MADISON’S METRONOME:
THE CONSTITUTION AND THE TEMPO OF AMERICAN POLITICS

A Dissertation
submitted to the Faculty of the
Graduate School of Arts and Sciences
of Georgetown University
in partial fulfillment of the requirements for the
degree of
Doctor of Philosophy
in Government

By

Gregory S. Weiner, M.A.L.S.

Washington, D.C.
April 19, 2010
ABSTRACT

Scholarship on the political thought of James Madison has long been preoccupied with whether he believed in majority rule, but Madison himself would scarcely recognize the terms of that discussion. For Madison, there was no empirically plausible alternative to majority rule: One of the most consistent themes in his work is the assumption that persistent majorities are bound, sooner or later, to get their way. For a study of Madison’s democratic theory, as for Madison himself, the relevant question is not whether majorities will prevail but rather what kind of majorities will prevail—and what Madison regarded as the decisive question: when they should prevail. This study thus hypothesizes that Madison’s political thought maintains a consistent commitment to “temporal majoritarianism,” an implicit doctrine according to which the majority is always entitled to rule, but the primary criteria for whether it should prevail at any given point of decision is the length of time it has cohered. This duration is generally proportional to the gravity of the decision in question, with more serious issues requiring more persistent majorities. On this interpretation, the Constitution is an essentially majoritarian instrument among whose primary purposes is to act as a metronome regulating the tempo of American politics. Madison assumed the natural pace of
majoritarian politics was *allegro*; the Constitution’s purpose was to slow it to a steady but deliberate *andante*.

This dissertation traces the development of this doctrine throughout Madison’s writings and explores its operation in several key areas of his thought, including the extended republic thesis of Federalist 10, the Bill of Rights and his theory of constitutional interpretation. In each of these cases, it endeavors to establish both the supremacy of majority rule and the centrality of time in Madison’s thought. The concluding chapter discusses the contemporary implications of temporal majoritarianism, especially the importance of patience as the linchpin of the Madisonian order.
ACKNOWLEDGEMENTS

It is a cliché to preface a dissertation by saying that words cannot adequately express one’s gratitude to one’s advisor. My most strenuous attempts to devise a means of conveying that sentiment in some novel way have led me to conclude that some truisms attain that status precisely because they are, simply, true. This is one of them. I heard George W. Carey described once as “the last of the gentleman scholars.” He is not the last, one hopes, but he surely epitomizes a standard that I shall not surpass but to which I nonetheless aspire. Studying with him has been an extraordinary privilege that has informed every observation and conclusion in the pages that follow. I am similarly grateful to the other members of my committee. The footnotes in this work do not adequately discharge the intellectual debt I owe to Professor Patrick J. Deneen’s reflections on localism and civic engagement, which are so vast that I simply did not know which among them to cite. Professor Richard Boyd has been an unfailing source of both rigorous standards and enthusiastic encouragement. So have other members of the faculty during my time at Georgetown, including Professors Bruce Douglass, Gerald Mara and the late Valerie Earle.

Several friends and fellow students have also provided valuable observations and encouragement, including Mo Steinbruner, Justin Litke, Jason Ross, Todd Stubbendieck, Matt Townley and Jack Moline.

My parents will eventually discover that their pride is disproportionate to my achievements, but their support nonetheless means everything. In particular, Martin
Weiner (Ph.D., then, years later, M.D.) has always provided an example of lifelong learning and individual initiative that somehow made the altogether senseless act of returning to graduate school mid-career seem rational, and Phyllis Weiner’s maternal effusiveness ought never to obscure the fact that—in the matters of the heart whose importance exceeds those of any professional endeavor—I am the one who aspires to achieve as much as she has.

Hannah, Jacob and Theodore have inspired, amused, encouraged, tolerated and provided a general example of eager and innocent curiosity that I hope I can emulate and they can sustain.

As for Rebecca, whose idea this entire adventure was and who has borne every sacrifice associated with it, usually with good cheer and always with patience exceeding my own, any attempt at conveying my gratitude would be hopeless. Were there an academic convention for footnoting sources of inspiration, moral support, constructive needling and constant kindness, her name would appear on every page—in which case it would still be necessary for me to say that there are no words.
DEDICATION

This, as all else, is for Rebecca.
# TABLE OF CONTENTS

Methodological Note................................................................. ix

Introduction.................................................................................. 1

Chapter 1.................................................................................... 11

Aristocrat or Republican? The Debate in Madison Scholarship.............. 11

Madison on Majority Rule............................................................. 25

Chapter 2.................................................................................... 72

Reason vs. Passion................................................................. 72

Temporal Majoritarianism............................................................. 87

Gradualism............................................................................. 111

Madison on Human Nature........................................................ 116

Chapter 3.................................................................................... 123

Introductory Considerations.......................................................... 123

Factious Activity in the States....................................................... 127

Time and Majority Formation in the Tenth Federalist........................... 150

Temporal Majoritarianism and the National Negative........................... 167

Chapter 4.................................................................................... 178

Introductory Considerations.......................................................... 178

Freedom of Conscience................................................................. 181

Political Expression................................................................. 192
The Bill of Rights as Majoritarian Instrument………………………………………...  204
The Judiciary and Constitutional Interpretation……………………………………..  219
Temporal Majoritarianism and the Separation of Powers…………………………….  234
Chapter 5………………………………………………………………………………...  240
Quantum Constitutionalism and the Law of Compounding Disappointment………..  242
Transactional Politics and the Lost Skills of Civic Engagement……………………..  250
The Lost Virtue……………………………………………………………………………  257
Bibliography……………………………………………………………………………..  263
METHODOLOGICAL NOTE

The inherent risk of attempting to draw disparate strands of any author’s work into a single coherent interpretation is compounded when the subject in question is a practicing statesman rather than a systematic theorist. This study relies not merely on Madison’s explicitly theoretical works but also on his correspondence as well as polemical writings produced for political contexts. Rather than attempting to divine which among these reflect Madison’s “true” beliefs, I have approached this study by assuming that Madison more or less meant what he said in whichever context in which he expressed himself. I have endeavored not to deviate from this standard unless there was a specific reason to privilege or diminish the importance of a particular document, in which case I have attempted to be conscientious about acknowledging and explaining such a choice. There are, of course, difficulties involved in imputing theoretical meaning to non-theoretical writings. By way of apologia, I would note, first, that the fact that Madison was not a systematic theorist forces us to rely on a full range of writings in order to obtain a comprehensive sense of his views; second, that by the standards of a practicing politician, his private and public statements are remarkably consistent, and I am unaware of any instance of fundamental and contemporaneous incompatibility between them; and, finally, that what George W. Carey says of *The Federalist* also
applies to the range of Madison’s work: Its value lies precisely in the fact that it constitutes a public philosophy articulated in and accommodated to the political realm.¹

The most important apology for this approach is, of course, acknowledging its limits and claiming conclusions no more sweeping than the method itself can justify. My intent is merely to identify one pattern—a tendency, one I assert to be a strong one—on which I believe Madison to have remained largely consistent. Where I am aware of writings that complicate or contradict this interpretation—as, in a public career spanning six decades, there must be—I have tried, again, to acknowledge the difficulties involved.

Finally, at various places I have invoked illustrations from either contemporary or, in historical terms, relatively recent politics. These include the New Deal regime, the health care controversy and disputes over various assertions of rights. Generally speaking, I have tried to minimize the use of controversial illustrations so as not to distract from the underlying exegetical intent of this study. However, I wish to emphasize that in identifying tensions between the Madisonian order and certain aspects of the contemporary regime, I do not mean necessarily to say I disagree with the programs or principles in question. To say, for example, that the New Deal regime is incompatible in considerable respects with the constitutional order as Madison envisioned is not the same as opposing the programs in question. It is to say, however, that it matters whence we began—and that one could do worse for a guiding philosophy than deviating

from that beginning only with a measure of self-awareness, humility and intellectual respect.
Introduction

‘The Sovereign Physician of our Passions’

Twelve-year-olds do not read Michel de Montaigne anymore, much less take notes. James Madison did both, and a circa 1763 entry in his childhood commonplace book indicates that one of the French essayist’s observations made a particular impression: “Time,” Montaigne wrote and Madison transcribed, “is the Sovereign Physician of our Passions, & gains its End chiefly by supplying our imaginations with other & new Affairs, wearing out the Old by new impressions.” To this, Madison added an observation of his own: “Our passions are like Torrents which may be diverted, but not obstructed.”¹

History provides no direct support for a dramatic link between the boy’s reading that day and the statesman’s political theory decades later. Madison did not quote Montaigne in writing again. But the sentiment he formulated in his own hand bears a striking resemblance to his lifelong assumption about popular majorities—that they were bound to get their way sooner or later, and hence could be diverted but not obstructed—

¹ William T. Hutchinson and William M.E. Rachal, eds., The Papers of James Madison: Volume 1 (Chicago, the University of Chicago Press), 16. This first series of Madison’s papers is hereafter referred to by PJM, followed by volume and page number, as in PJM 1:16. The precise date of the notes quoted above cannot be conclusively ascertained. The first heading in the book reads “December 24, 1759,” when Madison was eight years old, but no subsequent entry is dated. The initial entries are a lengthy series of aphorisms and other observations from the memoirs of Cardinal de Retz. The entries on Montaigne immediately follow these. The editors note that the Latin translations included in these early entries, as well as the fact that Madison also recorded some of Montaigne’s reflections on romance, suggest that they date to the time of his study with the Scottish tutor Donald Robertson. See PJM 1:4-6. Madison’s autobiographical reflections late in life indicate that this study commenced around the age of 12. For the quotation from Montaigne, see his essay “On Diversion” in M.A. Screech’s translation of Michel de Montaigne: The Complete Essays (New York: Penguin Putnam, 1991).
while the quotation he recorded from Montaigne presaged his view of time as central to the proper operation of republicanism: Because time defuses the passions, majorities should prevail only after cohering for an interval sufficient to ensure that reason rather than impulse guides their will. This study argues that these elements of Madison’s thought—the centrality of time and the inevitability of majority rule—converge to form an implicit doctrine that may be called “temporal majoritarianism.”

Both elements have received substantial attention in the extensive literature on Madison. Madison’s commitment to majority rule has been carefully documented in a redemptive strain of late-20th century scholarship that reasserts his republicanism against decades of interpretation that cast the Founder as a reactionary aristocrat who sought to shield the propertied few from the landless masses. Several commentators have also emphasized the importance of deliberation, and hence of delay, in Madison’s thought. The study that follows aspires to refine both interpretations by establishing the following features of Madison’s democratic theory:

---


First, at no time did Madison contemplate either the possibility or desirability of any system of governance other than majority rule. He criticized the decisions of majorities with which he disagreed; he believed certain kinds of majorities under certain kinds of conditions were prone to error or abuse; he denied that a decision was just merely because a majority had reached it. But he never questioned the majority’s rightful authority to make decisions, and his criticism of certain majorities in certain situations does not impeach his majoritarian credentials any more than a critic of the President or Congress today could be accused of opposing the Constitution. Indeed, as will be seen, many of the passages in which Madison criticizes majorities most harshly also affirm their ultimate right to bind the community.

This normative commitment to popular government must be understood in the context of Madison’s empirical belief that majority rule was inevitable, something like a law of nature, in republican societies. Perhaps the most consistent assumption behind his political thought was the futility of what he dismissed as “parchment barriers” that attempted to impose rules without regard for the political and sociological realities in which they would operate. This fact is overlooked if Madison’s political thought is evaluated as though it were a heuristic enterprise whose object was identifying the ideal

---

4 Willmoore Kendall observes of Madison and Hamilton: “[W]e err greatly when we confuse their animus against the popular majority bent on injustice with an animus against the popular majority, the majority of the people, as such.” See Kendall, “The Two Majorities,” Midwest Journal of Political Science 4.4 (1960): 334. The contemporary assumption that justice cannot be objectively defined obscures this distinction, on which point see Chapter 3 below as well as George W. Carey, “Majority Rule and the Extended Republic Theory of James Madison” in Carey, In Defense of the Constitution (Indianapolis: Liberty Fund, 1995).
regime. His intent, rather, was to overlay political mechanisms onto existing sociological forces he accepted as unalterable in their essential characteristics. Institutions, rules and compacts worked within the boundaries set by political reality; their chief purpose was to channel rather than dam the energies of popular majorities; and if they were to succeed, they had to establish a more or less self-regulating and self-perpetuating mechanism that drew its power from the inherent conditions of republican society. This self-regulating character of the Constitutional order is crucial to an accurate understanding of Madison’s thought. He never understood himself to be engaged in a debate about the advisability of majority rule *per se*; the question was always what kind of majorities would rule—and, conversely which should not.

Hence, and second: Madison maintained a lifelong concern about impulsivity in politics. The majorities to which he objected were almost always those that formed, spread and prevailed quickly, a point underscored by his frequent portrayal of them with metaphors like fire and contagious epidemics that connoted sudden eruptions of sentiment sweeping across populations or political institutions before there was time for thoughtful consideration. Political decisions, institutions or majorities that concerned Madison were “impetuous,”“hasty,”“precipitate,”“overheated” and contaminated by


“contagious passion.”⁹ A majority acting under such circumstances was prone to error because it was unlikely to perceive its long-term interest in treating minority groups justly—what Tocqueville called the American doctrine of “self-interest well understood.”¹⁰ Moreover, impulsive majorities were apt to change their minds quickly and repeatedly, so enshrining their views in policy at any one moment during such turmoil would be arbitrary.

