

# **Publius's Political Science**

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## **Introduction**

The purpose of the Federalist was to persuade New Yorkers to adopt the proposed constitution, mostly by predicting the ways the new institutions would work and arguing that these consequences would be acceptable even to those worried about an intrusive national government. In that sense it combined an exercise in positive (empirically based) political science with normative political theory to defend the novel constitutional scheme.

Nowadays political science students are taught to use theoretical models drawn from game theory, economics and sociology and to do laboratory or field experiments or complex statistical analysis of field or survey data. But the basic project of political science – using scientific observational methods to find empirical truths about political institutions and behavior -- has remained the same since the time of Aristotle. Leaving aside technical refinements, the methodology would be familiar to Aristotle as well: make use assumptions about human

psychology to deduce how institutions would work in various settings, evaluate these predictions empirically, and then appraise these results normatively. We start by sketching Publius's normative views and then take up "his" views about human nature.

We may assume that Hamilton's and Madison's normative views, about which the Federalist is somewhat informative, roughly bracket those of others at Philadelphia in the summer of 1787.<sup>1</sup> Roughly speaking, Hamilton wanted the new republic to be powerful enough to stand up to European powers on land and sea, and to secure internal social order. Such a government needed to be led by a decisive (energetic) president in order to exercise its powers effectively. Madison wanted a government in which people were secure in their liberties, which required a government that could not only provide internal and external security but also one in which it would be difficult for tyrannical legislative projects to take root. Hamilton thought that a powerful republic had to be economically dynamic with a flourishing industry and commerce and that the national government had to be committed to supporting these interests. Madison wanted a stable government within which diverse classes and regions could confidently pursue their own projects without too much interference from the others.

Both wanted the national government to be strong but we think they differed on the issue of how "dynamic" or decisive they wanted it to be. These differences may have been masked somewhat by their partial agreement as to how the powers of the new government would be

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<sup>1</sup> Banning has argued that "In 1787 as in 1798 Madison desired a well-constructed federal republic – not as Hamilton did, because nothing better could be secured – but because no other form of government seemed consistent with the American Revolution.... [Madison's] starting point for constitutional reform and his conception of the finished Constitution were never anything but incompatible with Hamilton's." Lance Banning, "The Hamiltonian Madison: A Reconsideration," The Virginia Magazine of History and Biography, Vol. 92, No. 1 (Jan., 1984), p. 9. As a statement of the normative aspirations we can agree with this. But we think that they may well have shared certain empirical beliefs in 1787-8 that they no longer did in 1791.

exercised. Both agreed that in a republican government, the legislature was the most powerful and dangerous branch – its power and danger was located in its “closeness” to the people. And both probably thought that the executive was “naturally” bound to execute and enforce congressional statutes (within constitutional limits). But Hamilton probably thought that Article II granted more room for creativity to the president than Madison did.

What about Publius’s political psychology? The Federalist abounds with generalizations about human nature which are deployed to exposit and justify features of the proposed constitution. In his overview of checks and balances in Federalist 51, Madison starts from an Augustinian description of humans after the fall: People are, he thought, generally motivated to pursue their material interests despite their (usually weaker) attraction to public purposes. This frailty explains why we accept government with coercive powers over us: “what is government itself but the greatest of all reflections on human nature. If men were angels there would be no need for government.” But he argued that the pull of material interests could, to some extent, be shaped or channeled by means of institutional design. It’s all a matter of lining up incentives in the right way. A good example of this is also in Federalist 51 “...the great security against a gradual concentration of the several powers in the same department, consists in giving those who administer each department, the ... constitutional means, and personal motives to resist encroachments of the others... Ambition must be made to counteract ambition. The interests of the man must be connected to the constitutional rights of the place.”<sup>2</sup>

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<sup>2</sup> Nowadays, scholars doubt that the Constitution’s design actually accomplished what Madison claimed. We agree. But that only means that the framers fell short as constitutional designers; not that the task itself is impossible or unattractive.

In Federalist 70 Hamilton paints a similarly pessimistic picture of human nature, though with more emphasis on men's vanity and passion than on their self interest. "Whenever two or persons are engaged in any common enterprise...there is always the danger of difference opinion... of personal emulation or and even animosity. From....all these causes, the most bitter dissensions are apt to spring....Men often oppose a thing merely because they had no agency in planning it...if they have been consulted and happen to disapprove, opposition becomes... an indispensable duty of self love." The "inconveniencies" of these tendencies "...must necessarily be submitted to in the formation of the legislature; but it is necessary and therefore unwise to introduce them into the constitution of the executive." But, like Madison, he thought that a smart constitutional engineer could make use of these tendencies: a single executive, knowing he would be held responsible, would be amply motivated to take responsibility for giving effect to the laws and protecting the nation from internal and external threats.<sup>3</sup>

Despite their shared pessimism about human nature, Madison and Hamilton presumed that the people of New York would weigh arguments for and against the proposed constitution rationally – at least in the context of abstract debates about ratification. Why else did they take up their publication project and endeavor to provide public interest oriented arguments for why New Yorkers should agree to the proposed constitution? Taken together their views of human nature resemble one that Albert Hirschman ascribed to other 18<sup>th</sup> century writers (like David Hume): people are motivated both by self interest and private passions but retained some rational capacity to pursue public purposes and to yield their private pursuits to common purposes if they were presented with sufficiently good reasons. This latter capacity – reasonableness – may not

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<sup>3</sup> Ironically, modern political science has tended to give better marks to Hamilton's design ideas than to Madison's. As we shall see, the constitutional scheme gives the president ample incentive to act responsibly – at least until the adoption of the 22<sup>nd</sup> Amendment.

be evenly distributed across the population however; likely it is somewhat more developed in some than others.

Though both writers were realistic about human nature we think there are important differences between their views. Madison was worried that self interested men would find it relatively easier and more attractive to pursue factional projects than the public good. Hamilton's worry main was that, even if they had strong reasons to cooperate, men would often find it hard to put their vanity aside to pursue common ends. In other words, both were centrally concerned with collective action problems but their worries were somewhat different. We think that this difference explains why Madison was much more interested than Hamilton was with making it hard for self seeking factions to capture the instruments of government. And it explains why Hamilton emphasized the vital role of the President who could (as a single official elected for a fixed and relatively long term) act effectively to take public regarding actions to implement congressional statutes and conduct foreign policy without needing to create supporting coalitions at every moment.

Publius's political science, therefore, seems to us to embody three main propositions: one is that collective action is difficult to achieve. The second is that a powerful and energetic republican government requires that the legislative power be prevented from its tendency to encroach on other departments (or states). The third is that the main difficulty in establishing stable republican rule is "The People" and so they must be kept from an active role in both day to day and constitutional politics.

Let's start with issues of collective action. It is hard for people to coordinate their actions to pursue public goods and so such goods will tend to be undersupplied.

There was a time when we were told that breaches, by the States, of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union. This language, at the present day, would appear as wild as a great part of what we now hear from the same quarter will be thought, when we shall have received further lessons from that best oracle of wisdom, experience. (Federalist 15).<sup>4</sup>

This principle – stated in its familiar or positive form -- is presented as a justification for giving Congress the authority to make laws binding directly on the people. Hamilton presents the case:

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES OR GOVERNMENTS, in their CORPORATE OR COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist.... the United States has an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option. (Federalist 15)

We can find the same principle invoked in other papers as well – explaining why federal taxation would be more efficient than that of the states, why the federal government is more likely than the states to build a Navy to protect American commerce than the separate states are, etc.

The collective action problem has another, dormant, aspect, however, which is key to Madison’s argument in Federalist 10. In its “dormant” guise the difficulties of collective action are not only a problem but a design opportunity. Not a bug but a feature, as the saying goes. By

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<sup>4</sup> Hamilton helpfully connected the problem to his view of human nature: It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power. Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses, for which they would blush in a private capacity.

forming the new government on a national scale, factions will face hard problems in coordinating their activities to pursue private regarding legislation. In that respect, the principle of collective action plays two roles in justifying the constitutional design: it supports the expansion of congressional powers to create public goods; and it justifies the formation of a large and heterogeneous republic.

The second issue has to do with the nature of the functional powers of a republican government. Publius thought that the legislature is the most powerful and dangerous branch and that it needed to be carefully regulated in order that the executive and judiciary departments could do their job. This required that the legislative power be divided and checked and, subject to review. But few such checks were needed on the powers of the weaker but no less essential branches. The point of having a distinct executive was to create an official who could detect dangers to the republic and act expeditiously, subject only to ex post accountability. The point of having judges was to apply the laws evenhandedly and to maintain the superiority of the constitution to ordinary statutes.

The third important idea is found in the tendency of republican governments to be excessively responsive to public opinion. This tendency is worrisome in every department as it would make the republic tumultuous and unstable, but it is more troubling in the executive and especially the judicial departments. Both men thought it inevitable that the legislature, even if it was composed of representatives, would have to be dependent on the people. Republican rule required that the legislature to be open to the people through elections and the operation of public opinion, and the new constitution recognized this dependence in various ways. But this dependence was appropriately modulated by bicameralism, by relatively long terms of office for the House and especially the Senate, making the election of Senators indirect, and in other ways

as well. Even with these requirements in place however, Madison believed that the legislature remained the most powerful and dangerous branch precisely because it was closest to the people, and so the constitution should be designed to regulate exercise of that power. The main idea is to elect representatives who would be older, better educated and generally more likely to be guided by public purposes than ordinary voters. But even if the best people fill legislative office, the constitution imposed further checks on the exercise of legislature powers (much more than for the other departments) in order to resist its tendency to draw other matters into the “legislative vortex.” These checks were especially needed if the new republic was to be governed by laws rather than men.

The essay will have four main sections: In part 1, we try to lay out some of Publius’s design principles for a constitution these are practical norms that are supported by beliefs about human behavior. Part 2 will examine Federalist 10 and show how it failed (in ways, incidentally, that Hamilton may have understood). Madison’s response was constitutional: to try to devise interpretive canons which would ameliorate the newly revealed weaknesses in the text. In Part 3 we show how Madison’s understanding of the Presidency – which he had termed a simple office easily controlled – turned out to be wrong and how he tried, in line with his response to the predictive failure of Federalist 10, to devise interpretive canons to try to cabin newly claimed executive authority. In Part 4 he tried similarly constitutional moves to counter the enactment of the Alien and Sedition Acts. Following the disappointing response of the states (and the nonresponse of the Court) to these unconstitutional statutes, he and Jefferson launched a campaign to appeal to “The People Themselves” in a ‘constitutional’ campaign that culminated in the Revolution of 1800. In each case the key event was the failure of an empirical prediction as to how constitutionally designed institutions would work. And in each case Madison’s



response was ‘constitutional’ in the small c sense (that Eskridge and Ferejohn develop in Republic of Statutes) rather than Constitutional in the Article V sense: again based on the revelation that the other states refused to play their appropriate constitutional Article V role even in the face of a direct and palpable attack on fundamental liberties.

