOR THE NATION

The final component of Madison’s vision for Congress was that it would have the legislative power and authority it needed to govern a fledgling nation. Such wherewithal had been conspicuously lacking, much to Madison’s chagrin, under the Articles of Confederation. The first sentence after the preamble to the Constitution declared that “all legislative powers herein granted shall be vested in a Congress of the United States.” Among this awesome set was the all-important power of the purse, i.e., the power to tax and appropriate funds, as well as the power to regulate inter-state commerce and international trade, to borrow and coin money, to regulate the currency, to manage immigration and naturalization, to provide for and regulate an army and a navy, to declare war, and (through the Senate’s “advice and consent” powers) to ratify treaties. In short, Congress and the national government it anchored could now address the array of problems that had been bedeviling the nation at home and abroad.

Madison and the Founders viewed Congress not simply or primarily as a check on executive power, as had long been the tradition in Anglo-American politics. Rather, Congress was meant to be, on account of its proximity to the people and institutional design, the generative, law-making body in the new republican system of government.<sup>5</sup> It was only in Congress that the full sweep of ideas, agendas, interests and passions

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<sup>3</sup> Madison makes this case in *The Federalist* Nos. 52–57. See also Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago, University of Chicago Press, 1994), 20–28.

<sup>4</sup> Greg Weiner, *Madison’s Metronome: The Constitution, Majority Rule, and the Tempo of American Politics* (Lawrence, Kansas: University of Kansas Press, 2012).

<sup>5</sup> Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Random House, 1996), Chapter 8.



could be represented and reconciled, and it was only in Congress that the legislative alloys in which they would be combined could be forged and tempered. Madison's "republican remedy" thus depended on this difficult and often clamorous work getting done in Congress.

## II. THE MISMATCH BETWEEN MADISON'S VISION AND TODAY'S REALITY

How is Madison's vision for Congress playing out at present? The low esteem Americans have for Congress today is a clear signal that something is amiss. In a nutshell, the mischiefs of faction, rather than having their effects controlled by a Madisonian Congress, are spiraling out of control from within it. And Congress, rather than encroaching on the branches of government, has been ceding—in many cases quite willingly—its powers to them, especially the presidency. These fundamental problems are in turn making it difficult for Congress to engage in substantive and productive deliberation on major policy issues, and to legislate in ways that generate the negotiated settlements on these issues that the nation needs.

### A. MISCHIEFS OF FACTIONS

Congress's faction problem today is multi-faceted. In surveying it, we cannot overlook the challenge of minority factions, which Madison believed could be dealt with via majority rule. But Madison had assumed that the federal government would be limited in its scope and activities. As both its scope and activities have expanded, especially in the period from the New Deal through the mid-1970s, federal legislation and regulation have generated countless nooks and crannies in which minority interests—be it a firm, an industry, or a group of people—have concentrated costs or benefits at stake. Such circumstances have prompted and enabled these interests to solve their collective action problems and engage in focused policy advocacy in ways that lead to responsive representation in Congress. Meanwhile, the countervailing and broader but more dispersed interests of taxpayers, consumers, and—not least—future generations have found it harder to have their concerns represented on Capitol Hill.<sup>6</sup>

Over the years, as these dynamics have played out, a multi-billion dollar lobbying industry has developed in the nation's capital. It has grown to the point that five out of the ten wealthiest counties in the United States can be found in the Washington, D.C. metro area—exactly the type of concentration of wealth in and around the capital city that has long concerned theorists of republican government.<sup>7</sup> Congress is both a target and a recruiting pipeline for this lobbying-industrial complex. What once was taboo—retired members lobbying their former colleagues—has become commonplace. Over the past three election cycles, more than 60 percent of the retiring members of Congress who have kept working have done so in the lobbying industry.<sup>8</sup> With the revolving door spinning like this, no wonder Americans are calling to drain the swamp that lies on the other side of it.

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<sup>6</sup> Jonathan Rauch, *Government's End: Why Washington Stopped Working* (New York: Perseus Books, 1999) and Greg Weiner, "After Federalist 10," *National Affairs* (Fall 2017), 132-136.

<sup>7</sup> Rebecca Lerner, "The Ten Richest Counties in America 2017," *Forbes*, July 13, 2017, retrieved from <https://www.forbes.com/sites/rebeccalerner/2017/07/13/top-10-richest-counties-in-america-2017/#3a34710e2ef3> on October 30, 2018.

<sup>8</sup> Retired member lobbying data from Center for Responsive Politics, "Revolving Door," retrieved from <https://www.opensecrets.org/revolving/departing.php?cong=114> on October 30, 2018.

Our two political parties present even more vexing mischiefs of faction. To be sure, we have had parties dating back to the Washington Administration, when Madison—despite his well-articulated reservations about them—joined with Thomas Jefferson to form a party to counter what they saw as the anti-republican Federalist interest.<sup>9</sup> But for the vast majority of American history, our political parties have internalized the diversity of the extended sphere. They have been coalitions encompassing different regions, ideas, and interests, and served to modulate expressions of partisanship. Over the past fifty years, however, the two parties have sorted themselves out, cohering internally and diverging externally, to the point where they are as polarized as they have been since the Civil War. This entrenched conflict in Congress undermines the effectiveness and legitimacy of the institution. It also radiates out through partisan media echo chambers to the public, driving polarization in the electorate.

As University of Maryland political scientist Frances Lee has recently observed, a big part of the problem is that the parties are mired in an unusually protracted battle for control of Congress. Traditionally, one of the parties has dominated for extended periods of time, with comfortable majorities in both houses. The other party, relegated to minority status with little hope of winning power in the near future, has to “go along to get along.” The past four decades, in contrast, have been marked by intermittent periods of red or blue control, with much narrower majorities. As these majorities have been politically insecure, they have been loath to work with a minority that could plausibly unhorse them. The minority, meanwhile, is equally dead-set against cooperation, trying instead to isolate and embarrass the majority so as to increase its odds of winning power back in the next election.<sup>10</sup>

The party lines in the prolonged battle for political control are reinforced by rival coalitions of issue groups, that political scientists have termed “intense policy demanders.” Think the National Rifle Association (NRA), Americans for Tax Reform, and National Right to Life on the Right, or the Sierra Club, the AFL-CIO, and NARAL-Pro-choice America on the Left. It is not a foregone conclusion that they should naturally ally with each other. Yet on issue after issue, these groups, and the donors and activists behind them, hang together in a partisan coalition, pushing the party and candidates on their side of the political divide to hew to polarized positions.<sup>11</sup> Minority factions outside of Congress are in effect banding together to submit the parties and candidates to litmus tests that worsen polarization inside the institution.

Rather than producing a mix of legislators capable of refining and enlarging the public views—and of resisting the more intense claims of partisanship—these dynamics actively select for legislators inclined to be more responsive to such claims. The polarization is further reinforced by primary elections in which those donating and voting to nominate candidates are much more partisan and ideological than the electorate as a whole. And the primary election is effectively *the* election in the states and districts that have been rendered safe for one party or the other by the geographic sorting of the electorate and / or (in some states) egregious gerrymandering of House districts.

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<sup>9</sup> On the extent to which Madison anticipated the partisanship he came to practice in Congress, see William F. Connelly, Jr., *James Madison Rules America: The Constitutional Origins of Congressional Partisanship* (New York: Rowman & Littlefield, 2010).

<sup>10</sup> Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* (Chicago: University of Chicago Press, 2016).

<sup>11</sup> Kathleen Bawn, Martin Cohen, David Karol, Seth Masket, Hans Noel, and John Zaller, “A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics,” *Perspectives on Politics* (2012), 571–597.

## B. FROM IMPETUOUS VORTEX TO WILLING PUSHOVER

Alongside its failure to mitigate the effects of the “mischief of faction,” Congress has also failed to hold its own within and defend against attacks on the separation of powers. The presidency—not Congress—has turned out to be the “impetuous vortex” that Madison worried would encroach on the other branches. This dynamic would not surprise Madison. Even as he was serving in the House of Representatives, President Washington and his enterprising Secretary of the Treasury, Alexander Hamilton, had demonstrated that the executive branch could seize the initiative in domestic and foreign policy alike, to Madison’s alarm and consternation.<sup>12</sup> The emergence of the presidency under Andrew Jackson as a democratically elected office—the only one for the nation as a whole—brought more power and authority into the White House. So did the twentieth century rise of the United States as a global and nuclear power, one for which the president served as the chief diplomat and commander-in-chief. Meanwhile, Theodore Roosevelt and Woodrow Wilson scrapped longstanding norms against presidents appealing to the public to advance their policy agendas, further augmenting the powers of their office. Finally, new media technologies—radio, television, and now social media—have more naturally focused the public’s attention on the president in the White House rather than on the hundreds of legislators in the Capitol.

But for all of these institutional developments empowering the presidency vis-à-vis Congress, the largest source of legislative disempowerment has been Congress itself. Ambition in Congress has always been challenged to check ambition in the president given the latter’s superior capacity for “decision, activity, secrecy, and dispatch” that Hamilton described in *Federalist 70*. However, over time, congressional ambition has twisted and taken the form of delegating and deferring to presidents to avoid responsibility for exercising the powers that the Constitution gave to Congress. Deep down, members know it. As two of them—Senator Mike Lee and Representative Jeb Henslerling—recently lamented:

The dysfunction in Washington today has accreted over decades, under Houses, Senates, and presidents of every partisan combination. . . .The stability and moral legitimacy of America’s governing institutions depend on a representative, transparent, and accountable Congress to make its laws. For years, however, Congress has delegated too much of its legislative authority to the executive branch, skirting the thankless work and ruthless accountability that Article 1 demands and taking up a new position as backseat drivers of the republic.<sup>13</sup>

Apart from the problematic delegation of law-making power to the administrative state, Congress increasingly fails to exercise two of its most critical powers. The first is the power of the purse, perhaps the bedrock of the Congress’s authority. This power is wide-ranging, but Congress has worked itself into a straightjacket when it comes to wielding it. Two-thirds of federal outlays are on automatic pilot via entitlement programs, primarily Social Security and Medicare. Like the third rails they are often likened to, these mandatory spending programs are essentially impossible for lawmakers to adjust, despite the pressure they are putting on the rest of the budget. On the other side of the ledger, the unstinting advocacy of the anti-tax faction has made it similarly difficult, if not impossible, to raise taxes, notwithstanding the

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<sup>12</sup> John Ferejohn, “Madisonian Separation of Powers,” in Samuel Kernell, ed., *James Madison: The Theory and Practice of Republican Government* (Stanford: Stanford University Press, 2003), 126-155.

<sup>13</sup> Mike Lee and Jeb Henslerling, “A Stronger Congress, A Better Republic,” *National Review Online*, Feb. 2, 2016, retrieved from <https://www.nationalreview.com/2016/02/congressional-law-makers-representatives-dont-represent/> on October 24, 2018.



need for more revenue and the underlying wealth of the country from which it could be drawn. The resulting deficits, once again running in the trillion-dollar range annually, further tighten the fiscal squeeze via larger interest payments. The deficits also give rise to rapidly accumulating national debt, which already exceeds our annual gross domestic product.

Madison would be equally concerned by Congress's abdication of its war powers. Since the congressional declaration of war at the outset of American involvement in World War II, the United States has waged subsequent wars in Korea, Vietnam, the Persian Gulf, Afghanistan, and Iraq without one. The 2001 congressional "authorization" of military force, originally meant to be used against those complicit in the 9/11 attacks, continues to be invoked by presidents seventeen years later as a blanket authorization for the global war on terror. Data compiled by scholars at Brown University indicates that between 2015 and 2017, this never-ending and amorphous war witnessed U.S. air and drone strikes in 7 countries, U.S. combat troops operating in 15 countries, and U.S. counter-terrorism training operations in 58 countries.<sup>14</sup>

Meanwhile, the pattern of Congress yielding its power and authority to the presidency on multiple fronts has been accelerated by polarization and, in a vicious cycle, actually worsens it. A divided Congress is even more hard-pressed to take the collective action needed to rein in or rebuff unilateral executive actions. And in a deeply divided society, unilateral executive action rallies those supporting the president, while at the same time enraging their opponents.<sup>15</sup>

### C. "A PARLIAMENT OF PUNDITS"

Not surprisingly, the polarization in Congress and legislators' abdication of core constitutional responsibilities have had a negative impact on legislative deliberation. A major shift here has been the subordination of congressional committees to congressional parties. This change was set in motion in the 1970s by liberal reformers in the Democratic Party, who had sought for years to reduce the power of their predominantly southern and more conservative committee chairs who had retained their gavels via the seniority system. The post-Watergate surge of liberal Democrats in the 94th Congress led to the unseating of three of the most obstinate chairmen in the House and the caucus putting the others on notice that they could not stray far from the party line. In the wake of the Contract with America in the 104th Congress, Newt Gingrich and the new Republican majorities took things to the next level, making seniority a secondary consideration, and loyalty to the party leadership the acid test, for GOP committee leaders. In addition, from that point forward, GOP committee leaders have been term-limited, further reducing their clout.

Parties, not committees, have become the primary drivers of legislation, and party leaders steer bills using methods that reduce opportunities for committee members, let alone rank and file legislators, to deliberate on the merits of major policies. Key bills are increasingly hashed out by majority party leaders and their staffs, who negotiate with their minority counterparts only when they have no choice to do otherwise. These packages are then pushed through Congress in carefully structured processes that restrict debate and amendments. The reliance on unorthodox procedures is now the new orthodoxy.<sup>16</sup>

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<sup>14</sup> Brown University Costs of War Project, "Current United States Counterterror War Locations," retrieved from [https://watson.brown.edu/costsofwar/files/cow/imce/papers/Current%20US%20Counterterror%20War%20Locations\\_Costs%20of%20War%20Project%20Map.pdf](https://watson.brown.edu/costsofwar/files/cow/imce/papers/Current%20US%20Counterterror%20War%20Locations_Costs%20of%20War%20Project%20Map.pdf) on October 24, 2018.

<sup>15</sup> Richard Skinner, "Barack Obama and the Partisan Presidency," *Society Magazine* (2012); Sidney Milkis and Nicholas Jacobs, "Donald Trump, the Administrative Presidency, and the Hazards of Executive-Centered Partisanship," *The Forum* (2017).

<sup>16</sup> The title of a leading textbook tells this story: the late Barbara Sinclair's, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, first published in 1997 to describe departures from the "textbook Congress," is now in its fifth edition.





Another factor facilitating party control of legislation and undermining Congress's capacity for deliberation is the substantial reductions in policy staffing and expertise available to support lawmakers. This change was also driven by the new Republican majorities in the 104th Congress, who followed through on the Contract with America's pledge to reduce House committee staff by one-third. The GOP majorities also eliminated the Office of Technology Assessment, with its specialized expertise meant to give Congress an independent perspective vis-à-vis the executive branch's technocrats, and lowered the budgets and staffing of the Government Accountability Office and the Congressional Research Service. Critics of this shift have likened it, harshly but not unfairly, to a self-administered "big lobotomy" from which Congress has yet to recover.<sup>17</sup>

Finally, the imperatives of the permanent campaigns that members of Congress feel obliged to wage have undermined deliberation and bipartisanship. Most members of Congress now live in their states and districts rather than move with their families to Washington. This means members spend much less time together in D.C. and struggle to develop the relationships with each other that were once commonplace—and essential for legislative negotiations. Moreover, newly elected members are instructed by party officials to spend at least half their time fundraising, further curtailing members investing the time, holding the hearings, and acquiring the knowledge needed for substantive deliberations. Many legislators seem to be focusing more on the performative aspects of their role, serving as media commentators about what the president is or is not doing, supporting or opposing his actions depending on whether they are from the same party or not. What they are collectively doing much less of is serving as legislators carrying out their constitutional responsibilities in a co-equal branch of government. As Jonah Goldberg recently put, we no longer have a Congress so much as "a parliament of pundits."<sup>18</sup>

The cumulative effect of these developments is the failure of Congress to address the major problems facing the nation. Sarah Binder of the Brookings Institution has found that levels of legislative gridlock have been steadily rising in recent decades, especially on the most salient issues.<sup>19</sup> Presidents of both parties have tried to take advantage of these impasses, issuing executive orders and using other administrative tools in an effort to make national policy on matters where Congress cannot or will not act. But these legislative workarounds are superficial and unstable. To be sure, a president can decide not to bother with the hard work of assembling majorities in Congress, to wave his phone and pen and endeavor to bring about sweeping policy shifts on his own. But his successors can wield their own phones and pens to negate or reverse these policies. We have seen this whiplashing occur over the past few years on immigration, free trade, climate change, and gun control, among other major and contentious issues, roiling policies and politics alike. We must find a better way forward.

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<sup>17</sup> Paul Glastris and Haley Sweetland Edwards, "The Big Lobotomy," *Washington Monthly*, Summer 2014, retrieved from <https://washingtonmonthly.com/magazine/junejulyaug-2014/the-big-lobotomy/> on October 30, 2018.

<sup>18</sup> Yuval Levin, "Congress is Weak Because Its Members Want It To Be Weak," *Commentary*, June 2018, retrieved from <https://www.commentarymagazine.com/articles/congress-weak-members-want-weak/> on October 30, 2018; quotation from Joe Concha, "Fox's Goldberg: Congress 'a parliament of pundits': Everyone wants 'to secure their position on Morning Joe or Fox & Friends,'" *The Hill*, August 2019. <https://thehill.com/homenews/media/400741-foxs-goldberg-congress-a-parliament-of-pundits-everyone-wants-to-secure-their?>

<sup>19</sup> Sarah Binder, "Polarized We Govern?" Brookings Institution Center for Effective Public Management, May 2014.

## HOW MIGHT WE BEGIN TO RECOVER A MADISONIAN CONGRESS?

To be practical, any proposed changes or improvements for Congress need to be developed and implemented within the constraints of our existing system. But there is power in constraint: it forces us to think clearly about what would be feasible and desirable, and to identify and work with rather than against the grain of the constitutional system. With this in mind, we turn now to explore three potential paths forward. They are distinct but not mutually exclusive. They overlap with and reinforce each other, and they all point in the same general direction: toward the recovery of a Madisonian Congress. These pathways include depolarizing our politics, strengthening Congress as an institution, and revitalizing Americans' appreciation for and commitment to the people's branch of government.

### A. DEPOLARIZING OUR POLITICS

The first pathway involves mitigating the effects of factions, in particular polarization and hyper-partisanship, that too often work to inflame passions and grind things in Congress to a halt. The difficulty here is that most of the potential levers of reform are hard to pull, have to be done on a state-by-state basis, and may not have the desired consequences. Consider the reforms touted most frequently by pundits as the cure for polarization: expanding the use of nonpartisan redistricting and opening up primary elections currently controlled by parties. There may be good democratic reasons to adopt these reforms, but the available evidence suggests they will not do much to alleviate the underlying problem of polarization.<sup>20</sup>

An emerging reform that may hold more promise is "ranked choice voting" (RCV). This election format gives voters more choices and provides a finer-grained register of public opinion, ensures that winning candidates are supported by a majority of voters, and—most importantly—gives candidates incentives to forgo highly negative and partisan campaigns.<sup>21</sup> RCV is currently used in many other countries (including Australia, Ireland, and multiple Canadian provinces) and in cities across the United States. The citizens of Maine have now passed two ballot measures establishing RCV for their state and federal legislators in primary and general elections beginning in 2018. Momentum for adopting RCV is building in several other states.

RCV could work especially well in the context of multi-member legislative districts, a combination that would enable fuller representation of women, racial minorities, and both parties in state congressional delegations, while practically eliminating the possibility of partisan gerrymanders. Multi-member districts are less alien than they may seem at first glance. Across the U.S., 15 percent of state legislators represent multi-member districts, as in effect do U.S. Senators. Multi-member districts were common in the House of Representatives until the 1840s, and some states continued using them for the House of Representatives until 1967, when Congress passed legislation requiring single-member districts. But this law could be overturned, and legislation has been introduced that would do just that, establishing RCV in multi-member house districts.<sup>22</sup>

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<sup>20</sup> Nolan McCarty, "Reducing Polarization: Some Facts for Reformers," *University of Chicago Legal Forum*, 2015, 243-278.

<sup>21</sup> Here is how RCV works: voters rank the candidates in order of preference, and the ballots are initially counted for each voter's top choice. If a candidate secures more than half of the first-place votes, that candidate wins. If not, the candidate in last place is eliminated. Votes are then reallocated to the voters' top choices across the remaining candidates. This process repeats until one candidate is the top remaining choice of a majority of the voters.

<sup>22</sup> See FairVote, "The Fair Representation Act," retrieved from <https://www.fairvote.org/the-fair-representation-act#why-rcv-for-congress> on October 30, 2018.

We also need to find ways of mitigating the polarizing effects of our current system of campaign finance, which has been deregulated through a series of Supreme Court decisions. Given recent appointments to the Court, these problematic precedents will not be revisited anytime soon. We are going to have to cope with the problems they have produced, including effectively unlimited and undisclosed spending by highly ideological outside groups in the years ahead. But reformers can learn from and work to expand novel experiments in public financing via the matching funds and voucher systems currently being used in New York City and Seattle, respectively. These experiments have the virtue of encouraging candidates to build connections with and raise funds from their constituents. Recent scandals involving so-called Leadership PACs could also prompt reforms of those entities, which intensify the pull of partisanship in Congress.

While these reforms would be helpful, they will not address the fundamental causes of polarization and hyper-partisanship in Congress. In the end, our politics will need to be reformed through politics. This will probably entail some combination of two developments. The first is that one party will need to decisively win the battle for control of Congress that, at least since the mid-1990s, has had the two parties fighting on a knife's edge in each electoral cycle. More secure and stable majorities in Congress would signal to the minority party that they would need to go along or risk marginalizing themselves further. The second development is a reshuffling of the party coalitions so that they once again overlapped, with each party competing (albeit more or less effectively) for the votes of all Americans. President Trump's resort to identity-based appeals to white Americans is clearly taking us in a different direction at present. But demographic changes already underway will likely make it increasingly difficult for future GOP presidential candidates to follow his lead and win national office. That said, if the move toward identity politics continues unabated, it will certainly make it harder to cope with the problem of polarization. Some political divisions are impossible to bridge.