Third, Madison’s solution to the problem of impulsivity was to harness what he saw as the inherent power of time to dissipate passions. One purpose of delay was to facilitate deliberation, but in another and perhaps broader sense, its utility did not derive from what occurred in the interval between impulse and decision. The interval itself was the point. Time would ensure that passion subsided, reason resumed its throne and therefore that transient appetites yielded to long-term interests. Moreover, a majority that cohered for a sufficient duration was probably settled and thus unlikely to change its mind barring changed circumstances. As a result, institutions or majorities that Madison saw as seasoned with time and ripe to prevail were “cool,”¹¹ “deliberate,”¹² “settled”¹³

---

⁷ Madison to Edmund Randolph, June 11, 1782, PJM 4:333-34.
⁸ Madison to the Marquis de Lafayette, Nov. 25, 1820, WJM 9:35-38.
⁹ Madison’s unaddressed 1833 letter on “Majority Governments,” WJM 9:520.
¹¹ Federalist 63:327.
and focused on “permanent” needs rather than immediate desires.\textsuperscript{14} He wrote in Federalist 63:

As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers: so there are particular moments in public affairs, when the people, stimulated by some irregular passion … may call for measures which they themselves will afterwards be the most ready to lament and condemn.\textsuperscript{15}

Madison can be cast as anti-majoritarian only by excising the first half of the passage. Taken \textit{en toto}, it provides a synopsis of his democratic thought. To begin with, the normative and the empirical intersect: The people’s “cool and deliberate” sense both \textit{should} and \textit{will} prevail. Impulsive measures are apt to arise at “particular” moments brought about by “irregular” passions, formulations that suggest such will not be the normal course of events, and that it is therefore a mistake to interpret the entire Constitution as a project to thwart popular majorities. But such moments will arise; such majorities will be likeliest to be unjust or unsettled if they impose their will in a hectic rush; and, conversely, they will be liable to reflect liberal values if they persist long enough to survive the series of constitutional processes necessary to prevail.

\textsuperscript{12} Madison in Convention, June 5, 1787, \textit{PJM} 10:26. All references to the Convention are to Madison’s notes unless specified otherwise. For simplicity, rather than referring to a separate volume of Madison’s notes, I cite them as they appear in his published papers.

\textsuperscript{13} Madison to Judge Spencer Roane, May 6, 1821, \textit{WJM} 9:59.

\textsuperscript{14} See Federalist 10:43 and 42:219, among others.

\textsuperscript{15} Federalist 63:326.
Consequently, one function of the Constitution was to serve as a metronome setting the proper tempo for republican politics. The natural and sometimes appropriate pace was *allegro*; often, though, Madison utilized constitutional mechanisms to slow the pace of politics to a leisurely *andante*. Thus the idea of temporal majoritarianism: Majorities should prevail when they have cohered for a duration appropriate to a given set of circumstances. From this perspective, progressive commentators misplace their criticism in describing as anti-democratic institutional arrangements that require super-majorities or seemingly redundant consensuses from multiple branches of government. Madison’s perspective is lateral rather than vertical: Rather than asking how *many* people agree with a given view at one discrete point in time, the decisive question is how *long* a majority has cohered. The relevant measure is a time-elapse photograph, not a snapshot.

Madison never articulated this doctrine systematically, nor does temporal majoritarianism explain the totality of his thought. The present study does contend, however, that temporal majoritarianism is latent in views to which he adhered more or less consistently over the course of his career, even when his positions on other fundamental topics evolved. The chapters that follow explore how temporal majoritarianism operates in several core areas of Madison’s political thought: the extended republic theory of Federalist 10, the Bill of Rights and constitutional interpretation, among others. In varying ways, critics have held up each of these areas as evidence of Madison’s closet aristocratism. The perspective of temporal majoritarianism
instead shows that in each case, Madison’s objective was not to thwart majorities but rather to facilitate a certain kind of majority: one seasoned by time.

Having set out the basic features of this theory and its operation in Madison’s thought, this study will explore the implications of temporal majoritarianism for contemporary politics, this chief among them: To the extent Madison’s democratic theory depends on time, the virtue on which it hinges is patience. If so, fundamental features of Madison’s democratic thought stand in tension with a 21st century ethos of instant gratification and communication—what William E. Scheuerman has called “the social experience of speed.”16

In exploring this feature of Madison’s thought, it is important not to equate his democratic theory with the Constitution itself. Madison is miscast as the Father of the Constitution. He lost several foundational battles at the Philadelphia Convention. By Forrest McDonald’s count, “of seventy-one specific proposals that Madison moved, seconded, or spoke unequivocally in regard to, he was on the losing side forty times.”17 Rather than the Father of the Constitution, Madison is better understood as its midwife and, later, its nursemaid. No one did more to bring the Constitution into existence; only


Washington did more to shape the culture and norms under which it began to operate.\textsuperscript{18} The sheer tenure of Madison’s public career—he was the youngest delegate to the Convention and its last survivor, and he was present at or a respected commentator on virtually every major political event in between—placed him in a position of undeniably profound influence over the early and formative years of the new regime. But Madison, as he insisted himself, was not the Constitution embodied.

Thus, this study is an interpretation of Madison’s democratic theory, not of the Constitution. Its intent is exegesis, not hagiography. To say Madison consistently championed majority rule is not necessarily to proclaim him a democratic or liberal hero. On the contrary, he may have trusted majorities too much; he may have appreciated the restless character of American politics too little; he may have referred decisions to majorities at levels of society so broad, and at which civic participation was so diluted, as to make him a communitarian without community; or, conversely, as nearly a century of deference to the judiciary suggests, he may have overstated the propensity of majorities to resist encroachments on their rule. Democrats and rights theorists alike will find reasonable fault with the Madison portrayed in the interpretation that follows. The present study seeks merely to understand him on his own terms, whatever flaws or strengths that exploration may reveal.

\textsuperscript{18} To say no one did more is not, of course, to deny the arguably equal influence of Hamilton during this period.
We begin with the odyssey of Madison scholarship in the 20th century, which the Founder entered as an aristocratic villain and left as a republican hero—a dichotomy, as will presently be seen, that its subject would scarcely recognize.
Chapter 1
‘The Vital Principle of our Constitution’: Madison on Majority Rule

1.1. ARISTOCRAT OR REPUBLICAN? THE DEBATE IN MADISON SCHOLARSHIP

1.1.1. The Anti-Majoritarian Reading

The same judicial veneration of individual rights that contemporary progressives now hail as a hallmark of Constitutional government was once their bane. In the 1905 case of Lochner v. New York, the Supreme Court held that the Constitution forbade restrictions on the length of bakery workweeks, ushering in a series of rulings that invoked the Bill of Rights and the 14th Amendment to thwart economic reforms. Unable to persuade the Court that it was misinterpreting the Constitution, many historians of the period took dead aim at the founding document itself. Cushing Strout notes that commentaries on the founding had theretofore waged ideological battles via competing interpretations of the Constitution. However:

In the first decade of the twentieth century a generation of reformers began to question the [Constitution] itself. The Founding Fathers had become the idols of the established powers in business and politics, and the reformers began to seek elsewhere for the democratic wisdom to deal with the corruption, privilege, monopoly, and exploitation which characterized urban and industrial life.

---

1 Our ability to assess each author’s view of Madison is limited by the fact that the most theoretically relevant numbers in The Federalist were mistakenly attributed to Hamilton until Douglass Adair’s landmark mid-century essay, “The Authorship of the Disputed Federalist Papers,” which conclusively established Madison’s authorship of the separation of powers numbers, among others. (Reprinted in Adair, Fame and the Founding Fathers (Indianapolis: Liberty Fund, 1998), 37-105.) Many of these critics, especially Beard, single Madison out, but others refer more generically to the Founding period. This study treats these criticisms of the Constitution—especially the mechanisms whose explanations were written in Madison’s hand in The Federalist—as criticisms of Madison. The only purpose in doing so is to understand how Madison stands up to the charge that the Founding was anti-majoritarian. Whether the Progressive critics had Madison personally in mind is not material to the central fact this study endeavors to establish: that Madison never entertained any alternative but majority rule.
Perhaps the saving wisdom had somehow been lost—lost ever since it had first been glimpsed by the American rebels of 1776. It might even be that the Founding Fathers and their Constitution were themselves at the root of the evils.2

The forerunner3 of this revisionist school was J. Allen Smith, the populist and champion of localism whose 1907 work *The Spirit of American Government* described the Constitution as “a reactionary document” whose framers, prompted by a “fear of democracy,” sought “to limit the power of the majority.”4 Twentieth century reformers were engaged in the hopeless project, Smith wrote, of “trying to make an undemocratic Constitution the vehicle of democratic rule.” Indeed, it was “surprising” that “anyone who has read the proceedings of the Federal Convention can believe that it was the intention of that body to establish a democratic government. The evidence is overwhelming that the men who sat in that convention had no faith in the wisdom or political capacity of the people.”5 Understanding Madison’s reflections on factions to

---


3 Woodrow Wilson also deserves attention as an influence on, if not a member of, this school. His 1885 classic *Congressional Government: A Study in American Politics* (Boston: Houghton, Mifflin and Co., 1901) presaged the critique of separation of powers that later commentators like James McGregor Burns articulated in the 20th century. See, for example, page 284, on which Wilson apparently refers to both federalism and the separation of powers: “It is … manifestly a radical defect in our federal system that it parcels out power and confuses responsibility as it does.” Wilson’s 1912 campaign tract *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* (New York: Doubleday, Page, & Co., 1918) goes further in accusing the founders—he singles out Alexander Hamilton, but refers to the separation of powers essays in *The Federalist*—as anti-democratic. Both books advocate reforms that more immediately translate public views into policy.

4 Smith, v-vi. These arguments permeate the work; I quote them here from the heading and subheadings Smith assigns to Chapter III.

5 Smith, 31-32.
refer to political parties, and political parties to be essential to democratic reforms, Smith wrote that the framers’ “chief purpose was to prevent the very thing which the responsible political party aimed to establish, viz., majority rule.”\(^6\) The ostensible purpose of separation of powers was “to limit the authority of the government and thereby make it responsible to the people,” but its actual goal was to replicate on American shores the unresponsive British regime against which the colonists had rebelled a decade earlier.\(^7\)

Smith’s work inspired a new generation of critics. Vernon Parrington’s Pulitzer Prize-winning \textit{Main Currents in American Thought}, which was dedicated to Smith, saw Madison as articulating a “general view” at Philadelphia that barriers should be erected to an eventual landless majority. “In elaborating a system of checks and balances,” Parrington wrote, “the members of the convention were influenced by the practical considerations of economic determinists more than by the theories of Montesquieu.”\(^8\) Edward Elliott wrote in 1916 that “the people of the United States have been hindered in the attainment of democracy” by constitutional mechanisms that prevented the “immediate and direct rule of the numerical majority . . . .”\(^9\)

\(^6\) Smith, 205.

\(^7\) Smith, 128-130. Again, following the practice of the time, Smith attributed the separation of powers papers in \textit{The Federalist} to Alexander Hamilton.

\(^8\) See Parrington, \textit{Main Currents in American Thought}. Vol. 1, Book 3, Ch. 2, quoted from the online text available at \url{http://xroads.virginia.edu/~Hyper/Parrington/vol1/bk03_01_ch02.html}.

authority than Woodrow Wilson called for the “emancipation of the generous energies of a people” from the rigid view of the Constitution set forth by the Founders. “Freemen,” he wrote, “need no guardians.”

In terms of enduring influence on interpretations of the founding, even Wilson’s influence was outshone by the historian Charles Beard, whose seminal *Economic Interpretation of the Constitution of the United States* cast the founders as possessive aristocrats who designed the American regime to shield their property from the masses. Rather than the assemblage of “demigods” that Thomas Jefferson had called the Grand Convention of 1787, Beard argued that the framers were self-interested property owners whose purpose in Philadelphia was to protect their wealth by erecting barriers to popular majorities.

One consequence, probably unintended, of Beard’s examination was to rescue a then little known paper called the Tenth Federalist from obscurity. Madison regarded the extended-republic theory first publicly articulated in that paper as central to his democratic thought, but—as Douglass Adair notes—its importance had escaped commentators in the years between its publication and Beard’s analysis:

---

10 Wilson, *The New Freedom*. The call for “emancipation” appears on the title page. “Freemen Need No Guardians” is the title of Chapter 3, which begins with a criticism of the founding generation that is specifically targeted at Hamilton but would, apparently, apply to Madison as well. See n. 1 and n. 3 above.

11 Beard, *op. cit.* In an introduction to this edition, Forrest McDonald cites Smith as an influence on Beard. (See page xi.)
Before Beard published *An Economic Interpretation of the Constitution*, practically no commentator on *The Federalist* or the Constitution, none of the biographers of Madison, had emphasized Federalist 10 as of special importance for understanding our “more perfect union”; after Beard’s book appeared the tenth Federalist became the essay most often quoted to explain the philosophy of the Fathers and thus the “ultimate meaning” of the United States Constitution.\(^{12}\)

Despite the essay’s famous claim to have discovered “a republican remedy for the diseases most incident to republican government,” \(^{13}\) Beard saw the political theory of the Constitution as both aristocratic and economically deterministic:

> The economic corollary of this system is as follows: Property interests may, through their superior weight in power and intelligence, secure advantageous legislation whenever necessary, and they may at the same time obtain immunity from control by parliamentary majorities.”\(^{14}\)

Beard’s attack became the basis for Progressive historians whose narrative assumed the economic motives of the founding.

By mid-century, as Adair’s seminal historiography of the Tenth Federalist\(^ {15}\) documents, the anti-democratic thesis stood virtually unchallenged in American historical scholarship. Robert Dahl was among the first commentators to approach this interpretation from the perspective of political theory. His 1956 *Preface to Democratic Theory* argued that the constitutional structures Madison explicated in *The Federalist*

\(^{12}\) Adair, 107.

\(^{13}\) Federalist 10:48.

\(^{14}\) Beard, 161. Beard analyzes Federalist 10 in depth but refers also to separation of powers, the super-majority requirement for amendments and other mechanisms.

\(^{15}\) See Adair, “The Tenth Federalist Revisited,” pp. 106-131 in *Fame and the Founding Fathers*. 
were undemocratic because they placed barriers before popular majorities that were unnecessary to achieve their stated goals.