## 1. Constitutional Theory and Practice

Political science has two aspects: it claims to possess some substantive principles or generalizations that are useful in making and criticizing political choices. Secondly it urges the use of systematic empirical methods as the best way to attain such generalizations. While both Hamilton and Madison had substantive beliefs about how institutions would work when writing their numbers in the Federalist, we think they also shared a methodological commitment to revisit and update their beliefs based on experience. They saw the new nation as embarked on an experiment to see if a stable and effective republican government was possible in the United States.<sup>5</sup> The proposed constitution represented the best attempt to establish such a government on the tricky political terrain of the new United States. The Federalist presents the constitutional project in this light and asks its readers to understand the new design and to see that it does not threaten their attachments to liberty and self government, and suggesting that it would remain open to modification of things did not as they expected.

We assume that, as “experimentalists” in this modest sense, Madison and Hamilton could not take all of their beliefs as open to revision at the same time. Like any experimental scientist, they had to hold held certain beliefs constant as “maintained hypotheses” while testing others.

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<sup>5</sup> We do not doubt that normative beliefs may also be rationally revised in light of experience. We may always question what it makes sense to want or aim at as well as how best to attain what we want. Could either of us rationally pursue a career in theoretical physics?

We doubt, for example, that either would have been prepared to conclude that his foundational theory of human nature was wrong even if the proposed institutions did not work as expected. In Madison's case these views may have been drawn from Calvinist/Augustan teachings (or not) but they found ample support in his everyday frustrations as a political leader in the state and national legislatures. These views are stated pretty clearly in *Federalist*: humans are not angels and that the reason to have government is precisely man's fallen nature. We very much doubt that he would have been willing to surrender those opinions after 1791 even if men had begun behaving angelically. More likely he would have ascribed the change to a well designed constitution.

Where did their substantive beliefs come from? They seem mostly to have been derived from their understandings of the experiences of the young states and national government under the Articles, as well as beliefs based on the experiences of other republican governments (historically or comparatively). Many of these ideas are canvassed in the *Federalist*, some drawn directly from experience and others from the "greatest adepts" of political science. We think it was sensible to refer to the works of the pioneers of comparative politics to whom the framers would have had access: Aristotle, Polybius, Machiavelli, Hume, and of course, the venerable Montesquieu.<sup>6</sup> These men, like the framers, had diverse normative aspirations as well as distinctive beliefs. Publius did not of course copy the substantive ideas of these thinkers but used them as starting points for understanding more recent empirical experiences. The ideas drawn from the "greatest adepts" probably provided some initial guidance to the complicated political problems that the founding generation faced and helped them to develop likely institutional

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<sup>6</sup> This is no doubt too short a list. We could well include Locke and Rousseau for their theories of consent as well as their endorsements of the use of majority rule.

remedies that could then be tested in the real world of political experience. Of course, they (and the American people) were playing for keeps and, for all that Article V says, it would not be all that easy to redesign flawed constitutional institutions on the fly. Indeed, Madison made a powerful argument at the time to the effect that such efforts, if embarked on prematurely, may not be wise. He may have lived to regret that.

Evidently, by the end of the Convention both Madison and Hamilton thought that the institutions agreed to in the proposed constitution were reasonably well adapted to the ends each of them sought (however different these ends may have been).<sup>7</sup> The Constitution provided ample new legislative powers to the national government, a single executive, and independent courts, while preserving much control over local affairs to the states. It also provided protections against congressional intrusions on the other powers and, to an extent, against the states too. If they could get states to agree, they would have an opportunity to learn from experience about how it is their proposed institutions would work and to change them if they did not. To the extent that institutions did not work as expected, they could learn about which of their beliefs were false. This would be a matter of testing, in the laboratory of experience, the design adopted in Philadelphia and agreed to in the state conventions, and seeing how it worked.

If we consider six short articles -- four numbers from the Federalist 10, 49, 51 and 63, written by Madison and two of Hamilton's most important pieces (Federalist 70 and 78) -- we can see that each one articulates a practical norm of constitutional design and seems to rest on some underlying proposition of political science and is used to justify some aspect of the Constitution or some critique of the Articles or state constitutions.

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<sup>7</sup> Though Madison was skeptical about the effects of the loss of the Congressional negative on state legislation.

1. the republic ought to be large and diverse; this will make it difficult for factions to form and capture governmental institutions (Federalist 10)
2. the rule of law requires that the powers of the departments ought to be separated to some extent, which requires that the weaker departments be given the means to defend themselves against encroachments by the legislature which is the strongest and most dangerous department in a republic (Federalist 51)
3. Government should be conducted by elected representatives and their appointees because a well structured election process will assure high quality representatives; the people themselves should have no direct role either in the operation of the government or the revision of the Constitution; because “the people” acting together (as a mob) will be vulnerable to appeals of interest and passions rather than public purposes (Federalist 49 and 63).
4. the executive authority ought to be exercised by a single person for fixed (lengthy) periods: because otherwise the laws will be badly executed and have little effect on the conduct of public or private affairs (Federalist 70).
5. constitutional norms ought to be enforced by independent judges: otherwise the constitution would be no constraint on the conduct of government (Federalist 78).

We think, as we will note in passing, that these practical “design” norms pervade other numbers as well though in different ways. Generally speaking they justify the creation of a representative government with stably separated powers, on a large scale, with large election districts, and regular but not very frequent elections.

To many political scientists, Madison’s reputation as a constitutional designer rests substantially on his writings on checks and balances and specifically in **Federalist 51**. In that

number, we find his defense of the system of checks and balances embodied in the proposed Constitution. There, he lays out his principles of institutional design: the justification of government itself is human imperfection (if men were angels there would be no need for it). He emphasizes the importance of exploiting these imperfections in service of constructing and sustaining good government: using ambition against ambition in order to restrain the encroachments by the various departments of governments. In that essay he also expresses his conviction that in a republic, it is the legislative power that the most dangerous to control (even if the most essential). So, in **Federalist** 51, he emphasizes the need for dividing that power both internally, and between Congress and the other branches. There too he worried that even these checking measures might not be adequate to protect the other branches from what he thought would be the inevitable encroachments of the legislature.

The structure of the Constitution reflects these assumptions. The relatively greater length and detail of Article I compared with Articles II and III is only the most obvious manifestation of this fact. Article I, first all, identifies the powers of the federal government with the legislative power. The restrictions on the power of the national government are, in effect, restrictions on the power of the legislature. Some of these restrictions – those found in the enumeration of powers in Section 8 of article I for example – Madison was later to call “parchment barriers” and some were structural such as the division of legislative powers between the House and Senate and the provision for a limited presidential veto. In comparison, Articles II and III are both shorter and the qualifications they impose on executive and judicial powers are less precise. Given Madison’s assumptions, and those of the other framers, this imprecision with respect to the executive and the judiciary is understandable. These were simply less powerful and less

dangerous departments and it was not nearly as important to limit their authority as it was to control what the legislature could do.

## 2. Failures of Federalist 10

The debate over the ratification of the Constitution during the late 1780s and the Constitution's proper interpretation during the 1790s rested on the assumption that governmental scale affected democratic accountability. To the opponents of the Constitution, a stronger national government ruling over a larger population and the seaboard of an entire continent would be less democratically accountable than state governments ruling over smaller populations and territories. To these critics of the Constitution, democracy suffered from diseconomies of scale. James Madison resisted this distrust of large-scale democracies during the ratification debates.

The opposition to the proposed Constitution (confusingly dubbed "Anti-Federalists" by the Constitution's supporters on the theory that the Constitution was "federal" in character) generally were located further from centers of, and less deeply involved in, trans-Atlantic commerce and finance than the Constitution's supporters (although the Constitution enjoyed some western support from frontier areas seeking more effective protection from Indian raids).<sup>8</sup> Suspicious of commercial wheeler-dealers in the coastal cities, the Anti-Federalists inveighed against "great men," arguing that the new plan for a continental-scaled republic would be

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<sup>8</sup> Jackson Turner Main, Political Parties Before the Constitution 358, 388 (1973) (noting that Anti-Federalists tended to be "agrarian-localist" rather than "commercial cosmopolitan" leaders). Donald Lutz notes that Main's anti-cosmopolitan explanation for Anti-Federalist opposition to the Constitution cannot explain the Constitution's support from the inhabitants in some frontier areas of the states. See Donald S. Lutz, *Federalist versus Antifederalist* in Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions 171, 175-86 (1980).

controlled by a metropolitan elite of “natural aristocrats,” who would disempower persons farther from centers of commerce and finance.<sup>9</sup> The proposed Constitution, they thought, had been drafted and promoted by the Philadelphia magnate Robert Morris’ close allies, James Wilson, Gouverneur Morris, and Alexander Hamilton: the sort of metropolitan elites that, as “Agrippa,” an opponent of the Constitution complained, “have never shown themselves capable of that generous system of policy which is founded in the affections of freemen.”<sup>10</sup>

The Anti-Federalists’ case against a stronger national government, however, did not rest on a merely *ad hominem* attack on the proposed Constitution based on its elite parentage. They also purported to offer a more general theory of scale and popular control. Under this theory, as republics increase in territory and population, they tend to lose their republican character, becoming dominated by elites using corruption to control the ostensibly representative legislature. Anti-Federalists supported this theory by an analogy between the proposed Congress and the British Parliament, noting that “when it was proposed by some theorist that we should be represented in Parliament, we uniformly declared that one legislature could not represent so many interests...”<sup>11</sup> They also frequently invoked the “small republic” theory of Charles de Secondat, Baron de Montesquieu, set forth in his 1748 classic, *The Spirit of the Laws*. Montesquieu had stated that “[i]t is natural for a republic to have only a small territory,” because, “[i]n an extensive republic the public good is sacrificed to a thousand private views; it is subordinate to exceptions, and depends on accidents.” By contrast, according to Montesquieu,

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<sup>9</sup> James H. Hutson, *Country, Court, and Constitution: Antifederalism and the Historians*, 38 *Wm. & Mary Q.* 337, 340 (1981)

<sup>10</sup> “Agrippa,” Letter XI, *Mass. Gazette*, January 8th, 1788.