## B. STRENGTHENING CONGRESS AS AN INSTITUTION

In addition to finding better ways of controlling the effects of faction, we also need to find ways of strengthening Congress as an institution in our separation of powers system. Rather than piecemeal reforms to different parts of Congress — e.g., ending term limits for GOP committee leaders, or moving to biennial budgeting — what is needed first and foremost is a multi-faceted reassertion of congressional power and authority vis-à-vis the executive branch. This was the pattern that prevailed in the immediate aftermath of World War II, when Congress passed a number of measures, including the Legislative Reorganization Act and the Administrative Procedure Act, to recapture some of the powers it had ceded to the executive branch during the years of depression and war; likewise with a series of reforms that Congress undertook in the wake of Vietnam and Watergate, including the Budget and Impoundment Control Act, the National Emergencies Act, and the Foreign Intelligence Surveillance Act. These legislative resets each had a half-life, and many of them have been depleted. After years of justifiable complaints of presidential overreach from legislators in both parties, the time is ripe for another reset.

We can expect this institutional reassertion to be led by what Roger Davidson once termed “procedural entrepreneurs” in Congress, i.e., legislators who seek to diagnose the institution's problems and develop solutions that would enable it to function more effectively.<sup>23</sup> Procedural entrepreneurs often serve as

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<sup>23</sup> Roger H. Davidson, “The Legislative Reorganization Act of 1946,” *Legislative Studies Quarterly* (1990) 15:3, pp. 357-373.



catalysts for larger groups of institutionally-minded and rank-and-legislators frustrated with the roles and few degrees of freedom assigned to them in the status quo, bringing them into reform coalitions. These coalitions formed and had great effect in the 1940s and 1970s. There are signs it is happening again. Several bipartisan reform caucuses have emerged in Congress to push various reform agendas, and multiple bills are now in circulation. There is growing support in Congress to establish a joint select committee to review and reform the operations of Congress as a whole, a step that lay behind these earlier waves of systematic institutional reform. A concurrent resolution that has been introduced in the present Congress to set up such a committee has a bipartisan group of 67 co-sponsors in the House.<sup>24</sup> As with these earlier periods, we now also see external advocates for congressional reform working across the political spectrum with procedural entrepreneurs inside Congress to inform and reinforce their efforts to remake the institution.<sup>25</sup>

Rather than run through a litany of potential reforms that could be advanced through a reassertion of congressional power, we should anticipate a few basic ways in which this reset might play out. We could expect the reset to be driven by, and clear the way for, individual members, especially in the Senate, taking action on their own, refusing to toe the partisan lines articulated by party leaders and presidents, and opting instead to work with like-minded colleagues on both sides of the aisle to advance shared policy and institutional concerns.<sup>26</sup> We could expect the reset to involve power and initiative flowing from party leadership back into committees and subcommittees, furthering the trend toward individual initiative and bipartisanship in congressional policy-making. We could expect the reset to begin to rebuild the staffing and expertise Congress needs to do its work—on committee policy staffs, in legislative support agencies like GAO, CBO, CRS, and perhaps in a rebooted Office of Technology Assessment or an equivalent entity. (As a side note, Congress augmenting its internal capacity to make and oversee policy would bolster the institution vis-à-vis minority factions by reducing the need for members and their staffs to rely on the “legislative subsidy” provided by lobbyists.)<sup>27</sup> Ultimately, the reset of Congress would be made manifest in an institution whose members spend more time making laws and overseeing their implementation, and in a Congress that has regained the basic control it is meant to exercise over the administrative state: the powers of the purse, and the nation’s wars—in sum, in a Congress fulfilling the essential functions that it is meant to, and has to, in our separation of powers system.

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<sup>24</sup> House Concurrent Resolution 28, retrieved from <https://www.congress.gov/bill/115th-congress/house-concurrent-resolution/28/cosponsors> on October 9, 2018.

<sup>25</sup> See for example the work of congressional reform advocates, think tankers, and scholars associated with the Legislative Branch Capacity Working Group at [www.legbranch.com](http://www.legbranch.com), Future Congress at [www.futurecongress.org](http://www.futurecongress.org), the Congressional Reform Project at <https://www.conginst.org/congressional-reform-project>, the National Budgeting Roundtable at <https://www.budgetingroundtable.com>, the Center for Effective Lawmaking at <https://thelawmakers.org>, and the Congressional Oversight Initiative at <https://www.pogo.org/congressional-oversight-initiative>.

<sup>26</sup> My thinking on this point has been greatly informed by conversations with James Wallner and Yuval Levin.

<sup>27</sup> Lee Drutman and Steve Teles, “A New Agenda for Political Reform,” *Washington Monthly*, Spring 2015, retrieved from <https://washingtonmonthly.com/magazine/maraprmay-2015/a-new-agenda-for-political-reform/> on October 30, 2018.

## C. REVITALIZING THE PEOPLE’S BRANCH

The pathways to change described above might suggest that recovering a Madisonian Congress is a job for electoral reformers, political leaders, and members of Congress—i.e., elites in Washington, D.C. But American citizens also have a role to play—indeed it might be the most important one of all. We all need

to revitalize our understanding of the proper functioning of Congress and do our part to ensure that our representatives and senators reflect this understanding. For some, this will entail more active engagement with the legislators representing us *in between* elections to ensure they understand their constituents’ preferences and are taking them into account. As with earlier periods of reform, new grassroots organizations and networks have emerged to help citizens engage with members in ways that maximize the influence of their voices. Other citizens are taking the lead in organizing political efforts to elect members of Congress that will better represent them. Not surprisingly, these local and informal political organizers are going about their work in a pragmatic manner well-suited for the places they live and know best (as opposed to the more ideologically doctrinaire spokespeople we encounter on national and social media).<sup>28</sup> Finally, a groundswell of citizens, many from non-political backgrounds, have been putting themselves forward to run for Congress. Brookings Institution researchers have found that 2,280 candidates ran for House seats in 2018, a 37 percent increase from 2014. The upcoming midterms will see many in this wave of new voices make it to Congress. When they get there, an ample portion of them will be determined to revamp the institution.

Running across all of these examples of reawakened citizen engagement with Congress is a conviction that the first branch of government can and must do better when it comes to representing the American people. This is a conviction that we all should share and act upon. The sustained public repudiation of Congress we noted at the outset reflects the reality that the institution has been underperforming for some time. But its duration also suggests that citizens have grown complacent and / or resigned in the face of its underperformance. Thus we too are implicated in the institutional failure. American citizens elect and get the Congress they deserve. If it is broken, we need to do our part to fix it. On this point, we might conclude with argument made by Madison in a speech at the Virginia Ratifying Convention: “I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks—no form of government can render us secure.”

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<sup>28</sup> See Lara Putnam and Theda Skocpol, “Middle America Reboots Democracy,” *Democracy: A Journal of Ideas*, February 20, 2018, retrieved from <https://democracyjournal.org/arguments/middle-america-reboots-democracy/> on October 30, 2018.



# JAMES MADISON AND THE JUDICIAL POWER

BY JACK RAKOVE<sup>1</sup>

## INTRODUCTION

Asking what James Madison would think about some aspect of modern political life is always a challenging exercise. The problem is not only that no time machine exists to pluck Madison out of his era and plop him down in ours. It is also that Madison was a deeply empirical and creative thinker whose ideas were never frozen into one perfect synthesis, and a political actor whose thoughts reflected his rich experience. If one asks, *What would Madison do?*, one has to give Madison the same historical knowledge and political experience that we enjoy, and then let him make up his own mind—an intellectual challenge that lies beyond our own poor powers to add or detract.

A second problem complicates asking how Madison thought about issues relating to the judiciary. Two overarching concerns drove his constitutional thinking in the 1780s. One involved the structure of the federal system and the problem of getting the states to perform their national duties. The other concerned the nature of collective deliberation and legislative decision-making. Madison's seminal experiences in the 1770s and 1780s were primarily legislative in nature. By contrast, only after 1793 did he turn his critical attention to considering the role of the executive in republican governments. His interest in judicial power also took some time to develop. Many of his most telling comments on this subject were written only after 1819, in response to the key decisions in *McCulloch v. Maryland* (1819) and *Cohens v. Virginia* (1821).

Yet Madison was also a close student of Anglo-American law; in Mary Sarah Bilder's phrase, he was something of a "demi-lawyer."<sup>2</sup> In his first sustained discussion of American republican governments in 1785, Madison observed that "*The Judiciary Department* merits every care. Its efficacy is demonstrated in G. Britain where it maintains private Right against all the corruptions of the two other departments & gives a reputation to the whole Government which it is not in itself entitled to."<sup>3</sup> At the Federal Convention, he proposed and vigorously supported the idea of giving the judiciary an active role in legislation. Although he worried that judges would never possess the same political advantages as legislators, he believed that the Supreme Court would play a critical role in maintaining the stability of the entire federal system. The brief statement on this point in *Federalist* 39 remained an orthodoxy to which he still adhered in the 1830s. His criticisms of the Marshall Court notwithstanding, Madison believed that a reliance on the authority of the Supreme Court would offer the South a lasting legal security against northern domination.

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<sup>1</sup> This essay draws upon my prior writings, including "The Origins of Judicial Review: A Plea for New Contexts," *Stanford Law Review* 49 (1996-1997), 1031-1064; "Judicial Power in the Constitutional Theory of James Madison," *William and Mary Law Review* 43 (2001-2002), 1513-1547; *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996); and *A Politician Thinking: The Creative Mind of James Madison* (Norman, OK: University of Oklahoma Press, 2017).

<sup>2</sup> Mary Sarah Bilder, "James Madison, Law Student and Demi-Lawyer," *Law and History Review* 28 (2010), 389-449.

<sup>3</sup> "Letter from James Madison to Caleb Wallace, Aug. 23, 1785," in Jack N. Rakove, ed., *James Madison: Writings* (New York: Library of America, 1999), 42.



## FIVE POSTULATES ABOUT MADISON AS A CONSTITUTIONAL THINKER

Before examining Madison's ideas about the judiciary, it would be helpful to list five essential elements of his constitutional thinking.

1. Madison was first and foremost a student of collective political deliberation. His formative political experiences were his three-and-a-half uninterrupted years of service in the Continental Congress (March 1780-October 1783) and the three consecutive terms he then spent representing Orange County in the Virginia House of Delegates (1784-1786). The problem of improving the quality of legislative deliberation and checking the misuse of legislative power dominated his political thinking, at least down to 1793 and again during the two decades of his retirement at Montpelier (1817-1836). His ideas about judicial power were largely derivative of his desire to curb the "impetuous vortex" of legislative activity.
2. Although Madison shared the American revolutionaries' commitment to the principle of separation of powers, his approach to this subject was never rigid or doctrinaire. As he observed in *Federalist 37*, "Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzles the greatest adepts in political science" (a group in which Madison counted himself). Constitutional statements affirming a rigid separation of powers were just that: so many "parchment barriers" that were never self-enforcing. A general adherence to the principle of separated powers did not preclude creative or pragmatic adaptations that would enable the pursuit of the public good and the protection of private rights, Madison's dual goals of constitutional government.
3. Madison knew that in republican governments, public opinion and popular will were the forces that ultimately drove political decision-making. Those forces were most powerfully expressed in the legislature, and especially in its lower house, the institution that represented the people most directly. To control its dominant political influence and legislative power, expedients might be developed to fortify and unite the weaker institutions, perhaps by linking the presidency with either the Senate or the judiciary. But the best solution of all was the extra-institutional one proposed in *Federalist 10* and restated in *Federalist 51*: to expand the republic to take in a "multiplicity of factions" or interests, so that the formation of the wrong kinds of popular majorities would grow more difficult.
4. It also follows that the most dangerous political forces would coalesce at the state and local levels of government. That was where "factious majorities" could more readily form, and where the plenary authority of state legislatures would leave rights vulnerable to violation. Madison's initial skepticism about amending the Constitution to include the Bill of Rights presumed that a declaration of rights would do little good unless it applied directly against the states. He also doubted that judges would have the political courage to apply federal constitutional guarantees against the mobilized will of public opinion, again particularly within the states. But he never doubted the moral value of such an ambition, and in principle he would have welcomed the growth of modern rights-based jurisprudence through the "incorporation" against the states of the guarantees of Section 1 of the Fourteenth Amendment.



5. Finally, Madison recognized that the ongoing task of making the constitutional system work required a patient willingness to sort out its complexities. As he first explained in *Federalist 37*, political phenomena were inherently difficult to classify, describe, and delineate. Grand theoretical statements or simple invocations of popular or state sovereignty would not do this work. The American system was a real “non-descript”: it had no true precedents and could only be analyzed inductively, in its messy details.

Save for postulates 4 and 5, the judiciary does not hold a commanding place in these discussions. Yet Madison’s thoughts on the subject still offer important clues to his thinking and to our notions of the Madisonian constitution that we often invoke but rarely describe in any serious detail (beyond citing *Federalist* Nos. 10 and 51).

## EARLY THOUGHTS ABOUT THE JUDICIAL POWER

When Madison praised the “efficacy” of the British judiciary in 1785, he reflected the prevailing American belief that the independence that Parliament had gained in the Glorious Revolution had since been corrupted by the modes of patronage and influence that allowed the Crown to control Parliament. Parliament could not fulfill its prescribed duty as the embodiment of legislative supremacy because too many members of its members had become “placemen” who served as the willing “tools” of the reigning ministry. Madison’s concerns with the role of the judiciary in American republican constitutions were also driven by his perception of the misuse of legislative power. But he was troubled, not by the *corruption* of American legislatures, but by the defects of deliberation and decision-making that lawmakers routinely revealed.

These defects were the subject of the four concluding items in his seminal April 1787 memorandum on the Vices of the Political System of the United States. Those items addressed the “multiplicity,” “mutability,” “injustice,” and “impotence” of the “laws of the States.”<sup>4</sup> Madison conceded that the burden of waging a revolutionary war had placed an unprecedented burden on their legislatures, and that allowance had to be made for “the situation in which the revolution has placed us.” Yet the problems he identified could not be reduced to that factor alone. “Try the Codes of the several States by this test,” he complained, “and what a luxuriancy of legislation do they present.” Laws enacted so hastily led to their repeal or supersession even “before any trial can have been made of their merits.”

Worse than the “want of wisdom” that these impulsive processes revealed was the “still more alarming” problem of legislative injustice, “not merely because it is a greater evil in itself, but because it brings into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.” Madison offered two diagnoses for this fundamental problem. The first involved the “ambition” and “personal interest” that distorted the decisions of many lawmakers, including those newcomers who fell prey to the manipulations of factious leaders. The second and far more important concerned “the people themselves,” *particularly within the boundaries of individual states*, where self-interested and passionate majorities could too easily form.

Madison’s solutions to these problems were both institutional and political. On the *institutional* side, he wanted to improve the quality of legislative deliberation: by giving the amateur lawmakers who staffed most assemblies longer terms, so they would learn their business better; by constituting select committees to serve as veteran drafters of bills; and by creating genuine senates possessing the confidence to check the impulses of the lower house. On the *political* side, as he famously proposed in *Federalist* Nos. 10 and 51, the best cure for the “mischiefs of faction” would lie in creating an “extended republic.” This social complexity would discourage the wrong kinds

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<sup>4</sup> “Vices of the Political System of the United States,” in *Madison: Writings*, 74–80, for this and the following paragraphs.





of factious majorities from forming nationally and also produce a more qualified class of national lawmakers superior to the lesser lights who flourished within the states.

Prior to the Convention, Madison initially gave the judiciary little thought. He was not even sure whether there should be a separate national judiciary. Some national courts of appeal were needed for “cases to which foreigners or inhabitants of other States may be parties,” but perhaps all else that was required was to have state judges swear “fidelity” to the “general” constitution.<sup>5</sup> His thinking did evolve in the succeeding weeks. The Virginia Plan provided for the establishment of “one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature.” Judges would enjoy tenure during good behavior, following the rule set in the parliamentary Act of Settlement of 1701, and their salaries would not be subject to legislative alteration. The jurisdiction of national courts would broadly cover “questions which may involve the national peace and harmony,” a tentative yet still quite open-ended grant of authority.<sup>6</sup>

Here was a preliminary basis for making the judiciary an independent department. Yet Madison’s most intriguing thoughts about judicial power bent in a different direction. His most striking proposal was to create a joint executive-judicial council of revision (modeled on the New York constitution) possessing a limited negative (or veto) over legislation. Under Article 8 of the Virginia Plan, this council would have “authority to examine every act of the National Legislature before it should operate, & every act of a particular [state] Legislature before a Negative thereon should be final.” (The latter part of the clause related to the congressional negative on state laws, which we will discuss below.) On the three occasions when this provision was debated, Madison defended it vigorously. One justification for the council rested on the perceived weakness of both the executive *and* the judiciary. It was to safeguard their authority against the “impetuous vortex” of legislative power that the two politically weaker departments should be formally allied.

It was, however, the other rationale that offers the best insight into Madison’s thinking. Madison wanted leading members of the national judiciary to have an active role in the drafting of legislation. Rather than have judges wait for some suitable case to come before them *legally*, after a statute was enacted, he wanted them to participate in its adoption. One could fairly object, Madison observed on June 6, “that the judges ought not to be subject to the bias which a participation in the making of the laws might give in the exposition of them” at a later point. Two other points outweighed this concern. First, there would be few occasions when this would occur. Second, and more important, the prior involvement of the judiciary would contribute positively to the enactment of legislation. As Madison remarked on July 21, just before the Framers conclusively rejected the council:

It would be useful to the Judiciary departmt. by giving it an additional opportunity of defending itself agst. Legislative encroachments; It would be useful to the Executive, by inspiring additional confidence & firmness in exerting the revisionary power: It would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check agst. a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities.

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<sup>5</sup> “Letter from James Madison to George Washington, April 16, 1787,” in *Madison: Writings*, 82.

<sup>6</sup> “Letter from James Madison to George Washington, April 16, 1787,” in *Madison: Writings*, 90-91.

There was thus a trade-off to be weighed and paid. One could impair the strict theory of separated powers that the first state constitutions had endorsed. But the net improvement in lawmaking gained by foreseeing and removing difficulties before they occurred was, in Madison's eyes, worth this theoretical cost. James Wilson amplified Madison's point by arguing the value of allowing judges to "remonstrat[e]" against laws that were "unjust," "unwise," "dangerous," or "destructive," yet not "so unconstitutional" as to demand rejection.<sup>7</sup>

The opponents of the council of revision predictably held that the only way that judges could participate in legislation was in their proper judicial capacity, and not as an advisory body. If judges participated in making laws, that might compromise their capacity to adjudicate them in subsequent proceedings. Perhaps most important, the opponents of the council declared that the judiciary already possessed the capacity to declare laws unconstitutional. In other words, Americans would not have to wait until 1803 for Chief Justice John Marshall to "establish" the legitimacy of judicial review in *Marbury v. Madison*. The concept of judicial review, though still novel and only partly formed, was something that the Framers already grasped.

The defeat that Madison suffered on these points did not lead him to reject his opinions. A year later, in his Observations on Jefferson's proposed revision of the Virginia constitution, Madison restated his support for a council of revision—but with several intriguing modifications. The great objective remained to provide "a check to precipitate, to unjust, and to unconstitutional laws." Rather than submit a bill to a joint council, pending measures should be sent to the executive and judiciary independently. If one department objected, a legislative override would need a two-thirds vote; if both objected, a three-quarters vote. But once the legislature made its decision, "It sd. not be allowed the Judges or the Ex[ecutive] to pronounce a law thus enacted, unconstitul. & invalid."<sup>8</sup>

That qualification would preserve the principle of ultimate legislative supremacy, admittedly exercised under tough super-majoritarian rules. Madison reaffirmed this point in the next paragraph of the Observations, which addressed the dawning recognition of the doctrine of judicial review.

In the State Constitutions & indeed in the Fedl. one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making their decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended, and can never be proper.<sup>9</sup>

Madison recognized the inherent existence of judicial review, but his analysis questioned whether the judiciary should be the final voice on the constitutional validity of statutes.

## TWO DEEPER CONCERNS

Beyond Madison's concerns with the deliberative qualities of representative bodies, two further problems shaped his attitude toward the judiciary. The first concerned the future uses of legislative power in a commercial and territorially expanding republic. The second was related to the fundamental problems of federalism that had troubled Madison ever since he entered the Continental Congress in 1780.

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<sup>7</sup> Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press 1911, 1937, 1966), I, 138-139; II, 73-80.

<sup>8</sup> "James Madison, "Observations on the 'Draught of a Constitution for Virginia," in *Madison: Writings*, 417.

<sup>9</sup> "James Madison, "Observations on the 'Draught of a Constitution for Virginia," in *Madison: Writings*, 417.



Madison had a very modern conception of the future uses of legislative power. He understood that legislatures would henceforth form the institutional locus within which multiple economic and social interests would try to bend public power to their own benefit. The business of colonial legislatures had been far more parochial. They enacted few general-purpose statutes; most of their work involved answering petty petitions that emanated from counties, towns, and interested individuals. They were not developing turnpikes and canals or providing for the building of bridges. In many ways, legislatures were still adjudicatory bodies that spent a great deal of time resolving local disputes.<sup>10</sup> That was one of the many complications that made Madison so skeptical about any neat or rigid theory of separated powers.

But once Americans had to govern a vast terrain stretching from the Atlantic to the Mississippi, the local knowledge that amateur lawmakers had carried to their provincial capitals would no longer suffice. National legislators had to acquire national knowledge. Although Madison hoped some members of Congress would aspire to serve more than one term, he rightly foresaw that each biennial Congress would bring major rotations in membership. Even though the Constitution did not require it, rotation in office remained the pervasive practice until the late nineteenth century. Each biennial session created its own educational cycle, as new members arriving from widely scattered districts learned the complexities of public policy on a national scale. *Indeed, nothing better indicates how much our political world differs from theirs than this basic disparity in the importance of incumbency.* Any political scientist working today assumes that reelection is the dominant motive shaping the behavior of our representatives. That presumption was manifestly not the case in the political world of the founders.