Chapters 3 and 4 will challenge Dahl’s critiques in more detail, but insofar as they pertain to Madison’s views of majority rule, they are essentially twofold. First, on Dahl’s analysis, the same conditions that Madison believed would inhibit factious majorities would also inhibit non-factious majorities, with the result that “the effectiveness of any majority whatsoever is severely limited if the electorate is numerous, extended, and diverse in interests.”

Second, Dahl understood Madison to have favored institutional curbs on majorities:

[M]adison wished to erect a political system that would guarantee the liberties of certain minorities whose advantages of status, power, and wealth would, he thought, probably not be tolerated indefinitely by a constitutionally untrammeled majority. Hence majorities had to be constitutionally inhibited.

Constitutional restrictions, Dahl wrote, were unnecessary because “internal checks” could restrain majorities from infringing the rights of minorities without also inhibiting legitimate exercises of popular rule:

[P]resent evidence suggests that “internal checks”—the conscience (super-ego), attitudes, and basic predispositions—are crucial in determining whether any given individual will seek to tyrannize over others … and that the probability of tyranny emerging in a society is a function of the extent to which various types of internalized responses are present among members of that society.

---


17 Ibid., 31.

18 Ibid., 18.
Dahl, then, may be summarized as follows: The purpose of constitutional mechanisms like the separation of powers was to restrain abusive majorities. These majorities can be restrained by means that do not also inhibit non-abusive majorities. Hence these mechanisms are needless restraints on majority rule.

Similarly, Louis Hartz’s *The Liberal Tradition in America* identified a strain of Lockean liberalism focused on individual rights as the country’s central political ethos. The country’s liberal political culture, like Dahl’s “internal checks,” was sufficient to restrain abusive majorities. Consequently, Hartz belittled the “neurotic terror of the majority” he saw as evident in Constitutional structures:

> What must be accounted one of the tamest, mildest, and most unimaginative majorities in modern political history has been bound down by a set of restrictions that betray fanatical terror. The American majority has been an amiable shepherd dog kept forever on a lion’s leash.

James MacGregor Burns expanded this analysis, especially its criticism of separation of powers, in 1963’s *The Deadlock of Democracy*. Burns’ complaint was that institutional deadlock retarded progress on economic reforms and civil rights even though electoral majorities supported such measures. One reason was that Madison erected multiple and duplicative roadblocks before popular majorities. On Burns’

---

19 Again, we shall see in Chapter 4 that such was not the purpose of separation of powers. Dahl, however, understands it to have been.


analysis, Madison placed his first hope for restraining majorities in the extent of the republic, then added a layer of protection through federalism.

But Madison still was not satisfied. There was still the possibility that even in the new Union a majority of the people might gang up on the minority. To be sure, Montesquieu’s old safeguard might work: divide up national power among different officials, legislative, executive, and judicial . . . . But even this might not be enough, for what if the different officials—Congressmen, President, and federal judges—got together and pooled their power for the interests of some oppressive majority?22

Madison answered the question, Burns wrote, by means of a uniquely American twist on Montesquieu’s theory: empowering each branch of government to restrain the other. One result was that “even after a majority had … won power, strong minority interests … would still have a veto power over government action.”23 But Burns diagnosed the same illness Dahl had identified: These checks were unnecessary and therefore undemocratic.


23 Burns, 40-41. As we shall see, this is precisely the system John C. Calhoun proposed not as an interpretation or description of Madison’s model but rather in conscious opposition to it.

24 Burns, 21.
Burns believed it was enough: A properly constituted party system could constructively channel majorities, who would be restrained by diversity and “overlapping memberships,” which ensured “that a governing majority … could not afford politically to be immoderate, because it could not afford to alienate moderate voters holding the balance of power.” This “Jeffersonian formula” was a more democratic alternative to the “Madisonian model.”

1.1.2. The Redemptive Reading

When Burns wrote, the anti-democratic reading of the founding was ascendant. But an alternative story was emerging: Madison was not opposed to majority rule; on the contrary, it was precisely because he was so devoted to republicanism that he sought to save it from its own excesses.

25 Burns, 40. The idea of “overlapping memberships” was originated by David Truman, who credited Madison as a progenitor of modern pluralist theory. See Truman, The Governmental Process (New York: Alfred A. Knopf), 1951.

The debate over whether the Constitution was republican or aristocratic has also been a subtext in scholarship that emphasizes the influence of civic republicanism in the American Founding, especially the Revolutionary period. The issues involved, however, generally concern the nature of representation, the importance of virtue and the proper size of republics rather than majority rule per se. Gordon Wood, for example, refers to disagreements about representation—that is, whether representatives should mirror or lead their constituencies—rather than majority rule when he calls the Constitution “aristocratic”: “Considering the Federalist desire for a high-toned government filled with better sorts of people, there is something decidedly disingenuous about the democratic radicalism of their arguments. . . .” See Wood, The Creation of the American Republic (Chapel Hill, N.C.: The University of North Carolina Press, 1998), 562. (See also Chapter 3 below for a more detailed discussion of Madison’s understanding of representation.) For other civic republican accounts of the founding, see J.G.A. Pocock’s landmark The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (Princeton, N.J.: Princeton University Press, 1975) and Bernard Bailyn’s Pulitzer Prize-winning study The Ideological Origins of the American Revolution (Cambridge: The Belknap Press of Harvard University Press, 1992). Garry Wills deals tangentially with similar themes in his questionable claim that Madison disapproved of public criticism of government. See Wills, Explaining America: The Federalist (New York: Penguin Group, 2001), especially Chapter Three.
Adair was among the first to reassess Madison through this lens. His 1957 essay “That Politics May Be Reduced to a Science: David Hume, James Madison and the Tenth Federalist” portrayed Madison as a sophisticated theorist rather than an economic opportunist. The accepted wisdom of Madison’s day, received from Montesquieu, was that a republic could only be established on a small territory. Alexander Hamilton and John Adams, Adair wrote, therefore advocated a British-style constitutional monarchy, a solution anathema to the republican Madison. Madison’s challenge, then, was to answer Montesquieu. Adair imagined the Founder as “electrified” by his discovery that David Hume, in his essays on political parties as well as his “Idea for a Perfect Commonwealth,” already had—and, in so doing, had also prepared the way for a solution to the problem of faction that had vexed Madison. Thus, contrary to Beard’s allegations of venality, Madison emerged as a scholar-statesman who sliced the Gordian knot that theretofore bound republican government in the United States. “This was the glad news that James Madison carried to Philadelphia. This was the theory which he claimed had

---

26 Adair, op. cit., 131-152.

27 The characterization is Adair’s: “To both Adams and Hamilton history proved (so they believed) that sooner or later the American people would have to return to a system of mixed or limited monarchy—so great was the size of the country, so diverse were the interests to be reconciled that no other system could be adequate in securing both liberty and justice.” (Adair, 138) Hamilton fiercely disputed descriptions of his proposals as monarchical. I follow Adair’s characterization for purposes of assessing his analysis on its own terms.

28 Adair, 141.
made obsolete the necessity for the ‘mixed [monarchical] government’ advocated by Hamilton and Adams.”

Adair’s primary purpose was to assert Hume’s influence on Madison. It was Martin Diamond who, writing in 1959, offered the first systematic refutation of the Progressive account of Madison and the founding. His essay “Democracy and The Federalist: A Reconsideration of the Framers’ Intent” argued that purveyors of the anti-democratic thesis persistently overlooked a distinction the founders saw as paramount: that between republics and democracies. “[The founders’] basic view was that popular government was the genus, and democracy and republic were two species of that genus of government.” Republicanism, embodied in the Constitution and completely compatible with the democratic ethos of the Declaration of Independence, was intended to cure the defects of untrammeled majority rule. Critics of the founders were unable to see those “defects,” Diamond observed, because their positivistic and characteristically modern outlook denied that any political action could be objectively described as defective. Within the founders’ framework of moral objectivity, though, the distinction between majorities deciding rightly and majorities deciding wrongly was both plausible and pivotal. Hence:

---

29 Adair, 151.


31 Diamond, 20.

32 For a fuller exploration of Madison’s moral objectivity, see Carey, In Defense, op. cit.
The Founding Fathers did in fact seek to prejudice the outcome of democracy; they sought to alter, by certain restraints, the likelihood that the majority would decide certain political issues in bad ways. These restraints the founders justified as mitigating the natural defects of democracy.33

To understand this distinction, it was essential to appreciate the founders’ view that democracy could exhibit “diseases” and be susceptible to remedies.34 According to this newly emerging interpretation, Madison concluded that American democracy in the post-Revolutionary period was so diseased it needed radical surgery to survive.

This view may now be as pervasive in the Madison literature as Beard’s once was. Jack Rakove, for example, understands Madison to have concluded that the mission of the Philadelphia convention of 1787 “would extend to saving not only the union from the states but the states from themselves.”35 Elsewhere, Rakove describes Madison as so alarmed at majority abuse during this period that his thought took on a “reactionary” character.36 Madison’s biographer Ralph Ketcham notes that the founder approached the problem of abusive majorities from a republican perspective: “Madison’s response to the problem … far from being one of despair or rejection of republicanism, was to seek

33 Diamond, 23.
34 Ibid., 22.
restraining or mitigating factors.”37 Neal Riemer, meanwhile, portrays Madison as believing that the central government must control abusive majorities lest an implosion of popular rule clear the way for an anti-republican regime.38 For Drew McCoy, Madison’s concern about abusive majorities was itself evidence that “his republican character and career were unmistakably cut from a neoclassical mold.”39

The view that Madison sought to save republicanism from itself received its fullest and most thoughtful treatment in Lance Banning’s The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic.40 “In emphasizing his determination to restrain majority excesses,” Banning wrote, “we should never let ourselves forget that it was popular self-governance he was working to preserve.” According to this interpretation, Madison’s primary concern at Philadelphia was to preserve the republican experiment by establishing a national government through which national majorities could prevail with respect to national issues. It was therefore a mistake to read the Madison of the 1780s as favoring nationalism at the expense of local


40 Lance Banning, The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic (Ithaca, N.Y.: Cornell University Press, 1995). Banning’s book is notable chiefly for its daring and somewhat problematic attempt to reconcile Madison’s nationalist perspective of the 1780s with his opposition writings of the 1790s, but that issue exceeds the scope of our inquiry.
majorities; his project was to enable national majorities to prevail only within what Banning called the “narrow sphere” the national government would occupy.41

On Banning’s analysis, Madison’s concern about abusive majorities was secondary to the project of reforming the confederation, but nonetheless serious: “Modern scholarship has not exaggerated Madison’s disgust with local politics and local legislation. . . . To Madison, however, these distinctive worries seemed related aspects of a single, general crisis of the Revolution. On this thought, he built a plan that was intended to address both sets of ills. . . .”42 Thus Madison succeeded in reconciling “liberty defined as the inherent rights of individuals, but also liberty defined as popular control”:

Convinced that neither sort of liberty could be secure without the other, temperamentally unable to decide between his “liberal” and his “republican” convictions, Madison set out to rescue both of the ideals enunciated in the Declaration at a time when growing numbers of Americans believed that they might have to choose.43

Interpretations like Banning’s have served the useful purpose of refuting critics like Beard and Dahl who impeached Madison’s majoritarian credentials. To an extent, though, even these corrections accept the critics’ terms: namely, that Madison faced a

41 Ibid., 117-118.
42 Ibid., 78.
43 Ibid., 10.
choice between endorsing and opposing majority rule. As may presently be seen, the choice itself was foreign to Madison’s thought.\footnote{George W. Carey and Michael Zuckert have also played pivotal roles in clarifying Madison’s republicanism. Their contributions will be encountered in subsequent chapters, especially Chapter 3.}

1.2. MADISON ON MAJORITY RULE

1.2.1. Defining Majoritarianism

The task of assessing Madison’s thought against these interpretations is substantially complicated by the fact that—as will be seen in the case of their views on rights—the critics do not define precisely what they mean by majority rule. A standard by which to measure Madison’s majoritarianism is hardly clear. Questions abound: How often need the majority be consulted? A majority of whom? Measured directly or via representatives?\footnote{For excellent discussions of these and related questions, see Kendall, \textit{John Locke and the Doctrine of Majority-Rule} (Urbana, Ill.: University of Illinois Press, 1959), and Elaine Spitz, \textit{Majority Rule} (Chatham, N.J.: Chatham House, 1984).}

Madison, too, employed variations on the theme of majority rule without precise definition. As was often the case in his thought, however, a precise, \textit{a priori} standard was less important to Madison than how a regime actually operated in practice.

In practice, Madison regarded all government as essentially majoritarian insofar as it derived its power from the willingness of majorities to obey.\footnote{This idea was perhaps David Hume’s most influential contribution to the founding generation’s political thought. See n. 121 and n. 122 below.} As we have already seen, this empirical assumption is of decisive importance in understanding the whole of
his democratic theory. But it is unavailing in establishing a normative standard by which
to assess Madison, for it risks placing him in the tempting but fatuous position of defining
the problem of majority rule away by declaring any operational regime to be majoritarian.

The fundamental idea that all governments exist at the sufferance of majorities,
however, does suggest how a standard might be formulated in Madisonian terms: All
governments are majoritarian, but they are also either more or less majoritarian as the
distance between the majority’s will and the regime’s authority grows or shrinks. The
ends of this continuum might be framed, at one extreme, by Madison’s definition of
republicanism in Federalist 39—power must be ultimately derived from “the great body
of people,” offices must be open to all rather than hereditary or aristocratic, and leaders
must serve for fixed terms or during good behavior47—and at the other by J. Allen Smith,
who claimed that popular rule could countenance “no checks” on majorities whatsoever
and that “every scheme under which the power of the majority is limited means in its
practical operation the subordination of the majority to the minority.”48

The question to be answered, then, is where to locate Madison on this continuum
vis-à-vis his critics. Critics place him at the end of this spectrum most removed from

proposed Constitution was compatible with “the great Principles of [republicanism], all Power being
derived mediately or immediately from the People. No Title or Powers that are either hereditary or of long
duration so as to become Inveterate. . . .”