<sup>11</sup> Letter XI.

“[i]n a small [republic], the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent, and of course are less protected.”<sup>12</sup>

Colonists of British North America had cited Montesquieu more frequently than any other author outside the Bible,<sup>13</sup> so the opponents of the Constitution could feel that they were on safe ground in declaring that “the ablest writers on the subject” agreed that “no extensive empire can be governed upon republican principles.”<sup>14</sup>

Neither the analogy to Parliament nor the invocation of Montesquieu, however, was an overwhelming argument against continental-scale democracy. Unlike Parliament, the proposed Congress would not straddle two constituencies separated by the Atlantic Ocean: Why then could Congress not represent Americans just as well as the English Parliament represented the English? Likewise, Montesquieu’s analysis of ancient city-states and Swiss cantons seemed wholly inapplicable to North American politics. As Hamilton noted in *Federalist #9*, the theory proved too much: States like Pennsylvania and New York were already far too large in territory, population, and diversity of interests to meet Montesquieu’s definition of a “small” republic. Each member of the Pennsylvania and New York legislatures was elected by over 1,000 electors, and these electoral districts divided up a vast diversity of ethnic groups, social classes, occupations, and geographic sections. The notion that the constituents of Pennsylvania, in particular, formed some tightly knit and socially homogenous band of homespun republicans akin to ancient Spartans or Romans was risible in light of the vehement division between town

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<sup>12</sup> Charles de Secondat, Baron of Montesquieu, *The Spirit of the Laws* Book VIII, chapter 16 (1748)(Thomas Nugent trans. 2<sup>nd</sup> ed. 1752).

<sup>13</sup> Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 Am. Pol. Sci. Rev. 189 (1984).

<sup>14</sup> “Agrippa,” Letter IV, Mass. Gazette, December 3<sup>rd</sup>, 1787 (Invoking “the ablest writers on the subject”).



and country, east and west, Quaker, German, and Scots Irish, manifested by the fight over the Bank of North America in the 1780s.

What else besides the “celebrated Montesquieu” could the Anti-Federalists offer? Anti-Federalists’ repeated assertions that larger jurisdictions promote the power of the “natural aristocracy” because the “democratical” part of the population would be unable to be elected from large electoral districts in a continental-scaled democracy,<sup>15</sup> can seem like windy dogmatism. (One witty Federalist critic mocked the repetitiveness of Anti-Federalist rhetoric by publishing a “recipe” for how to write an Anti-Federalist tract, advising would-be authors to use “WELL-BORN nine times—*Aristocracy* eighteen times –... *Great men*, six times”<sup>16</sup>). The connection between constituency size and elites’ electoral power is, after all, a complex and empirically contingent matter, depending on the particulars of voter information and organization and the scale economies (or lack thereof) in communication. There are circumstances under which it is plausible to believe that the likelihood of a wealthier resident’s casting the deciding vote in an election increases with the size of the constituency. For instance, voters with lower incomes or educational attainment might be more quickly deterred by the longer odds of casting the decisive vote in an election in a larger constituency.<sup>17</sup> Political participation aside from voting (for instance, showing up at public meetings or communicating with one’s representative) might also be easier in jurisdictions with fewer people competing for each representative’s attention: Some evidence suggests that participatory activities other than voting increases as the

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<sup>15</sup> See, e.g., “The Federal Farmer,” Letter VII, December 31<sup>st</sup>, 1787; “Brutus,” Letter III, November 11<sup>th</sup>, 1787.

<sup>16</sup> Quoted in Saul Cornell, *The Other Founders* at 81.

<sup>17</sup> For one such theory, see Rainald Borck, *Jurisdiction Size, Political participation, and the Allocation of Resources*, 113 *Pub. Choice* 251, 256-57, 260 (2002).

scale of jurisdictions decline.<sup>18</sup> There are, however, rival and equally plausible theories suggesting that, under different factual assumptions, the wealthy benefit from *reductions* in the size of voting constituencies.<sup>19</sup> If there are scale economies in communication, then it will be cheaper for voters to acquire information in a larger and more heterogeneous jurisdiction that can support a larger number of newspapers and interest groups.<sup>20</sup> On this view, one might infer that, partisan conflict being less likely in a smaller and more homogenous jurisdiction, reductions in the scale of government also increase the costs of acquiring political information and mobilizing the public.<sup>21</sup> To make matters more complex, size might affect the costs of politics in both directions simultaneously, by lowering the costs of showing up (because gaining access to representatives in smaller jurisdictions is less costly) but increasing the costs of acquiring information (because no one mobilizes the public to show up where there are few conflicting interest groups).

Putting aside general political theory, it was not obvious that small-scale constituencies always benefited elites in the Anti-Federalists' own political world. The representatives from New York's state legislative districts occupying the east bank of the Hudson River were, for instance, largely controlled by the magnates who owned the enormous manor lands on which large numbers of voters worked as tenants.<sup>22</sup> Increasing the size of such districts could hardly increase the power of the dynasties of Livingstons, Rennessears, and De Lanceys who handpicked their delegates to the state assembly, and it is possible that increasing district size

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<sup>18</sup> J. Eric Oliver, *Democracy in Suburbia* 63-65 (2001).

<sup>19</sup> Pranab Bardhan, *Decentralization of Governance and Development*, 16 *J. of Econ. Persp.* 185 (2002).

<sup>20</sup> J.S. Mill, *Considerations on Representative Government* in 19 *Collected Works of John Stuart Mill* 542 (John M. Robson, ed. 1977), available at <http://oll.libertyfund.org/titles/234>

<sup>21</sup> Grant McConnell, *Private Power and American Democracy* (1967); John Gerring & Dominic Zarecki, *Size and Democracy Revisited* (Working Paper 2012).

<sup>22</sup> Richard Beeman, *Varieties of Political Experience*....

might have fostered more competition among landed elites for voters' support. How, then, can one explain the Anti-Federalists' repeated and confident assertions the "natural aristocracy will be elected" in the larger electoral districts of the proposed national Congress?

To understand and appreciate Anti-Federalists' polemics, one should not view them as abstract propositions of political science true in all times and places. Instead, one must read them for what they were – period-specific rhetoric about the relative political strengths of the landed and "monied" interests. In the eyes of the Anti-Federalists, the Constitution was being promoted by a financial and commercial interest closely connected the trans-Atlantic world. The Anti-Federalists assumed that large electoral districts and a large heterogeneous republic would benefit this interest – the "natural aristocracy," in their phrase – because financiers and merchants belonged to networks rooted in liquid, mobile assets unmoored to any particular physical space. This relationship between size, democracy, finance, and land was well-stated by "Cornelius," an anonymous Anti-Federalist pamphleteer. Elections under the Constitution would involve "competition between the landed and mercantile interests" in which the latter would beat the former, because "[t]he citizens in the seaport towns are numerous; they live compact; their interests are one; there is a constant connection and intercourse between them; they can, on any occasion, centre their votes where they please." Already tied together by networks of newspapers, bills of exchange, relationships with English merchants and shipping firms, the "mercantile interests" in the seaport faced lower organizational costs in rallying their resources "where they please," while "the landed interest," according to "Cornelius," are scattered far and wide" and "have but little intercourse and connection with each other" such that "carrying elections of this kind" -- that is, elections that transcend the jurisdiction in which the gentry's

real estate is located – “is intirely out of their way.”<sup>23</sup> Cornelius’ complaint was echoed repeatedly by other Anti-Federalist pamphleteers like “Brutus,” who argued that the natural aristocracy “constantly unite their efforts to procure men of their own rank to be elected ... concent[rating] all their force in every part of the state into one point, and by acting together, will most generally carry their election.”<sup>24</sup> Likewise, the “Federal Farmer” asserted that the natural aristocracy “associate more extensively” while the middling sort “are not so much used to combining great objects.”<sup>25</sup>

The “Federal Farmer” ought to have known. The pseudonymous author has been most plausibly identified as Melancton Smith, a Dutchess County landowner and merchant who commanded a Dutchess County regiment during the Revolutionary War and acquired substantial land from the confiscated estates of Loyalists.<sup>26</sup> Smith’s power was rooted in the political networks of Poughkeepsie and Dutchess County, where he served as County Sheriff as well as a member of a Revolutionary commission to inquire into the loyalties of neighbors to detect Tory propensities. While he had ties to New York City (where he moved after 1787), he commanded little support in the financier’s metropolis, losing the election as New York City’s delegate to New York’s state ratifying convention, even as he won as Poughkeepsie’s delegate. The Federalists took New York City twenty to one.<sup>27</sup>

The Federalist leadership did not dispute the Anti-Federalists’ argument that the Constitution strengthened the influence of a cosmopolitan trans-Atlantic elite. Their argument

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<sup>23</sup> Letter of “Cornelius,” *Hampshire Chronicle*, December II and 18, 1787, reprinted in Samuel Bannister Harding, *The Contest over the Ratification of the Constitution* 117, 123 (1896).

<sup>24</sup> Brutus, Letter III.

<sup>25</sup> Federal Farmer, Letter VII.