Yet lawmakers would also be active advocates for their constituents' immediate interests. As one fascinating paragraph of *Federalist* 10 suggests, legislators would effectively serve as "judges and parties, at the same time." Particularly in the realm of economic legislation, lawmakers would act judicially, because "what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes which they determine?" In the realm of economic policy—laws covering creditors and debtors, producers and consumers, and modes of taxation—all decisions were both judicial and legislative in nature, because they would have different effects on different forms of property, which Americans regarded (along with freedom of conscience) as the most fundamental right of all.

This blurring of lines between what is formally legislative in appearance but latently judicial in nature illustrates the complexity of Madison's thinking. It also demonstrates why he felt few qualms about blurring or crossing the boundary between the distinct realms of legislation and adjudication, as the council of revision manifestly would have done. If the ultimate end was to secure the best legislation possible before it was enacted, why not adopt a procedure that would bring more "consistency, conciseness, perspicuity & technical propriety" to the task, especially when many representatives were relative amateurs at the legislative game?

Had it been approved, the work of the council of revision would have implicated Madison's other radical proposal: the negative on state laws that Congress could use either to protect the national government against interference from the states or to protect individuals and minorities against unjust acts. On July 17, the day after it approved the equal state vote in the Senate—to Madison's great regret—the Convention replaced the negative on state laws

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<sup>10</sup> See the important article by Christine Desan, "The Constitutional Commitment to Legislative Adjudication in the Early American Tradition," *Harvard Law Review* 111 (1998), 1381.



with the initial weak version of the Supremacy Clause. The language of that Clause was soon silently strengthened. It ultimately obliged *state* judges to treat the Constitution, federal laws, and national treaties as “the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Although even today skeptics argue that the Constitution did not explicitly provide for the exercise of judicial review, that is what the Supremacy Clause actually accomplished.

The principle underlying the Supremacy Clause resolved a problem that had long vexed Madison. From the start of his congressional career, he actively worried about how the states could be persuaded, encouraged, or coerced to fulfill their federal obligations. The prevailing theory underlying the Articles of Confederation was not a “proto-Calhoun”<sup>11</sup> belief that the states had a sovereign right to decide whether or not to implement the measures that Congress sent their way. It was rather that the states should adapt all those measures to local conditions, acting in effect as administrative arms of Congress. In the early 1780s, Madison believed that Congress should have the authority to compel states to do their duty. Although Congress never pursued this idea, Madison was still contemplating the advantages of coercing delinquent states in 1787.

Yet once the Convention began, Madison concluded that schemes of coercion were more likely to provoke civil conflict rather than orderly governance. The negative on state laws, which was modeled on the veto power the king had previously exercised over the colonies, became the next solution to this problem. The power would vest in Congress, but the council of revision would in turn use its limited negative to ensure that Congress acted appropriately. Once these two provisions were eliminated, the default option for policing conflicts over federalism fell to the federal judiciary, or more specifically to the Supreme Court.

Madison remained unconvinced that this was the best means to ensure that the states would conform to the new federal system. Privately, he still viewed the negative on state laws as a better mechanism than judicial enforcement. He laid out his rationale in a lengthy letter to Jefferson, written a month after the Convention adjourned:

It may be said that the Judicial authority under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is that it is more convenient to prevent the passage of a law, than to declare it void after it is passed; that this will be particularly the case where the law aggrieves individuals, who may be unable to support an appeal against a State to the supreme Judiciary, that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible.<sup>12</sup>

Yet in the months after Madison drafted this impassioned letter, he accommodated himself to the constraints that the Constitution imposed.

The critical passage illustrating his thinking appeared in *Federalist* 39. The second half of this essay was devoted to a five-pronged assessment of the federal (that is, state-based) and national properties of the Constitution. Near the close of this analysis, Madison raised the delicate question of the resolution of the inevitable controversies over the respective jurisdictions of the state and national governments.

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<sup>11</sup> John C. Calhoun was a South Carolina senator who used a states’ rights argument to protect slavery during the Nullification Crisis of 1832-33.

<sup>12</sup> “Letter from James Madison to Thomas Jefferson, Oct. 24, 1787,” in *Madison: Writings*, 148-149.

It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general Government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local Governments; or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

In fact, thirty years later, Spencer Roane, chief judge of the Virginia court of appeals (and Patrick Henry's son-in-law), did actively combat this conclusion. But the succinct statement of *Federalist* 39 defined the orthodoxy that Madison consistently defended.

Madison's principle merits two important comments. First, it demonstrates conclusively not only that judicial review was clearly part of the original meaning of the Constitution—its existence textually confirmed by the Supremacy Clause—but also that its main or more obvious use would involve questions of federalism rather than separation of powers. Second, when one turns to Madison's seminal essays on the separation of powers in *Federalist* 47-51, judicial power is made conspicuous by its absence. Perhaps this was a mere omission on Madison's part; perhaps it reflected his belief that the critical issue of separation of powers was the relationship between president and Congress; or perhaps it reflected his sense that the whole "doctrine" was too messy and "obscure" a subject to be amenable to any tidy resolution. Once one reaches the concluding essay, *Federalist* 51, it is striking how little Madison finally says about separation of powers. He devoted only a single paragraph to the institutional workings of checks and balances; instead, the second half of the essay largely restates the ideas of *Federalist* 10, which said almost nothing about institutions but was devoted instead to the mischief-curing benefits of a multiplicity of factions in society. The awkward conclusion remains that in 1787-88 Madison's nominal commitment to the role the judiciary would play in resolving conflicts of federalism did not inspire him to say all that much about how the judiciary would operate.

## LESSONS LEARNED

Three decades later, in retirement at Montpelier, experience gave Madison a different framework for thinking about the role of the judiciary in the federal republic.

When George Washington began staffing the federal judiciary in 1789, loyalty to the Constitution was the first criterion of appointment. One had to have been part of the Federalist *movement* that supported ratification of the Constitution. Twelve years later, President John Adams made membership in the Federalist *Party* the first criterion for seats in the new circuit courts the Judiciary Act of 1801 had just created. Madison's most celebrated contribution to the annals of constitutional case law took place as the named (though absent) defendant in *Marbury v. Madison* (1803), over his refusal to deliver the same magistrate's commission that Secretary of State John Marshall had failed to transmit to William Marbury. It says something about the institutional weakness of the federal judiciary at this point to note (a) that President Jefferson and Madison simply ignored Marbury's case; (b) that Marshall's opinion went out of its way to render grand pronouncements superfluous to the resolution of the case; and (c) that a week after *Marbury* was decided, a majority of the Court ducked its real challenge, holding in *Stuart v. Laird* that the abolition (through the Repeal Act of 1802) of the circuit court positions created in 1801 was constitutionally permissible, even though the new judges enjoyed the "tenure during good behavior" rule of Article III.



That rule presumed that this condition of tenure, reinforced by professional norms of behavior and republican honor, would maintain judicial independence. The fidelity to the Constitution that Washington expected of the first generation of national jurists was more a minimal condition of recruitment than a hard test of political loyalty. But the partisan tumult of the 1790s raised the entry price of this fidelity. The Judiciary Act of 1801 was a calculated Federalist response to the party's loss of control over all three political institutions of the national government. If one had reliable ways to know or test the political commitments of judicial appointees, Article III, if exploited quickly, would enable the Federalists to ensure their control of one branch of government for years to come. The real logic of Article III thus promoted the opposite of judicial independence. One could argue, not all that perversely, that the judicial ambitions of the Federalist Party in 1801 anticipated the judicial ambitions of the Federalist Society almost 200 years later.

Yet beyond the repeal of the 1801 Act and the failed impeachment of Justice Samuel Chase, Jefferson and Madison did *not* pursue a radical effort to reshape the federal judiciary. High among the various explanations for their moderation was their avowed desire to restore a political system in which the contentious party loyalties of the 1790s would dissipate and disappear. The goal of the first party system, in their view, was to drive the Federalists into collapse, and then to restore a system in which organized national parties would play no part. Under this presumption, using tenure during good behavior to stock the judiciary with loyalists was not their highest priority.

What did persist in Madison's thinking about the judiciary were two other concerns: first, that the Supreme Court not endorse the full Hamiltonian interpretation of the Necessary and Proper Clause, as expressed during the bank debate of 1791; and second, that it play the umpiring role Madison had assigned it in *Federalist* 39. The best elaboration of these views came after Judge Spencer Roane tried to recruit Madison to support his proposition that the federal and state supreme courts acted on a level plane of authority, and that disagreements between them did not require an ultimate resolution. Roane began forming these ideas in response to *Martin v. Hunter's Lessee* (1814), but the key exchanges took place after *McCulloch v. Maryland* (the bank case, 1819) and *Cohens v. Virginia* (1821), a contrived case involving the interstate purchase of lottery tickets that Chief Justice Marshall used to restate the principle of federal judicial supremacy.

In his first response to Roane, Madison politely deflected the invitation to equate the authority of federal and state supreme courts by focusing instead on Marshall's opinion in *McCulloch*. That opinion decidedly echoed Hamilton by emphasizing the discretionary power the Necessary and Proper Clause invested in Congress. Madison had long conceded that the course of discussion since 1791 had legitimated the incorporation of a national bank. But he still distinguished that particular precedent from the general doctrine Marshall was propounding. If one read the Clause as broadly as Marshall did, no effective restraint would prevent Congress from defining the scope of its own legislative authority. Marshall's mode of interpretation "seems to break down the landmarks [a favorite Madison word] intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned."<sup>13</sup> Had the Federalists presented such a reading of the Clause to the American people in 1787, the Constitution might well have been rejected. (This tracks the inventive approach to originalism that Madison had pioneered in 1796.)

When Roane renewed his plea in 1821, however, the discussion transcended a clausal reading of the Constitution to focus on the deeper problem of jurisdiction. In two further letters—one labored, the other more direct—Madison

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<sup>13</sup> "James Madison to Spencer Roane, Sept. 2, 1819," in *Madison: Writings*, 733-736.

refuted Roane's request on two basic grounds. If one wished to secure "the reserved sovereignty of the States" within the federal system, he argued, the greater danger lay not in the Supreme Court but in the expansive legislative power of Congress. Implicit in this response was the recognition that the South would hereafter be a political minority needing protection against the North. Second, and more important, Madison saw no alternative to supporting the primacy of the Supreme Court over the contending claims Roane had made for its counterparts in the states.<sup>14</sup>

Roane had another prominent reader, however, who proved more sympathetic to his claims: Thomas Jefferson. If serious conflicts arose between state and federal courts, on Roane's model of a parity between them, why not submit these disputes, Jefferson asked, to the "ultimate arbiter[,] the people of the Union, assembled by their deputies in convention, at the call of Congress or of two-thirds of the States"<sup>15</sup> This revised a proposal Jefferson had made back in the 1780s, and which Madison had subjected to respectful but devastating criticism in *Federalist* Nos. 49-50. Believing that the stability of the republic rested in part on the "salutary veneration" that the people should express for the Constitution, Madison offered two responses to this proposal. The first was to argue that courts at both levels should try to limit the danger of judicial confrontations by avoiding the kinds of grand overstatements of positions that both Marshall and Roane were prone to giving. Judicial doctrine should evolve case by case, the better to "obviate the dilemma of a Judicial rencounter [sic] or a mutual paralysis" between state and national benches. The second was finally to adhere to the wisdom of *Federalist* 39 and work to ensure that the sources of "impartiality" in judicial decision-making would be protected, while conceding that in the final analysis there could be no alternative to federal judicial supremacy.<sup>16</sup>

## LESSONS FOR THE PRESENT

Madison's desire for impartiality in interpretation now seems a lost fantasy of innocence from another constitutional age. True, much of the legal work that modern judges and justices perform reliably depends on precedent, doctrine, and professional competence. The judiciary as a whole is hardly running amok. But when one leaves the well-ploughed fields of ordinary law to tramp the cratered terrain of constitutional interpretation, our confidence in judicial independence evaporates. The ever-escalating crisis of judicial appointments—a one-way ratchet of politicization—makes Madison's belief that tenure during good behavior would secure judicial independence and impartiality appear delusional.

Exactly the opposite result now applies. In a system that supports the intense ideological vetting of judicial candidates, apparently often conducted by advocacy groups acting outside of government, the sacred rule of tenure during good behavior operates as an independent variable that promotes the appointment of politically reliable judges. Nominees happily pledge to perform as umpires calling balls and strikes or faithful adherents of the original Constitution—nothing more and nothing less. No candid observer can take those claims seriously. But the discovery of this potentiality was made in 1801, not two centuries later in *Bush v. Gore* (2000). Although the force and appeal of political reliability have waxed and waned over time, the ever-worsening deterioration and weaponization of the federal judicial appointments process is less a deviant departure from a disinterested norm than a sour fulfillment of the Constitution's latent possibilities.

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<sup>14</sup> "James Madison to Spencer Roane, May 6 and June 29, 1821," in *Madison: Writings*, 772-779.

<sup>15</sup> "Letter from Thomas Jefferson to Justice William Johnson, June 12, 1823," retrieved at <http://teachingamericanhistory.org/library/document/letter-to-justice-william-johnson/>.

<sup>16</sup> "James Madison to Thomas Jefferson, June 27, 1823," in *Madison: Writings*, 798-802.



Madison offers no obvious solution to this problem. His ideal notion of judicial appointments rested on distinguishing the professional credentials of jurists from the novice legislators who would rotate in and out of Congress. The best outcome he hoped for was that if one could leave the contested politics of the 1790s astern, the partisan bonds of the first party system could give way to a more professional, moderated mode of judging. But if intense partisanship continues to color and distort judicial appointments, as every sign indicates it will, Madison offers no ready answer to the problem, beyond hoping that the process would select judges prepared to resolve controversies on a case-by-case basis, avoiding grand statements of interpretive theory in order to focus on working out the inherently messy details of the American constitutional system. The question that is left open today is whether some other feasible form of judicial appointment could be imagined. Any move in that direction would require the daunting project of an Article V amendment.

On two other matters, however, one can draw strong inferences about the norms that Madison would apply to contemporary dilemmas of constitutional jurisprudence. On one of these points, Madison's conclusions seem fairly obvious; on the other, some creative thinking could reshape one of his ideas to contemporary purposes.

As I have proposed elsewhere, the most Madisonian part of the Constitution may well be Section 1 of the Fourteenth Amendment, which was ratified thirty-two years after his death.<sup>17</sup> At first glance this claim seems inherently specious. Yet the dominant motif in Madison's approach to the protection of constitutional rights rested on the belief that the real danger to rights in a republic would not come from the arbitrary concentrated power of a central government. It would arise instead from popular majorities acting instrumentally through the legislature, and these majorities would form much more easily at the state and local level than in an extended national republic.<sup>18</sup> The congressional negative on state laws was his preferred, if likely impracticable, solution to this problem. Yet if over time federal justices and judges acquired the confidence and demonstrated the capacity to enforce rights against legislative majorities within the states, that outcome would have delighted Madison. The three prongs of Section 1 (equal protection, due process, and privileges and immunities) made that protection possible, even if many decades passed before the incorporation doctrine became a living possibility.

No better illustration of this phenomenon exists than the system of racial segregation that emerged in the late nineteenth century. That was and remains — along with its precursor, the peculiar institution of chattel slavery that Jim Crow replaced — the primary example of the denial of civil rights in American history. As Madison privately observed in 1791, "In proportion as slavery prevails in a State, the Government, however democratic in name, must be aristocratic in fact . . . . The Southern States of America, are, on the same principle aristocracies."<sup>19</sup> One could easily apply the Republican Guarantee Clause of Article IV to reach a similar conclusion about Jim Crow, which was the logical continuation of that situation: a clear demonstration of the way in which state-based majorities could trample fundamental rights. One could similarly argue that the predictable consequences of the Supreme Court's disastrous decision in *Shelby County v. Holder* (2013), which quickly inspired fresh efforts to suppress or minimize the African American vote, embodies yet another modern application of this same animus.

Of course, one cannot unthinkingly transpose Madison's eighteenth- and early-nineteenth century opinions into contemporary debates. One cannot formulate an intelligent prediction of how Madison would have thought about

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<sup>17</sup> Rakove, *Original Meanings*, 336-338.

<sup>18</sup> The classic analysis comes in Madison's letter to Jefferson of Oct. 17, 1788, in *Madison: Writings*, 419-423.

<sup>19</sup> Robert Rutland et al., eds., *The Papers of James Madison* (Chicago and Charlottesville: University of Chicago Press, 1962-1999), 14: 163-164.





*Roe v. Wade*. Or as Justice Samuel Alito quipped in an exchange with Justice Antonin Scalia during the oral argument in *Brown v. Entertainment Merchants Association*, “I think what Justice Scalia wants to know is what James Madison thought about video games.”<sup>20</sup> Of course, there are some issues where one *can* draw reasonably plausible, perhaps even persuasive inferences about how Madison would have thought about particular cases. Given his known qualms about chaplains pronouncing essentially sectarian invocations for public meetings, it is difficult if not indeed impossible to imagine Madison endorsing the Supreme Court’s opinion in *Town of Greece v. Galloway*, permitting just such a routine.<sup>21</sup> But to conjure a coherent prediction about how Madison would have thought about cases like *Hobby Lobby v. Burwell* or *Masterpiece Cakeshop v. Colorado Civil Rights Commission* beggars the historian’s imagination. Such predictions, to borrow the lawyer’s phrase, would depend on “facts not in evidence.”

Yet on another more fundamental point, it is indeed possible, I believe, to posit a Madisonian position on the role of the judiciary in the American “political system” (to evoke Madison’s April 1787 memorandum formulating his agenda for the Philadelphia convention). The underlying premise of Madison’s entire theory of republican government was that the wrong kinds of “factious” majorities were more likely to form within the states individually than nationally. If the Supreme Court acquired the capacity and authority to act vigorously to protect rights *within* the states, Madison would have been all in favor of that result. Given a choice between the Warren Court, on the one hand, and the Rehnquist or Roberts Courts, on the other, I strongly suspect Madison would have preferred the former. (This is why the Federalist Society should renounce its perfidious expropriation of Madison’s profile as its institutional logo.)

The second contemporary dilemma relates to Madison’s council of revision. The specific case that Madison and James Wilson made for the council no longer seems relevant. With the professionalization of legislative service, the growth of congressional staffs, and the amount of knowledge available to both Congress and especially to the presidency, there is no obvious need to involve jurists in lawmaking for the purpose of improving the quality of legislative deliberation. Yet one could still wonder whether prior judicial involvement in lawmaking would reduce and mitigate the constitutional storms that sometimes rage over legislation, as the post-enactment history of the Affordable Care Act illustrates so amply. In 1787 one could have hardly imagined the extent to which constitutional law has become (to give Clausewitz’s famous dictum a fresh application) a continuation of politics by other means. Constitutional law, as such, did not really exist before 1789. It had no real precedent in British or colonial practice, and Americans were still grappling to define what it would mean to treat a constitution as supreme fundamental law.<sup>22</sup> Yet Madison’s idea of a council of revision did at least realize that judicial counsel on the constitutional aspects of a statute could be helpful in its formation. Modern constitutional courts in other nations now often operate in a similar fashion, encouraging *ex ante* review rather than *ex post* litigation. Applying the lessons they have learned while avoiding a direct replication of the American approach to judicial review might provide some helpful lessons. Rather than ratchet up the tensions that accompany the post-enactment testing of the constitutionality of a statute, in a Supreme Court that is acutely divided on partisan lines and often reaches predictable 5-4 decisions on just these kinds of cases, some moderated version of Madison’s council of revision might have beneficial consequences.

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<sup>20</sup> *Brown, et al. v. Entertainment Merchants Assn*, 564 U.S. 786 (2011).

<sup>21</sup> *Town of Greece v. Galloway*, 134 U.S. 1811 (2014).

<sup>22</sup> On this massively important point, see Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press 1969), chapter 8; and Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge: The Belknap Press of Harvard University Press, 2018).

A bit of wisdom from *Federalist 49* would be helpful here. In that essay, midway through his discussion of the separation of powers, Madison went out of his way to analyze a proposal that no one else in 1788 was discussing: Jefferson's idea, espoused in his *Notes on the State of Virginia*, to resolve constitutional disputes among the branches by calling popularly elected conventions to settle the matter. Amid his various criticisms of this idea, Madison mentioned the dangers that would arise from a repeated use of this expedient: "frequent appeals," he warned, "would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability." Veneration itself had a positive value in maintaining the stability of a constitutional system. Suspecting as we plausibly do that too many constitutional decisions made today nakedly reflect the political biases that inflect and infect the entire judicial appointments process, who can "venerate" modern constitutional jurisprudence as a principled endeavor to clarify (or "liquidate," as Madison would have said) the meaning of the Constitution? Allowing Justices to participate at some prior point in the adoption of legislation—in a manner akin to the rejected council of revision—would not wholly eliminate the partisan impulses that wrack our constitutional system, but it might help to enhance our veneration of constitutional norms.

## CONCLUSION

The Madison who did so much to frame the Constitution in 1787, though never inclined to practice law, was a keen and informed observer of the Anglo-American legal tradition. A concern with legislative deliberation was then the dominant variable in his constitutional thought. But he was also a deeply empirical thinker, and as the Constitution took effect, reassessing the nature of the power that the executive and judiciary branches would wield became subjects to which he gave fresh attention. We are entitled to reassess the judicial power of the United States with a similar critical commitment.



# THE RELEVANCE AND IRRELEVANCE OF JAMES MADISON TO FAITHFUL CONSTITUTIONAL INTERPRETATION

BY MICHAEL STOKES PAULSEN

*The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.*

*The Federalist 49 (James Madison)*

## I. INTRODUCTION: MADISON VERSUS MODERN PRACTICE

The two most fundamental questions of constitutional law are *how* to interpret the Constitution and *who* is to do the interpreting. On these two questions—how and by whom, interpretive *method* and interpretive *power*—hang essentially every other issue of American constitutional law.