48 Smith, The Spirit of American Government, 296. We shall see below that Smith’s analysis of
majority rule almost precisely mirrors Madison’s critique of the nullification doctrine.
immediate majority rule. As has been seen, these commentators have generally alleged that Madison was deeply uncomfortable with, if not outright opposed to, the idea of majority rule; that he believed individuals or political minorities should be exempt from majority rule when their rights were implicated; that he placed authority in institutions needlessly distant from popular opinion; and that he sought to restrict suffrage so as to accord property-holders disproportionate influence. Even redemptive readings have asserted that the reconciliation of minority rights and majority rule is a central theme—perhaps the central theme—in Madison’s thought. But by each of these criteria, Madison’s democratic theory lies much closer to Smith’s absolutist conception of majority rule than to his own definition of republicanism.49

1.2.2. Normative Commitments

Indeed, an innocent reader of Madison’s writings might be stunned to learn that critics ever understood him otherwise. When he offered paeans to the Constitution, the principle he cited as its defining feature was neither individual rights, nor liberalism more generally, nor the institutional checks that critics understand as impediments to majority rule. Rather, the central tenet of the Constitution was “respect for the Will of the

49 Madison’s definition would accommodate a constitutional monarchy or aristocracy on the British model. The basic idea, however, is that a regime is the product of majority rule if the majority has some ultimate right to replace it—presumably, in a republic, via election. The vast authority of the modern state, and the nearly infinite array of decisions it makes between elections, naturally limits the extent to which an election can be seen as an endorsement or rejection of any one policy. This issue is outside the scope of the present study, but suffice it to say for now that the reach of the modern state dwarfs anything within Madison’s contemplation.
majority. . . .”\textsuperscript{50} It was majority rule—not, significantly, individual liberty—that Madison called “the vital principle of our free Constitution. . . .”\textsuperscript{51} In his pre-convention essay “Vices of the Political Systems of the United States,” Madison—who, on the critical reading, ought here to have been plotting a coup against majority rule—indicated in passing that “[i]n republican Government the majority however composed, ultimately give the law.”\textsuperscript{52} Late in life, he once more affirmed that majority rule was “the vital principle of republican government” itself:\textsuperscript{53} In Federalist 58, Madison used similar language in opposing a super-majority requirement for action in the House despite explicitly acknowledging its potential for preventing “hasty and partial measures.” As Chapter 2 will show, “hasty” and “partial” were the very stigmata of majorities that Madison thought were likeliest both to err as to their own interests and to invade the rights of minorities. Madison nonetheless concluded that the necessity of passing measures that served the general good trumped the desire to block errant majorities:

In all cases where justice, or the general good, might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed [by a super-majority requirement]. It would be no

\textsuperscript{50} Madison to the Chairman of the Republican Society of Hancock County, Massachusetts, March 15, 1809. \textit{PJM}, Presidential series (hereafter \textit{PJM-PS}) 1:53.

\textsuperscript{51} Madison to Vermont Governor Jonas Galusha, November 30, 1812. \textit{PJS-PS} 5:472.

\textsuperscript{52} \textit{PJM} 9:355. Indeed, this statement was a preface to the section of that essay concerned with abusive majorities. At no point did he implicitly or explicitly question its premise. Majority rule was both the empirical fact and normative ideal that formed borders around any solution to the problem of majority abuse.

longer the majority that would rule; the power would be transferred to the minority.\footnote{Federalist 58:305. To be sure, Madison spoke approvingly of super-majorities in other situations, most clearly in his comments on Jefferson’s draft of a constitution for Virginia, in which he suggested that super-majorities should be required to override an adverse recommendation of a Council of Revision comprised of the executive and judicial branches (\textit{PJM} 11:285-293). But the criticism with which we are dealing at present is the relationship of a popular majority to a popular minority. Madison disapproved of blocking popular majorities by giving legislative minorities a veto over public acts. It is true that such a minority could exercise a veto under this suggestion, but only subsequent to a decision of the executive or judicial members of the Council of Revision, each of which, on Madison’s view, emanated ultimately from popular majorities. He may, of course, have been mistaken in assuming the judicial branch in particular represented majorities; it may even be likely that Madison’s proposal would have empowered minorities in its practical operation. The relevant point, however, is that Madison did not assume a Council of Revision would represent any fixed popular minority—or, indeed, any particular segment of the populace at all—so empowering minorities was, at the very least, not his deliberate intent. For a thoughtful discussion and contrary interpretation, see Samuel Kerner, \textit{James Madison: The Theory and Practice of Republican Government} (Palo Alto, Calif.: Stanford University Press, 2005), 239-240.}

Far from Louis Hartz’s “neurotic terror” of majorities, the latent premise here seems to be that the norm is for majorities to pursue the general good. Errant majorities, by contrast, are apparently enough of an aberration that a regime ought not to be structured around them. The alternative reading—that even if hasty and partial majorities are common, one still cannot risk impeding a majority pursuing the general good—would underscore Madison’s majoritarianism even more starkly.

The fact that the Articles of Confederation empowered minorities to block majorities when the general good required action was precisely what impelled the Constitutional project. It is true that Madison also expressed concerns about mistreatment of minorities in the states,\footnote{As Chapter 3 will endeavor to show, these concerns have been inflated by commentators of both the critical and redemptive schools. The policies Madison assailed as factious almost always involved} but contrary to Smith’s, Parrington’s and
Beard’s interpretation of the Constitution as a reaction against majority rule, its primary impetus was the paralysis of the Articles regime. Significantly, Madison repeatedly cast this problem as one of abusive minorities that were permitted to thwart the principle of majority rule. His most consistent critique of the Articles was that they allowed three states to block major decisions: “Could any thing in theory, be more perniciously Improvident and injudicious,” he asked in the Virginia ratifying convention, “than this submission of the will of the majority to the most trifling minority?”

Within the Philadelphia Convention, Madison’s positions were frequently more majoritarian than those of his colleagues. His Virginia Plan, which empowered the first house of the legislature to choose the second and both of them to choose the President, placed so much authority in the hands of the only directly popularly elected branch that Madison himself ultimately objected to some of its features as violating the principle of separation of powers. His riposte to delegates who wanted to base the entire Congress on equal representation of the states was also majoritarian: “Mr. Madison considered the popular election of one branch of the national Legislature as essential to every plan of free Government. . . . [Otherwise,] the necessary sympathy between [the people] and their national or interstate issues. Consequently, the underlying problem was not merely abusive majorities within the states but the inability of national majorities to address national issues.

56 PJM 11:79.

57 For the Virginia Plan, see PJM 10:15-17. Madison outlined its basic features in a letter to Virginia Governor Edmund Randolph on April 8, 1787, nearly two months before Randolph introduced the plan in Philadelphia. See PJM 9:368-71.
rulers and officers [would be] too little felt.” He pursued this argument to the brink of repudiating the very device that Adair saw as a linchpin of Madison’s plan for curbing abusive majorities: a Senate elected by the House and therefore one step removed from public opinion. That idea, Adair writes, was borrowed from Hume’s “Idea of a Perfect Commonwealth,” which proposed that successive levels of government elect the next higher level, thereby steadily and increasingly filtering the raw material of public opinion. Yet here is Madison early in the Convention, opposing a proposal for Congress to be chosen by state legislatures:

[Mr. Madison] was an advocate for the policy of refining the popular appointments by successive filtrations, but thought it might be pushed too far. . . . He thought too that the great fabric to be raised would be more stable and durable, if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislatures.59

By all accounts, Madison held out longer than any other member of the convention against giving states equal representation in the Senate, a policy that he repeatedly argued would violate the principle of majority rule and preserve the most unjust feature of the Articles. He argued this point with uncharacteristic rhetorical force, declaring on June 7 that such a departure from “the doctrine of proportional representation”—and, therefore, majoritarianism—would be “evidently unjust.”60

Proportional representation was so much “the proper foundation of Government” that

---

58 Adair (“The Tenth Federalist Revisited”), Fame and the Founding Fathers.

59 Madison in Convention, May 31, 1787, PJM 10:19 (emphasis added).

60 PJM 10:39-40.
“destroy[ing]” it would threaten the remainder of the Constitutional project. Nearly three weeks later, with the Convention at risk of imminent collapse beneath the weight of this dispute, Madison—normally a ready and skillful compromiser—”entreated the gentlemen representing the small States to renounce a principle wch. was confessedly unjust, which cd. never be admitted, & if admitted must infuse mortality into a Constitution which we wished to last for ever.” A week later, he all but expressed a readiness to force a majoritarian plan on the smaller states:

He conceived that the Convention was reduced to the alternative of either departing from justice in order to conciliate the smaller States, and the minority of the people of the U.S. or of displeasing these by justly gratifying the larger States and the majority of the people. He could not himself hesitate as to the option he ought to make. The Convention with justice & the majority of the people on their side had nothing to fear. With injustice and the minority on their side they had everything to fear. [He would prefer to conciliate the small States, but] if the principal States comprehending a majority of the people of the U.S. should concur in a just & judicious Plan, he had the firmest hopes, that all the other States would by degrees accede to it.

It is revealing that of all the battles Madison lost in the Convention—including the national veto over state laws, which he regarded as the linchpin of the Virginia Plan—the anti-majoritarian makeup of the Senate was the only feature he declined to rationalize

---


63 Madison in Convention, July 5, 1787, *PJM* 10:92-93. Yates’ notes of the convention record Madison even more starkly: The smaller states were asking “[t]wo thirds of the inhabitants of the union … to please the remaining one third by sacrificing their essential rights.” See editor’s note, *PJM* 10:94. Note that in Madison’s version, majority rule is connected with “justice,” while in Yates’, majorities have a “right” to rule. In neither case are justice or rights attached to minorities.
and defend in *The Federalist*, shunting it aside in No. 62 as a necessary compromise that it would be “superfluous to try, by the standard of theory . . . .”

Within the Convention, once the battle for proportional representation in the Senate was lost, Madison opposed empowering that body to appoint judges, again on grounds of popular rule. The executive, he said at this point, should have a role in appointing judges because he, unlike the Senate as now constituted, would be “a national officer, acting for and equally sympathising with every part of the U. States.” Madison thus insisted on a majoritarian influence in the appointment of the judiciary, the branch commentators like Beard have most criticized as aristocratic.

Madison also preferred that the president himself be more directly accountable to popular majorities. Smith characterizes the Electoral College as a scheme “to prevent the majority of the qualified voters from choosing the President.” But Madison spoke for the prerogatives of exactly such a majority when arguing in the Convention for the direct election of the president by the voters at large. Moreover, he joined James Wilson in

---

64 Federalist 62:320.


66 Smith, 332.

67 Madison Convention, July 25, 1787, *PJM* 10:115-117. In this speech as in other contexts, Madison also opposed election of the President by the Legislature—the very mechanism his Virginia Plan had proposed. In his pre-Convention comments on a draft constitution for Kentucky, Madison pronounced himself undecided on whether a legislature should choose an executive; after the convention, he called such an approach “improper.” The sequence strongly suggests it was during the Convention itself that Madison reached the strong conclusions about separation of powers later adduced in Federalist 51. For his early comments on the Kentucky constitution, see Madison to Caleb Wallace, August 23, 1785, *PJM* 8:350-57.
opposing a proposal to make the executive removable only by a vote of the state legislatures—again, the Articles model—on the grounds that “it would enable a minority of the people to prevent the removal of an officer who had rendered himself justly criminal in the eyes of a majority. . . .”

During the ratification debate, Madison continued to argue for the Constitution on majoritarian grounds. Federalist 40, responding to the anti-Federalist claim that the Constitution should require ratification by all 13 states, assailed “the absurdity of subjecting the fate of twelve states to the perverseness or corruption of a thirteenth,” a situation that could hold “fifty-nine sixtieths of the people” hostage to “inflexible opposition given by a majority of one sixtieth of the people of America. . . .” Madison went further in Federalist 51, embedding a majoritarian argument in the very section of the paper concerned with abusive majorities:

In the extended republic of the United States, and among the great variety of interests, parties, and sects, which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles, than those of justice and the general good: whilst there being thus less danger to a minor from the will of the major party, there must be less pretext also, to provide for the security of the former, by introducing into the government a will not dependent on the latter: or, in other words, a will independent of the society itself.


69 Federalist 40:203.

70 Federalist 51:271.
At least three times in this passage, Madison emphatically endorsed majority rule even as he implied concern about its potential for abuse. First, the proposed regime was to be tested not merely according to its compliance with justice—which presumably includes minority rights—but rather by whether it served “justice” and “the general good.” There is no evidence in this paper that Madison saw those goals as being in tension with one another; on the contrary, the advantage of an extended republic consisted in alleviating the need to choose between the two. Second, in an argument Madison evidently regarded as unremarkable but that fundamentally challenges contemporary conceptions of rights as exemptions from majority rule, he equated “the society itself” with “its major party.” In other words, when the majority spoke, it spoke for the entire community. Third, among the benefits of the new regime was that it removed any pretext even to introduce into the government any will not dependent on the majority.

Further, if indirect, support for Madison’s belief in popular rule comes from the fact that his contemporaries, including his contemporary critics, understood him in these terms, a fact evident both during the ratification debates toward the beginning of Madison’s public career and at the end of his life.71

---

71 Also among Madison’s contemporaries, it may be worth observing that the French National Assembly, certainly no bastion of aristocracy, conferred honorary citizenship on Madison and Hamilton for their authorship of The Federalist. The revolutionary French understood that work to be a monument to republicanism. For Madison’s acknowledgment of the honor, see his letter to the French interior minister in April 1793, PJM 15:4.
The majoritarian understanding of Madison is latent in many strains of Anti-Federalist thought. To be sure, the fear that the Constitutional regime would engender a functional aristocracy was a mainstay of Anti-Federalist argument. But this was, for the most part, an empirical prediction based on the idea that Congressional districts would be so large that only the high-born would be able to win election—the assumption, again, being that voting by popular majorities would be the mode of selection. On this point, at least, advocates of the Constitution were not accused of hatching such a scheme for the purpose of shielding the privileged from majorities; the assumption was that majorities themselves would select the privileged. Patrick Henry, indeed, argued that most voters would voluntarily turn to the high-born for advice as to how to vote.