<sup>26</sup> Robert Webking, *Melancton Smith and Letters from the Federal Farmer*, 44 *Wm. & Mary Q.* 510 (1987)

<sup>27</sup> Robin Brooks, *Alexander Hamilton, Melancton Smith, and the Ratification of the Constitution in New York*, 24 *Wm. & Mary Q.* 346, 346-47 (1967).

in favor of the Constitution was the mirror image of the Anti-Federalists' complaints, merely reversing the value signs. Madison agreed, for instance, that larger electoral districts would change the character of elections by promoting elections of "men who possess the most attractive merit and the most diffusive and established characters." By "diffusive ... characters," Madison meant reputations (paradigmatically, General George Washington's) diffused broadly through national networks of literary fame, military service, law, or commerce. Madison differed from the Federal Farmer in commending rather than criticizing large districts for screening out persons whose names and deeds were not so "diffused." Madison's factual assumptions about "diffusive... characters" are essentially similar to the Federal Farmer's claim that larger districts would promote the election of persons who "associate more extensively" compared to the owners of "middling and small estates." Likewise, Madison's famous argument that demographic heterogeneity would temper majoritarian faction rested on the idea that different interests had different capacities to cooperate with each other. Some groups would find it "more difficult ... to discover their own strength, and to act in unison with each other" in a large republic with a variety of interests, but other groups, championing "enlightened views and virtuous sentiments," would be relatively unimpeded by the challenge of assembling a majority. Madison does not explain how those public-spirited leaders are able to get anything done when the demagogues are stymied by multiple interests. It is not, however, a heroic inference that, in Madison's implicit view, owners of finance capital and other creditors would be more tightly united in their pursuit of repayment according to norms of international credit than frontier populists were by their "improper or wicked project[s]" such as William Findley's proposal to re-negotiate the charter of the Bank of North America. The former were unified by ties of commerce and correspondence; the latter, divided by section. Put another way, Madison

concluded with “Cornelius” that financiers promoting “great and national objects” like a national market, powerful military, and costly infrastructure would be better able to “centre their votes where they please” in a large and heterogeneous republic than the gentry. Federalists simply regarded this differential ability as beneficial rather than corrupting.

Both Anti-Federalists and Federalists, in sum, pressed for different versions of federalism as a means for preserving or diluting a system of gentry republican government. For state-builders like Robert Morris, Alexander Hamilton, and James Madison, diluting the power of the gentry was necessary to promote long-term investments in infrastructure and defense. Networks of bondholders and financiers would supply a counter-balance to secure such investments from gentry’s suspicion and even change of heart that would undermine confidence in re-payment. For Anti-Federalists like the Federal Farmer, such networks were corrupting, because they undermined the power of the yeomanry. By strictly limiting the powers of the central government over finance, the Articles of Confederation insured that these middling property owners would exercise the lion’s share of power. By expanding the central governments’ powers, the proposed Constitution replaced this source of stability and commonsense with enterprising financiers, their urbane lawyers, and their gullible investors. The Anti-Federalists’ constitutional theory of federalism, in other words, makes no sense unless read in the light of their commitment to a particular type of landowner rule and their fear of a particular type of agency costs that would disrupt that rule.

The Anti-Federalists, of course, lost the battle over *whether* Congress’ powers should be expanded. The ratification of the Constitution’s additional grants of taxing, regulatory, and “necessary and proper” implied powers, however, did not resolve *how* Congress’ powers should be expanded. Madison and Jefferson struggled unsuccessfully to control the answer to this

question and, after several unsuccessful efforts to devise a canon for construing the Necessary and Proper Clause, Madison soon embraced the Anti Federalist fear of large-scale democracy after the Constitution's adoption, arguing that a broad interpretation of the new national government's powers would strengthen elites at the expense of ordinary farmers.

Hamilton had fired the opening shots. His proposal that the Congress confer a federal charter on the First Bank of the United States went to the heart of the unresolved dispute between the Anti-Federalists and Federalists over the scope of Congress' corporation-chartering powers: It seemed custom-tailored to arouse the gentry republicans' fears about financiers' influencing government for private gain. Private investors would own 80% of the bank's shares, and the bank would enjoy the exclusive privilege of holding deposits of federal revenue without paying interest, using the revenue as security to make loans and create a *de facto* federal currency through such commercial paper.

This proposal for federally supporting but not controlling private financiers immediately mobilized gentry opponents of finance capital. In particular, it provoked a rupture between Hamilton and James Madison that transformed a cordial friendship and close political alliance into bitter political and personal enmity. Madison had a cultured tidewater Virginian's preference for the national leadership by an educated elite – but, as a Virginian, he favored a *gentry* elite of landed proprietors, not an elite of monied and Anglophilic stock-jobbers. Like other Virginian planters, Madison felt a viscerally Anglophobic revulsion at an English-style financial revolution in the New World. Often deeply mired in debt to English merchants, Virginians had imbibed Country ideas about the threat of finance to citizens' political and

economic independence.<sup>28</sup> Hamilton’s plan triggered emotional as well as self-interested advocacy of these ideas.<sup>29</sup>

The legal case against the Bank was summarized by three leading Virginian politicians’ constitutional expositions— a speech by James Madison (in the House of Representatives) and memos by Edmund Randolph (President Washington’s Attorney General) and Thomas Jefferson (Washington’s Secretary of State).<sup>30</sup> All three opinions started from the textual premise that the enumeration of congressional powers in Article I, §8 implicitly barred additional implied powers that strayed too far from the express powers, because such powers by implication would lead to “consolidation” – meaning, aggrandizement of all power by the federal government .<sup>31</sup> Beyond this cursory reliance on Article I’s enumeration, however, the Virginians’ arguments did not turn on textual semantics but instead on a new rule of construction derived from pre-constitutional political theory – the principle of anti-corporate federalism. Promoted by Anti-Federalists as a reason to reject the proposed Constitution altogether, anti-corporate federalism was now dusted off by the Bank’s Virginian opponents as a reason to read the Constitution’s new grants of powers narrowly.

The purely textual portions of Madison’s argument, in particular, were almost self-consciously thin. His semantic points rested entirely on the idea that the detailed character of

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<sup>28</sup> See generally Stanley Elkins & Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800*, at 133-161 (1993).

<sup>29</sup> *Id.* at 113-114.

<sup>30</sup> Jefferson’s legal opinion can be found at 19 papers of Thomas Jefferson 275, 279-80 (1974). Randolph’s opinion can be found in H. Jefferson Powell, *The Constitution and the Attorneys General* 3-9 (1999). Madison’s speech on the floor of the House can be found in James Madison, *Writings* 480-490 (Jack Rakove ed. 1999). For a general account of the debate, see Stanley Elkins & Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800*, at 229-234 (1993).

<sup>31</sup> James Madison, at \_\_\_\_\_. In Jefferson’s words, “to take a single step beyond the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of definition.”



Article I's enumeration of powers suggested a rule of construction requiring a very close link between express and implied powers. Otherwise, the enumeration of express powers that were also convenient means for executing other enumerated powers would be redundant. For instance, it was unnecessary for Article I to enumerate both the power to punish counterfeiters and the power to coin money if Congress already enjoyed all implied powers that were merely convenient or helpful for carrying out express powers, because the power to punish counterfeiters was obviously helpful to the goal of coining money. "The latitude of interpretation required by the [Bank] bill," Madison concluded, was "condemned by the rule furnished by the constitution itself."

The problem with this textual argument, however, was that it both assumed too much and proved too much. The argument assumed that the Constitution was governed by an anti-redundancy norm, such that none of the enumerated powers contained in the list in Article I was superfluous. Madison himself, however, acknowledged that such an assumption was heroic: "It is not pretended that every insertion or omission in the constitution is the effect of systematic attention," he conceded: "this is not the character of any human work, particularly the work of a body of men." Perhaps narrow powers like the power to punish counterfeiters were added out of an excess of caution, to illustrate rather than exhaust the type of implied powers permitted elsewhere by the Necessary and Proper clause. In any case, if Madison's anti-redundancy canon barred any and all interpretations that made items on Article I's list of power redundant, then his own construction of the Necessary and Proper clause was itself barred, because Madison acknowledged that the clause merely made plain implied powers that would exist in its absence. Moreover, the invocation of a canon against redundancy proved too much, because it would

render unconstitutional many uncontroversial measures that the First Congress had already enacted and that Madison himself had supported. [Quote from Fisher Ames]

The critical question, therefore, was whether there was some special reason, above and beyond the enumeration of powers, to invoke an especially strict version of the anti-redundancy canon where corporations and especially banks were concerned. Madison's answer to this question rested not on any semantic analysis of constitutional text but rather frankly extra-textual considerations of policy. The load-bearing parts of his argument were canons of construction requiring the interpreter to resolve textual ambiguities by the effects of an interpretation.<sup>32</sup> In particular, Madison urged that the "importance" of an implied power should weigh against its being accepted as "necessary and proper" for the execution of enumerated powers, because "the degree of [a power's] importance" determines "the probability or improbability of its being left to construction." Madison construed the Necessary and Proper clause to exclude an implied power to charter a corporation like the First Bank, because such a power was "a great and important power," which, because of its greatness and importance, must be "evidently and necessarily involved in an express power."

But what precisely made the power to charter a bank so "great" and "important"? Madison invoked all of the Country faction fears of financial corporations, "dilat[ing] on the great and extensive influence that incorporated societies had on public affairs in Europe." The language could have been straight from Cato, Defoe, Swift, Bolingbroke, or any other Country writer inveighing against the Bank of England. "They are powerful machines," Madison declared, "that have always been found competent to effect objects on principle in a great

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<sup>32</sup> "Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences."

measure independent of the people.” In particular, Madison saw special danger in the Congress’ proposed grant of land-purchasing authority and exclusive banking privileges to the First Bank. “Congress themselves could not purchase lands within a state without the consent of its legislature,” Madison noted: “How could they delegate a power to others which they did not possess themselves?” The power to act as the United States’ exclusive fiscal agent for twenty years “takes from our successors, who have equal rights with ourselves, and with the aid of experience will be more capable of deciding on the subject, an opportunity of exercising that right for an immoderate term.” Moreover, the proposal “involves a monopoly, which affects the equal rights of every citizen.”

What, then, made Madison’s proposed canon against “great and important” implied powers a constitutional position rather than simply an ordinary effort to defeat a legislative proposal opposed by his faction? Consider two aspects of Madison’s theory that gave it a constitutional character – its character as a remedy for Congress’ institutional unreliability and its simple, categorical nature as a bright-line rule. First, Madison’s canon was intended to change the structure of democratic decision-making, by constraining Congress’ power to cater to monied interests. The idea that legislatures of large republic were susceptible to control by financiers was a familiar Anti-Federalist idea: Because the nation’s population was physically scattered, demographically heterogeneous, and large, Congress would not, unaided by some structural limit, accurately gauge public opinion or resist the blandishments of financiers and their stock-subscriber allies. Madison endorsed this Anti-Federalist position about the effects of scale on democracy soon after he vote lost the vote on the First Bank, arguing in “Consolidation,” a short essay published for Freneau’s *National Gazette*, a newly founded organ for the newly founded Democratic-Republican Party, that the consolidation of the states into a

single national government would vitiate the expression of public opinion. “[N]either the voice or the sense of twenty millions of people, spread through so many latitudes as are comprehended within the United States,” Madison wrote, “could ever be combined or called into effect, if deprived of those local organs, through which both can now be conveyed.”<sup>33</sup> Unable to act together at a national scale, citizens would soon cease to make the futile effort: “[T]he impossibility of acting together, might be succeeded . . . at length by a universal silence and insensibility,” Madison warned, “leaving that whole government to that self-directed course, which, it must be owned, is the natural propensity of every government.”<sup>34</sup> Scale thus threatened to eliminate the expression of public opinion altogether: “The larger a country, the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited,” Madison wrote in a second essay in the *Gazette*.<sup>35</sup> Large scale also demoralized potential opposition to the national government, because “the more extensive the country, the more insignificant is each individual in his own eyes,” a psychological state of impotence “unfavorable to liberty.”