There exists a clear modern consensus on the answers to these bedrock questions – and that consensus is almost certainly wrong. The error starts, subtly, by taking up the questions in reverse order: It has become common in modern times to identify the power of constitutional interpretation exclusively with the decisions of courts, and especially with the decisions of the U.S. Supreme Court. The answer to the question “Who interprets?” is, most everyone today would agree, “The Supreme Court.” And once the question of interpretive power is resolved in favor of a supreme judiciary, the question of interpretive method tends to be answered in terms of deference to *whatever that supreme judiciary decides*. The judicial power “to say what the law is”<sup>1</sup> thus rapidly degenerates into the cynical view that the law is “what the judges say it is.”<sup>2</sup>

It has thus become commonplace to assert that the Constitution itself contains no discernible rules or instructions concerning how it is to be interpreted. All such matters are instead left to the assumed exclusive discretion of courts, to be exercised in accordance with whatever criteria judges think most appropriate. Thus, the twin pillars of American constitutional practice today have become *judicial supremacy* and *interpretive license*: The power of constitutional interpretation is exercised by a supreme judiciary according to interpretive criteria of the judges’ own choice.

Nothing could have been further from James Madison’s vision of proper constitutional interpretation and the proper, limited province of the judiciary. To be sure, Madison’s views are not necessarily dispositive as to the proper understanding of the Constitution. As I explain presently, even Madison did not think his own views should be given controlling weight, and his views were not always consistent. Nonetheless, it bears serious consideration that the Framers often called the “Father of the Constitution”<sup>3</sup> had a quite different view of the proper role and power of courts within the U.S. constitutional system than the one that dominates today.

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<sup>1</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>2</sup> Charles Evans Hughes, “Speech before the Chamber of Commerce, Elmira, NY (May 3, 1907),” in Charles Evans Hughes and Jacob Gould Schurman, *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906-1908* (New York and London: G.P. Putnam’s Sons, 1908), 139. (“We are under a Constitution. ... The Constitution is what the judges say it is.”)

<sup>3</sup> I have employed this honorific title for Madison in previous work. See Michael Stokes Paulsen and Luke Paulsen, *The Constitution: An Introduction* (New York: Basic Books, 2017), 9, 12.

Madison did not believe in judicial supremacy in matters of constitutional understanding and decision. Quite the contrary, the Madisonian model of constitutional interpretative authority is one of separation of powers and the mutual “checks” of coordinate, independent branches of government, and even of the states. No one branch of the national government possesses interpretive supremacy or superiority over the others; none is bound by the constitutional judgments of the others; and each can and should use its independent power to check the others in order to hold all accountable and to keep the Constitution secure. Likewise, the states, as parties ratifying the Constitution, have a vital role in checking and resisting unconstitutional actions of the national government. Madison’s view of constitutional interpretive authority was the very antithesis of judicial supremacy.

For Madison, the judiciary’s power of constitutional interpretation was significant and important. The judicial power of independent interpretive judgment was a vital part of the Constitution’s separation-of-powers design. More than that, Madison believed that courts frequently would have the last word simply because they typically would be the last to speak on a constitutional question. Thus, in “the ordinary course of Government” the “exposition of the laws and Constitution” would belong to courts, where constitutional questions would often receive their ultimate resolution.<sup>4</sup>

But Madison was careful always to emphasize that the Constitution gave the judiciary no intrinsic superiority over their co-equal branches in deciding the boundaries of constitutional power and the content of constitutional rights. Quite the contrary: “The several branches being perfectly co-ordinate by virtue of their common commission,” none could “pretend to an exclusive or superior right” to decide constitutional disagreements, Madison wrote in *Federalist 49*.<sup>5</sup> Madison reiterated this view as a prominent Member of the First Congress, in 1789,<sup>6</sup> and adhered to it throughout his life.<sup>7</sup>

Nor was the judicial power supreme over the states. In judging whether the Constitution has been violated by the national government, the national judiciary could not be the supreme authority, Madison argued as a member of the Virginia state legislature, resisting the constitutional validity of the hated Alien & Sedition acts in the late 1790s. As Madison wrote in the famous *Report of 1800* on behalf of Virginia, “the judicial department, also, may exercise or sanction dangerous powers beyond the grant of the Constitution.” Where that occurs, the right of states to resist violations of the Constitution by the national government “must extend to violations by one delegated authority as well as by another—by the judiciary as well as by the executive, or the legislature.”<sup>8</sup> Madison respected judicial authority, but plainly did not accept the idea that the Constitution vests *supreme* constitutional interpretive authority in the federal judiciary, over the other branches of national government or over the states.

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<sup>4</sup> See the statement of Representative Madison in Joseph Gales and William Winston Seaton, *The Debates and Proceedings in the Congress of the United States* (Washington: Gales & Seaton, 1834), 500. See also James Madison, “Unaddressed Letter of 1834,” in *Letters and Other Writings of James Madison, Volume 4* (Philadelphia: Lippincott & Co., 1865), 349. For discussion of these statements, see Michael Stokes Paulsen, “The Most Dangerous Branch: Executive Power to Say What the Law Is,” *Georgetown Law Journal* 83 (1994), 217, 234, 236, 308-311.

<sup>5</sup> *The Federalist* No. 49, in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Isaac Kramnick (London: Penguin Books, 1987), 313.

<sup>6</sup> “I beg to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments? ... I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.” Gales & Seaton, *Debates and Proceedings*, 500.

<sup>7</sup> “Unaddressed Letter of 1834,” 349 (denying judicial supremacy over the other branches in constitutional interpretation as an arrangement “which was never intended and can never be proper”).

<sup>8</sup> James Madison, *Report of 1800*, in “Founders Online: The Report of 1800, [7 January] 1800,” National Archives and Records Administration, accessed June 14, 2019, <https://founders.archives.gov/documents/Madison/01-17-02-0202>.

Division of interpretive authority was necessary to check abuses of the power to interpret. The two principles worked hand in glove: Just as Madison did not subscribe to judicial supremacy, neither did he subscribe to the idea of unconstrained judicial discretion in constitutional interpretation. Far from believing that the Constitution's provisions could fairly be interpreted any which way courts (or politicians) might choose, Madison viewed the Constitution as possessing on most matters a fixed, determinate meaning. That meaning was defined by the objective meaning of the words of the text—not the subjective understandings of interpreters (or even, for that matter, the subjective “intent” or expectations of its framers). The “meaning of the Instrument,” Madison insisted, “must be derived from the text itself.”<sup>9</sup> Departures from the text's meaning were, simply put, *violations* of the Constitution

Moreover, for Madison, the text's meaning consisted of the *original meaning* of the words of the document—the meaning the Constitution's words and phrases would have had to those using them at the time the document was adopted (accounting for any well-understood specialized meanings or term-of-art understandings). The meaning of the Constitution's terms did not change with time. That would be anachronistic, Madison thought. “What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense!” Madison wrote in 1824, mocking the notion that “the meaning of the text be sought in the changeable meaning of the words composing it.”<sup>10</sup> The Constitution's meaning, where sufficiently clear, was fixed by the sense of its language as it would have been understood at the time.

Where a provision was “obscure” or “equivocal,” however, Madison thought its meaning might come to be “liquidated” (that is, *settled*) by long and universally accepted practice, where such practice rested on an interpretation agreed to, over time, by all branches of government and universally embraced by the public.<sup>11</sup> Importantly, though the Constitution's meaning was *not* simply a function of judicial decisions or precedent. The courts were not vested with exclusive power to settle the Constitution's meaning for everybody else. On any such view, “the delegation of judicial power, would annul the authority delegating it.”<sup>12</sup> For Madison, the meaning of the Constitution was on most points a matter of objective fact, not subjective interpretation or blanket judicial discretion. On doubtful points, the Constitution's design contemplated *objective resolution by the people*, acting over time through the vehicle of consistent interpretation by all the institutions of constitutional government—not just courts.

These were James Madison's core views on the power and proper method of constitutional interpretation, compressed in a nutshell. Obviously, those views stand in stark contrast to modern constitutional practice. The two leading features of the modern consensus—judicial supremacy and interpretive license—are directly contrary to Madison's most fundamental views of proper constitutional government and correct principles of constitutional interpretation. To put it simply: If James Madison's vision of proper constitutional interpretation is right, much of our modern constitutional practice is wrong.

But how far can we credit—and should we follow—Madison's personal views on constitutional interpretation? Can we rely on a “Madisonian Constitution” as the correct understanding? Indeed, would Madison have thought we should?

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<sup>9</sup> “Letter from James Madison to Thomas Ritchie (Dec. 27, 1821),” in *Letters and Other Writings of James Madison, Volume 3*, 228.

<sup>10</sup> Letter from James Madison to Henry Lee (June 25, 1824),” in James Madison, *The Writings of James Madison, Volume 9*, ed. Gaillard Hunt (New York: G.P. Putnam's Sons, 1900).

<sup>11</sup> *The Federalist* No. 37; “Letter from James Madison to Spencer Roane (Sept. 2, 1819),” in *Letter and Other Writings of James Madison, Volume 3*, 143, 145.

<sup>12</sup> James Madison, *Report of 1800*, in “Founders Online.”



## II. THE PROBLEMS WITH RELYING ON MADISON'S VIEWS

There are just three problems with relying on Madison's views concerning constitutional interpretation. But they are fairly significant problems. First, and somewhat ironically, Madison's view was that his own views should not matter—that is, that his subjective, personal understanding of the Constitution was not important or even especially relevant. Put differently, Madison's "original intention" was that his original intention should not count—and neither should any other framer's intention. What should count is objective constitutional meaning, broadly accepted understanding, and consistent practice. (The obvious conundrum is that, on Madison's own view, we should not take Madison's word on this.) A second and perhaps more serious problem is that Madison was, over time and depending on events, somewhat inconsistent in his stated views concerning not just specific constitutional issues but also questions of interpretive method and power. In short, Madison was something of a moving target. It is at least troubling, for any theory that takes seriously Madison's approach to constitutional interpretation, that Madison sometimes can be heard speaking on both sides of an issue.

The third problem helps explain the other two: Madison was part principled constitutional theorist and part practical politician. Sometimes these two strands of Madison's constitutional personality worked together in harmony. But other times they produced contradiction and inconsistency. Madison sometimes departed in political practice from his prior positions as a constitutional theorist—and then sometimes sought to explain his departures in terms that qualified (or corrupted) his earlier views.

For these reasons, Madison's views cannot serve as a perfectly reliable decoder ring for interpreting the Constitution. There is to be sure a common core to Madison's thought: his repeated denial of any one branch's supremacy in constitutional interpretation; his emphasis on the original meaning of the text; his denial of the propriety of reliance on subjective original intention; his embrace of the possibility that long practice might "liquidate" the meaning of uncertain provisions. But these conclusions are qualified by the fact that the "Father of the Constitution" abjured any special status as its interpreter, was somewhat inconsistent in his views, and seemingly shifted positions with changing political circumstances. What is one to do with this reality?

### A. THE INEVITABILITY OF INCONSISTENCY

To begin, one must confront, and accept, that some degree of inconsistency and imprecision is inevitable in all human actors, even from the estimable James Madison. For all his brilliance; for all his constitutional insight; for all his political skill and practical wisdom, Madison was not perfectly consistent in his constitutional views over the course of his long public career.

This should not be all that surprising, nor should it be particularly alarming. A person's views sometimes change over time. They are altered by events—sometimes for the better, sometimes for the worse. And even where one's core views have not changed, they sometimes come to be expressed differently or given different shades of emphasis in different circumstance.

Moreover, a practical politician—Madison would have found nothing pejorative in the term—is especially susceptible to finding his views changing with changing roles and events. And Madison certainly played many such different roles: member of congress under the Articles of Confederation; state legislator; framer of the "Virginia Plan" and key delegate to the Constitutional Convention at Philadelphia in 1787; co-author of



*The Federalist* essays publicly defending and explaining the draft constitution; vital advocate for the document's adoption, in Virginia's ratifying convention; leading member of the House of Representatives in the First Congress, prime drafter of the proposed Bill of Rights, and informal adviser to President George Washington; prominent leader of constitutional resistance to the Alien & Sedition Acts during the administration of President John Adams, and author of Virginia's "Report of 1800" defending the propriety of state "interposition" against unconstitutional assertions of power by the national government; President Thomas Jefferson's Secretary of State (and defendant in *Marbury v. Madison* in 1803); fourth President of the United States, from 1809-1817; and in retirement, revered elder statesman, constitutional theorist, and public advocate.

Who, in the course of such a long and distinguished public career, spanning six decades, would not, at least sometimes, change or shift positions? Who would remain perfectly consistent in his stated views concerning constitutional questions? Surely Madison may be forgiven his occasional deviations from pure principle and slight reformulations of earlier positions. If he strayed, it was not too far or often; if he changed, it was (with few exceptions) not very much and not at the sacrifice of first principles. We should acknowledge—and accept—a tolerable degree of inconsistency in Madison, and not seize on small differences to dismiss his thoughts entirely. The goal should be to find the core of coherence on points of principle and to weigh that coherence more heavily than episodic inconsistency.

## B. THE IMPORTANCE OF OBJECTIVE, IMPERSONAL STANDARDS

Another response to the problem of Madison's inconsistency is to reduce its relevance. And here, Madison himself helps. Not only are Madison's changes in his constitutional views—his adjustments of position and variations in formulation—to be expected, but they arguably are less cause for alarm because of Madison's views about the essential irrelevance of his personal opinions and statements on constitutional questions.

As noted, Madison believed that his own views about the proper interpretation of specific constitutional provisions did not matter much. What mattered was the public meaning of the words of the text as adopted by the people, not the subjective understandings of members of the Constitutional Convention, who served as mere draftsmen of a proposal to be submitted to the People. As Madison once put it, as a member of Congress in 1796:

"[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as an oracular guide in expounding the Constitution. As the instrument came from them, it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity was breathed into it by the voice of the people, speaking through the several State Conventions.<sup>13</sup>

The Constitution was a public document—the enactment of "We the People," not of the Constitutional Convention. As such, the Constitution's meaning consisted of the objective, public meaning of its words and

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<sup>13</sup> Gales & Seaton, *Debates and Proceedings, 776* (statement of Representative Madison). Interestingly, Madison was then arguing *against* a position taken by delegates to the Constitutional Convention: the decision to exclude the House of Representatives entirely from any role in the treaty-making process. Madison was arguing that that intention did not control the issue of whether the House legitimately could seek documents concerning the negotiation of the Jay Treaty.

phrases. That truth was at the core of Madison's constitutional methodology. The Constitution meant *what its words said*, as those words would have been understood by the political community that brought them to life. That understanding would in turn be informed by public deliberations and debates, of course. But the Constitution's meaning ultimately flowed from the document itself. As Madison put it late in his public life, "the legitimate meaning of the Instrument must be derived from the text itself."<sup>14</sup> It did not consist of the un-enacted, private "intentions" or subjective expectations of the Framers, because those were not part of the written document adopted by the People. It therefore did not really matter to Madison what he (or anyone else) might have "had in mind." What mattered was what the document objectively said and meant. Madison's intention was that his personal intentions should not matter.<sup>15</sup>

This seems plainly correct. Madison's theory of constitutional interpretation rightly emphasizes that the Constitution's meaning is something objective that stands on its own, outside the subjective (and sometimes idiosyncratic) views of individuals. It was to Madison's credit—not really *a problem*, at all—that he applied this principle even to himself. Indeed, it is a principle that helps mitigate the problem of Madison's own inconsistencies over time. If individual framers' views do not themselves determine the Constitution's proper understanding, it is less of an issue if those views might shift over time. The Constitution's meaning remains anchored to the objective, original public meaning of the text. There is thus less at stake with Madison's changes of mind on specific topics, given Madison's (correct) view that his mind is not what needs to be read in the first place. (It is the document that needs to be read.) Further, to the extent that individual framers' statements might be thought competent *evidence* of the probable meaning of the Constitution's words and phrases, Madison's emphasis on the primacy of the *original* meaning of the text suggests a principle for assigning relative weight to his different views at different times: Madison's contemporaneous expositions of the text at or about the time of its adoption—like *The Federalist* and, to a lesser degree, his statements in the First Congress—furnish better evidence of the text's original meaning than do his own later interpretations and reformulations.<sup>16</sup>

### C. EXPLAINING INCONSISTENCY: MADISON AND "LIQUIDATED" UNDERSTANDINGS

As noted, Madison recognized that some of the Constitution's terms had an uncertain or indefinite meaning, admitting a range of plausible readings. As to such terms, Madison believed that a long, consistent, and broadly accepted interpretation and practice might, over time, settle the understanding of such uncertain terms or phrases as a practical matter. In this respect, the Constitution was no different from other laws, which "are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications," Madison wrote in *The Federalist* No. 37. Much later

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<sup>14</sup> "Letter from James Madison to Thomas Ritchie (Dec. 27, 1821)," in *Letters and Other Writings of James Madison, Volume 3*, 228.

<sup>15</sup> A wag might well note that, if Madison was right about his views not being controlling, that same reasoning would suggest that his *views about his views not being controlling* should not be controlling either! Indeed, I think this observation is correct: If "objective original public meaning" is the right approach to constitutional interpretation, it is right *because it is right*—because it is the approach textually and logically suggested by the document itself, not because Madison *thought so*. See generally Michael Stokes Paulsen, "Does the Constitution Prescribe Rules for Its Own Interpretation?," in *Northwestern University Law Review* 103 (Spring 2009), 857.

<sup>16</sup> See Paulsen, *The Most Dangerous Branch*, 309-310 (making the point that for purposes of faithfully understanding the original meaning and structure of the Constitution, "it is Madison-as-Publius that counts" and that "earlier, general statements of principle control over the later, case-specific practice." If Madison's later statements or actions were "unfaithful to Publius's principles, one should question the application, not the principle.").





in his career, he again affirmed that it “was foreseen at the birth of the Constitution” that “difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.”<sup>17</sup>

The process of “liquidation”—to embrace Madison’s quaint eighteenth century term (understood in terms of its contemporaneous, not its modern, meaning)—could thus play a role in constitutional interpretation. Practice could settle, as a practical matter, certain questions genuinely left open by the Constitution’s text.

And it might even do so in a fashion contrary to Madison’s original personal views on particular constitutional questions. In one famous instance, Madison, as president, switched his position on the constitutionality of Congress’s power to create a “Bank of the United States.” As a member of the First Congress, he had taken a narrow view of Congress’s enumerated powers and denied that it could create such a bank. As president, nearly a quarter century later, he concluded that long practice and consensus had settled on a view other than his initial one.<sup>18</sup>

Taken seriously, such a stance might go a long way toward mitigating (or at least explaining) the apparent inconsistency of Madison’s views over time. Interpretation and practice could not actually change the Constitution. (Madison never said *that*.) But it sometimes could change Madison’s own mind about what should be understood as the accepted public meaning of the Constitution, even where Madison had initially thought differently.

Madison embraced the idea of “liquidation” from the start. As noted, it is present in his discussion of the Constitution in *The Federalist*.<sup>19</sup> There is no reason to believe that it was not an honestly believed position. Nonetheless, there is reason to be at least mildly suspicious that this view became a convenient way for Madison to rationalize inconsistencies between his later actions and earlier stated positions. (This seems especially true with respect to the question of congressional power to create a national bank, as many have observed.<sup>20</sup>) At all events, Madison’s view of “liquidation” was not a theory of *judicial* power to alter, or settle, the meaning of the Constitution by dint of their decisions alone, but a political theory of public consensus on (formerly) uncertain but no longer disputed questions.

Finally, this distinctively Madisonian theory of liquidation surely qualifies as a specific *opinion* of Madison’s—his subjective, individual view about how the Constitution might be expected to work in practice. It is not a prescription to be found in the document itself. As such, it might well be one of those matters on which Madison believed his own intentions or expectations do not count.

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<sup>17</sup> See *The Federalist* No. 37; “Letter from James Madison to Spencer Roane (Sept. 2, 1819),” in *Letters and Other Writings of James Madison*, 143, 145.

<sup>18</sup> For a good short distillation of this story, see Richard S. Arnold, “How James Madison Interpreted the Constitution,” in *New York University Law Review* 72 (1997), 267, 274–276.

<sup>19</sup> See *The Federalist* No. 37, 245.

<sup>20</sup> See Marvin Meyers ed., *The Mind of the Founder: Sources of the Political Thought of James Madison* (London: University Press of New England, 1981), 390 (noting Madison’s evident desire to reply to “the common charge of inconsistency”).

With these concessions to the problems and paradoxes of relying on Madison's views, we can now return to and reexamine Madison's bedrock positions on the fundamental questions of constitutional interpretation: *who* interprets the Constitution, and *how* is the document faithfully to be interpreted and applied? While Madison is not perfectly consistent on these points, there is an essential unity that is hard to miss—and an implicit indictment of modern practice that is hard to deny.

### III. WHO INTERPRETS? MADISON VERSUS THE MYTH OF JUDICIAL SUPREMACY

Who has the power to interpret the Constitution? For Madison, the answer was clear: *everybody*. The power of constitutional interpretation is not vested exclusively in any one branch or institution of government—including the courts—but is instead divided and shared among all of them, and by officers of state governments as well. All who exercise governmental power under the Constitution share in the power and duty of faithful constitutional interpretation, with none literally bound by the views of any of the others. That is the simple Madisonian vision. It is clear in his most fundamental political premises, stated in *The Federalist* and later statements. And it is clear in his specific statements concerning the power of constitutional interpretation. While there are certain later comments, and actions, by Madison that taken in isolation might suggest a changed view—a stronger embrace of the priority of judicial interpretations of the Constitution—Madison actually remained remarkably consistent on this point throughout his long public career.

The place to begin is Madison's political theory of the Constitution in *The Federalist*, grounded firmly in the ideas of separation of powers and federalism. If there is one theme that pervades James Madison's constitutional thought from start to finish, *it is the importance of avoiding the concentration of government power in a single institution or group of actors*. It is this cornerstone of Madison's thought that makes the modern practice of judicial supremacy so deeply problematic.

The very point of the separation of powers is to divide and diffuse governmental authority in order to avoid concentrations of power dangerous to liberty. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny," Madison wrote in *Federalist* 47.<sup>21</sup> Maintaining the necessary degree of separation—and thus thwarting accumulations of power—required that the several branches "be so far connected and blended, as to *give to each a constitutional control over the others*," he wrote in *Federalist* 48. Each branch must possess checks on the encroachments and aggressions of the others. But, crucially, none must be permitted to exercise, "*directly or indirectly, an overruling influence over the others in the administration of their respective powers*."<sup>22</sup>

This necessarily entails a denial of judicial supremacy in constitutional interpretation. For Madison, granting interpretive supremacy to any one branch would directly contradict the foundation of separation of powers: it *would* amount to the accumulation of all powers in the same hands—"the very definition of tyranny" deplored in *Federalist* 47. Interpretive supremacy—the power to determine the scope of all other powers—would give the judiciary preeminence over the other branches. It would literally give courts "an overruling influence" over the other branches "in the administration of their respective powers"—a flat contradiction of *Federalist* 48. Judicial supremacy is thus

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<sup>21</sup> *The Federalist* No. 47; see also *The Federalist* No. 48 (again discussing the danger of "assembling all power in the same hands").