There is another important sense in which many Anti-Federalists assumed the intention—if not the effect—of the Constitution was to empower national majorities. Those of a communitarian bent like Henry, George Mason and Melancton Smith feared the Constitution would dilute civic identity and participation by removing authority from

---

72 Cecilia Kenyon takes this argument further, suggesting that it was the Anti-Federalists whose commitment to majority rule was weak. (Cecilia Kenyon, “Men of Little Faith: The Anti-Federalists on the Nature of Representative Government,” The William and Mary Quarterly 12.1 (1955): 4-43. Wilson Carey McWilliams argues the opposite view (see n. 74 below).

73 As will be seen in Chapter 3, this model of representation—the high-born leading the common—was decidedly not what Madison meant when he spoke in Federalist 10 of “fit characters” “refining and enlarging” public opinion. On the contrary, Henry’s portrayal of the witless commoner so ignorant as to need the tutelage of the upper classes might be said to reflect the more aristocratic, or at least more patronizing, mentality.
a comparatively intimate to a diffuse and anonymous level of government. But also implicit in their frequent invocation of Montesquieu’s dictum that a republic was only feasible in a small territory was an assumption that the Constitutional regime was indeed republican, which was precisely why it was folly to attempt to deploy it over a large country.

Moreover, to the extent Anti-Federalists feared the new national regime, it was often because Madison’s understanding was theirs: The Constitution would empower national majorities. The dispute pertained to whether the issues to which their authority would extend were actually national in scope as opposed to local. Thus Henry in the Virginia Ratifying Convention, explicitly acknowledging that the new regime would be based on national majorities, but fearing they would be empowered to abolish slavery, which he believed to be a local issue: “And this must and will be done by men, a majority of whom have not a common interest with you. . . . The majority of Congress is to the north, and the slaves are to the south.”

---

74 On this point, see Wilson Carey McWilliams, “Democracy and the Citizen: Community, Dignity, and the Crisis of Contemporary Politics in America” in Robert A. Goldwin and William A. Schambra, eds., How Democratic is the Constitution? (Washington: American Enterprise Institute for Public Policy, 1980). This is also substantially the interpretation of “civic republican” commentators who see the Constitution as a departure from the republican ideals of the Revolutionary era. See, for example, Wood, Creation of the American Republic, op. cit.

75 By “local,” I mean simply “not fully national”—i.e. state-level, regional but less than national, and so forth.

Nearly half a century later, John C. Calhoun returned to this theme of a national majority abusing a Southern minority, even more explicitly identifying Madison as a majoritarian. Both men were concerned about abusive majorities, but the crucial difference was that Madison was concerned about factious majorities, whereas Calhoun saw all majorities as either inherently factious or as so prone to abusive behavior that they had to be treated as such. Hence Calhoun believed in a “concurrent majority” system by which measures would require the approval of both overall majorities and the majorities they affected. Calhoun claimed the Constitution enacted a concurrent-majority system and—crucially—that Madison misconstrued the document in assuming the right of national majorities to bind minorities. Calhoun’s Discourse on the Constitution and Government of the United States grouped Madison alongside Hamilton in a project to “carry out their predilections in favor of a national form of government, as far as, in their opinion, fidelity to the constitution would permit.” These predilections, Calhoun concluded, impelled Madison and Hamilton to mischaracterize the proposed government as “partly federal and partly national.” The difference between these forms for Calhoun—who believed the regime to be “federal throughout”—was that a federal government operated via a concurrent majority, while a national government operated via


78 Calhoun referred to the analysis of Madison’s Federalist 39 but cited the entire Federalist, imputing it to both Hamilton and Madison. For his critique of Federalist 39, see Union and Liberty, 108-109.
a numerical majority. The problem with the latter form, to which Calhoun understood Madison to aspire, was precisely that it accorded national majorities absolute rule.

Calhoun complained that Madison’s claim in Federalist 39 that the Constitutional regime was simultaneously national and federal was absurd; in the final analysis, Calhoun noted, one or the other form must be supreme. An indication of Calhoun’s view of a national regime—again, the form he imputed to Madison—may be found in his statement that had the Constitution been so constructed, “the will of the majority of the whole people of the Union would have bound the minority. . . .” This is precisely the position Madison took in response to the nullification controversy of the late 1820s and early 1830s. Madison understood the nullification doctrine, which asserted the right of a state to disregard a national law unless three-quarters of the states overruled such an action, to be an assault not merely on the permanence of the Constitution but first and foremost on its defining principle: majority rule: “[T]o establish a positive & permanent rule giving such a power to such a minority over such a majority, would overturn the first principle of free Gov’t and in practice necessarily overturn the Gov’t itself.”

It bears emphasis that this “first principle” was decidedly not the rights of individuals or minority groups. On the contrary, interpretations that see Madison’s primary objective as protecting inviolable rights against popular abuses find little support in his stark

Conclusion that an aggrieved minority had no Constitutional recourse. Consider the following passage from Madison’s circa 1835-36 essay “Notes on Nullification”:

> It has been asked whether every right has not its remedy, and what other remedy exists under the Govt. of the U.S. ags’t usurpations of power, but a right in the States individually to annul and resist them. The plain answer is, that the remedy is the same under the government of the United States as under all other Govts. established & organized on free principles. The first remedy is in the checks provided among the constituted authorities; that failing the next is in the influence of the Ballot-boxes & Hustings; that again failing, the appeal lies to the power that made the Constitution, and can explain, amend, or remake it. Should this resort also fail, and the power usurped be sustained in its oppressive exercise on a minority by a majority, the final course to be pursued by the minority, must be an object of calculation, in which the degree of oppression, the means of resistance, the consequences of its failure, and the consequences of its success must be the elements.\(^80\)

As will be seen in subsequent chapters, Madison regarded the “first remedy”—that is, constitutional “checks”—as, at root, majoritarian instruments. Moreover, Chapter 4 will argue that Madison thought abuses possible but “sustained” abuses highly unlikely. At this point, though, we need notice only the following: Contemporary discourse assumes that the very essence of rights is that there are certain basic entitlements individuals or political minorities should not be compelled to defend in the political arena. Madison stands accused by critics like Beard of having erected constitutional barriers that would relieve minorities of precisely such a burden. Yet Madison wrote in the just quoted passage that appeals to majorities or majoritarian institutions were in fact the only available remedies to minorities. As will be seen, again, in Chapter 4, the question at stake is not the extent of Madison’s commitment to rights. It is what

\(^80\) *WJM* 9:597.
mechanisms can meaningfully protect them. These were, in sequence, constitutional mechanisms subject to majoritarian pressures (“checks”); elections (“the Ballot-boxes”) or public persuasion (“the Hustings”), both of which were subject to the judgment of majorities; or, finally, an appeal to popular majorities acting in their constitutional capacity81 (“the power that made the Constitution”). If these remedies failed, minorities had no recourse but to exit political society, a radical step that Madison clearly meant to warn was not worth its substantial risks and costs. The relevant distinction, one Madison drew explicitly,82 was between constitutional rights and natural rights, with the former referring to rights within political society and the latter referring exclusively to the right to rebel, which returned the rebellious party to the state of nature. On Madison’s view, minorities had no constitutional rights except appeal to majorities. Failing that, the choices were either sufferance or the natural right of revolt—no more, no less.83

81 Burns and other progressives have criticized the super-majority requirement for constitutional amendments. Martin Diamond (“Democracy and the Federalist,” op. cit.) correctly notes that the requirement is actually that simple majorities in three-quarters of the states ratify an amendment. Its effect, then, is to ensure that a simple majority is nationally distributed.

82 Madison appended a footnote to “Notes on Nullification” (WJM 9:589) asserting that the “right” to nullification that Jefferson adduced in the Kentucky Resolutions of 1798 was a “natural right, which all admit to be a remedy against insupportable oppression,” as opposed to a political or civil right guaranteed under the forms of the Constitution. The natural right, in other words, was to revolution.

83 Madison’s formulation is consistent with, even remarkably similar to, Willmoore Kendall’s understanding of Locke’s Second Treatise—that is, individuals give over all rights to majorities upon entering civil society, with no other recourse but the “appeal to Heaven” implicit in revolt. See Kendall, John Locke and the Doctrine of Majority-Rule, op. cit. Cf. also Smith, The Spirit of American Government, 296: “All governments must belong to one or the other of two classes according as the ultimate basis of political power is the many or the few. There is, in fact, no middle ground. We must either recognize the many as supreme, with no checks upon their authority except such as are implied in their own intelligence, sense of justice and spirit of fair play, or we must accept the view that the ultimate authority is in the hands of the few. Every scheme under which the power of the majority is limited means in its practical operation
This does not mean Madison opposed individual rights; only that he knew no political institution could meaningfully secure them other than a majority seasoned, as will be seen, with time. It is true, of course, that within three decades, a Southern minority that felt oppressed did not blink when confronted with Madison’s stark choice between suffering perceived injustice and returning to a state of nature. But stark the choice remained, and Madison framed it as a question of majority rule:

It has been said that all Govt. is an evil. It wd be more proper to say that the necessity of any Govt. is a misfortune. This necessity however exists; and the problem to be solved is, not what form of Govt. is perfect, but which of the forms is least imperfect; and here the general question must be between a republican Govern’t in which the majority rule the minority, and a Govt in which a lesser number or the least number rule the majority.84

Thus far, Madison’s commitment to majoritarian government has been documented during the two most theoretically fruitful times of his career: the period surrounding the ratification debates in the late 1780s, and his final years in the early 1830s. A test, perhaps, of his commitment to these ideas would be his behavior during the intervening years when he operated within the regime he helped to create. Much scholarly literature has been preoccupied with the question of Madison’s consistency over this period, especially on the issue of federalism.85 This debate is not, per se, this

---

84 WJM 9:523.

85 For an excellent précis of this debate, see Alan Gibson’s “The Madisonian Madison and the Question of Consistency: The Significance and Challenge of Recent Research,” The Review of Politics 64.2 (2002): 331-338.
study’s concern beyond observing, as Drew McCoy has, that Madison was born “a subject of George II [and] died a citizen of Andrew Jackson’s republic.” It would be extraordinary, and not altogether admirable, if he never changed his mind on any issue over that period. But on one issue central to the question of his majoritarianism, Madison’s views remained, for the most part, unchanged: He was a consistent Congressional supremacist despite serving twice as long in the Executive Branch as he did on Capitol Hill.

This importance of this fact is that it calls into serious question the claim that Madison attempted to shunt decision-making into institutions insulated from public opinion. On the contrary, Madison believed Congress—the House especially—was the branch most immediately susceptible to popular opinion. He said in the Constitutional convention that the popular election of the lower house of the legislature was a core principle of free government. House elections were the most majoritarian insofar as they were the contests in which individual ballots had both the most concentrated impact and the most immediate effect. Moreover, the House was the only institution that could be completely remade every two years, thus making it rapidly sensitive to majority views.

86 McCoy, Last of the Fathers, xiv.

87 There are other theoretical reasons to regard Congress as the more majoritarian branch. The Presidency is a winner-take-all institution in which the preferences of voters on the losing side can be more easily discarded than in Congress, in which shifting coalitions allow realignments on multiple issues. The Presidency is also, so to speak, a blunt instrument: that is, policy rests ultimately in the hands of a single individual whose judgment may or may not accommodate minority views, whereas Congress is a more supple institution in which subtle accommodations can be made. More important is the role of deliberation: Most voters do not cast ballots with fixed preferences on all policies in mind; on the contrary, we fully
And in Federalist 52, Madison wrote that “liberty” made it “particularly essential” that the House “have an immediate dependence on, and an intimate sympathy with, the people.”

If the critical reading is correct, then based on Madison’s own description of the House as immediately responsive to public opinion, one would expect him to steer decision-making away from it. Yet Madison’s record of nearly a quarter-century in federal office shows him to be a fierce defender both of Congressional prerogatives and, within that institution, the power of the House specifically—the institution, significantly, to which he first aspired. Patrick Henry retaliated for Madison’s victory in the Virginia Ratifying Convention by scheming to deny him election to the Senate, but there is no indication Madison ever aspired to any position other than the House. In pursuit of that goal, he engaged in a fierce campaign against his friend James Monroe, going so far as to violate his long-held dictum against delivering speeches on the stump.

expect issues to arise of which we were not aware on Election Day, and we expect views on these and other issues to develop and evolve in response to argumentation and deliberation. It is in the inherent nature and institutional design of a legislature to accommodate and respond to these changes, whereas the concentration of executive authority in a single individual does not. This is not to say Presidents do not respond to minority views; only that an individual does not realign in the same subtle and complex ways a legislature does. On the deliberative role of Congress, see Kendall, “The Two Majorities,” op. cit., and Carey, “The Future of Conservatism,” Modern Age, Fall 2005, 291-300.

88 Federalist 52:273. Cf. Edward Elliott in n. 9 above: The Framers erected institutional barriers with the express purpose of preventing the “immediate and direct rule of the numerical minority. . . .”

89 For accounts of this campaign, see Irving Brant, The Fourth President: A Life of James Madison (New York: The Bobbs-Merrill Company, Inc., 1970), 222-224, and Ralph Ketcham, James Madison: A Biography (Charlottesville, Va.: The University of Virginia Press, 1990), 276-77. The fact that the legislature, and specifically the House, was widely assumed to be the most powerful branch of the new government is clear, almost quaintly, in Madison’s and Thomas Jefferson’s fear that a Virginia Federalist named John Marshall would run for Congress. In advice he would surely rue, Jefferson wrote to Madison
When Congress undertook its first major discussion of a treaty—John Jay’s 1794 Treaty of London—Madison played a decisive role in establishing a precedent, still in place, that the Senate’s power to ratify treaties did not trump the House’s power to legislate on such matters as commerce and war. In the early Congresses of the 1790s, Madison consistently resisted assertions of executive authority in areas he thought properly legislative. The extent to which he insisted on this point is especially stark in comparison with the broad swaths of authority that have since been delegated to the executive with minimal dissent. Article I of the Constitution, for example, explicitly empowers Congress to appropriate funds for postal roads; Madison opposed even giving the President discretion to designate which roads fit that description. The House, he insisted on this and other occasions, lacked the authority to alienate its own powers even if it wanted to do so.