In short, Madison flipped his argument in *Federalist #10* on its head: He continued to maintain that demographic heterogeneity and populousness impeded the mobilization of majorities, but now he regarded this impediment as a fault to be remedied, not “a republican remedy for the diseases most incident to republican government.” The problem was exacerbated by the disproportionate burden that size imposed on the landed interests as compared to the monied interest. As “Brutus,” another essayist in Freneau’s *Gazette*, argued, citizens outside the class of “speculators” “liv[ed] remote from the scenes of speculation” and

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<sup>33</sup> *Consolidation*, Nat’l Gazette, December 5<sup>th</sup>, 1791.

<sup>34</sup> *Id.*

<sup>35</sup> “Public Opinion,” *National Gazette*, December 19<sup>th</sup>, 1791.

had “neither ... time or opportunity to acquire [stock in the Bank.]”<sup>36</sup> Even the so-called Compromise of 1790 under which Jefferson and his followers acquiesced in the federal assumption of state war debt in return for the movement of the national capital to the Potomac River, would not solve the disproportionate power of financial interests by moving the capital closer to the gentry: Despite the capital’s relocation, Jefferson complained that the permanent funded debt “enabled Hamilton so to strengthen himself by corrupt services to many that he could afterwards carry his bank scheme and every measure he opposed in defiance of all opposition,” deploying “that speculating Phalanx” of bondholders “in and out of Congress.”<sup>37</sup> The complaint that financial networks operated more effectively in a large republic was a familiar trope from gentry writers as early as 1790, even before Madison’s break with Hamilton.<sup>38</sup> This view of the disproportionate power of financiers in large-scale democracy scale was, again, orthodox Anti-Federalist rhetoric.<sup>39</sup>

There is a second sense in which Madison’s anti-corporate canon constitutes a constitutional, as opposed to a merely legislative, proposal. Madison announced the rule as a categorical moral imperative, designed to unify the gentry against their enemies. The gentry enjoying numerical superiority, could prevail over financiers if political competition were

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<sup>36</sup> Brutus, No. V, On the Funding System, National Gazette, April 5, 1792, at 2.

<sup>37</sup> Thomas Jefferson, *Memorandum on the Compromise of 1790*, in Liberty and Order 64, 65 (Lance Banning ed. \_\_\_\_).

<sup>38</sup> Walter Jones, a Virginia Democratic Republican, complained to Madison that Hamilton had the backing of “strong auxiliaries” – “system-mongers and fund jobbers,” in Jones’ phrase – that the “landed interest” could not easily match. Letter from Walter Jones to James Madison, 25 March 1790. The “multitude who will be interested in the funds,” an effective machine controlled by Hamilton. George Lee Turberville to Madison, April 7th, 1790, in Liberty and Order at 67.

<sup>39</sup> Consider “Cornelius,” the Anti-Federalist pamphleteer, arguing that that the “mercantile interest” had “a constant connection and intercourse” in a large republic allowing them to “centre their votes where they please” while the “landed interest” was “the landed interest,” “scattered far and wide” and “have but little intercourse and connection with each other.” Letter of “Cornelius,” Hampshire Chronicle, December II and 18, 1787, reprinted in Samuel Bannister Harding, 2 The Contest over the Ratification of the Constitution 117, 123 (1896).

reduced to a single dimension of landed versus paper wealth. In response, “[t]he anti republican party” will try to multiply the dimensions of politics “by reviving exploded parties, and taking advantage of all prejudices, local, political, and occupational, that may prevent or disturb a general coalition of sentiments.”<sup>40</sup> To counteract this effort to divide the majority by multiplying the issue environment, the gentry needed to “bury[] all antecedent questions” and “banish[] every other distinction than that between enemies and friends to republican government, and in promoting a general harmony among the [landed interest].”<sup>41</sup> As John Taylor put it, avoidance of sectional strife would “deprive ambition and avarice of a handle, by which to work up and manage geographical passion and parties, for their own selfish ends.”<sup>42</sup> Again, Madison simply flipped *Federalist #10*’s argument about demographic heterogeneity and coalitional fragility on its head: He continued to acknowledge that such characteristics weakened majority power, but he changed the value sign on this effect from positive to negative.

The gentry republican suspicion of government assistance for corporations provided the Democratic-Republicans with a familiar and deeply felt basis for mobilizing the public against Hamilton’s Bank proposal. The resonance of this suspicion with his audience allowed him to set forth his “great and important powers” canon as an absolute constitutional ban, precluding compromises based on (for instance) requiring the Bank to maintain branches in Southern or Western territory or to write loans secured by mortgages on favorable terms. The constitutional character of this argument diminished Madison’s flexibility, but it also enabled him to sound a clarion call for a coalition that could resist the blandishments of the monied interest.

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<sup>40</sup> James Madison, “A Candid State of Parties,” *The National Gazette*, September 26, 1792.

<sup>41</sup> *Id.*

<sup>42</sup> John Taylor, *An Inquiry Into the Principles and Policies of the Government of the United States* (1815).

Madison's attempt to constitutionalize the interpretation of governmental powers failed as a legal matter. But it succeeded politically in creating an articulate and principled opposition party that could stand against the expansive view taken by Hamilton and other Federalists. But the price of this success was that Madison's principal argument, in Federalist 10, for why the states had little to fear from the National government had collapsed and he, essentially, abandoned it. He was forced, in the terms he used in Federalist 51, to place all his hopes on what he had called "auxiliary precautions" – the checks and balances that were to defend the separation of powers -- which looked by 1792, to be the main impediment to an encroaching national government.

### 3. The underrated executive power

Madison came to the issue of separation of powers from a fairly orthodox eighteenth century whiggish viewpoint that had been well articulated by Montesquieu<sup>43</sup> in the Book XI of the **Spirit of the laws**.<sup>44</sup> Like Montesquieu, he thought that the separation of legislative, executive and judicial powers was vital to the protection of liberty. Montesquieu believed that in a

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<sup>43</sup> I am not claiming that Montesquieu could be ideologically identified as a republican but that he offered a "positive theory" of republican government that was largely accepted by Madison among others. This theory stressed the importance of maintaining a separation of legislative and executive from judicial powers, if republican liberties are to be preserved. He also anticipated later writers in defending something like checks and balances in order to preserve adequate separation of powers. See M. J. C. Vile, **Constitutionalism and the Separation of Powers**, Indianapolis: Liberty Fund, 1998, 83-106.

<sup>44</sup> "When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the the same monarch or senate that makes tyrannical laws will execute them tyrannically.

"Nor is there liberty if the power of judging is not separate from legislative and from executive power. If were joined to legislative power the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to the executive power, the judge could have the force of an oppressor." Montesquieu, **The Spirit of the Laws**, (Anne Cohler, Basia Miller, Harold Stone, eds.) Cambridge: Cambridge University Press, 1989, 157.

republican government, the legislature was most dangerous to liberty.<sup>45</sup> Partly this is because legislation -- authoritative rule making -- is in its nature flexible and open ended and hard to confine. In part too, the danger arose from the intimate connection of the legislature, especially the popular part of it, to the people, and from the resulting susceptibility to popular passions. The danger was due to the fact that the authority of a republican legislature is drawn only from the people, and is unmixed with aristocratic or monarchic sources. Moreover, as he recognized prior to the Convention, the problem was even worse in the states where the legislatures were elected from smaller districts and more frequent elections. That is why he thought it was vital that the constitutional means be put in place to negative state legislation.<sup>46</sup>

Examples of popular or legislative interference with other governmental powers were widely known to 18<sup>th</sup> century readers, especially from Ancient Athens but also from the diverse republics in renaissance Italy. Republics and democracies were thought to be especially susceptible to populist passions, stirred up by effective orators, taking over the lawmaking powers. And the particular danger in a republic is that popular passions will overwhelm the administration of justice. For Montesquieu, in fact, tyranny was virtually defined as the circumstance in which legislative and judicial functions are co-mingled B where the power to make law is confounded with its application to particular cases B so that people will be unable to know in advance when they are acting within the law or to foresee when they may be punished. In

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<sup>45</sup> Montesquieu makes this point rather obliquely, in saying that “If the executive does not have the right to check the enterprises of the legislative body, the latter will be despotic.” But “... the legislative power must not have the reciprocal faculty of checking the executive .. As execution has limits of its own nature, it is useless to restrict it.” (Op cit. 162). Elsewhere, of course, he points out that the judicial power is “null.”

<sup>46</sup> His preferred method was put in the Virginia Plan which allowed Congress a negative over state laws. Article III, as it emerged from the Convention and especially from John Marshall’s opinion in Marbury was the substitute and Madison was uncertain as to how well that would work (see letter to Jefferson)



such a system everyone is vulnerable to arbitrary or whimsical rule. Montesquieu's famous examples of tyrannies illustrate many of the ways in which liberties are insecure when the legislative and judicial powers are combined.

Montesquieu thought that the British constitution which he took to be essentially republican, though masked under a veneer of mixed government maintained an adequate separation of powers in various ways. He emphasized the role of juries in separating the exercise of judicial power from the legislative. Indeed, his description of judicial power in Book XI, where he says the judicial power is a *«pouvoir nul»* seemed to confuse juries which are made up of lay people who come together to decide a particular dispute and then disperse -- with judges, who are continuing officials of government.<sup>47</sup> In any case, English judges had been made substantially independent of parliament by the time of his sojourn in that country so he was justified in seeing the judicial process generally, as well as its separate components, as having a good deal of independence from parliamentary or crown influence.