<sup>22</sup> *The Federalist* No. 48 (emphasis added).

irreconcilable with Madison's understanding of the separation of powers. It is no surprise, then, that Madison included in *Federalist* 49 the famous line quoted at the outset of this essay: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."<sup>23</sup>

That statement of Madison's is about as clear and categorical a rejection of judicial supremacy as it is possible to imagine. The solution to the problem of maintaining the Constitution's separation of powers clearly was not, in his view, to vest interpretive supremacy in one branch, and the Constitution clearly did not do so. Madison discussed but rejected (as either naïve or impractical) the possibilities of leaving powers to a "mere demarcation on parchment"<sup>24</sup> or relying on constitutional conventions to enforce the separation.<sup>25</sup> But what is striking to modern sensibilities is that Madison did not even *consider* the idea that courts would have the supreme or final word. One-branch interpretive supremacy simply was not a serious option for Madison.

The Constitution's solution was quite the opposite: to empower rival power centers, making them as independent of each other as possible, and "so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."<sup>26</sup> Each branch must "have a will of its own" and the ability to exercise that will *independently* of the control of the others. "Ambition must be made to counteract ambition," Madison wrote in a famous line, so that "opposite and rival interests" might supply "the defect of better motives."<sup>27</sup>

Judicial independence formed an integral part of this system. Life tenure and salary guarantees provided courts the security they needed to resist the encroachments or usurpations of the other branches with respect to exercise of the courts' one true power: independent judgment. As Madison's co-author of *The Federalist*, Alexander Hamilton, would explain in *Federalist* 78, these safeguards were designed to protect the intrinsically *weak* judiciary from being overawed by the political branches. But protecting judicial independence hardly meant establishing judicial supremacy. Quite the contrary: the judiciary remained the "least dangerous" branch because it possessed the *least* power,<sup>28</sup> and because it remained subject to the stronger checks held by the other branches.<sup>29</sup>

For the most part, Madison remained consistent throughout his years in denying that the federal courts possessed interpretive supremacy over the other branches of the national government. (I will note some cautionary exceptions presently.) Besides *The Federalist*—the most important and directly relevant datum bearing on the question—there is the statement made by Madison as a member of the First Congress, briefly noted above, defying his colleagues to show "upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments?" Madison asserted, to the contrary, that no one of "these independent departments" possessed "more right than another to declare their

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<sup>23</sup> *The Federalist* No. 49.

<sup>24</sup> *The Federalist* No. 48.

<sup>25</sup> These are the principal topics of Madison's discussion in *The Federalist* 49 and *The Federalist* No. 50.

<sup>26</sup> *The Federalist* No. 51.

<sup>27</sup> *The Federalist* No. 51.

<sup>28</sup> *The Federalist* No. 78.

<sup>29</sup> For a full description and defense of such checks, see Michael Stokes Paulsen, "Checking the Court," *NYU Journal of Law & Liberty* 10 (2016), 18. Each of these checks is embraced by Alexander Hamilton's discussion of the judicial branch in *The Federalist*, Nos. 78-83.

sentiments on that point.” The Constitution, Representative Madison declared, simply did not make provision “for a particular authority to determine the limits of the Constitutional division of power between the branches of Government.” Those were matters that “must be adjusted by the departments themselves, to which no one of them is competent.”<sup>30</sup>

Madison’s position is clear: No branch is the superior of the others in constitutional interpretation. None has “more right than another” to press its views. No branch is “competent” to speak above all others as to what the Constitution means.

In the main, Madison remained remarkably consistent in affirming the complete co-ordinacy of the branches and their resulting independent, co-equal power of constitutional interpretation. There are occasional remarks, in specific contexts, that might be taken to suggest a somewhat more prominent role for judicial decisions. But none, considered in their circumstances, gives reason to doubt the core point of equality and independence of the branches. Consider a few instances:

First, Representative Madison, introducing in the First Congress what would become the Bill of Rights, expressed faith in the courts as “impenetrable bulwark[s]” who would guard the Constitution “against every assumption of power in the legislative or executive.”<sup>31</sup> This was not an assertion of judicial supremacy but an appeal to the role of courts as “independent tribunals.”

Then, more than a decade later, as a Virginia legislator defending the propriety of that state’s actions declaring the Alien and Sedition acts unconstitutional, Madison noted, hypothetically, that “[h]owever true” it “may be” that the judiciary would decide “in the last resort ... in relation to the authorities of the other departments of the government,” that could not license the federal judiciary to authorize national violation of the Constitution at the expense of the States. In context, Madison’s seeming concession to judicial supremacy (for the purposes of argument) was far more apparent than real, for Madison emphatically denied judicial supremacy over the Constitution in the same breath: Judicial authority derived from “the parties to the constitutional compact” and was limited by the terms of the commission. “On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers, might subvert forever, and beyond the possible reach of any rightful remedy, the very constitution, which all were instituted to preserve.”<sup>32</sup> It is hard to construe this, fairly, as an endorsement of judicial supremacy, even over the other branches. (Moreover, to do so would have the James Madison of 1800 contradicting the James Madison of *The Federalist*, in 1788, and the James Madison of the First Congress, in 1789.)<sup>33</sup>

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<sup>30</sup> See Paulsen, *The Most Dangerous Branch*, 234, quoting Rep. Madison in Gales & Seaton, *Debates and Proceedings*, 500.

<sup>31</sup> James Madison, “Rights,” June 8, 1789, in *The Papers of James Madison* 12, ed. William T. Hutchinson et al. (Chicago and London: University of Chicago Press, 1962--77), available at The Founders’ Constitution Online, vol. 1, chapter 14, document 50 <http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html>.

<sup>32</sup> Madison, *Report of 1800*.

<sup>33</sup> Indeed, in general, Madison’s position in the Report of 1800 goes too far, suggesting that States are the *supreme* interpreters of the Constitution – the ultimate judges of constitutional boundaries. This position is as flawed as the assertion of judicial supremacy. See Paulsen and Paulsen, *The Constitution: An Introduction*, 134-136. Aspects of Madison’s rhetoric during this period of intense political controversy are careless and imprecise, perhaps attributable to the heat of political circumstances, and should be discounted appropriately.

Fast forward another decade. In 1809, Madison, as President of the United States, rejected a request by Pennsylvania's governor to intervene to deny enforcement of a judicial decree in a messy litigation of an admiralty dispute.<sup>34</sup> In refusing the request, Madison stated that a judicial decision was binding on the executive in particular cases, remarking that he was "not only unauthorized to prevent the execution of a Decree sanctioned by the Supreme Court" but obliged to carry the judgment into effect.<sup>35</sup>

It is not clear how much weight can be placed on this incident or Madison's statement, which might simply have been an expedient excuse to avoid becoming embroiled in a dispute of middling consequence. Madison never retreated from his core theoretical position embracing the co-ordinacy of the branches, including in matters of constitutional interpretation. Madison might have thought that the duty of the executive to enforce the decrees of courts in decided cases was a specific exception to this principle, not at odds with the general rule. Or his concession might be thought an example of deference to the judiciary in cases not especially within the executive's area of expertise. Or his statement might have been nothing more than a politically convenient excuse not to make the case a bigger problem. At all events, it is hard to view it as a repudiation of Madison's earlier statements of constitutional principle rejecting judicial supremacy.

Madison returned to those first principles in a memorable, unaddressed memorandum (or letter) that he penned in retirement, in 1834. The constitutional issues of the recent past had included South Carolina's attempted "nullification" of federal law and, separately, President Andrew Jackson's veto of the bill reauthorizing the Second Bank of the United States on constitutional grounds that had been rejected by the U.S. Supreme Court in the case of *McCulloch v. Maryland*, in 1819. Madison noted that legal questions "generally find their ultimate discussion and operative decision" in the courts, because of the order in which the branches typically act on a question. (Interestingly, Madison largely reversed positions on state-versus-national supremacy in law interpretation from the position he had taken in the *Report of 1800*.) But Madison noted that this observation about judicial resolution of constitutional questions was subject to the principle of the co-ordinacy of the branches:

As the Legislative, Executive, and Judicial departments of the United States are co-ordinate, and each equally bound to support the Constitution, it follows that each must, in the exercise of its functions, be guided by the text of the Constitution, according to its own interpretation of it; and, consequently, that in the event of irreconcilable interpretations, the prevalence of one or the other department must depend on the nature of the case, as receiving its final decision from the one or the other, and passing from that decision into effect, without involving the functions of any other.<sup>36</sup>

In many ways, the 1834 unaddressed memorandum is a reprise of the themes of separation of powers and the "perfectly co-ordinate" status of the three branches of government that Madison advanced in *The Federalist*, applied once again to the specific task of interpreting the Constitution. While Madison may have qualified his views somewhat (or simply stated them differently) during certain periods of his political career, or departed from principle on occasion, whether in the heat of political battle or to avoid an unnecessary conflict, he always returned to home base. And that base point was the impropriety of concentrations of power and the incorrectness of reading the Constitution as centralizing the power of constitutional interpretation in any one institution or set of hands.

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<sup>34</sup> I tell a fuller version of this story in Paulsen, *The Most Dangerous Branch*, 308-311.

<sup>35</sup> "Letter from James Madison to Simon Snyder (April 13, 1809)," in *Papers of James Madison: Presidential Series, Volume 1*, ed. Robert A. Rutland et al., (Charlottesville: University Press of Virginia, 1984), 114.

<sup>36</sup> James Madison, "Unaddressed Letter of 1834," in *Letters and Other Writings of James Madison, Volume 4*, 349.



## IV. HOW TO INTERPRET? MADISON VERSUS INTERPRETIVE LICENSE

How is the Constitution to be interpreted? The question is fully as urgent where interpretive power is decentralized and shared (Madison's vision) as where it is viewed as concentrated and exclusive (the myth to which most subscribe today). Centralized interpretive power can be abused if there are no standards to constrain its use (and especially if there exists no competing power to check the abuse). But it is equally true that decentralized interpretive authority could tend toward chaos and incoherence if there are no standards to constrain its exercise. As I have put it in other writing: "What if one branch, or body, advances a highly idiosyncratic interpretation, and insists, for its own policy or self-interested purposes, on pressing such a position to the wall?"<sup>37</sup>

Madison did not believe that the Constitution lacked objective criteria for its interpretation. He did not assume that all branches and institutions would *agree* as to the correct resolution of any particular constitutional question—disagreements were inevitable—but that is not to say that there are no standards by which all constitutional interpreters should be governed, and by which all should be held accountable.

It is here that Madison's views stand in most clear contrast to modern practice—and also where it is most clear that they did not materially vary through his long career. Though he occasionally changed his mind about specific conclusions on specific constitutional questions, he rarely if ever deviated from first principles as to *what properly counts*—and, equally important, what does not—in sound constitutional interpretation. At the risk of oversimplifying, Madison can be seen to embrace, with a relatively high degree of consistency over time, five core principles of constitutional interpretation.

First, Madison embraced the absolute primacy of the constitutional text itself. To be "legitimate" interpretation, the meaning of the Constitution must be "derived from the text itself."<sup>38</sup> This may seem elementary, but it is a rule that is violated with distressing frequency in modern judicial practice. Only in the loosest and almost empty sense of the term can certain of the Supreme Court's modern landmark decisions be thought "derived" from a fair and natural sense of the words of the text. Madison was an early opponent of loose, or tendentious, construction of the Constitution's powers. It seems plain that he would not have accepted as legitimate the free-wheeling invention that characterizes so many modern judicial decisions.

Second, and reinforcing this first principle, Madison believed that the Constitution's text had to be interpreted and applied in accordance with the *original* sense of its words and phrases—not anachronistic readings that removed the meanings of words from the sense in which they were understood at the time (which could work a shocking "metamorphosis" in the meaning of constitutional law, given the changeable meanings of words) and even more obviously not purely invented, idiosyncratic, imaginative or individual readings that effectively substitute the will of the interpreter for the document being interpreted. Madison plainly allowed room for the use of specialized legal terms of art (including "ancient phraseology") or familiar idioms of the day, but that was completely consistent with his focus on the text's original meaning. That was simply what such terms would have been understood to mean by the people using and reading them at the time.

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<sup>37</sup> Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, *Michigan Law Review* 101 (2003), 2706, 2739.

<sup>38</sup> "Letter to Thomas Ritchie (Dec. 27, 1821)" in *The Writings of James Madison, Volume 9*.

Third, and flowing from the notion that the Constitution's meaning is an objective meaning flowing from its original sense, not from individual views, Madison (fairly) consistently denied the direct and controlling relevance of Framers' subjective "original intent," as opposed to the text's objective linguistic meaning, in constitutional interpretation. Recall his 1796 statement that "whatever veneration might be entertained" for the men who framed the Constitution, "the sense of that body could never be regarded as an oracular guide in expounding the Constitution" since all they could do was draft a proposal.<sup>39</sup> A written text must "speak for itself," Madison wrote on one occasion, referring to the proper understanding of one of his own veto messages as president. The relevant intention of a text was to be gleaned from the public meaning of the words themselves. His private intention "cannot be substituted for" the intention revealed by "established rules of interpretation" of the text itself. Madison was not perfectly consistent about this in practice, of course: in some congressional debates he even appealed to his memory of what had transpired at the Constitutional Convention, whose records of debates were not public.<sup>40</sup> But he quickly repented of this practice and with reasonable consistency ever after he denied that the framers' subjective intentions played any important role in constitutional interpretation.<sup>41</sup>

Fourth, Madison consistently emphasized the logic of the Constitution's structure and overall design as relevant to its proper understanding. Madison did not make a special point of emphasizing this as a separate standard, or marker, in constitutional interpretation. But it is implicit in practically every one of his specific constitutional arguments. It is a central feature of the exposition of the Constitution in *The Federalist*. And it can be seen as simply an aspect of his commitment to the constitutional text: the text must be considered *as a whole* and understood in terms of its overall architecture as well as its specific provisions.

Fifth, and as already discussed at length above, Madison believed that the meaning of uncertain, ambiguous, or indefinite constitutional language could—under proper circumstances—be "liquidated" by a long, consistent, and settled practice resting on a universally agreed (or long-conceded) interpretation—even if that interpretation had once been vigorously contested. This second-order criterion, which for Madison came into play only if the original meaning of the text admitted of a genuinely uncertain range of meaning, exists in some limited tension with the other criteria Madison embraced and championed. But on the whole, it remains tolerably consistent with those criteria. Practice contrary to the Constitution cannot change the meaning of the Constitution; it can only establish, in sufficiently clear circumstances, which of two or more competing meanings of a term is the accepted one.

Finally, it is interesting to note what is *not* on Madison's list—and what, by implication, is excluded as improper. Nowhere does Madison endorse a principle that the Constitution's meaning changes; or that the understanding of the Constitution "evolves"; or that its meaning is determined or refashioned anew by successive generations. Each of these variations on the same theme is contrary to Madison's vision of what proper constitutional interpretation includes.

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<sup>39</sup> Gales & Seaton, *Debates and Proceedings*, 776 (statement of Representative Madison).

<sup>40</sup> Richard Arnold, "How James Madison Interpreted the Constitution," in *New York University Law Review* 72 (1997), 267, 275

<sup>41</sup> See generally Arnold, "How James Madison Interpreted the Constitution, 271-278. Perhaps in part for this reason, Madison delayed publication of his own magnificently detailed *Notes of Debates in the Federal Convention* until after his death in 1836. For consideration of the role that the Records of the Constitutional Convention, including Madison's *Notes*, legitimately might play nonetheless as evidence of constitutional meaning, see Vasani Kesavan and Michael Stokes Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," in *Georgetown Law Journal* 91 (2003), 1113.

## CONCLUSION: RECOVERING A “MADISONIAN CONSTITUTION”?

Madison’s constitutional thought stands as a powerful critique of modern constitutional practice. It is but a small exaggeration to say that the loss of the Madisonian vision—and the substitution in its place of a practice under which the Supreme Court possesses essentially plenary and exclusive interpretive power, exercised according to whatever criteria the members of the Court think fit—accounts for nearly everything that ails our constitutional law today. We cede authority over the Constitution to the courts alone. We therefore place huge emphasis on who fills those judicial robes, raising too much the stakes of judicial appointments even as we lower the standards of faithful constitutional interpretation. We thereby create political turmoil over constitutional interpretation but on precisely the wrong terms. And we place too little reliance in the checks properly possessed by other actors within our constitutional system with which to counter the errors inflicted on our constitutional order by errant, arrogant, and arrogating judges.<sup>42</sup>

Restoring a “Madisonian Constitution” for today is a reclamation project as it concerns the judicial power. Whether “We the People” are interested in undertaking such a project is a question both of politics and of constitutional principle: Do the people whose Constitution it is desire such a restoration and have the will and effective power to achieve it? At all events, the first step in such a process is understanding. Madison’s vision has much to say to today. That vision is not right just because it is Madison’s—Madison would not have thought such deference correct. Rather, that vision is largely right because of the first principles of the Constitution itself. Madison understood those principles well—even if he occasionally strayed from them. “We the People” should understand them, too.

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<sup>42</sup> Paulsen, *Checking the Court*.





# MADISON'S AMERICA: DELIBERATIVE REPUBLICANISM, POLITICAL COMMUNICATION, & THE SOVEREIGNTY OF PUBLIC OPINION

BY COLLEEN SHEEHAN

## INTRODUCTION

KIM: Captain, we're being hailed on a subspace frequency.

JANEWAY: Are there ships in the vicinity?

PARIS: Negative. Tracking the source. Seems like it's coming from an unmanned buoy, coordinates one four zero mark three one seven.

KIM: It looks like a Kazon signal, Captain.

JANEWAY: Take us out of warp. Open a channel.<sup>1</sup>

Officer Kim's report to Captain Janeway of the *Star Trek Voyager*, "We're being hailed on a subspace frequency," has become a Trekkie catchphrase, indicating faster than speed of light communications and spawning a good amount of controversy. Is it possible for communications to exceed the speed of light? Some physicists take exception to Operations Officer Kim's announcement, arguing that communications will never be faster than 186,000 miles per second.<sup>2</sup> Others claim that, though it would seem to break the laws of physics, some "workarounds" hold "the tantalizing promise of allowing for faster-than-light, or 'superluminal' communication."<sup>3</sup> At present, however, light can only travel 50 times between New York and London in a second—which, nonetheless, is a whole lot faster than the six to 14 weeks it took for a letter to cross the Atlantic in the late eighteenth century!

The improvements in communications technology have been tremendously beneficial on many fronts, including for people whose family or friends live at a distance; for those engaged in international trade; and for communications between nations, particularly in tense, dangerous times. Resistance to totalitarian regimes has been substantially aided by electronic media, as in the case of Radio Free Europe during the Cold War, and the current battle against human rights violations in China, despite governmental attempts to squash its critics. The verdict is still out, however, about whether the warp speed communications of our time will prove more beneficial than not, particularly in respect to politics.

It is common to hear someone say today that the world has become a smaller place. What they mean, of course, is that it is easier to get places, easier to communicate, and things once distant and foreign have become familiar, whether because one has traveled to far-away lands, or because he is acquainted with another country and its culture through television or the Internet. What the telegraph, telephone, and radio first did to revolutionize

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<sup>1</sup> *Star Trek: Voyager*, Season 2, Episode 26.

<sup>2</sup> Bruce Dormine, "The Physics of Star Trek: Why Faster Than Light Communication Is Not In Anybody's Future," *Forbes*, August 24, 2015, retrieved from <https://www.forbes.com/sites/brucedorminey/2015/08/24/the-physics-of-star-trek-why-faster-than-light-communication-is-not-in-anybodys-future/#737c56901503>.

<sup>3</sup> Peter Ray Allison, "Will we ever speak . . . faster than light speed?" *BBC Future*, March 19, 2015, retrieved from <http://www.bbc.com/future/story/20150318-will-we-ever-speak-across-galaxies>. See also Clara Moskowitz, "Warp Drive May Be More Feasible Than Thought, Scientists Say," *SPACE.com*, September 17, 2012.

communications and shrink the world in the nineteenth and early twentieth centuries, the television and Internet did in geometric proportions in the next 100 years. Today, one can watch CBS, ABC, NBC, CNN, FOX, or MSNBC to catch up with the daily political news. Depending on your location and access, you may also be able to tune into the BBC (UK), TRT (Turkey), RT (Russia), DW (Germany), IRIB (Iran), CGTN (China), i24NEWS (Israel), Al Jazeera (Qatar), ZEE (India), AfricaNEWS, France 24, and other international news broadcasting systems. The full reach and effect of electronic communications in making the world a smaller place are only beginning to be comprehended in our time. The Internet, Email, Facebook, Twitter. What's next? Certainly, more will come, and the changes wrought will be innovative, considerable, and exciting. But will these changes, on balance, be good for us?

Most people—certainly most parents—today are well aware of the social and psychological dangers associated with the electronic media age, and in particular with smartphones and messaging apps, social media sites and apps like Facebook, Snapchat, Instagram, online chatrooms, and the various forms of communications technology and social media that occupy so much of the time of America's youth. (Ninety-four percent of "mobile teens" are online every day, and nearly a quarter of them are on their smartphones "almost constantly."<sup>4</sup>) These problems, of course, aren't restricted to teenagers, nor are they limited to the social and psychological domains. In the sphere of politics, the progressive leaps and bounds of electronic communications technology have had an enormous impact on the speed, the reach, and the nature of political communications. As early as 1992, for example, the third party candidate, Ross Perot, advocated adopting a system of "electronic direct democracy" in presidential elections. Knocking out the middlemen of representation, "e-democracy" would mean that all citizens can participate equally in the proposal, development, and enactment of laws. Further, proponents argue, this direct system of democratic participation and decision-making would achieve the freer and more equal practice of self-determination. While the feasibility of e-democracy was somewhat controversial in 1996, now, just over twenty years later, only a troglodyte would argue that it can't be done.