For similar reasons, the Sedition Act was objectionable because it gave the president discretion to define what would make an alien “dangerous” for purposes of deporting him or her, a function Madison took to be legislative in nature. On another occasion, he spoke against a motion asking the executive branch to submit a plan on the public debt for the consideration of the House; the House, he said, should first

---

that Marshall should be banished to a less powerful position: “Hence … I think nothing better could be done than to make him a judge.” See Jefferson to Madison, June 19, 1793, *PJM* 14:333-34.

*90* See, *inter alia*, the petition Madison drafted to the Virginia General Assembly on this topic, *PJM* 16:95-103.

*91* See, for example, Madison’s speech in Congress, December 7, 1791, *PJM* 14:142-43.

*92* Virginia Report, *PJM* 17:324.
decide broad questions of policy and only then consider executive plans for implementing them.\textsuperscript{93} A proposal to “request the president to submit a plan for the defense of the frontiers” might, he mused, be unconstitutional.\textsuperscript{94} Madison denied the slightest executive discretion over spending appropriated funds: Except in “extraordinary and pressing” emergencies, the executive owed “an inflexible conformity” to congressional instructions.\textsuperscript{95}

Madison’s Helvidius essays—penned in reply to Alexander Hamilton’s claim, writing as Pacificus, that the Washington Administration had the authority to declare the United States to be neutral in the Franco-British conflict sparked by the French Revolution—spoke of the Executive not as a coequal policymaking branch but rather as self-evidently subservient to the legislature.\textsuperscript{96} Indeed, on Madison’s reading of the very nature of legislative power, there would seem to be virtually nothing the Executive could do unless Congress acted first. He wrote in the first essay of Helvidius: “The natural province of the executive magistrate is to execute laws, as that of the legislature is to

\textsuperscript{93} Madison in the House of Representatives, November 19, 1792, \textit{PJM} 14:413-14.

\textsuperscript{94} See editor’s note, \textit{PJM} 15:461. For the motion about which Madison raised questions, see \textit{Annals of Congress, 3rd Congress, 2nd Session}, 1163.

\textsuperscript{95} Madison in the House of Representatives, March 1, 1793, \textit{PJM} 14:456-468.

\textsuperscript{96} Burns (\textit{Deadlock of Democracy}, op. cit.) regarded separation of powers as undemocratic because, among other reasons, it prevented Presidents from acting on their popular mandates. Madison’s writings substantially predate the onset of the plebiscitary presidency. While, as we have seen, Madison did believe the President should be directly elected by the people, he simply did not see the Executive as a policymaking branch. The tone of his Helvidius essays suggests he believed he was expressing a truism in stating this fact.
make laws. *All his acts* therefore, properly executive, must pre-suppose the existence of the laws to be executed.” While Hamilton’s claim might be seen as a precursor to the contemporary theory of the unitary executive—that is, that barring specific exemptions, the President has complete authority where he has any authority—Madison came very close to theorizing what might be called a unitary legislature: that is, in areas in which the Constitution gave the national government authority, the legislature was the repository of all powers not specifically allocated to the President. Hence his syllogism, also suggested in Helvidius I, that war represented the highest act of foreign policy, Congress had the power to declare war, and Congress consequently wielded ultimate authority over every power subsidiary to that.97 The executive, he went on to argue, should neither speak nor be spoken of as “the government” of the United States.98 Madison singled out Locke and Montesquieu, two philosophers he otherwise admired, for stinging criticism because of their broad views of executive prerogative.99 It bears further emphasis that all this was apparent to Madison not merely in the technical details of the Constitution but also in the plain meaning of the terms “legislative” and “executive.”

---

97 For the complete exchange between Hamilton and Madison, writing as Pacificus and Helvidius, see Morton J. Frisch, ed., *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding* (Indianapolis: Liberty Fund, 2007). The argument above appears in Helvidius Number I. The emphasis is mine.

98 See Helvidius Number V.

99 See Helvidius Number I.
Of course, Madison was a member of Congress during this time, and these arguments for legislative supremacy might be seen as self-serving—or, perhaps more charitably, as the kind of institutional self-defense predicted in Federalist 51. But Madison adhered to these views with remarkable consistency even as an official of the Executive Branch. When President Jefferson suggested deflecting criticisms of judicial vacancies by publishing a docket of cases to demonstrate how little federal judges did, Madison, his secretary of state, demurred because Congress had made “no specific appropriation for the expence” of such a report. He declined a correspondent’s request that the Administration support his petition for relief in a case of maritime losses, explaining that because Congress had sole authority over the matter, it would be inappropriate for the President even to comment on it. In an act especially difficult to imagine in today’s aggrandized executive, Madison resisted as “unconstitutional” a Senate attempt to give the Administration—again, it bears emphasis, an Administration of which he was a high-ranking official—authority to call up militia troops to defend New Orleans.

When he succeeded Jefferson in 1809, Madison inherited a presidency so modest by contemporary standards that, three weeks into his Administration, it was necessary for

100 Madison to Jefferson, September 3, 1802, *PJM-Secretary of State Series* (hereafter *PJM-SS*) 3:537-538.


him to inquire personally of his predecessor “whether the time piece in the sitting room [of the White House needed to be wound] monthly or weekly . . . .” More significant is that he left the office that way. Many historians have criticized Madison as having blundered into the War of 1812, but nearly all credit him with the substantial feat of being perhaps the only president who led the nation through armed conflict without enlarging his own powers. Madison remained nearly as deferential to Congress as President as he had been as Helvidius. During a dispute over the Spanish monarchy, for example, Madison refused to receive an ambassador from one aspirant to the crown, not merely on the prudential basis of his neutrality policy, but also because Congress had not authorized him to do so.

On those occasions when he did stretch executive authority, Madison did so self-consciously and took special care to ensure his actions could not be construed as precedents for enlarging presidential power. His 1809 proclamation suspending trade with Great Britain was based not on an assertion of presidential authority over national security, but rather on a generous interpretation of congressional statute. Similarly, Madison’s proclamation annexing West Florida—probably his boldest exercise or, depending on one’s perspective, greatest abuse of presidential authority—cited statutes that “contemplated … an eventual possession of the said Territory by the United States,

103 Madison to Jefferson, March 27, 1809, *PJM- Presidential Series* (hereafter *PJM-PS*) 1:82.


To be sure, it seems likely if not certain that Helvidius would have objected to both proclamations. But whereas modern Executives have tended self-consciously to legitimate expansions of their power by declaring them to be implicitly or explicitly Constitutional—and thereby enshrining them as precedents—Madison took specific care on these occasions to ensure his actions could not be used to legitimate future aggrandizements of the presidency. His correspondence surrounding both the 1809 trade proclamation and the annexation of West Florida suggested he knew he was stretching the limits of his Constitutional authority and that he did not intend for these exceptions to become rules. It was the difference, so to speak, between breaking the speed limit en route to the hospital and declaring speed limits generally to be null and void. In the normal flow of constitutional traffic, Madison believed, the president owed deference to the branch of government more fully reflecting majority opinion.

That Madison did not treat these exceptions as precedents is evident in his June 1, 1812, message to Congress, which documented repeated acts of war on Great Britain’s part yet ultimately acknowledged legislative authority:

Whether the United States shall continue passive under these progressive usurpations, and these accumulating wrongs; or, opposing force to force in

---

106 *PJM-PS* 2:595-96.

defence of their national rights, shall commit a just cause into the Almighty
disser of events … is a solemn question, which the Constitution wisely confides
to the Legislative Department of the Government. In recommending it to their
eyearly deliberations, I am happy in the assurance, that the decision will be worthy
the enlightened and patriotic Councils, of a virtuous, a free, and a powerful Nation.\textsuperscript{108}

Madison’s rhetoric indicates he hardly considered the question of the proper course to be
an open one. But Congress’ subsequent and bitter debate—the Senate required two votes
before it passed a declaration of war more than two weeks after Madison’s message—
also indicates he knew the outcome was uncertain and submitted the issue to the
legislature anyway. Had he operated only on political convenience, he need not have
done so. Because the essence of the message was that a state of war already existed, he
might merely have retaliated against Great Britain without the arguably superfluous and
politically uncertain step of inviting congressional deliberation.\textsuperscript{109} That he did not
underscores his understanding of congressional authority as supreme.\textsuperscript{110}

Even if Madison supported government by majorities of qualified voters, he might
still have protected the interests of the wealthy by restricting the voting-eligible
population. This commonplace charge against the Founding is refuted in considerable
measure by the Constitution’s explicit rejection of property qualifications. Beard,

\textsuperscript{108} P.JM-PS 4:437.

\textsuperscript{109} Further evidence of Madison’s majoritarian commitments: The letter to Jonas Galusha
referenced in n. 51 above alludes to northeastern states’ opposition to the war but says they are nonetheless
bound by the decision of a national majority.

\textsuperscript{110} Madison also vetoed a bill that would have empowered him to require Supreme Court justices
to hear cases in district court, explaining in his veto message that it “introduce[d] an unsuitable relation of
Members of the Judiciary Department, to a discretionary authority of the Executive Department.” (P.JM-PS
4:285–86) Presidents, it seems, are no longer in the habit of denying themselves discretionary authority.
singling out Madison by name, imputes economic motives even to this rejection: “Propositions to establish property qualifications [for offices or voting] were defeated, not because they were believed to be inherently opposed to the genius of American government, but for economic reasons—strange as it may seem.” Madison, Beard wrote, opposed property qualifications in the Convention only because he did not believe factious activity correlated with property ownership \textit{per se} and that these measures therefore would not succeed in protecting minority wealth.

Beard arguably extrapolated excessively from Madison’s speeches on this topic, which treat the issue of property qualifications much more ambivalently than his historian critic suggests. Still, Madison provides some basis for the charge that he sought to restrict political participation on the basis of property. He said in the Philadelphia Convention that he did not object to property qualifications for electors, even if he doubted that a practical and measurable standard could be devised. Even more problematic for the majoritarian interpretation, he not only suggested that one house of the Kentucky legislature be reserved for the propertied, he urged that the Constitution enshrine that protection precisely \textit{because} a majority of people were likely in time to be landless.

\footnote{Beard, 165.}
\footnote{See Madison’s speeches on July 26 and August 7, \textit{PJM} 10:117-18 and 138-39, respectively.}
These difficulties must be addressed carefully for, as will presently be seen, Madison himself eventually abandoned his proposal for Kentucky as anti-majoritarian. Still, several mitigating factors deserve attention. First, it is both a theoretical and a historical mistake to view “landowner” as a proxy for “wealthy,” a point Madison emphasized when he observed in Philadelphia that possession of land provided “no certain evidence of real wealth”; on the contrary, debtor landowners were among the chief proponents of unjust state laws. More important, ownership of land was so widespread, and property qualifications for political participation so liberal, that Bernard Bailyn estimates that “fifty to seventy-five per cent of the adult male white population was entitled to vote” during the Revolutionary era. The relevant conflict, if any, was less between rich and poor than between freeholders and members of the merchant and professional classes.

Second, Madison was as concerned about the wealthy abusing the poor as the other way round. At Philadelphia, he opposed allowing Congress to establish property qualifications for its own membership lest it become “an aristocracy or oligarchy” with

---


114 Madison’s speech of July 26, PJM 10:117-18. His point was that a landholding requirement would not achieve its stated objective of protecting wealth. Nor should we necessarily equate a property requirement with venality. Blackstone identified the requirement as ensuring voters had a will of their own and therefore were not merely amplifying the views of feudal aristocrats.

“a distinct interest from the people.” Even in his remarks on a constitution for Kentucky, Madison took care to limit property qualifications to one house of the legislature: “Give all power to property; and the indigent [will] be oppressed. Give it to the latter and the effect may be transposed.” His *National Gazette* essay on “Parties” said an equalization of wealth was to be preferred to the extent such a goal was feasible.118 During retirement, Madison wrote: “It has been said that America is a country for the poor, not the rich. There would be more correctness in saying it is the country for both, where the latter have a relish for free government; but, proportionally, *more for the former* than the latter.”119

Finally, during the rapid democratization of the Jacksonian era, Madison, a devotee of Thomas Malthus, came to believe that the poor and landless were destined to become a substantial majority. Precisely for this reason, he abandoned property qualifications in the Virginia constitutional convention of 1829-30. A note he made to himself during the convention says of the landless:

---

116 Madison’s speech of August 10, *PJM* 10:143. What distinguished this proposal from Madison’s comments on Kentucky was that the property qualification in the latter case would have been fixed in the Constitution rather than being left to legislative discretion.

117 *PJM* 11:287.

118 *PJM* 14:197-98. The apparent target of this remark was either John Adams or Alexander Hamilton, both of whom Madison believed actively favored unequal distribution of wealth so that American society could be “balanced” as Great Britain’s was. It would be absurd, Madison wrote, to inflate distinctions in wealth artificially merely to ensure the existence of mutually contending interests.

119 Madison to Francis Corbin, November 26, 1820, *WJM* 9:40-41. (emphasis added)
What is to be done with this unfavored class of the community? If it be, on one hand, unsafe to admit them to a full share of political power, it must be recollected, on the other, that it cannot be expedient to rest a Republican Government on a portion of the society having a numerical & physical force excluded from, and liable to be turned against it; and which would lead to a standing military force, dangerous to all parties & to liberty itself. 