Montesquieu himself never really explained how it was that the English managed to maintain their system of separated powers. The protections for judges (continuing service on

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<sup>47</sup> We doubt that Montesquieu was confused in this way. It is better to read his text as referring the judicial power and not to judges as institutional officials. Such a reading is consistent with Roman institutional practices with which he was very familiar. In Roman law, there was a separation of the institution of the Praetor, who prepares a legal question out of the actual dispute, and the iudex, who decides the dispute. The Praetor is a high ranking elected official who held office for a term of years, whereas the iudex is appointed only for a single trial. The power of the iudex was, in Roman law, the judicial power, and corresponds closely to the power of the jury in an English trial. A similar distinction is made between prosecuting magistrates and those sitting as deciding judges within the judiciaries of civil law systems, though both magistrates are state officials in this case. See Especially chapter 18 of Book Eleven in which Montesquieu describes the exercise of the judicial power in Rome and notes that the English practice is "quite similar."

good behavior rather than at the pleasure of the crown) and, indeed, the use of juries, were based in statutes and could be amended by Parliament as could any other aspect of legal procedure.<sup>48</sup> Besides, judicial independence was a recent invention when he wrote and had been vigorously contested by the crown for centuries prior to its establishment. Indeed, perhaps he was wrong to think that the protection of English liberties was due to its (virtual) republicanism; perhaps, as Tocqueville was to suggest about nineteenth century America, those liberties were protected despite the popular elements of the English constitution and not because of them.<sup>49</sup> Indeed, the monarchy and the House of Lords represented distinct non republican sources of authority that might well have mitigated popular impulses dangerous to liberty, within the balanced model of crown in parliament. If that is so, then whether or not the protections of liberty achieved by the British under their mixed constitution could be maintained in a pure republic -- in which all authority is traceable to the people, one way or another -- remained an urgent and open question.

Madison shared many of these ideas. He regarded the legislative power as difficult or impossible to place under external limitations. He regarded the separation of powers as essential to the protection of liberties and he saw the need to be especially careful in ensuring that the legislature would not encroach on the other powers. Like Montesquieu, he also maintained a distinctive model of institutional power within a republican government, though he spelled it out in more detail. We can see an explicit instance of this model in his writings on federalism (in **Federalist** 45-6), where he argued that the states and localities, because they are close to the

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<sup>48</sup> We suspect that the real protection for judges was found in the crown-in-parliament model, which made legislation of any kind extremely difficult to enact as it required agreement by all three constitutional parts of British government.

<sup>49</sup> Tocqueville emphasized the importance of an American "aristocracy" of lawyers and especially judges in creating and protecting a system of rights within a system that was otherwise open to egalitarian sentiment and majoritarian government.

people, will understand and sympathize with their problems and respond to them.<sup>50</sup> For this reason, these governments will tend to be trusted and to enjoy popular affections, and therefore tend to retain power and vigor. The people will look first to these nearby and friendly governments as they confront problems requiring public coordination and assistance.

Madison is best understood as entertaining a similar theory with respect to institutions more generally. The legislature -- especially its popular chamber -- being closest to the people, will be highest in their affection and therefore the most vigorous and most dangerous to other institutions. "In a representative republic ... where the legislative power is exercised by an assembly, which is inspired by its supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which activate a multitude; but not so numerous as to be incapable of pursuing the objects of its passions.... it is against this department that the people ought to indulge all their jealousy and exhaust all their precautions." **Federalist 48** (Rakove, **Writings**, 283) This closeness to the people may be maintained by frequent elections, relatively small electoral districts, and by electing this body on a wide suffrage. The Senate, and then the President and finally the courts would then, lacking as frequent and intense contact with the people, will enjoy successively less popular affection and trust and can be less active and dangerous to liberty. The power of institutions in a republic is tied, in this way, to closeness to the people. In this sense, the people themselves remain the chief source of instability and injustice in republican government and

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<sup>50</sup> "The first and most natural attachment of the people will be to the governments of their respective states.... With the affairs of these, then people will be more familiarly and minutely conversant... on the side of these, therefore, the popular bias may well be expected most strongly to incline." **Federalist 46** (Rakove, **Writings**, 266-7.) And, in the same number, Madison argues that their popularity gives the states overwhelming advantages in resisting federal encroachments.

therefore the chief threat to liberty. Ironically, as the people are sovereign in republican government as well, they are the ultimate source a solution to this threat.

These were Madison's starting points. He understood that the American republics could rely on nothing but popular sovereignty -- institutionalized in various ways -- and the processes and mechanisms built from it, to guarantee liberties. There were no other acceptable bases of authority than the people and no other principle of choosing a government but election. Because of this monolithic source of legitimation, the legislature, and especially its popular branch, remained the principle source of difficulty to be tamed and controlled in a successful republican government. The question is whether and how this might be done.

The relative vagueness of executive and judicial authority is explicable if the drafters and ratifiers shared what I have called the republican view of the threats to liberty. If the legislature is in fact the most powerful and dangerous branch, it is especially important to carefully specify its powers, and to put in place regulatory mechanisms that can keep it within bounds. But limiting the range of executive or judicial powers was both unnecessary and possibly counterproductive. Madison and the other framers had little interest in weakening these new departments -- especially in view of the necessity that they be made vigorous enough to stand up to the popular branch. "As the weight of the executive authority requires that it should be thus divided, the weakness of the executive may require that it should be fortified." **Federalist 51** (Rakove, **Writings**, 295) "The executive power being restrained within a narrower compass, and being more simple in its nature; and the judiciary being described by land marks, still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves." (Rakove, **Writings**, 282).

At the time that the **Federalist** was written, Madison had adopted a distinctive principle of constitutional control: we might call it the principle of institutional self interest.<sup>51</sup> By dividing up the legislative power and giving some share of it to the other branches, the Constitution provides these branches with the means to protect themselves against congressional encroachments. He did not doubt that occupants of these offices would have the will to use these devices to protect the authority of their own departments, blocking bills, giving them narrow interpretations, or even striking them down as inconsistent with the Constitution. In this respect, then, the distribution of powers given in the Constitution appears to be self enforcing, almost mechanical, and there would be no need to rely either on the self restraint of officials, or on an external enforcement mechanism (such as appeals to the courts or the people). This, at any rate, is widely taken to be the genius of the Madisonian constitution, at least as understood by contemporary political scientists and economists.

It seems clear in retrospect that the analysis of the various powers presented in **Federalist** 51 was at least ambiguous if not fatally flawed.<sup>52</sup> The text of the Constitution itself distinguishes pretty clearly between the governmental departments and powers. It speaks, for example, of

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51 Modern readers sometimes ascribe to Madison the idea that human beings are inherently venal and self seeking in a materialist sense. His assertion that men are not angels can certainly support such an interpretation. I think a more “cognitive” reading is better however: the weakness of human beings lies not in their venality but in their limited imaginative and empathic capacities. So, when someone assumes a governmental office, she tends to assume its perspectives and interests as her own. A later political observer of bureaucratic politics later coined the expression “where you stand depends on where you sit.” Indeed, much of the dispute between Madison and Hamilton in the early 1790s can be explained that one was a member of the House and the other a minister in government.

52 Daryl Levinson and Richard Pildes, “Separation of Parties not Powers”, Harvard Law Review, vol 119 (2006), 2311. The failure of Madison’s assumption was not evenly spread across the departments however. It seems to us that the President and the Supreme Court have actually been quite good in defending their institutional prerogatives. It is in Congress where the assumption has failed, in large part because, once again, the collective action problem has intervened. Had he anticipated this unevenness in 1788, Madison might not have been bothered: after all Congress was the most dangerous branch and his worry (exemplified in the elaborate precautions against congressional usurpation) was that the restraints in Congress may not have been sufficient.

vesting the executive power in the President and of placing the judicial power in “one supreme court, and in such inferior courts as Congress may...ordain and establish.” This distinction between powers and institutions seems to lie at the heart of Madison’s theory of checks and balances. The notion of dividing the legislative power among the departments plainly rests on this idea. Madison could still think in 1788, as Montesquieu did forty years earlier that, as the executive power is inherently simple and self limiting, there is little danger in placing all or most of it in a single pair of hands. Indeed, Madison’s worry was that the executive powers were not enough to enable the President to maintain his constitutional position and for that reason his powers needed to be beefed up.

Madison and Hamilton soon discovered that the elegant structure of checks and balances put in place in the first three articles of the Constitution was no barrier to the expansion of executive authority. Almost as soon as the Constitution went into operation the administration led by Alexander Hamilton began to launch innovative projects. Madison was forced to recognize the very incomplete manner in which the executive power had been specified. We may trace this recognition through several distinct events centering on the extent of the executive power that was to be vested, with some qualifications, in the President. In each case (as above), Madison’s response was to try to define and invoke a “constitutional morality” – or canons of construction -- according to which actors would restrain themselves to correct constitutional interpretations.

We begin with the first dispute over the powers of the executive to remove high officials, in that arose in 1789, while Congress was enacting statutes to establish executive branch departments. Did the power to appoint ministers with the advice and consent of the Senate imply that the president must also consult the Senate before such officials can be fired? In this case,

Madison rejected that fairly natural implication on both practical and theoretical grounds. Practically, needing Senate consent for removal would require that the Senate be in session continuously (more or less). Theoretically he argued that a wide reading of the grant of executive power to the president was appropriate. Madison regarded the president as the most responsible officer in government – “he is impeachable for any crime or misdemeanor, before the senate, at all times ... and he is impeachable before the community at large every four years....” (**Writings**, 454) If the president could be stuck with ministers who he could not work with, he could hardly be responsible to see that the laws are carried out – the core of the executive power.

Giving this wide reading to the powers of the executive is consistent with Madison’s previous views in favor of buttressing the weak executive powers. In a letter explaining the advantages of his favored position, he reminded his reader that, in any case, the legislature retains other ways to influence the executive (it can appoint ministers for fixed terms, set their salaries, control appropriations). Moreover, he wrote, “if the Federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the Encroachments of the Legislative department. If the possibility of encroachments on the part of the Ex. or the Senate were to be compared, I should pronounce the danger to lie rather in the latter than the former” (letter to Edward Pendleton, June 17, 1789, **Writings**, 467) This is vintage Madison, but of an early vintage.