The more interesting question, of course, is whether less representation and less filtering of public opinion is politically beneficial. At first blush it may seem obvious that purer democracy would be good for democracy. We may recall, however, the words of James Madison in *Federalist* 58: Beware democratizing measures that make the "countenance of the government . . . more democratic, but the soul that animates it . . . more oligarchic."<sup>5</sup>

Though we have not adopted e-democracy in the United States—yet, at least—in 2019 it is clear that many of the original spatio-temporal features associated with representational and deliberative politics, which served to decelerate the process and refine public opinion, have been weakened or devitalized. If deliberative republicanism starts with the clash of diverse sentiments and partial views, and is characterized by the filtering, moderation, refinement and enlargement of those views, ultimately producing *public* opinion, the current predominance of "filter bubbles" and "echo chambers" would seem to counteract that deliberative process. Rather than a political environment that tempers factionalized interests, prejudices, and views by setting them against other such factionalized opinions, allowing free argument and debate to do its dialectical work, a good amount of political information sources are chosen for their general ideological agreement with the consumer. This kind of balkanization of ideas, even perhaps ideological segregation, in which people hear only what they already believe allows them to escape the process of subjecting

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<sup>4</sup> Ann Brenoff, "7 Things You Need to Know About What Your Teens Are Doing: Follow Their Smartphones If You Want to Know What Your Teens Are Up To," *HuffPost*, July 10, 2015, retrieved from [https://www.huffingtonpost.com/entry/tk-things-you-dont-know-about-what-your-teens-are-doing-online\\_us\\_559e9023e4b0967291559170](https://www.huffingtonpost.com/entry/tk-things-you-dont-know-about-what-your-teens-are-doing-online_us_559e9023e4b0967291559170).

<sup>5</sup> Alexander Hamilton, James Madison and John Jay in *The Federalist Papers* 58: 358, ed. Clinton Rossiter, Introduction and Notes by Charles Kesler (New York: American Library, 1961).



their ideas to critical examination. It is a dodging of the political deliberative process that is a fundamental requisite for republican government. Add to this the warp-like speed of the communication of political opinions and demands today, whether it be in the form of constituents contacting their congresspersons, the 24-hour news cycles of CNN, CNBC, and FOX News, or websites and blogs, including the *Drudge Report*, *Huffington Post*, *National Review Online*, *Daily Kos*, and others. In effect, the days of Huntley and Brinkley are long gone. In their place are Maddow and Hannity.

## I. JAMES MADISON AND THE POLITICS OF PUBLIC OPINION

How did James Madison envision deliberative republicanism working in the United States, and in what way have the advances in communications technology impacted Madison's vision of the politics of public opinion?

Let me begin by briefly summarizing Madison's well know theory of the problem of majority faction and his proposed "cure" for this disease, but add to this the less-familiar theory about how Madison intended political communication to operate in the extended republic.

According to Madison, factions are opposed to the rights of some citizens or to the public interest. When a majority composes a faction, power rather than right is the basis for rule. Since the causes of faction cannot be removed without destroying liberty or changing human nature, Madison advocated a political system that could control the effects of faction, including deterring the formation of majority faction. This would require constructing a socio-political environment in which the communication of factious views can effectually be thwarted.

In a small republic, Madison argued, it is easy for a majority to communicate and unite on the basis of selfish interests or prejudices, and thereby oppress the minority. By contrast, in an extensive republic there will be a larger population, greater diversity of interests and religious views, a greater distance over which opinions must be communicated, and a greater distrust of unjust or dishonorable purposes. This will make it more difficult for a majority to form on the basis of a narrow interest or harmful passion. In a large society, a coalition of the society will be necessary to achieve a majority; thus its demands will have to pass muster with a great variety of economic, geographical, religious, and other groups in society. As Madison well understood, this would be no easy task.

According to Madison, the task of representatives in popular government is to "refine and enlarge the public views." Although he hoped elected officials would be men "whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations," he was not naive about the temptations of power and ambition that accompany political life. He knew that "enlightened statesmen will not always be at the helm." To guard against personal ambition and the threat of governmental tyranny (i.e., minority faction), Madison endorsed a system of prudential devices, including institutional separation of powers, bicameralism, checks and balances, and federalism. These "inventions of prudence" are intended to channel, check, and control the self-seeking personal motives of political office holders and thereby enable government to police itself.

Madison made clear in *Federalist* 51, however, that these safeguards against governmental tyranny are only "auxiliary precautions." The primary control on the government, he declared, remains always with the people. In the final analysis, governmental decisions depend on the will of the society, or in other words, on the will of the majority.



As Madison well understood, his proffered “solution” of the extended territory and representation diminishes the odds that a majority faction will gain ascendance (or even form) in the American republic, but it does not forestall the possibility. If Americans lack a consciousness about what constitutes unjust or dishonorable purposes, then a majority faction will not find it so difficult for its members to communicate their schemes and unite to oppress others in society.

This is one side of the Madisonian communications strategy—the negative side. The other, positive aspect utilizes political communication to form, refine, and express the will of the society. Madison’s overall aim was not to stymie the will of the majority, but rather to place obstacles in the path of factions, including majority faction. At the same time, he sought to facilitate the development of a just majority, or in other words, the reason of the public. In general, communicative activity is both part of the problem and part of the solution in Madison’s republican design. Too swift and facile political communication allows the mere will of the majority, or sheer power, to rule in the regime. The slow, measured process of the communication of ideas, however, refines and modifies the will of the society, subjecting power to the test of right reason. In respect to the influence of public opinion on government, political communication enables the people to watch over government and guard against tyranny, at the same time that it provides the means to reach consensus and settle public opinion, thereby enabling the public to influence the measures of government.

Madison’s goal, then, was to encourage the type of communicative activity that involves deliberation and results in the measured exchange of ideas about public matters. His object was to promote this “commerce of ideas” at the level of government and throughout “the entire body of the people.” This is why, for example, he advocated the idea of a territory that is not “overgrown,” but rather of a “practicable sphere.”<sup>6</sup> If the society is too large, communication across the territory is stymied and the public voice is silenced. Contrary to the view that Madison’s preoccupation with territorial size is for the sole purpose of preventing the formation of a factious majority, I would argue that his theory has another and larger purpose: It is ultimately intended to establish the conditions in which a certain kind of majority can feasibly form and rule.

“Public Opinion,” Madison proclaimed in 1791, “sets bounds to every government, and is the real sovereign in every free one.”<sup>7</sup> When public opinion is settled, governmental representatives must obey it; when it is not settled, they may influence it. Madison’s notion of “public opinion” should be distinguished from what is generally meant by the term today, namely, daily polling aggregates. In Madison’s conception, there is a world of difference between the immediate reactions of the people to political issues, and the considered views of the public. The kind of public opinion that Madison called sovereign, and which government must obey, is the settled opinion of the community. This authoritative opinion is produced by the slow, complexly layered, communicative and deliberative processes that filter and enlarge the public views within the government and throughout the society. In this sense, public opinion is neither the fleeting whims of the multitude nor an imaginary entity constructed to give credence to elite rule. For Madison, there is a two-way street between the government and the people. Public opinion is both acted upon by the governmental representatives as well as itself an active and authoritative voice that influences the direction of government. The formation of public opinion involves the influence of representatives, of the literati, as well as of the laws on the views of the people. Once formed and settled, public opinion is the operational sovereign in free government.<sup>8</sup>

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<sup>6</sup> For Madison’s conception of the “practicable sphere” see *The Federalist* No. 14:95-97 and 51:322.

<sup>7</sup> “Public Opinion,” in *The Mind of James Madison: The Legacy of Classical Republicanism* (Cambridge: Cambridge University Press, 2015), 245.

<sup>8</sup> Madison’s conception of the dynamic relationship between public opinion and political leaders was hardly new; it constituted the core of the art of statesmanship in classical republicanism. Madison modified and applied this art to republican government in an extensive territory characterized by modes of modern communication, thus translating the classical task of civic education to the modern era.

Madison furthered his analysis of political communications in a large but practicable sphere by considering other factors that may act as equivalents to a contraction of the territorial limits. These include good transportation routes, domestic commerce, and a free press that circulates “*through the entire body of the people, and Representatives going from, and returning among every part of them.*”<sup>9</sup> Also included among these factors is federalism, in the sense of the role of state and local institutions of government in the collection and formation of public opinion in regimes in which the borders might otherwise be too distant for effectual popular rule. It is in this way that federalism emerges as a “principle” of republican government in Madison’s theory. Without a sufficient attention to the principle of federalism, the republican experiment of an extended territory cannot succeed, for state and local institutions are necessary to collect, “combine” and “call into effect” the voice and sense of the people spread over a large nation.

The circulating print media also serve as means for the communication of ideas throughout the society. Madison expected leading citizens both within and without government—representatives and the literati—to educate and refine public views. Working through public and private communication channels, thoughtful and active citizens contribute to shaping a more considered, reasonable opinion of the public, thereby subjecting the will of the public to the reason of the public. Madison taught that it is not only the right, but “the duty . . . of intelligent and faithful citizens to discuss and promulgate [political information and ideas] freely” in order to control government by the “censorship of public opinion” and “according to the rules of the Constitution.”<sup>10</sup> Via a multi-layered process, then, Madison devised a system of communicative politics in which the interests and passions of the public are regulated by the government, and in turn, the government is controlled and regulated by the reason of the public.<sup>11</sup>

In sum, Madison’s solution is mechanistic only in the sense that institutional arrangements encourage the clash of political interests, ambitions, and views, thereby slowing down the legislative process. This design simultaneously establishes a milieu that calls representatives to act as statesmen and literati to enlist their fellow citizens in the exchange of ideas. It summons thoughtful citizens in both the public and private sectors to take up the task of civic education, engage in the art of argumentation and persuasion, and pursue the refinement and enlargement of the public views. Indeed, the wisest and best of men and women have a responsibility to their fellow citizens directed towards the highest of political and human ends, for they are “the cultivators of the human mind—the manufacturers of useful knowledge—the agents of the commerce of ideas—the censors of public manners—the teachers of the arts of life and the means of happiness.”

As critically important as statesmen and literati are in Madison’s design for civic education in the American republic, however, it cannot be over-emphasized that his ultimate reliance is not upon either of these elite minority groups within society, but upon public opinion—which, for all practical intents and purposes, is the opinion of the majority. “In republican government,” Madison wrote, “the majority however composed, ultimately give the law.”<sup>12</sup> In the final analysis, then, there is no substitute for the defect of better motives in the citizenry. Republican government is sustained only by citizens who are committed to and practice the republican way of life.

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<sup>9</sup> “Public Opinion,” *The Mind of James Madison*, 245.

<sup>10</sup> William T. Hutchinson, et al., eds., *The Papers of James Madison* (Chicago and Charlottesville: University of Chicago Press and University Press of Virginia, 1962 –), 17:342.

<sup>11</sup> *The Federalist* No. 49:314.

<sup>12</sup> “Vices of the Political System of the United States,” *The Mind of James Madison*, 201.

## II. OUR CURRENT POLITICAL PREDICAMENT

If the constitutional design of the United States once functioned as Madison envisioned, various historical, technological, and political changes that have occurred since the founding era have substantially altered the operation of the system. While it is true that Madison witnessed or anticipated a number of advances in travel and communications technology (he was, as historian Drew McCoy noted, “the last of the Framers,” living until 1836), he could hardly have imagined the extent of change that was on the horizon. In the eighteenth and nineteenth centuries the amount of time required to build a national constitutional majority was largely contingent on territorial size, or space. The effect of space upon time produced a milieu conducive to deliberative politics in eighteenth century America. In the current era, however, space cannot influence the factor of time sufficiently to produce such an environment. Today, no matter the earthly territorial distance, the speed of communication is almost instantaneous.

In Madison’s scheme there is a connection between space and time on the one hand, and reason and passion on the other. The process of refining, enlarging, and modifying the public passions into the reason of the public is in part contingent on the effect of spatial on temporal factors. With advances in communications technology and the negation of the impact of distance on promoting deliberation, one of the chief elements in Madison’s plan to achieve “the cool and deliberate sense of the community” is now missing.<sup>13</sup>

This change has prompted some to ask if our current political problems are, at least in part, a result of the swift and facile public communications of our time. In other words, are the instant and hardly deliberative communications practiced by Twitter users, for example, substantially to blame for the vitriol that characterizes American politics today? How much are the political problems of our time the result of the unregulated flow—even contagion—of public passions and interests across the nation, particularly by blogs and social media? Have we come full circle since the Founding period and are once again faced with the old challenge of how to remedy the disease of that most “dangerous vice,” faction?

This is certainly one way that the current situation might be assessed.<sup>14</sup> Given the changes since the Founding period—including historical, demographic, geographic, and especially technological changes—there would seem to be no adequate check to the lightning-quick political communications in the nation today. Even the extension of the territory beyond sea to shining sea and the hundred-fold increase in population from 1790 to our day (from 3.5 million to 350 million) offer no equivalent counter-balance to the passion-fueled opinions transmitted by high-speed electronic devices. Is it the case, then, that we have entered a new reality in which the American political and constitutional design is simply no longer apposite?

For some today, a sea of red-capped heads bearing the logo “Make America Great Again,” and chanting “Drain the Swamp,” summarizes the problem. For a different set, alarm arises from black-masked and clad Antifa protestors chanting “No Trump, no wall, no USA at all!” Have the “cooling mechanisms [Madison] designed to slow down the formation of impetuous” factions been undermined, as Jeff Rosen queries? Has Madison’s worst nightmare been realized?<sup>15</sup>

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<sup>13</sup> *The Federalist* No. 63: 382.

<sup>14</sup> See e.g., Jeffrey Rosen, “America is Living Madison’s Nightmare,” *The Atlantic* (Oct. 2018), retrieved from <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/>; cf. Dylan Matthews’ response, “The tyranny of the Majority isn’t a problem in America today, tyranny of the minority is: Minority rule brought us Trump, and worse,” *Vox*, September 12, 2018, retrieved from <https://www.vox.com/2018/9/12/17850980/democracy-tyranny-minority-mob-rule-james-madison>. For a different perspective on the “mob,” see Shari Goodman, “Mob Rule Comes to America,” *American Thinker*, October 5, 2018, [https://www.americanthinker.com/articles/2018/10/mob\\_rule\\_comes\\_to\\_america.html](https://www.americanthinker.com/articles/2018/10/mob_rule_comes_to_america.html).

<sup>15</sup> Rosen, “America is Living Madison’s Nightmare.”

I do not believe Madison would assess the situation in quite the same terms, or think the current predicament incurable. While I do think he would have been seriously concerned about the deleterious effects of social media on aggravating the public passions, he would identify the problem as not only procedural, but also substantive.

Besides the increased speed of political communications, we should take note of those factors that remain relatively intact and continue to have a moderating influence on public opinion. We recall that in Madison's political design, the causes of faction are controlled in two ways: first, by slowing down communication over a vast geographical area, and second, by comprehending within the large republic a greater number of inhabitants and a multiplicity of interests, parties, and sects. If scientific advancements have negated the effects of the former, they have not invalidated the impact of the diversity of economic interests, religious sects, or ideological views associated with advanced civilizations. Thus, even with the increased speed of communication over an extensive territory, the continued presence of a plentiful variety of interests and sects counteracts the formation of majority faction. Thus, given the multiplicity and diversity of interests and passions within modern society, it is still less likely that there exists an overriding partial interest or prejudicial passion capable of uniting such sundry groups. Nevertheless, it is the case that social media has contributed to the contagion of passion in our society, sometimes verging on producing group think, and this phenomenon could manifest itself as an oppressive majority.<sup>16</sup>

The principle of representation also remains a mode of refining and enlarging the public views, even in the social media age, though it has been altered in two significant respects: first, the ratio of representatives to the people has decreased proportionate to the increase in population, and second, since 1913, U.S. senators have been elected directly by the people of their respective states rather than by state legislatures. The latter change has given Senators more independence (since answering to more people each with substantially less power loosens the routine answerability of the office-holder). This, along with a number of other factors, has contributed to the decline in the influence of state governments upon the power of the national government. In addition, the twentieth and twenty-first centuries have witnessed increased executive power and the unprecedented growth of a massive national bureaucracy.<sup>17</sup> At the same time that the power and influence of the states have deteriorated, so too has that of the national Congress declined, with power shifting from the national legislative branch to the executive administration and the judiciary. The transfer of power to the bureaucracy has occurred largely as a result of Congress' abdication of responsibility to the executive branch; legislation from the bench has resulted from the unconstitutional exercise of legislative power by the contemporary judiciary.

This considerable diminution of power of Congress has substantially impacted the power of public opinion in contemporary American politics. In Madison's plan, when public opinion is fixed, governmental representatives must follow it. However, with so much legislative decision-making relegated to the bureaucracy or supplanted by the Supreme Court, the Congress—through whose prescribed legislative process public opinion is refined and enlarged—is largely closed for business.

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<sup>16</sup>As is well known, Madison's remedy for majority faction in *Federalist* 10 is not to remove the causes, but rather to control the effects. This chosen solution is further divided into two sub-categories, i.e., 1) make it highly unlikely that there will exist a majority of citizens who hold the same factious views at the same time, or 2) if such a majority were to exist, make it difficult for them to unite together, given the large population and territorial distance over which they must communicate their views and coalesce them. It is the second sub-set of this second part of Publius's outline solution that is exacerbated by the speed of communications in the contemporary world.

<sup>17</sup>The "fourth branch" is the notion of a powerful non-constitutional entity that rivals the three traditional branches of government, viz., the legislative, the executive, and the judiciary. Occasionally, the media is referred to as the fourth branch. On the administrative state see the excellent work by John Marini, including John A. Marini, Gordon S. Jones, and Newt Gingrich, *The Imperial Congress: Crisis in the Separation of Powers* (World Almanac, 1989); and most recently, John Marini, ed. Ken Masugi, *Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century* (Encounter Books, 2019).

So, while the speed of political communications has made it easier for a popular majority to form and express its views, the enfeebling of the national legislature has actually weakened the role of public opinion in the governing process. The diminished role of the state and local institutions of government has also negatively impacted the power of public opinion, that is, if such vehicles are needed at the front end of the process to collect and convey the public voice in a large nation, as Madison contended.

It should also be noted that many ordinary Americans today feel that public intellectuals, the media, Hollywood, and professional Washingtonians look upon them with a good amount of contempt. This “ruling class,” as middle America views them, consider themselves more broad-minded and “woke” than the average citizen, especially those who inhabit rural areas where people hunt, attend religious services, or watch NASCAR. This perceived disdain of an elite, ruling class towards average citizens is viewed as concomitant to the growth of a distant and unresponsive government, thus amplifying ordinary citizens’ feelings of being on the “outside” in their own country.<sup>18</sup>

The displacement of the views of ordinary American citizens is, I believe, the emphatic phenomenon of our time, much more of a risk to the present stability and health of the regime than the risk of majority faction. The breakdown in separation of powers, checks and balances, and federalism in the nation, caused by a government that legislates without Congress, has significantly damaged the processes of deliberative republicanism and the operational sovereignty of public opinion that these processes are intended to achieve.

### III. ONE AMERICA, OR TWO? IF ONE — WHICH ONE?

At the same time that public opinion has been supplanted by the administrative state in America, the nation has become increasingly divided into two groups warring over the political future of the country (albeit there are a good many citizens not fully committed to either side).<sup>19</sup> The leading cause of this fissure is not race, ethnicity, class, religion, age, sex, or geographic region. Rather, it is political partisanship, and the intensity of the split is such that each side sees the other as hateful and threatening the common good of the country.<sup>20</sup> In fact, the rivalry is deeper than party labels or public policy differences signify. It is a dispute over the meaning of the American constitution (small “c” constitution) in the sense of what constitutes the nation, what constitutes its way of life and gives it its particular character. On one side of this quarrel are those who defend the Constitution and the principles of the

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<sup>18</sup> See the excellent piece by Angelo M. Codevilla, “America’s Ruling Class and the Perils of Revolution,” *American Spectator*, July 16, 2010, retrieved from <https://spectator.org/39326-americas-ruling-class-and-perils-revolution/>; Angelo M. Codevilla, “After the Republic,” *Claremont Review of Books*, September 27, 2016, retrieved from <http://www.claremont.org/crb/basicpage/after-the-republic/>. See also Allan J. Lichtman, “Who Rules America?,” *The Hill*, August 12, 2014, retrieved from <https://thehill.com/blogs/pundits-blog/civil-rights/214857-who-rules-america>; Emily Badger, “Estranged in America: Both Sides Feel Lost and Left Out,” *The New York Times*, “The Upshot,” Oct. 4, 2018, retrieved from <https://www.nytimes.com/2018/10/04/upshot/estranged-america-trump-polarization.html>. It is not surprising that despite the advances in communications technology that “make the world a smaller place” and so would seemingly empower and energize citizens of a large republic, this has not actually happened. In fact, American citizens today feel their voice matters less than they did a half-century ago. (While a 2015 PEW Foundation study shows that more people feel that their voice matters, other studies by *The New York Times*, Suffolk University, and the Congressional Institute show that Americans feel their voice is not effectual). Madison himself worried about this: “[T]he more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty” (“Public Opinion,” *The Mind of James Madison*, 243).

<sup>19</sup> See Steve Chapman, “Is America more politically polarized than ever? Not quite,” *Chicago Tribune*, September 21, 2018, retrieved from <https://www.chicagotribune.com/news/opinion/chapman/ct-perspec-chapman-polarized-america-civil-war-0923-20180921-story.html>.

<sup>20</sup> See Shanto Iyengar and Sean J. Westwood, “Fear and Loathing across Party Lines: New Evidence on Group Polarization,” 59 *American Journal of Political Science* 3 (July 2015), 690–707; see also “Political Polarization in the American Public: How Increasingly Ideological Uniformity and Apathy Affects Politics, Compromise, and Our Everyday Lives.” *The Pew Research Center*. <https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.





Founding, including the idea of natural law and natural rights. On the other side, this stance is challenged by the contemporary Progressive perspective, which either rejects the notion of natural law in favor of an evolving, inclusive egalitarianism, or its postmodern variant, which rejects natural law and the notion of human nature itself, in favor of social constructs, hierarchies of power, and identity politics.