Consequently, Madison concluded there was no choice but to trust the “combined numbers” of these masses; individuals who possessed types of property other than land; and the “political & moral influence” provided by what would, by that time, be a lengthy tradition of just behavior on the part of majorities. Here we arrive at a decisive fact for an accurate understanding of Madison’s political thought. Power in society ultimately resided with those possessing “numerical & physical force.” By definition, the numerical force always resided with the majority. In the republican political culture of America, Madison believed, majorities always possessed the physical force as well. The supremacy of majorities was a defining feature of American political culture, one approaching the status of a physical law, and parchment laws were powerless to alter this fact. On Madison’s reasoning, debating whether the majority should rule made no more sense than debating the normative dimensions of the law of gravity.

1.2.3. The Inevitability of Majority Rule

The inevitability of majority rule was the fundamental limiting condition on Madison’s democratic thought, and he understood it in direct contradistinction to “parchment barriers.” The emptiness of the latter was the defining feature of the crucible

---

120 WJM 9:359.
in which Madison’s political views were formed: his service in the Continental Congress. The Articles of Confederation were packed with paper directives: “the states shall,” “no state shall,” yet the repeated experience was that the states did as they pleased.

What experience taught, theory confirmed. David Hume’s essay “Of the First Principles of Government” argued that no regime could physically overpower an entire populace, and that “[i]t is therefore, on opinion only that government is founded . . .”121 Even tyrannical regimes, Hume wrote, could only rule if their subjects believed their authority to be legitimate and obedience to be in their interest. This dictum is, to my knowledge, the only nearly direct quotation from Hume that appears in The Federalist in Madison’s own hand.122 He paraphrased it elsewhere as well. His National Gazette essay on “Charters” declared: “All power has been traced up to opinion. The stability of all governments and security of all rights may be traced to the same source.”123 “British Government,” another essay for the party press, argued that the British regime so admired by Hamilton and Adams derived its “boasted equilibrium” from “public opinion” rather than the institutional distribution of powers.124 “Public opinion,” he also wrote in the


122 See Federalist 49:262: “If it be true that all government is based on opinion. . . .”

123 PJM 14:191-192.

party press, “sets bounds to every Government, and is the real sovereign in every free one.”

The import of Hume’s insight was that it was empirical nonsense to say a people could be ruled against their will. Monarchs did not rule because a charter entitled them to; they ruled because their subjects chose to obey, or at least not to resist. Political power was ultimately derived from physical force, and the physical force of the masses always exceeded that of the rulers. This, as has been seen, was precisely why Madison believed it was ultimately impossible to exclude from political participation a landless majority that possessed the balance of the country’s “numerical & physical force. . .”

But while Hume deployed this insight to explain why monarchs could rule the masses, Madison invoked it to explain why, in America, they could not. Madison joined his contemporaries in citing the republican “genius” of the people. To contemporary ears, the term sounds like normative praise. In its time, it more closely resembled “genus”: To refer to the “republican genius” of the people was to say this was who they were, the type according to which they should be categorized. Madison thus observed that the “genius” of the American people was opposed to monarchy and aristocracy. Elaborate

---

125 *PJM* 14:161.

126 *WJM* 9:359.

127 Garry Wills, citing Johnson’s *Dictionary* as well as Hume’s *History of England*, defines the term as “ethos.” See Wills, *Explaining America*, 281.

128 Madison to Jefferson, May 9, 1789, *PJM* 12:142-43
titles for the President and Vice President, similarly, could not be reconciled with “the genius of the people.” Hume’s argument came down to the fundamental fact that all government is more or less majoritarian: It is obeyed if its people believe it is legitimate. In America, Madison wrote, such would only be the case if the government was literally majoritarian.

Throughout his writings, with perhaps more consistency than any other belief, Madison assumed that majorities would exercise power regardless of what strictures were recorded on parchment. While the Tenth Federalist has repeatedly been interpreted as the keystone of Madison’s plan to corral the masses via constitutional aristocracy, the essay’s conclusion was actually—and explicitly—that majorities inevitably ruled and that no institutional mechanism could stop them. The republic had to be extended for precisely this reason. Madison had previewed this observation in Philadelphia: “In a republican government, the majority, if united, have always an opportunity [to abuse minorities]. The only remedy, is to enlarge the sphere. . . .” The impotence of parchment barriers was also among the reasons that Madison believed Calhoun’s doctrines of nullification and concurrent majorities to be impractical. Aggrieved states had no practical recourse except to majority opinion. This belief was evident in Madison’s position on the Missouri Compromise. Slaveholding states argued that the compromise was unconstitutional because a state could not be admitted to the union on terms that


130 Madison in Convention, June 6, 1787, PJM 10:32-34.
restricted rights other states enjoyed. Madison was sympathetic to the Constitutional reasoning, but observe that the following commentary on the issue says appealing to the Constitution “is”—not “should be,” but empirically “is”—the equivalent of an appeal to the majority. There was, Madison wrote, no alternative:

But what is to control Congress when backed & even pushed on by a majority of their Constituents, as was the case in the late contest relative to Missouri …? Nothing within the pale of the Constitution but sound arguments & conciliatory expostulations addressed both to Congress & to their Constituents.131

The basis of Madison’s belief that power was drawn naturally to the “legislative vortex” was that Congress would be the most majoritarian branch and that majority opinion was the society’s most powerful force. Madison therefore worried in Philadelphia that the House’s power would overwhelm the Senate’s even if their authority was equal on paper and even if senators’ terms were extended to seven years.132 He opposed a proposal to give the executive an absolute veto because it would be pointless to do so: Even the king of Great Britain could not resist a unanimous Parliament, and neither could a president, no matter how powerful, resist a determined Congress.133 Federalist 48 likewise denied that “a mere demarkation on parchment” could guarantee that each branch of government would have its own will.134

---

131 Madison to Spencer Roane, May 6, 1821, WJM 9:58 (emphasis added). For Madison’s opposition to the Missouri Compromise, see Madison to Robert Walsh, November 27, 1819, WJM 9:6-10.

132 Madison in Convention, June 12, 1787, PJM 10:50-51.

133 Madison in Convention, June 4, 1787, PJM 10:24.
A similar belief animated Madison’s concern about bills of rights and other constitutional guarantees of liberty, an issue we shall encounter in more detail in Chapter 4 below. Most analyses of Madison’s opposition have emphasized the arguments Hamilton articulated in Federalist 84, which said that a Bill of Rights was unnecessary because Congress was already limited to the enumerated powers and that a Bill of Rights would actually be dangerous because it would imply authority beyond the strict limits of Article One, Section Eight. Madison more or less shared Hamilton’s view, but his assumption that majority rule was inevitable also provoked a unique set of concerns. Such protections would, he argued, be least useful when most necessary—that is, at moments of public passion and uproar—the assumption being that majorities would merely circumvent or ignore them. This, in turn, would create a precedent for violation that would weaken such protections in future situations, triggering a downward cycle. Madison adduced this argument on several occasions. He said in Federal 41 that it would have been pointless for the Constitution to forbid maintaining troops in peacetime, because the people would insist on raising armies if they felt a need to do so: “It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain: because it plants in the constitution itself necessary usurpations of power, every

---


135 Marvin Meyers summarized Madison’s view as a dislike “of absolute prohibitions that would have to yield to political necessity.” Marvin Meyers, The Mind of the Founder: Sources of the Political Thought of James Madison (New York: The Bobbs-Merrill Company, Inc., 1973), xxxvii.
precedent of which is a germ of unnecessary and multiplied repetitions.” Madison’s comments on Jefferson’s draft constitution for Virginia questioned whether it should guarantee the right of habeas corpus to cases of rebellion. “If there be emergences which call for such a suspension, it can have no effect to prohibit it, because the prohibition will assuredly give way to the impulse of the moment. . . .” Commenting on a draft constitution for Kentucky, he wrote:

Temporary deviations from fundamental principles are always more or less dangerous. . . . The first precedent too familiarizes the people to the irregularity, lessens their veneration for those fundamental principles, & makes them a more easy prey to Ambition & self Interest.

This need for veneration opens a crucial insight into Madison’s posture toward popular majorities. The contemporary observer, accustomed to Americans’ longstanding deferral to the courts, may have difficulty imagining a majority simply ignoring barriers to its rule. From today’s vantage point, Madison’s empirical assumptions seem simply wrong: Americans not only abide but revere Constitutional forms, even those that seem to remove decisions further from majority will. But to understand Madison’s thought accurately, it is important to examine it from the perspective of his political reality rather than ours.

In Madison’s context, majorities could override limitations on their rule in at least three ways. First, Madison had indeed seen factious majorities run roughshod, and without pretense of legality, over state constitutions. Second, and more commonly,

136 Federalist 41:209.


138 Madison to Caleb Wallace, Aug. 23, 1785, PJM 8:350-357.
majorities employed technicalities and turns of legal phrase to make their abuses seem to abide by constitutional forms. As will be discussed in Chapter 3, this was the reason Madison insisted that a national veto over state laws reach “all cases whatsoever”: States—which Madison believed to be prone to the immediate rule of factious majorities—would exploit any available loophole or technicality, thus trampling Constitutional limits while claiming to respect them.

But it is the third means of overcoming Constitutional limits on majority rule that is most important for understanding Madison’s views on the subject: If majorities believed that limits on their rule were excessive, they would change or abandon the underlying governing agreement—i.e., the Constitution—that imposed them. It is true, as critics of Madison have long noted, that the amendment procedure within the Constitution requires a super-majority in order to propose a change.139 But it could never have been far from Madison’s mind that the Constitution itself—and every governing procedure it contained, including those that impeded the immediate expression of popular will—was ratified by simple majorities in the states. If simple majorities could completely replace the Articles of Confederation despite its requirement of unanimity for any change, presumably they could do the same with the Constitution despite its requirement of super-majorities for amendments. In this sense, the Constitution’s authority depended at any given moment on the sufferance of simple and often sparse majorities. Indeed, the margins for ratification in many states for which precise records exist were narrow,

139 In other words, two-thirds of Congress must pass an amendment to refer it to the states, or two-thirds of state legislatures must agree to call a convention. The three-quarters majority required to ratify amendments cannot accurately be described as a super-majority standard since, as Martin Diamond notes (“Democracy and the Federalist,” op. cit.), its intent or at least effect is to require a national distribution of simple majorities. This, as will now be seen, is also why the Constitution itself must be seen as the product of simple majorities.
especially in the more populous states where Madison believed the numerical force of the nation to lie. Massachusetts, for example, ratified by a margin of 187-168, New York by 30-27, and Virginia by 89-78. 140 The importance of these margins is underscored by Madison’s belief, one to be explored in more detail in Chapter 3, that the physical survival of the nation—that is, its ability to withstand foreign attack—required the cohesion of all 13 states. Add to this Madison’s intimate knowledge that no majority vote had been necessary to call the Philadelphia convention in the first place, and he must have recognized that the entire edifice rested on the fragile foundation of a simple majority.

The modern observer, again, will have difficulty imagining a serious statesman fearing a wholesale revision of the Constitution today. Madison himself looked forward to an era in which popular reverence for the Constitution would render fundamental alterations to governing procedures unlikely. But even at this point, veneration of the Constitution would only render a simple majority less likely to act on its always looming prerogative to change the form of government. More important, Madison’s writings on this topic always conveyed his concern that such a point had not been reached, a point he made most clearly in Federalist 49’s critique of Jefferson’s proposal to empower any two branches of government to call a Constitutional convention: Such a proposal would “deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.” 141 We shall recur to this essay in Chapter 4 below. Its relevance for now is

141 Federalist 49:262.
that time alone could create the Constitutional inertia that would make wholesale changes unlikely. At that point, the veneration would still be an expression of opinion and hence of majority will. During the time that Madison wrote, however, it was completely plausible to imagine the country turning back if the majority perceived the Constitution as excessively curtailing its rule. Madison himself had led an effort to do precisely that when the Articles proved unworkable.

The import of these observations, again, is that even to the extent Constitutional mechanisms required super-majorities to prevail, the Constitution itself—and hence those mechanisms—rested on the ongoing sufferance of simple majorities. Constitutionalism was, in this sense, a form of self-restraint—but, crucially, a voluntary one the people could relinquish. In a 1789 Congressional debate, Madison characterized constitutionalism as follows: “My idea of the sovereignty of the people is, that the people can change the constitution if they please, but while the constitution exists, they must conform themselves to its dictates.” Parchment could not restrain majorities against their will because majorities always retained the power to rewrite it. The success of any aristocratic plot depended on the consent of the very masses the founders are accused of disenfranchising.

---

142 This raises the intriguing question, one better suited for a separate inquiry, of whether Madison’s democratic theory was better suited to a period of founding than to a stable republic.

143 Madison in Congress, August 15, 1789. See Helen E. Veit, Kenneth R. Bowling, et. al, eds., Creating the Bill of Rights: The Documentary Record from the First Federal Congress (Baltimore: The Johns Hopkins University Press, 1991), 167. In the same speech, Madison denied the authority of “detached bodies”—i.e., representative institutions—to “contravene an act [the Constitution] established by the whole people,” thereby placing his argument for constitutionalism on majoritarian grounds. In other words, a legislature that contravened the Constitution betrayed the will of the majority.
Operating always on these empirical assumptions, Madison never entertained the idea of a constitutional order based on any principle other than majority rule. Even were he inclined to endorse the rule of privileged minorities, the empirical limitations on his thought forbade such an idea.