Importantly, on this occasion, Madison articulated a new fundamental interpretive principle: **limitations** on departmental powers should be narrowly construed. The Constitution vested the executive power in the president, subject to particular qualifications: specifically that the Senate shall have a role in appointments of high ministers and in treaty making. As nothing

was said about removals, Congress has no authority to add additional qualifications to those enumerated in the document. This principle is in some tension with the doctrine of strict construction that Madison and his Republican colleagues developed and were to defend over the next decade. In the case of the removal power, there was a choice of whether to construe either the executive power or its limitation broadly or narrowly. Evidently, in this instance, Madison chose to give an expansive reading to the executive power, and construe limitations on those powers strictly. Nothing in the idea of strict construction mandates that these choices be made.

One can imagine two justifications for this interpretive principle: Madison argued in this case, as he had in **Federalist 51**, in favor of investing the various powers (legislative, executive, and judicial) substantially in their respectively named branches, subject to particular and specific exceptions and qualifications. Therefore, interpretive precedence should be given to this primary assignment of powers as a way of preserving as much separation of powers as the Constitution could support. Each branch is presumed to be competent to exercise its proper power, subject to checks that keep it from encroaching on the others. An alternative theory would separate out the weaker branches for special treatment. As we have seen, up until 1789, Madison assumed that it was the President and not Congress that needed institutional buttressing and so he might have preferred to limit this new interpretive principle to the executive branch (and possibly to the judiciary had the issue arose). It is hard to say which account is to be preferred and in any case events soon moved beyond this dispute.

These events were largely driven by the fact that the United States was surrounded by arrogant and often hostile European powers. Revolutionary happenings in France had set in motion a global confrontation, at once material and ideological, between that country and the European monarchies and this led to the outbreak of a general war in 1792. For the United



States, this confrontation mostly involved Britain, France and, to a lesser extent, Spain, and the American interests that were most threatened concerned commercial shipping to Europe and the Carribean.<sup>53</sup> War in Europe was a favorable and tempting circumstance for American farmers and traders and there was much eagerness to supply American products to belligerents on all sides. But, as can be imagined, neither the British nor the France looked with favor on U.S. shipping to their enemy and there was, as a result, much interference with commercial intercourse. At the same time, revolutionary events in France had excited the enthusiasm of many Americans who saw the emerging French republic as a natural ally and a vanguard of a general republican transformation in Europe. Moreover the U.S. had a long standing trade treaty with France, dating to 1778, that assured her of most favored nation treatment and incorporated other commercial understandings as well. Madison and Jefferson were particularly sympathetic to this pro French American policy and hoped that United States would continue to follow it. And they were hopeful that President Washington shared their sentiments on these matters.

It came therefore as a surprise to Madison, then, when the President issued a proclamation of strict neutrality that seemed favorable to British control of Atlantic trade and implicitly to undercut prior agreements with France. Madison had learned from Jefferson of the tense cabinet deliberations on the subject. Hamilton had argued, in cabinet, that the treaty with France had been made with a monarchical government and was, with the revolutionary transformation of that nation, a dead letter. Moreover, he thought that American commercial interests were so closely aligned with the British that it was pointless to risk them by taking the hopeless course of opposing British navigation policy by insisting on moribund treaty

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53 Though, westerners were affected as well because the European powers each had allies among the indian tribes.

obligations. Jefferson responded, again in cabinet, that there were no grounds in international law for Hamilton's claim that a change in government voided the treaty and that, in any case, he thought the President could not constitutionally declare neutrality without involving Congress.

Writing under the pseudonym **Pacificus**, Hamilton answered with an argument superficially reminiscent of Madison's view of the removal powers: "as the participation of the Senate in the making of treaties and the power of the legislature to declare war, are exceptions out of the general executive power, vested in the President, they are to be construed strictly...." (Quoted in Madison's **Helvedius** No.1 in **Writings**, 538) In effect, Hamilton claimed the whole territory of foreign affairs – what Locke had called the federative power – for the President subject only to narrow exceptions.<sup>54</sup> It was left to Madison to argue against this last point in his **Helvedius** essays.

In Madison's view the issue was simple. The Constitution conferred the power to declare war on the Congress and it placed the treaty power in the hands, jointly, of the President and two thirds of the Senate. The power to make war is essentially legislative: The power to declare a war "is one of the most deliberative acts that can be performed; and, when performed has the effect of repealing all the laws operating in a state of peace, so far as they are inconsistent with a state of war..... In a like manner a conclusion of peace annuls all the laws peculiar to a state of war..." (**Writings**, 541) Put this way, it is clear why Madison and Jefferson believed that the

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54 We may lay part of the confusion on this point to Montesquieu himself. Though he started his famous Chapter Six of Book Eleven with an allusion to Locke's federative power, the topic disappeared immediately behind the now familiar conception of separation of powers into the legislative, the executive, and the judicial. Conduct with foreign powers fits poorly in this classification as it contains uneliminable elements of both legislative and executive powers. Nowadays, of course, we are less scrupulous in attributing legislative authority to the executive so this eighteenth century debate has a rather abstract feel to it. I owe this point to Pasquale Pasquino in private conversation.

President had overstepped his constitutional authority in issuing the Neutrality Proclamation. The declaration of neutrality had, in effect, put American ships under new (legislated) regulations – subjecting captains and crews to new legal obligations -- without any congressional participation at all.

Washington, acting with Hamilton's advice, then sent John Jay to London to negotiate in secret a new treaty to settle longstanding disputes (having to do with American shipping and frontiers) which had festered since the 1783 Paris Treaty. The treaty was agreed to in November 1794 but its terms were kept secret until after the Senate ratified and the President signed it. Indeed, Madison did not learn of the details until the following summer and he was dismayed on learning of the terms, and especially at the procedures that had been followed. To the Republicans the treaty, when it was made public, was a disaster. Not only did it permit the British to continue interfering with American shipping, it also granted numerous concessions that the French were sure to take as a (further) departure from neutrality. It risked a decisive break with France, the nation that Madison and other republicans thought our natural republican ally, in favor of a humiliation by the overbearing British.

In any case the deed was done. Obviously the Federalists had control of the Senate and there seemed, on the face of things, little that the House could do. The Treaty required, however, the creation of several commissions that would investigate and resolve disputes among British and American citizens and this required money. The Constitution, it will be recalled, entitles the House to originate money bills and so the House might claim to exercise authority over the fulfillment of treaty obligations. The House requested President Washington to turn over the papers relating to the negotiations so that it might decide what course to take. The President refused, saying that he could see no constitutional purpose behind such a request. So, here was

the conundrum: the Constitution vests the treaty making power in the President and the Senate. But what if a treaty requires appropriations? Does the fact that the House has a constitutional role in appropriations give it a role in treaty making, at least with respect to treaties that require money.<sup>55</sup>

Madison recognized that there is no clear line that can be drawn between treaties and statutes: things that can be accomplished by statutes may be done by treaty instead. Speaking to the House on the Jay Treaty, Madison pointed out that “The President and Senate by means of a Treaty of alliance with a nation at war, might make the United States parties in the war: they might stipulate subsidies, and even borrow money to pay them: they might furnish Troops, to be carried to Europe, Asia or Africa: they might even undertake to keep up a standing army in time of peace...” (**Writings**, 562) Treaties are, indeed, a species of statutes --they simply have different procedural requirements. Madison worried that the House would have an obligation both to declare the war that had come into existence and, as the originator of revenue bills, an obligation appropriate the funds for it. To behave otherwise would, he worried, be deemed treasonable. Congress would be, in this instance, “mere heralds proclaiming [war]” (**Writings**, 563). But an obligation of the nation to go to war is only a special instance of what might be undertaken by treaty. The executive and Senate might commit us to regulate rivers, commerce, or populations or, with a little imagination, almost anything else.

As a matter of constitutional practice, of course, treaties are negotiated (drafted) by the executive, subject to two thirds senatorial approval, and there is no role for the House of

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<sup>55</sup> A dispute of this kind had arisen earlier in treaty negotiations with the Barbary powers. Those treaties were agreements to pay ransom for American hostages or to purchase free passage for American ships. As such, these treaties were concerned with money and nothing else. The American had, at that point, no way of actually threatening to retaliate against the Barbary states.

Representatives at all. Moreover the president and his ministers play the leading role in negotiating treaties with foreign powers and such negotiated agreements cannot easily be amended. So, in treaty making, the president not only has the power to propose legislation, something he lacks in the case of ordinary legislation. He has essentially the power to make an unamendable take it or leave it offer to the Senate. In these respects then, not only do we have two separate legislative processes, but the procedures by which the two processes are to work are remarkably disparate in that the President's authority is much greater in the treaty process. One might hope that the requirement to get 2/3 of the Senate to approve would offset this advantage. But whether that is so is a contingent matter. As it happened in 1794 the Federalists had the votes in the Senate.

On Madison's account of the treaty power, the Jay Treaty was constitutionally defective. Its enactment had the effect of imposing new regulations on American merchants without any participation or legislative process involving the House of Representatives. The secrecy by which the treaty was ratified also had the effect of excluding the House of Representatives from playing its proper constitutional role in making appropriations. Moreover, the president, by refusing to forward papers that House needed to do its job, had arrogated to himself the right to decide what the constitutional responsibilities of another department of government.

Madison's solution was to propose yet another constitutional canon of interpretation: where treaty legislation overlaps with congressional authority – when for example it requires expenditures or regulates foreign commerce – Congress retains its authority to legislate to accomplish these things. In particular the House has the constitutional duty to deliberate and legislate where treaties require action that is within congressional powers. In other words, where a treaty power overlaps congressional authority, congressional action is still required to bring the

treaty into effect. Unless such legislation is agreed to, the treaty would remain a dead letter, even though it was validly ratified. Madison dismissed the notion that this view would emasculate the nation's capacity to enter into treaties with others and it would strip the Senate of its prerogative in treaty making. Characteristically, he argued that "The several powers vested in the several Departments form but one Government; and the will of the nation may be expressed thro' on Government, operating under certain checks...." (**Writings**, 566). The fact that both legislative processes are expressions of a popular sovereign would supply sufficient unity.

Thus, as he had in the case of the removal power, Madison used this occasion to develop and extend principles of constitutional interpretation. As the executive's prerogatives in the realm of foreign affairs have an essential legislative component, the presumption must be in favor of requiring congressional participation – either of two thirds of the Senate, or of the whole Congress: "the powers of making war and treaty being substantially of a legislative, not an executive nature, the rule of interpreting exceptions strictly, must narrow instead of enlarging executive pretensions on these subjects."(**Writings**, 542) While Hamilton had claimed the terrain of foreign policy as nearly exclusively executive, Madison claimed the terrain mostly for Congress at least as regards making rather than executing policy. The executive was to be concerned solely with executing laws and treaties, and perhaps with proposing and negotiating them, but to have no authority beyond that.