Madison and the Founders believed that all men are by nature equal and possess natural rights, that a just government is based on consent, limited in its scope, and committed to securing the rights and liberties of its citizens. Human beings possess reason, he claimed, but since that reason is fallible and prone to the influence of selfish passions and partial interests—“the latent causes of faction are sown in the nature of man”—a constitutional system that separates and checks the power of those in government, and a geo-social environment that thwarts the formation of majority faction, are needed. In the early twentieth century, Progressives in the United States, including men such as John Dewey and Woodrow Wilson, rejected both the Madisonian model of government as well as the Enlightenment principles of natural law and natural rights. For them, evolution replaced human nature; organic growth and historical progress took the place of eternal truths and natural laws. In essence, changing historical circumstances and changing economic and social needs required a new constitutional and political framework to achieve social justice. For Wilson, separation of powers and checks and balances were obstacles in the way of economic and social progress; in place of this dispersed, conflict-driven model of politics Wilson called for specialized experts with differentiated functions in the ranks of government.<sup>21</sup> Liberating government from the institutional restraints imposed by Madison and the Founders in the original Constitution and substituting efficient, highly trained bureaucrats would lend to efficiency and the achievement of the true interests of the people, Wilson contended.

The explicit rejection of the Madisonian system and the advocacy of the Progressive model initiated by Wilson still inform the core of the Progressive movement in our time (though some ultra-progressive proponents, including supporters of Antifa, would radicalize Wilson’s historicism and give up on politics, calling for violence as the only option in a world devoid of rationality or ethics). We are, as it were, faced with choosing between two alternate regime ideas, between two different constitutions. The decision before us is whether to keep the America of the Declaration of Independence and the Constitution, and to continue to work to vindicate the experiment in republican self-government, or to leave these old ideas behind us and institute a new and different form of government that we think will be more conducive to our happiness. The battle we are engaged in is a battle over the mind and soul of America. It is a war over what it means to be human and how we should live our lives.

The fundamental nature of this disagreement points to a fissure in the nation that has led some commentators to declare that in America today there are actually two different countries.<sup>22</sup> While I would certainly agree that the issue of whether we are still “one people” is at stake, I do not think the question has yet been answered. It is a question we have faced before, of course, most prominently in the 1860s. For some time it was unclear whether the union could be saved and “the people” of the United States would remain together as members of the same band of brothers and sisters. To have remained together without mutual dedication to the proposition and principles of the Declaration of Independence, however, would have meant the preservation of the union in name only. Without the central idea of the Declaration binding north and south, black and white, and all Americans together in a shared vision of justice, the union and the laws had no purpose.

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<sup>21</sup> See Woodrow Wilson, “What is Progress?” retrieved from <http://teachingamericanhistory.org/library/document/what-is-progress/>.

<sup>22</sup> Alan I. Abramowitz, “America Today is Two Different Countries: They Don’t Get Along,” *The Washington Post*, March 10, 2016, retrieved from <https://www.washingtonpost.com/news/in-theory/wp/2016/03/10/america-today-is-two-different-countries-they-dont-get-along/>.

Lincoln's conception of the American union was one in which even more than justice, civic friendship undergirds the bonds of citizenship. When in his First Inaugural Lincoln appealed to all Americans to rise to the better angels of their nature, to come together not as enemies but as friends, he conveyed to his fellow citizens the moral character of the promise they made to one another when they adopted the appellation, "American." In this, Lincoln followed Madison's understanding of the moral character of the American social compact. In free governments, in the final analysis, the law is the expression of the opinion of the majority. In back of the law is a moral principle, and a pledge by the people to commit to that principle, which gives the law its authority and makes it worthy of respect and obedience. Without this promise, there can be no genuine republican community. With it the people reveal their mutual pledge and the bonds of friendship that constitute the basis of their legal and civic life.

Either explicitly or tacitly, every citizen of the United States consents to join the social compact which binds him to every other citizen. In becoming a member of the country, each makes the same promise the Founders made when they ratified the Constitution in 1787-1788. That pledge is an acknowledgment of what each citizen owes his or her fellow citizens, according to the precepts and rights of humanity. It is a commitment to protect the rights of others, even to consider a trespass on any one member a trespass on all.<sup>23</sup> It is a hallowed pledge to the republican way of life of self-government. For in the final analysis, the majority ultimately gives the law, and there is no arbiter that can protect the rights of the minority other than the majority, that is, the people themselves.

Madison's political theory is aimed towards making majority rule just rule, or as he termed it in "Vices," placing power on the side of right. His aspirations for America depended on the capacity of the people to govern themselves, which in turn depended on the willingness of the people to engage in the deliberative processes with the aim to—and in the spirit of—finding common ground. The willingness to engage with one another, despite our differences and perspectives, is the first condition of free government, prior even to subjecting the public views to the processes designed to regulate and control factious views. Re-establishing this primary condition is the challenge we are faced with in America today. It is the challenge of bringing together those who disagree on the most fundamental of political questions in sustained and productive dialogue. As such, the new communicative modes of social media are not the chief problem. Social media are merely the vehicles for the uncivil posts and Tweets that are exacerbating the current political divide. It is the messages, or rather the messengers, who must bear the ultimate responsibility for the damage that is being inflicted on (or the good that might be done for) our civic life.

In the current divisive and often wrathful political—and digital—environment, the task ahead may appear a daunting one, perhaps an impossible one. But we have, after all, faced similar if not identical challenges before. In the fight over the Constitution, Madison reminded his fellow Americans that, no matter their political differences, they must not listen "to the unnatural voice which tells you that the people of America, knit together as they are by so many cords of affection, can no longer . . . be fellow citizens of one great, respectable" nation.<sup>24</sup> In 1791, during the battle between fierce differences of opinion that would result in the origins of political parties in America, Madison appealed to Americans to "concur amiably and differ with moderation," and "by such examples, to guard and adorn the vital principle of our republican constitution."<sup>25</sup> The more concord the people have with one another, he reminded his fellow citizens, the more they can sympathize with one another and look past prejudices and "mistaken rivalships."<sup>26</sup>

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<sup>23</sup> Madison sets forth the argument demonstrating the moral basis of the social compact in his *National Gazette* essay, "Property," *The Mind of James Madison*, 262-64.

<sup>24</sup> *The Federalist* 14: 98-99.

<sup>25</sup> "Consolidation," *The Mind of James Madison*, 236.

<sup>26</sup> "Consolidation," *The Mind of James Madison*, 236.

This is good advice for us today. As Madison knew, no regime can sustain itself on the basis of legal agreement alone. The American social compact is at once a legal and moral agreement, but it is the latter which makes the former binding and obligatory. In becoming American, each of us makes a pledge to every other American based on the natural obligations we possess as human beings, one to another.

## POSTSCRIPT

One of the most memorable lines in the Star Trek film series is “the needs of the many outweigh the needs of the few.” This “dictate of logic” is spoken by Mr. Spock, but it is not the last word on the subject. Captain Kirk immediately adds: “or the one.” Later in the series, when the Starship is in imminent danger, Spock sacrifices his life to save the crew. As he lies dying, he entreats Kirk not to grieve, for “the needs of the many outweigh...” – and Kirk finishes his sentence – “the needs of the one,” to which Spock adds, “or the few.” In yet a later episode, we learn that Spock is actually alive, his once-separated body and soul reunited by his crew. In the spirit of wonder, Spock remarks to Kirk, “My father says you have been my friend. You came back for me.” “You would have done the same for me,” Kirk responds. “Why would you do this?” Spock asks. Kirk replies: “Because the needs of the one outweigh the needs of the many.”<sup>27</sup>

In an essay titled “Charters,” Madison explained that compacts of government are inviolable pledges “bound on the conscience[s]” of individuals. They are the most sacred of civic obligations “because every public usurpation is an encroachment on the private right, not of one, but of all.”<sup>28</sup> As the protracted exchange between Spock and Kirk taught, the relationship between the individual and the community is a layered and complex one. On the one hand, the common good sometimes requires individual sacrifice; on the other hand, the community is only as good as its care for and protection of each of its members. In respect to the latter, Spock’s cold logic of right was amended and elevated by the warmth of human and civic friendship.<sup>29</sup> The pledge of each citizen to care for the liberty and protect the rights of every other citizen constitutes the trust that anchors the American compact. This is more than following contract rules; it involves the kind of political bonds and concord that make the United States a genuine union, and the collection of individuals who inhabit it “one people.” This is the pledge of civic friendship that constitutes Madison’s America.

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<sup>27</sup> See *Star Trek, The Wrath of Khan* (1982), *The Search for Spock* (1984), *The Voyage Home* (1986).

<sup>28</sup> “Charters,” in *The Mind of James Madison: The Legacy of Classical Republicanism* (Cambridge: Cambridge University Press, 2015), 247.

<sup>29</sup> The lesson of these exchanges between Spock and Kirk is that utilitarianism is not the “human” answer. Human beings living in community need justice, and justice is elevated and perfected by friendship.

# ‘THE ULTIMATE JUSTICE OF THE PEOPLE’ MADISON, PUBLIC OPINION AND THE INTERNET AGE

BY GREG WEINER

## FAST OPINION, SLOW RESULTS

On September 24, 1789, President Washington sent the names of the first six nominees to the Supreme Court to the U.S. Senate for its advice and consent. Two days later, the entire slate was confirmed on a voice vote, almost certainly without the public noticing or its opinion influencing senators. In 2018, when Justice Anthony Kennedy retired, the confirmation process for his successor, Brett M. Kavanaugh, took three months. Yet public opinion on the Kavanaugh nomination formed instantaneously. Both opponents and supporters of the nominee Tweeted, phone-banked and blasted emails within moments of the announcement. In one case, an advocacy group was so anxious to express itself that it issued a press release identifying the future justice as “[insert name here].” This curious reversal—from rapid confirmation with slow public opinion to instant opinion but gradual confirmation—is striking. It is not coincidental.

To be sure, the complicating factors in the Kavanaugh nomination are well known, from his replacement of a swing justice to the allegations of sexual assault leveled against him late in the confirmation process. Moreover, it is unlikely the public would have taken much interest in Washington’s nominees even had they known, for the judiciary was not then seen as an ultimate arbiter of ultimate issues. The point is that no technological mechanism existed to enable the rapid formation of public opinion even had Americans much cared who sat on the Supreme Court. Today, the constitutional distance both between public officials and their constituents and between the origination of ideas and the formation of public opinion on them has collapsed. This is partly a technological phenomenon—speed that was once impossible is now routine; partly a result of the democratization of a republican regime that once resolved issues at a step of remove; and partly, in turn, a function of a larger, more centralized regime that, for better or worse, has raised the stakes of national politics.

Whatever the cause or combination of causes, this collapse of distance presents a challenge to the Madisonian understanding of American politics. Madisonian politics relies on a series of assumptions about public opinion. The first is the use of time as a pacing mechanism: James Madison believed public opinion would be sovereign, but it would form gradually. Second, opinions rooted in passions would be naturally fleeting; only those rooted in what Madison regarded as the “cool” faculty of reason could be sustained. Similarly, Madison assumed a fluidity of political alignments such that those who were on the losing side of one issue could hope to win on the next, while those who prevailed would be chastened in victory by the knowledge that they would be in the minority on a future occasion. This was a rational calculation that assumed a capacity to put long-term interests over immediate appetites. Finally, Madison’s analysis of faction is rooted in moral objectivity. That is not to say everyone agrees on what is right, but Madison did appear to assume everyone operated in roughly the same universe of facts even if those facts yielded different conclusions.

All of these assumptions are in tension with a media and technological environment that has accelerated communication and the formation of public opinion, erased the constitutional distance between representatives



and constituents and between constituents and each other, and, finally, hardened factional and political alignments as consumers of media on all sides retreat into private and self-reinforcing realities. Here, as always, we should avoid romanticizing the Founding generation, whose disputes were bitter and whose media were partisan. What is different is the simultaneous immediacy and privacy of contemporary politics. We are less likely to deliberate before concluding, less likely to come into contact with ideas or neighbors with whom or views with which we disagree, and less likely to place long-term consequences ahead of immediate outcomes. This is inseparable from the media environment and irreconcilable with Madisonian politics.

## MADISONIAN PREMISES

Madison's writings on public opinion present the following puzzle: First, Madison was concerned about the rule of impulsive majorities, which he alternately described as "impetuous," "hasty," "overheated" and contaminated by "contagious passions."<sup>1</sup> Second, one of the most consistent themes of his writings is that persistent majorities always prevail in the long run. As will presently be seen, this is most evident in *Federalist* 63's remark that "the cool and deliberate sense of the community" both "ought" and "actually will . . . ultimately prevail" in republican societies.<sup>2</sup> Yet, third, Madison was also confident that impassioned majorities would not prevail in the United States, as when he wrote to the Marquis de Lafayette in 1830 that the American regime "has so many safety-valves giving vent to overheated passions, that it carries within itself a relief agst. the infirmities from which the best of human institutions cannot be exempt."<sup>3</sup> In sum, persistent majorities eventually get their way, but impassioned majorities do not. The assumption that resolves this puzzle is that impassioned majorities by their very nature are not persistent, a premise latent throughout Madison's writings. The solution, which I have elsewhere called "temporal republicanism,"<sup>4</sup> was to separate the formation of public opinion from the decision to act upon it with sufficient time for passions to dissipate.

Temporal republicanism is rooted in Madison's distinction between reason and passion. Rather than reaching conclusions in advance, the reasoning faculty was capable of interpreting objective facts and accounting for different perspectives. By contrast, an impassioned public or public official would be impervious to either evidence or opposing ideas, stubbornly refusing to confront a question with the hallmark of reason: an open mind. In *Federalist* 49, for example, Madison rejected Jefferson's suggestion to turn to the public to remedy constitutional abuses because the resulting disputes would be decided with "the spirit of preexisting parties, or of parties springing out of the question itself." The same politicians who had committed the abuses would influence or make the decision about the remedy. Their interest in the question would distort their judgment. "The *passions*, therefore, not the *reason*, of the public, would sit in judgment. But it is the reason of the public alone, that ought to control and regulate the government. The passions ought to be controlled [*sic*] and regulated by the government."<sup>5</sup>

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<sup>1</sup> See Gaillard Hunt, ed., *Writings of James Madison, Vol. 9*, 76 ("impetuous"); *The Federalist* No. 58 ("hasty"); *Writings of James Madison* 9:35-38 ("overheated"); *Writings of James Madison* 9:520 ("contagious passions").

<sup>2</sup> George W. Carey and James B. McClellan, *The Federalist: The Gideon Edition* (Indianapolis: Liberty Fund, 2001), 327. References to *The Federalist* are hereinafter cited by paper and page number to this edition, as in "Federalist 63:327."

<sup>3</sup> *Writings of James Madison* 9:35-38.

<sup>4</sup> Greg Weiner, *Madison's Metronome: The Constitution, Majority Rule and the Tempo of American Politics* (Lawrence, Kan.: University Press of Kansas, 2012).

<sup>5</sup> *The Federalist* No. 49.



These passions, in turn, came on suddenly, spread rapidly and, equally important, flamed out quickly. Madison tended to describe factions, for example, as “sudden” or as acting on “impulse.” One of his complaints about the “multiplicity” and “mutability” of the laws of the states in his pre-convention memorandum “Vices of the Political System of the United States” was the rapidity with which these measures changed, often under the immediate influence of mobs.<sup>6</sup> In “the ancient republics,” he wrote late in life, popular assemblies were “so quickly formed, so susceptible of contagious passions.”<sup>7</sup> His circa 1817 “Detached Memoranda” worried about the “contagion & collision of the passions” in the smaller states, whereas he wrote to John Adams in the same year that the American experiment “is favored by the extent of our Country, which prevents the contagion of evil passions.”

The clearest instance in Madison’s writings of temporal republicanism and the fleeting nature of the passions, *Federalist* 10, pertains to the problem of faction, which the essay describes as “a number of citizens, whether amounting to a majority or 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.”<sup>8</sup> The problem, in other words, is citizens ganging up on other citizens, using government as an instrument for doing so. Critics of Madison, most notably Robert Dahl, have observed that this definition seems not to take account of differing views of the public good, which Dahl notes no one typically acknowledges opposing.<sup>9</sup> But this proves no more than it would to say that few prisoners confess their guilt. As George W. Carey has shown, Dahl attempts to retrofit modern moral relativity onto a Madisonian system that seems rooted in a morally objective understanding of the public good. “[T]hose who do not believe in an objective moral order cannot ‘enter’ Madison’s system,” Carey writes.<sup>10</sup> That Madison believes public questions are generally resolvable by reason is further evident in his admonition that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment,” with this latter faculty, judgment, generally able to reach right or at least impartial answers if unimpeded by interest or passion. This is not to say Madison was a technocrat or that he would have turned politics over to a class of experts. Far from it: He was a champion of prudence, the classical quality that, as Aristotle, says, pertains to things that could be otherwise. It is the existence of a common good, not agreement as to its content, that is important for understanding the Madisonian ethos.

Indeed, Madison cannot mean that the common good is easily perceived. He tells us that our interests and passions can corrupt one another, especially where property is involved. But other assumptions do seem to be present. The shared belief that the common good *exists*, even amid disagreement about its content, is central to Madisonian politics, as is the *possibility* of discovering it: *Federalist* 51’s prediction that majorities would seldom form on the basis of principles other “than those of justice and the general good” implies that majorities that were based on those foundations could cohere.<sup>11</sup> This public good is not simply the cumulative product of or lowest common denominator between each individual’s private views. Madison teaches, moreover, that reason applies itself to evidence with an open mind. For both reasons, facts cannot be a matter of personal perspective according to

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<sup>6</sup> Robert A. Rutland and William M.E. Rachal, eds., *The Papers of James Madison: Volume 9* (Chicago: The University of Chicago Press, (1975), 348-357.

<sup>7</sup> *Writings of James Madison* 9:520.

<sup>8</sup> *The Federalist* No. 10.

<sup>9</sup> Robert Dahl, *A Preface to Democratic Theory: Expanded Edition* (Chicago: University of Chicago Press, 2006), 26.

<sup>10</sup> George W. Carey, “Majority Rule and the Extended Republic Theory of James Madison,” in *In Defense of the Constitution* (Indianapolis: Liberty Fund, 1989).

<sup>11</sup> *The Federalist* No. 51:271..

which that with which we agree is true and that which unsettles us is fake news or right-wing propaganda. The media of Madison's day was unquestionably partisan, but the partisanship was checked by the existence of a public square in which citizens were reasonably likely to encounter competing views. If media drive people behind walls not just of viewpoint but of fact itself—in other words, if there is no consensus as to a common reality—then consensus as to even the existence of a common good, like the basis of evidence to which the reason would apply itself, seems elusive.

*Federalist* 10 also distinguishes between reason and passion. This is evident at several points in the essay, first in Madison's taxonomy of factions. Whereas David Hume had regarded factions based on property as excusable because they were rational and their demands were therefore negotiable, he felt those based on passion—such as attachment to political personalities or systems of religious belief—were inherently dangerous.<sup>12</sup> Madison reversed this understanding. For him, fanaticisms like cults of personality surrounding public figures could not endure because passion might be initially kindled but could not be sustained. The real danger was factions based on property, and Madison's reason is instructive: These factions are "durable."<sup>13</sup> Because they are rooted in tangible interest, they last. Interest, like passion, operates to distort the reason.

The challenge, then, was how to defuse the passions while elevating the reasoning faculty. The answer, for Madison, was time. Public views would form so gradually in a large republic, in which communication would be naturally slow, that passions would have time to dissipate before factions could act upon them. It is well known that Madison believed majority factions were unlikely to form because of the diversity of interests in a large republic. But Madison also provided for a scenario in which they did form. His answer was that "it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other."<sup>14</sup> Why should this be so? Communication was not impossible, as Madison's dozens of volumes of published letters attest. But *rapid* communication was. This is the missing link in Madison's argument. What holds it together is the assumption that in the time it would take a majority to discover its own strength, its passions would be diffused.

This is essentially a passive mechanism. It is generally compatible with observers who posit a more active means of shaping public opinion, such as Colleen Sheehan, who places Madison in the mold of a classical republican who seeks to enlighten and ennoble the public views, or Martin Diamond, who argues that Madison sought to proliferate commercial interests as an outlet for public energies.<sup>15</sup> Jeremy Bailey, meanwhile, has argued that pacing may be a necessary but is also an insufficient condition for deliberation.<sup>16</sup> Madison certainly believed in deliberation. But whatever time adds to this process in terms of dissipating the passions—a precondition for deliberation—it adds of its own volition: Time itself does the work. We can see this in a famous, and often misinterpreted, passage from *Federalist* 63. To see the silent operation of time, we must engage it at some length. Speaking of the calming function of the Senate's six-year terms, Madison wrote:

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<sup>12</sup> See Hume, "Of Parties in General," in *Essays: Moral, Political, and Literary* (Indianapolis: Liberty Fund), 54-63.

<sup>13</sup> *The Federalist* No. 10:44.

<sup>14</sup> *The Federalist* No. 10:48.

<sup>15</sup> See Colleen Sheehan, *James Madison and the Spirit of Republican Self-Government* (New York: Cambridge University Press, 2009) and *The Mind of James Madison: The Legacy of Classical Republicanism* (New York: Cambridge University Press, 2015), and Martin Diamond, "Democracy and *The Federalist*: A Reconsideration of the Framers' Intent," *American Political Science Review* 53:1 (March 1959), 52-68. For an instructive rejoinder to Sheehan, see Alan Gibson, "Madison on Democracy, Property, and Civic Education: A Reply to Matthews and Sheehan," *The Review of Politics* 67:1 (Winter 2005), 69-76.

<sup>16</sup> Jeremy Bailey, *James Madison and Constitutional Imperfection* (New York: Cambridge University Press, 2015), 49.