Facing unified Federalist opposition and a President who increasingly cast his lot with Hamilton, Madison's constitutional gambit failed. The president had successfully claimed vast new legislative powers and there was nothing the House of Representatives could do about it without risking the charge of treason. And, things were about to get much worse as hostilities between the British and French escalated and both sides tried to drag Americans into their

conflict. Increasingly issues of national security were pushed onto the political agenda and there were increasing concerns about the loyalty of citizens and visitors. Faced with a hostile republican press, the president's congressional allies thought his neutrality policy could not succeed without restricting certain domestic liberties. The Federalist dominated Congress pushed through the Alien and Sedition Acts which criminalized criticism of the government and exposed noncitizens to deportation. Madison had not really seen this coming and now the reality loomed before him: "...actual war is not the only state which may supply the means of usurpation. The real or pretended apprehensions of it, are, sometimes of equal avail to the projects of ambition." (**Writings**, 605) During the ratification debates Madison had understood the president as merely the enforcer of laws enacted by the legislature, but when foreign issues dominate the agenda, the president is often required to be the initiator. This presidential advantage is not, however, rooted in the constitutional text, but arises from circumstances of danger or "necessity" and from the willingness of the public or of congressmen to follow his lead. This presidential advantage is, as Madison came to realize, a profound threat to the constitutional structure. As he wrote in the Aurora Advertiser in 1799, "...war is among the dangerous of all enemies to liberty; and that the executive is the most favored by it, of all the branches." (Rakove, **Writings**, 605).

We will not take the time to describe Madison's response in much detail. He and Thomas Jefferson persuaded the Virginia and Kentucky legislatures to enact resolutions asking the other state governments to 'interpose' against the unconstitutional Alien and Sedition acts. It was not clear what "interpose" meant exactly. He and Jefferson may have been calling for the states to convene an Article V convention for the purposes of introducing new amendments. It is hard to say. In any case it seemed plainly an effort to erect a constitutional barrier against executive usurpation, much in the spirit of Madison's early attempts to constitutionalize his view

of the correct (republican) reading of the constitution. In the event the effort failed. The other states were controlled by Federalists and either ignored or spit on the resolutions.

Before moving on to the last substantive part it is well to remark on what had happened in the period between 1798, when the Resolutions were enacted and 1800, when Madison published his careful analysis of their failure. During the ratification debates Madison had, famously, rejected the idea that the “people” should be called upon to settle constitutional disputes (Federalist 49). Such an appeal will undermine not merely the Constitution but the very attraction of constitutional government itself. Now, after a frustrating decade in which it became more and more apparent that powerful financial interests had been able to get control of all of the major constitutional departments and that the president was not very well controlled in the Constitutional scheme he was prepared to rethink his argument in Federalist 49. The resolutions were a fairly timid step in that direction – at least if we are right that they were pointing toward a new constitutional convention. But their failure led him to a strategy that must have seemed, far more radical.

#### **4. A new Role for the people**

Madison’s most significant constitutional innovation in the 1790s was found in his (and Jefferson’s) responses to the Alien and Sedition Acts. The failure of the constitutional order to forestall tyrannical legislation forced them to re-think the role of the states, and then of the people themselves in the federal republic. In the Virginia Resolutions he resorted to first principles of political contract and argued that the states, as parties to the constitutional compact, “have the right, and are in duty bound, to interpose... for maintaining within their respective limits, the authorities, rights and limits appertaining to them.” (In Rakove, **Writings**, 589).



What interposition meant precisely was not obvious, but it was clear that the states had some rights and duties that arose from their being the contracting parties that formed the federal government. Thus, interposition was plainly intended as an indirect appeal to the people, assembled in the states, to help police a breakdown in the constitutional machinery.

To be sure, this argument was not created out of whole cloth. In arguing for the stability of federal arrangements in Federalist 45 and 46, Madison had already envisioned an indirect role for the people in the event of encroachments on the states by the national government. In that sense one could say that Madison was simply invoking a constitutional mechanism that he had already contemplated in the constitutional scheme. This seems pretty unconvincing, however. The role of the people in those early essays as well as in the Virginia Resolution does not seem to be exercised within the constitutional framework at all but appears to be antecedent or foundational to that framework. “The state governments will have the advantage of the federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence...to the powers vested in them; to the predilection and probably support of the people.” (Madison, Federalist 45) While the first and third of these comparisons may be products of the constitutional design, the second and fourth seem to be political predictions: features that are expected to hold in virtue of the proximity of people to their local government and its leaders. He continues in the next number: “...ambitious encroachments of the federal government on the authority of the State governments would not excite the opposition of [merely] a single state...They would be signals of general harm... a correspondence would be opened. Plans of resistance would be concerted.” Unless the federal government backed off, there would be an “... appeal to a trial of force.” (Federalist 46). To drive the point home he continued: “Extravagant as the supposition is... Let a regular army, fully

equal to the resources of the country, be formed and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger.” (#46). Madison then imagines a confrontation of a federal army of 30,000 men facing an armed militia of half a million. He thinks it obvious which side would prevail. While Madison was plainly making a reductio here, it seems evident the argument was not grounded in any features of the constitution but rested instead pre-constitutional “facts” about political power and political psychology.

Perhaps, by sounding the “clarion” call that he had anticipated in Federalist 45-46, the Virginia and Kentucky legislatures were merely asking their sister legislatures to play the pre-constitutional role envisioned in those numbers by interposing to prevent the progress of a constitutional evil. Should the national institutions attempt to exercise powers not granted ... the people retain the right to “interpose, for arresting the progress of the evil...” (1800 Report on the Alien and Sedition Acts, Rakove, **Writings, 609**), or dissolve the compact. Clearly at this point he and Jefferson were going beyond Article V and suggesting a return to a preconstitutional situation in which the state governments retained the primitive (and inalienable) right to interpret the constitutional contract and revoke it if necessary. We are not sure how to understand it. In any case, for Madison of 1787-8, the final determination ought to have been by the people, acting in their sovereign capacity rather than their state governments. As things stood in 1800 Madison had left a dangerous legacy to the future – one that envisioned a proper (if unlikely) role for force.

In any case, these desperate attempts failed. The other state legislatures were mostly in Federalist hands and they dismissed Madison’s and Jefferson’s pleas. The ordinary constitutional mechanisms had failed to prevent tyrannical laws; it was left to these two leaders

to craft a role for the people to interpose that could be situated within the Constitution. This they accomplished by running an electoral campaign aimed at asserting, through ordinary electoral processes, that the people refused to accept the conduct of the national government. Historians, writing of the 1800, campaign generally fixate on the peculiar mechanism by which the vice president was chosen – he was to be the candidate with the second highest vote total in the electoral. Moreover presidential electorals could, constitutionally be chosen either by direct election or selected by the legislature, the choice being left to the states. Moreover that choice was shaped by short run political considerations – the Federalists controlled most of the existing legislatures and tended to pick the system that they expected to do best in. Only two states chose direct election. What this meant was that the Republican campaign needed to tailor itself to these political realities and develop a ticket and state level organizations that would accomplish their desired task.

Famously the republicans chose Aaron Burr, Hamilton’s New York nemesis (they needed to win support there) as vice president. Meanwhile the Federalists, seeing that Adams had no hope, campaigned for Republican support for their vice presidential candidate while the Republicans campaigned successfully for republican electors to vote a solid ticket. The result was a tie between Jefferson and Burr, leaving it up to the Federalist to choose which of the two Republicans would be president. This is all fascinating in its way but we think it misses a deeper point about the 1800 election. That is that the People themselves had been asked to interpose against the enactment of unconstitutional laws and that they had responded positively. This the People did by removing the Federalists from executive and legislative power and leaving them in

control only of the judiciary.<sup>56</sup> This assertion of a popular role was never articulated in the high constitutional discourse of the Virginia Resolution or, indeed, in interpretations of various clauses of the Constitution. Such matters were carried out in the old ways: arguments about the “meanings” of texts or by appeal to “first principles” of social contracting. Stuff like that.

In the end however, everything was accomplished on the ground, through an electoral appeal. The most ordinary kind of electoral politics was summoned and proved sufficient to reconfigure the constitutional balance. In the event, the appeals either to a republican morality of self restraint, or to pre-constitutional principles were unavailing. The people themselves played the needed role. Ironically, the resulting configuration of republican control of the elected branches and Federalist control of the judiciary was to lead to the gradual development of a judicial role in the enforcement of separation of powers. Madison as a constitutional theorist had a lot of problems with this development. But Madison as a political scientist ought to have been able to appreciate how far it was driven by the actual experience of the new republic.

## **5. Conclusion**

The point of this essay was to separate Publius’ s contributions to government and political theory from his contributions to political science. To political science Publius contributed a vision of institutional design that was based on a realistic, if pessimistic, view of human nature -- one that regarded a competent and well structured government as a means to pursue genuinely common interests. From this viewpoint, it is a virtue of a set of institutions that

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<sup>56</sup> Even this concession was insecure. Congress repealed the 1801 Judiciary Act and fired the sixteen federal judges who had been appointed by its authority.

they are stable or self enforcing and, given his view of human nature, it seemed natural to seek to obtain this stability by enlisting man's lower capacities -- ambition and self dealing -- to accomplish these necessary tasks. Institutions, so designed, seem well suited to work among individuals who must be taken largely as they are found. This vision of institutional design still inspires us as political scientists.

After 1789, we must abandon Publius and look separately at the political science of Madison and Hamilton. They took somewhat different lessons from the experience of the 1790s. Madison learned almost immediately that republican rule on a large scale did not prevent well financed and highly motivated factions from capturing governmental powers. He learned soon after that the Presidency was far more powerful and more much resourceful than he had thought, even in the hands of a man he admired as a republican and held in great esteem. And he learned that the carefully designed federal institution could not be counted on to resist the temptation to impose plainly unconstitutional laws. Hamilton was probably neither surprised nor disappointed by the success of urban banking and commercial interests in getting favorable policies enacted. He would not have been troubled by the expansive development of presidential powers either respect to the control of the executive branch or the use of the treaty power. However, he might have been somewhat troubled by the failure of the Supreme Court to take a close look at the Sedition Act, at least if he did not buy the argument that it amounted only to a codification of limitation of the common law crime of seditious libel.