As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers: so there are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth, can regain their authority over the public mind?<sup>17</sup>

The passage in many ways encapsulates Madison’s democratic thought. As we have already seen, the public sense both should and—regardless of whether one wants it to—“actually will” prevail in a free society, but only “ultimately.” But there are also “particular,” which is to say apparently unusual, moments when the public is seized by passion. These passions are “irregular,” and they yield measures which the people themselves later lament. In such moments, the role of senators is to “suspend the blow” the people contemplate inflicting against themselves “until”—and this “until” is vital—“reason, justice, and truth, can regain their authority over the public mind.” While Madison unquestionably counts on the good character of senators, it merits observation that one of the foremost qualities they need, *Federalist* 62 had said, is “firmness.” That is, they must be able to withstand public passions but not necessarily to enlighten them. All a senator needs to be able to do is cause his or her constituents to pause long enough for their reason to take hold, which is almost always well within the six-year timeframe on which senators operate. That is because “reason, justice, and truth” eventually “regain”—notice the assumption in *regain* that they had it in the first place—their hold over the public mind.

One particular dimension of the seasoning function of time was that it helped individuals elevate their long-term interests over their immediate desires. *Federalist* 42 recognized the need: “[T]he mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamours of an impatient avidity for immediate and immoderate gain.”<sup>18</sup> In 1786, writing to James Monroe about a proposed treaty that would have bargained away rights to the Mississippi River to Spain, Madison argued that it was wrong to equate the interest of the majority with political morality. But such a standard was obviously true, he continued, if interest meant “Ultimate happiness.” The problem was the “popular sense, as referring to immediate augmentation of property and wealth.” In this distorted sense, “it would be the interest of the majority in every community to despoil & enslave the minority of individuals.” Notice that it does *not* serve one’s “ultimate happiness” to oppress one’s neighbors, because in the fluid political situation of the United States—in which majorities and minorities would realign on different issues—someone who is in the majority today is apt to find him - or herself in the minority tomorrow.<sup>19</sup>

Madison’s 1791 *National Gazette* essay, “Public Opinion,” helps to fill out our understanding of his views on the topic by drawing attention to the question of when rather than whether majorities rule: “As there are cases where the public opinion must be obeyed by the government; so there are cases, where not being fixed, it may be influenced by the government. This distinction, if kept in view, would prevent or decide many debates on the respect due from

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<sup>17</sup> *The Federalist* No. 63:327.

<sup>18</sup> *The Federalist* No. 42:219.

<sup>19</sup> *Papers of James Madison* 9:140-42. We of course cannot avoid or excuse Madison’s blindness to the problem of chattel slavery in these passages, which very decided attached to a fixed minority.





the government to the sentiments of the people.”<sup>20</sup> In other words, only persistent majorities merited deference from government; transient majorities, far from commanding obedience, could be influenced by government. By this point, early in the operation of the constitutional regime, Madison was less concerned about the people being inflamed by passion than by public officials being so consumed. The party system would help to mobilize public opinion to counteract this phenomenon. Madison noted in the essay that in a large territory, the public’s “real opinion” was harder to “ascertain” or to “counterfeit.” When actually ascertained, it would be more respectable to individuals, which favored the authority of government. “For the same reason, the more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty.” Consequently, “[w]hatever facilitates a general intercourse of sentiments” — such as better transportation and communication — was “equivalent to a contraction of territorial limits, and is favorable to liberty, where these may be too extensive.”

By the end of Madison’s life, steamboats, railroads and the like had begun this contraction in earnest. Today, fueled by instant communication and rapid transportation, the contraction has proceeded almost to a singularity. That leaves us with a difficulty from the perspective of Madisonian theory about public opinion. In Madisonian terms, a contraction of territorial limits is not an unvarnished good. After the Philadelphia Convention, he had written to Thomas Jefferson, previewing the theory of *Federalist* 10 but warning that it operated only “within a sphere of a mean extent.” If a territory was too small, factions would form. If it was too large, it would be too difficult to mobilize public opinion against the regime when necessary.<sup>21</sup>

Today, in the era of segmented news, immediate communication and fungible facts, the terms of the workable mean may have changed. Have we, instead of becoming too large, in effect become, once more, too small?

## PRIVATE REALITIES

In October 2014, the conservative news site [www.cnsnews.com](http://www.cnsnews.com) published an article entitled, “Liberals More Likely to Unfriend Because of Opposing Views of Politics.”<sup>22</sup> The topic was a Pew Research Center study entitled “Political Polarization & Media Habits,” and the headline was evidence of precisely what the study found: Increasingly fragmented media are driving political polarization.<sup>23</sup> The study had shown that while liberals were, in fact, likelier to “unfriend” people on social media because of opposing views, conservatives were also less likely to encounter opposing views in the first place. Yet the headline and the story beneath it had focused on only one side of the story, illustrating a fact of today’s segmented media landscape; especially for the most opinionated consumers, the purpose of media is not to learn what we do not know but rather to confirm what we believe we already do.

The Pew study painted a portrait of Americans retreating into private realities in which their views go largely unchallenged. Some 47 percent of consistent conservatives gleaned information mainly from Fox News. While consistent liberals’ news-consumption habits reflected more diversity of sources, that appears to be (or conservatives would certainly attribute it to) at least in part a result of the greater number of sources available to their point of

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<sup>20</sup> *Papers of James Madison* 14:170.

<sup>21</sup> *Writings of James Madison* 5:31.

<sup>22</sup> Ali Meyer, “Liberals More Likely to Unfriend Because of Opposing Views on Politics,” CNS News (Oct. 21, 2014), <https://www.cnsnews.com/news/article/ali-meyer/liberals-more-likely-unfriend-because-opposing-views-politics>.

<sup>23</sup> Amy Mitchell, Jeffrey Gottfried, Jocelyn Kiley and Katerina Eva Matsa, “Political Polarization & Media Habits,” Pew Research Center, October 21, 2014, <http://www.journalism.org/2014/10/21/political-polarization-media-habits/>.



view. Social media appear to reinforce this ideological consistency even further. Nearly half of consistent conservatives said the political posts they encountered on Facebook mostly aligned with their views. On the other hand, 44 percent of consistent liberals, compared with 31 percent of consistent conservatives, had blocked a social media contact because of a political disagreement. The more consistent one was in one's political views, the less likely one was to encounter opposing perspectives, whether online or in conversation. About half of consistent liberals and two-third of consistent conservatives reported that most of their close friends agreed with them politically.

Here, too, we should beware nostalgia. But the era is not distant when "the news" meant most Americans watching one of three or four networks operating in largely the same format and at least purporting to present information objectively. This was the electronic equivalent of the public square, enabling conversations within the same broad universe of factual information. The reason to avoid nostalgia is that those networks were perennially accused of bias, the best cure for which is competition. But what has been gained in choice has been offset, at least in part, by the retreat from the public square into the privacy of media habits that can be arranged to exclude competing views or unwelcome information. As with the extended republic, there is a mean on both sides of which inconveniences lie.

Pew was not alone in finding that this mean was being strained. A 2017 study by John V. Duca and Jason L. Saving found that the fragmentation of media better predicted partisan polarization than income inequality.<sup>24</sup> Matthew Levendusky's research indicates that the effects of media segmentation are most intense at the partisan extremes: "Partisan media do not shift the center of the distribution of mass opinion; rather, they help elongate the tails of the distribution," making already heavily partisan consumers even more partisan.<sup>25</sup> This occurs in our personal lives as well: Bill Bishop's *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* showed that migration patterns reveal a preference for neighbors who share one another's political views.<sup>26</sup> These effects, again, are most pronounced at the edges. But the edges are also likeliest to vote, speak and donate, and as Levendusky has also noted, the fragmentation of media allows less partisan voters increasingly to tune out from politics altogether.<sup>27</sup>

It is not too much to say that the effect of this segmentation is to allow media consumers to live in worlds of their own making, increasingly isolated from opposing views. The coverage of similar events on networks from opposite perspectives could easily lead voters to opposite conclusions or, more likely, reinforce preexisting views that led them to choose the fragmented media in the first place. The cycle turns in on itself: A partisan voter chooses partisan media, which reinforces partisan views and further isolates the voter in turn. It seems easier for a media consumer who never encounters opposing views to demonize, and resist compromise with, those who hold them. The result is a hardening of the factional lines that Madison assumed would be shifting and fluid: There is even less incentive to compromise if one does not see oneself belonging to a different political alignment in the future. Truth itself has become partisan, a trend of which President Trump has been accused of being a culmination but is hardly the cause.<sup>28</sup>

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<sup>24</sup> John V. Duca and Jason L. Saving, "Income Inequality, Media Fragmentation, and Increased Political Polarization," *Contemporary Economic Policy* 35:2 (April 2017), 392-413.

<sup>25</sup> Matthew Levendusky, *How Partisan Media Polarize America* (Chicago: University of Chicago Press, 2013), 141. See also Natalie Jomini Stroud, *Niche News: The Politics of News Choice* (New York: Oxford University Press, 2011).

<sup>26</sup> Bill Bishop with Robert G. Cushing, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (Boston: Mariner Books, 2009).

<sup>27</sup> Levendusky, "Are Fox and MSNBC polarizing America?" *The Washington Post*, Jan. 3, 2014, [https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/03/are-fox-and-msnbc-polarizing-america/?utm\\_term=.c52f9c4e78f1](https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/03/are-fox-and-msnbc-polarizing-america/?utm_term=.c52f9c4e78f1).

<sup>28</sup> See Greg Weiner, "Trump and Truth," *National Affairs*, Spring 2017 (in which I argue that Trump's fabulism is inseparable from the postmodern assault on objective truth).

Recall in this context that Madison's particular concept of reason entailed the application of open minds to objective facts. If minds are never open, and facts are always fungible, Madisonian reason cannot operate. If all this is communicated at the speed of light, neither can Madison's device for dissipating the passions.

## POLITICS AT LIGHT SPEED

As a candidate for the Presidency, Donald Trump issued a "Contract with the American Voter" in which he promised a wide sweep of actions to "Make America Great Again" within his first 100 days in the White House.<sup>29</sup> They ranged from labeling China a currency manipulator to proposing a constitutional amendment imposing term limitations on Congress. He jumped the gun by 10 days when he claimed in Kenosha, Wisconsin, in April 2017 that "[n]o administration has accomplished more in the first 90 days."<sup>30</sup> Critics mocked this assertion, comparing President Trump's 100-day record to his predecessor Franklin Roosevelt's. The question is why the standard applies in the first place. To be sure, President Trump, like virtually every President since Roosevelt, has both invited the measure and been assessed according to it. But this completely separates governance from circumstance. President Roosevelt confronted a genuine emergency; despite his inaugural portrait of "American carnage," whatever challenges President Trump confronted are objectively difficult to liken to the Great Depression.

This is a function of both the media landscape and the public's appetite for instant political gratification. The levers of Madison's machinery of public opinion were made to operate gradually. Yet the media, obsessed with the "new" ("news," after all, is the plural of that word) has no gauge for prudent governance according to the needs of the time. This combination of public and media appetites has resulted in a standard of presidential success that I have formulated as  $s=c/t$ : Success is change divided by time.<sup>31</sup> The more a President causes to be different in a shorter amount of time, the more successful he or she is assumed to be. That sometimes might require conservation and others change does not matter: What is compelling is what is new.

The 100-day standard reflects expectations of rapid change that account neither for need nor for Madisonian institutions, which operate on the separate rhythms of all three branches of government. The result is a relentless disjunction between what the Madisonian system is able to deliver and our expectations of it. What appears to be gridlock tends to be the natural constitutional result of oscillating majorities who expect their views to be captured in an instant. On Madisonian assumptions, capturing their fluctuating views at any one moment would be arbitrary; a majority should prevail only after it has cohered for an interval appropriate to the gravity of the issue under consideration.

The irony is that the faster public opinions seem to form, the slower the gears of government seem to turn. The drawn-out saga of the Kavanaugh confirmation, in which opinions calcified nearly instantaneously, illustrates this point. The machinery may in part be paralyzed by the overwhelming inputs that result from the collapse of constitutional distance between constituents and representatives. The lack of legislative output, in other words, may result from excessive input. With an appropriate distance from it, there may be more room for reasoned debate and compromise. Under a constant assault of public opinion, though, positions are far likelier to harden before the faculty of reason, characterized by the open mind, can take hold. Moreover, the desire for instant results has altered the Madisonian regime by driving Americans away from Congress, which is deliberative by design, to the presidency and the courts, which are much abler to deliver quickly because they can do so by decree.

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<sup>29</sup> "Donald Trump's Contract with the American Voter," <https://assets.donaldjtrump.com/landings/contract/0-TRU-102316-Contractv02.pdf>

<sup>30</sup> "Remarks by President Trump on Buy American, Hire American Executive Order," The White House (April 18, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-buy-american-hire-american-executive-order/>.

<sup>31</sup> See Weiner, *Madison's Metronome*, op. cit., 139.

At the same time, the speed at which public opinions coalesce makes it difficult to believe they are formed on the basis of Madisonian reason rather than passion. On Madisonian assumptions, this should be impossible. Passions, we recall, are fleeting by nature, incapable of being sustained over long periods of time. In the analysis of *Federalist* 10, we should not be motivated by, for instance, attachments to political personalities because there is no means of feeding these passions. But now there is: Social media is both isolating—it allows us to avoid conflicting views—and incessantly nourishing. President Trump, whose use of Twitter costs nothing and connects him directly to his base without any mediating or skeptical intervention, has proved a master at it, never allowing passions wholly to subside without stoking them anew. Nor is this a partisan phenomenon. The bumper sticker popular among Hillary Clinton's 2016 supporters, "I'm With Her," likewise indicates an attachment to personality, as does the animus both she and Trump face, evident in the party-line calls for criminal investigations of each.

Public measures are increasingly evaluated in terms of their allegiance or opposition to such personalities. Republicans for whom free trade was a decades-long principle turned on it when President Trump claimed their party's mantle; longtime Democratic skeptics, detesting the President, became sudden defenders. A Pew poll showed a partisan chasm in attitudes toward free trade agreements opening in an astonishingly short period roughly, though not precisely, coinciding with President Trump's arrival on the political scene.<sup>32</sup> A similar split was evident in attitudes toward Russia.<sup>33</sup> This bears all the markings of *Federalist* 49's concern about questions being decided "in the spirit of preexisting parties" rather than on the basis of reason.

This compression of time, combined with the nationalization of politics, has also shortened congressional time horizons. For example, Senators whose six-year terms once supplied leisurely breaks from the vicissitudes of public opinion are now locked in a parliamentary-style and permanent two-year battle for the majority in the chamber. This is in no small part the result of the fact that narrow majorities place the majority within relentless reach. It is also a media phenomenon: The segmentation of news has had the ironic effect also of nationalizing it. Even as national cable outlets have proliferated, local news sources have steadily eroded. While local news still outpaces cable news for viewers<sup>34</sup>—though it is certainly not clear that local news is a primary source of information on national officeholders—growing numbers of American encounter their members of Congress as commentators on national platforms on national issues. They are not, that is, interpreting the local implications of these issues, but rather are remarking on national issues as national issues. Yuval Levin makes the persuasive case that part of Congress' institutional weakness results from the fact that its members on both sides see themselves as performers rather than legislators: "Simply put, many members of Congress have come to see themselves as players in a larger political ecosystem the point of which is not legislating or governing but rather engaging in a kind of performative outrage for a partisan audience."<sup>35</sup>

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<sup>32</sup> Bradley Jones, "Support for free trade agreements rebounds modestly, but wide partisan differences remain," *Pew Research Center* (April 25, 2017), [http://www.pewresearch.org/fact-tank/2017/04/25/support-for-free-trade-agreements-rebounds-modestly-but-wide-partisan-differences-remain/ft\\_17-04-24\\_freetrade\\_usviews\\_2/](http://www.pewresearch.org/fact-tank/2017/04/25/support-for-free-trade-agreements-rebounds-modestly-but-wide-partisan-differences-remain/ft_17-04-24_freetrade_usviews_2/).

<sup>33</sup> Rob Suls, "Share of Democrats calling Russia 'greatest danger' to U.S. is at its highest since end of Cold War," *Pew Research Center* (April 20, 2017), <http://www.pewresearch.org/fact-tank/2017/04/20/share-of-democrats-calling-russia-greatest-danger-to-u-s-it-its-highest-since-end-of-cold-war/>.

<sup>34</sup> *Pew Research Center*, "State of the News Media" (July 25, 2018), <http://www.pewresearch.org/topics/state-of-the-news-media/>.

<sup>35</sup> Yuval Levin, "Congress is Weak Because Its Members Want It to Be Weak," *Commentary*, June 2018, <https://www.commentarymagazine.com/articles/congress-weak-members-want-weak/>.



Madisonian architecture was not designed for such performances. It was designed for political leaders ambitious not for celebrity but rather for power. In this sense, it tapped into natural political impulses and did not need to draw on restraints from outside the mechanics of the Constitution, such as the morality of statesmen, to inhibit abuses. Once members of Congress see themselves as celebrities rather than legislators, the architecture begins to crumble. The challenge is not so much to accede to the media environment as to ask whether those exterior restraints are now necessary.

## MADISON AND VIRTUE

The velocity of political life was not a consideration in Madison's time because it was not an empirical possibility. The closest Madison came to predicting it was an 1833 letter expressing his satisfaction that the country could be territorially enlarged because "the improvements already made in internal navigation by canals & steamboats, and in turnpikes & railroads" had already made the country smaller than it was when the Constitution was enacted.<sup>36</sup> But "faster" is a far cry from "instantaneous." There is a reason retailers want shoppers to make impulse purchases on the spot: Even a moment away from the storeroom floor can often be sufficient to break the trance, what Madison would call the spell of "passion," which distorts the long-range judgment of "reason." In this sense, there is far more distance between even a moment's delay and the instantaneous than there was between the exceedingly slow pace of mail in 1787 and the comparatively fast circulation of communication by 1833.

The pace of communication has effectively made the formation and communication of public opinion simultaneous. As we have seen, the net result is that public opinion spreads more rapidly while politics works more slowly. Another is that public opinion is likelier to be inflamed by passion rather than rooted in reason, and these passions are sustainable in a way Madison assumed was impossible. At the same time, the fragmentation of media and the acceleration of social media have made it more difficult to exercise reason on the basis of widely recognized facts or to achieve consensus even as to the existence of the common good.

What, then, is to be done? Madisonian politics counsels us to take the world as we find it and adapt our politics to it, not to seek to break the former to the bridle of the latter. Instant technology is here, and what Madison said of conquering factions by curtailing freedom—that the cure would be worse than the disease, the equivalent of depriving the world of oxygen because it fueled fire<sup>37</sup>—would certainly be true of attempts to tame technology. The question, rather, is how we use it and whether we are willing to accord our elected representatives the distance they need to do their jobs.

Yet this presents us with something of a Madisonian dilemma. Madison is famously unwilling to rely on virtuous statesmen who act on disinterested, patriotic motives rather than interest to maintain the regime. Men are not angels, he warns us in *Federalist* 51.<sup>38</sup> But neither is Madison a thoroughgoing pessimist. As he reminds us in *Federalist* 55, such would make republican government impossible: "As there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust: so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form."<sup>39</sup>

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<sup>36</sup> *Writings of James Madison* 9:522.

<sup>37</sup> *The Federalist* No. 10.

<sup>38</sup> *The Federalist* No. 51:269.

<sup>39</sup> *The Federalist* No. 55:291.

The question is whether facts of life in Madison’s time—such as the gradual pace of communication or the checking power of the public square—can be recovered as virtues, which is to say moral commitments, in ours: patience on the one hand and a willingness to emerge from the confines of our ideological divides to confront, with genuinely receptive minds, ideas with which we are disposed to disagree. An equally important question is our capacity to place long-term interests ahead of short-term desires, including the desire for victory at all costs.

There are several possibilities for inculcating such virtues. At the level of citizens, civic education and modeling by public figures in these areas would be a start—no more, but no less either. Civic education is often mocked as a solution to political problems, but the fact is that it has proved remarkably effective at instilling, for example, an exaggerated emphasis on the Bill of Rights at the expense of the mechanics of the overall regime. If civic education can shape public opinion in this way, there is no reason it should be unable to shape it in other ways that the moment demands.

This civic education should emphasize the importance of deferred gratification in politics and discourage the reflex to blame corruption or supposed systemic flaws when the regime fails immediately to deliver the results we prefer. It, like all education, should also emphasize the vital need to expose oneself to opposing opinions rather than isolating with like-minded voices.

Institutionally, the challenge is to restore the motive of ambition, especially to Congress, the First Branch of the constitutional regime. I have raised the possibility of term limitation as one option not of punishing members of Congress but rather of attracting a different kind of legislator: one who knows he or she is operating on a shot clock and must therefore focus earnestly on the hard work of legislating.<sup>40</sup> Breaking the cycle of legislative careerism would make Congress less attractive to mere performers who seek office for motives other than the exercise of power. But term limitation is not a cure-all. Ultimately, the people must care not just whether but also how the constitutional system achieves their goals. They must punish members of Congress who seek to perform rather than legislate and reward those whose ambitions match what the Framers anticipated.

As the Union crumbled in 1861, Abraham Lincoln voiced “a patient confidence in the ultimate justice of the people.”<sup>41</sup> These modifiers—“patience” and “ultimate”—are equally important. They require not just patient leaders like Lincoln who are willing to allow public opinion to ripen—recognizing that the public was just “ultimately” but not necessarily “immediately”—but also patient citizens who are willing to recognize that their preferences should not be instantly translated into results.

## CONCLUSION

If we are unable to recover these virtues, we are consigned to forsaking the Madisonian regime. It is not enough to invoke its outward forms and say we still live under three branches of government, that the president must still be 35, or that Supreme Court justices still serve for life. It is the norms and the assumptions that operate in the interstices of the regime that bring it to life, and few of these are more important than Madison’s assumptions about time, reason, and passions. We might say of a people unwilling to practice the virtues of patience, intellectual openness and deferred gratification what Madison said in *Federalist* 55 of a people so consumed with ambition

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<sup>40</sup> Greg Weiner, “A Madisonian Reform,” *National Affairs*, No. 38, Winter 2019.

<sup>41</sup> Abraham Lincoln, “First Inaugural,” *Collected Works of Abraham Lincoln, Volume Four* (New Brunswick, N.J.: Rutgers University Press, 1953).



that they could not be trusted with power: “[T]he inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.”

It is difficult to imagine the chains of despotism being required to control contemporary America. But it is equally difficult to conjure a functioning Madisonian regime without the minimal virtue on which he relies.