If, then, Madison believed America would countenance no political regime other than majority rule, what is to be made of a linchpin assumption of the redemptive school—that Madison sought to curb majority rule only because he was afraid abuses of it would lead to homegrown monarchy? Commentators have broadly understood him to harbor such fears, and with good reason. Douglass Adair, as has been seen, related a dramatic narrative of Madison conducting a fevered pre-convention search for a theoretical solution to the problem of faction lest the champions of “mixed government” impose order through monarchy.144 Marvin Meyers portrays Madison as concerned during the opposition period of the 1790s about “[a] cynical clique of insiders, wielding the power of purse and sword [and] rapidly establishing an oppressive oligarchy on the ruins of the Republic, and even squinting toward monarchy.”145

While Madison’s writings provide support for this interpretation, subsequent commentators have tended to overstate the extent to which even a constitutional monarchy146 was considered a realistic option, at least during the pre-constitutional

144 Adair, *Fame and the Founding Fathers*, op. cit., 151.


146 Adams, we recall, regarded such a system as republican, and provided the monarch is elective, it would in fact comply with the criteria of Federalist 39. Indeed, Madison spoke approvingly of the French constitution of 1791, which included a monarch, as heralding hope “for the cause of liberty & humanity . . .” (Madison to James Madison Sr., November 17, 1791, *PJM* 14:108.) Madison’s party writings in the 1790s nonetheless make clear that he was fiercely opposed to such a system in the United States.
period. Were Adair’s account true, and had Madison therefore set out for Philadelphia carrying the “glad news” that he had rescued republicanism from monarchy, one might expect this breakthrough to merit at least a passing mention if not a dramatic moment at the opening of the convention.\footnote{For roughly corresponding analyses of the Convention, see Larry Kramer (“Madison’s Audience,” \textit{Harvard Law Review}, January 1999) and Christopher Wolfe (“On Understanding the Constitutional Convention of 1787,” \textit{The Journal of Politics}, February 1977).} Instead, the delegates simply settled into a workmanlike hashing out of the details of a system that all appear to have assumed, whatever their other disagreements, would be republican. Virginia Governor Edmund Randolph “opened the main business” of the convention on May 29 by offering the Virginia Plan, and the several days of debate that commenced concerning legislative apportionment provide no reason to believe the delegates were conscious of serious proposals for monarchy or that they contemplated any course other than popular government. When the delegates took up the question of the executive, no proposal for a monarch was heard. Delaware’s John Dickenson spoke approvingly of the British system but quickly noted that “[a] limited Monarchy however was out of the question.”\footnote{James Madison, \textit{Notes of Debates in the Federal Convention of 1787} (New York: W.W. Norton & Company, 1987), 57.} It was June 18, by which time the republican die of the Convention was already firmly cast, before Alexander Hamilton rose to offer the closest to a monarchical alternative that the delegates heard: a President and Senate with life tenure, subject to good behavior. But far from monarchy being considered a serious alternative, Hamilton apparently
understood the notion to be sufficiently outside the mainstream that it was necessary for him to ask “Gentlemen of different opinions [to] bear with him in this,” and the morning after Hamilton’s speech, the delegates returned to their previous business as though he had never spoken.

Nevertheless, Madison did harbor fears about despotism, and in order to establish the idea that he did not consider alternatives to majority rule empirically plausible, they must be confronted directly. The critical fact to observe is that Madison’s critics accuse him of seeking to impose an aristocratic or otherwise anti-majoritarian regime through the Constitution—that is, peacefully. But when he raised concerns about the American republic terminating in monarchy, they always pertained to the possibility of despotism being imposed by force from either within or outside of the country. The fear was never that the majority would choose monarchy of its own accord.

Madison had, in fact, repeatedly acknowledged that a minority could at least temporarily rule a majority by force. When Anti-Federalists said the Constitution would allow the national government to crush even a democratic rebellion within a state, Madison replied that the power to guarantee each state a republican form of government was necessary for the opposite reason: that an armed junta could use force to impose its

---

149 Hamilton, like Adams, disputed the characterization of a President-for-life as monarchical rather than republican.

150 To be sure, on Hume’s reasoning, sustained submission to forceful rule could be taken as evidence of acquiescence, but the converse—revolution—was an outcome Madison was obviously keen to avoid.
will on a popular majority. To the extent Madison feared despotism would arise in the
United States, he feared it would arise through similar means.

The chief threat Madison perceived in the pre-constitutional period was that
monarchy would arrive from overseas. Britain, perceiving the fragile young country as
weak, might be tempted to retake the colonies. Similarly, the British crown might piece
off individual states through side deals, thereby destroying the solidarity Madison
believed necessary to maintaining independence in a dangerous world. Autocrats might
arise from within the country too—precisely the reason, he had entreated his colleagues
in the Articles Congresses, it was necessary to placate the unpaid revolutionary soldiers
who were threatening mutiny. He may have had either scenario in mind when he drafted
an address to the states warning of dire consequences if they did not comply with
requisitions. If the country was unable to establish itself on stable grounds, pay its debts
and fulfill the basic functions of government:

[T]he great cause which we have engaged to vindicate, will be dishonored &
betrayed; the last & fairest experiment in favor of the rights of human nature will
be turned against them; and their patrons & friends exposed to be insulted &
silenced by the votaries of Tyranny and Usurpation.  

Madison did not say here that Americans would choose despotism. Instead, here
as elsewhere, he was concerned about the outward image the country projected both
because a perception of weakness or chaos might have tempted adversaries and because it
might have discouraged other republican movements. Moreover, note that if the

\[151\] Address of Congress to the States, April 25, 1783, \textit{PJM} 6:487-494.
American republic collapsed, its friends would have to be “silenced” via “Tyranny and Usurpation” —i.e., by force. In neither case did Madison contemplate a majority of the American people throwing themselves into the arms of a tyrant.

A letter Madison posted to Edmund Pendleton in February 1787—the period when Adair places the former in frantic study to avert monarchy—has provided further fodder for the perception that Madison feared a home-grown monarchy chosen in response to chaos:

The late turbulent scenes in Massts. & infamous ones in Rhode Island, have done inexpressible injury to the republican character in that part of the U. States; and a propensity towards Monarchy is said to have been produced by it in some leading minds. The bulk of the people will probably prefer the lesser evil of a partition of the Union into three more practicable and energetic Governments.  

The following day, Madison conveyed a similar sentiment to Edmund Randolph:

Many individuals of weight particularly in the Eastern district are suspected of leaning towards Monarchy. Other individuals predict a partition of the States into two or more Confederacies. It is pretty certain that if some radical amendment of the single one can not be devised and introduced that one or other of these revolutions, the latter no doubt, will take place.

In both cases, Madison explicitly stated that monarchical opinion was festering only among elites and that the majority of the people preferred a partition. There is no indication, in other words, of monarchy voluntarily chosen. The concern Madison evinced here—and during the nullification controversies of the 1820s and 1830s—was that a partitioned union would be unable to defend itself from foreign threats. The only


scenarios these letters provide for despotism are its imposition either by domestic elites or foreign tyrants—in either case against the public will.

Madison came closest to predicting homegrown despotism during the administration of John Adams, whom the former accused of harboring monarchical ambitions. Yet even here, what Madison feared was a regime developing interests separate from those of the people and thereby imposing its will by anti-republican means. Madison first began to articulate these concerns when Adams, as vice president, proposed elaborate costumes and titles for high executive officers. Yet Madison also told Jefferson he did not fear titles themselves because they, like parchment, could not confer power against the will of the people. What he did come to fear was that Adams and his ilk would impose monarchy. Madison’s opposition essay “A Candid State of Parties” cast his opponents as

more partial to the opulent than to the other classes of society; and having debauched themselves into a persuasion that mankind are incapable of governing themselves, it follows with them, of course, that government can be carried on only by the pageantry of rank, the influence of money and emoluments, and the terror of military force.

Whether Madison portrayed Adams and other Federalists fairly is questionable at best. The important point for present purposes, however, is that in no case did Madison

---

154 We shall see in Chapter 4 below that this was among the scenarios the separation of powers was designed to prevent.


contemplate the possibility that the American people would choose any system of government other than majority rule.

The foregoing analysis has endeavored to establish two points: First, Madison was normatively committed to majority rule. Second, he never considered another system plausible. The distinction between these points is subtle but, for the analysis that follows, crucial. As has been seen, it is the second point that more persuasively refutes critics who cast Madison as an aristocrat, for on his reasoning, they charge him with aspiring to absurdity. Detached from his empirical assumptions, Madison’s normative commitment to majority rule cannot conclusively rescue him from the charge of aristocratism. Because, as will be seen in Chapter 2, Madison also expressed serious concerns about majority rule in certain circumstances, the most that could be said would be that he favored popular government more often than he opposed it. Finally, and most important, once Madison’s critiques of majority rule are examined in the context of his belief that majority rule was inevitable in a republic as a matter of empirical fact, it becomes clear that he was not criticizing majority rule per se, but rather specific majorities under specific circumstances.

We are now in a position to consider the question of which majorities, and which circumstances, these were.
Chapter 2

‘The Cool Dictates of Reason’

Madison’s Doctrine of Temporal Majoritarianism

2.1. Reason vs. Passion

In 1798, Madison wrote brief notes for a toast to be delivered at a Fourth of July dinner celebrating the 22nd anniversary of the young nation’s independence. The precise context of the toast is unknown, but its contents are instructive: “To the P[resident] & V[ice] P[resident] may the former never feel the passions of J.A. [John Adams] nor the latter be forsaken by the philosophy of T.J. [Thomas Jefferson].” Nearly every written comment Madison ever made about Adams included a specific denunciation of what he took to be the latter’s impulsive temperament. As early as February 1783, Madison reported that “Congress yesterday received from Mr. Adams [then American ambassador to Holland] several letters dated September not remarkable for any thing unless it be a display of his vanity, his prejudice against the French Court & his venom against Doctr.

---

1 PJM 17:161. After Jefferson’s death, Madison allowed that his longtime compatriot, too, had a tendency “of expressing in strong and round terms, impressions of the moment.” (Madison to Nicholas Trist, May 15, 1832, WJM 9:479.) But his use of “philosophy” as a synonym for “temperate” or “sober” in the toast’s context is evident from his use of it when doubting a rumor that, after his wife’s death, Jefferson “swooned” in the presence of his children: “I conceive very readily the affliction & anguish which our friend at Monticello must experience at his irreparable loss. But his philosophic temper renders the circulating rumor … altogether incredible.” (Madison to Randolph, Sept. 30, 1782, PJM 5:170-171.)

Richard K. Matthews also cites Madison’s critiques of Adams, but disapprovingly. His complaint is that Madison elevated what Matthews takes to be the cold and antiseptic quality of reason over matters of the heart. As such, one of Madison’s fiercest critics may also be the commentator who understands him most perceptively. See Matthews, If Men Were Angels: James Madison and the Heartless Empire of Reason (Lawrenceville, Kan.: The University Press of Kansas, 1995). The passages about Adams appear on pages 6 and 7.
Franklin.”2 Similarly, during Adams’ Presidency, Madison compared him unfavorably to Washington: “The one cold considerate & cautious, the other headlong & kindled into flame by every spark that lights on his passions. . . .”3 Even eulogizing Adams, Madison recalled the former President’s proclivity to become carried away:

That he had a mind rich in ideas of his own, as well as its learned store; with an ardent love of Country, and the merit of being a colossal champion of its Independence, must be allowed by those most offended by the alloy in his Republicanism, and the fervors and flights originating in his moral temperament.4

Again, whether Madison fairly described Adams is open to dispute, but the contrast Madison drew was clearly a central dichotomy in his attitude toward popular majorities as well as political figures: those governed by reason and those governed by passion.5

---


3 Madison to Jefferson, Feb. 18, 1798, *PJM* 17:83. Cf. Madison to Jefferson, June 3, 1798: “It is said, and there are circumstances which make me believe it, that the hotheaded proceedings of Mr. A are not well relished in the cool climate of Mount Vernon.” (*PJM* 17:141-142)

4 Madison to J.K. Paulding, April 1831, *WJM* 9:454. Paulding, a historian, had asked Madison for biographical reflections on several founding fathers, including Adams.

5 Whatever its theoretical pedigree, the discipline of one’s emotions seems to have been a cultural norm at the time. George Washington was known frequently to stage Joseph Addison’s *Cato*, which was understood to celebrate stoicism. See the editor’s introduction to Christine Dunn Henderson and Mark E. Yellin, eds., *Cato: A Tragedy and Selected Essays* (Indianapolis: Liberty Fund: 2004). Hamilton also employed the reason-passion dichotomy throughout *The Federalist*. Federalist 6, for example, refers to “momentary passions and immediate interests,” while Federalist 15 says government is necessary because “the passions of men will not conform to the dictates of reason and justice, without constraint.” (Federalist 6:23 and 15:73.) In Federalist 3, Jay surmised that a national government was likely to be “more temperate and cool” in resolving questions of war and peace than the states would be individually. (Federalist 3:12)
Madison did not define these terms precisely, but some suppositions of his meaning may be derived by the context in which he used them. In the passages that follow, Madison used reason in a sense akin to what Aristotle calls “rational calculation”: the ability to use the reasoning part of the mind to choose correctly among available alternatives.⁶ For Madison, reason carried an instrumental connotation in that it was the faculty one employed to identify the course of action likeliest to achieve a given end. Passion, by contrast, was an emotional influence that obscured or distorted reason. It referred not merely to ardent flights of emotion or temper but also more broadly to irrational appetites. Greed, for example, was a passion insofar as instant gratification was not in one’s long-term interest.

Understood in these terms, Madison believed majorities or their leaders should prevail when cold, considerate and cautious; those heated by passion should be stalled. He wrote to Benjamin Rush in 1790:

If we are to take for the criterion of truth the majority of suffrages, they ought to be gathered from those philosophical and patriotic citizens who cultivate their reason, apart from the scenes which distract its operations, and expose it to the influence of the passions. The advantage enjoyed by public bodies in the light struck out by the collision of arguments, is but too often overbalanced by the heat proceeding from the same source.⁷

---

⁶ Aristotle, *Nicomachean Ethics*, Terence Irwin, transl. (Indianapolis: Hackett Publishing Company, 1999), 1139a11. Aristotle’s understanding of prudence as “a state grasping the truth, involving reason, concerned with action about things that are good or bad for a human being” (1140b5) also applies, although Madison more often used “reason” in the instrumental sense of choosing the means likeliest to achieve a given end.

⁷ Madison to Benjamin Rush, March 7, 1790, *PJM* 13:93-94. Note that Madison refers here to the criterion of truth, not to whether the majority should rule. Nothing in this passage questions the legitimacy of majority rule, only the accuracy of some majority opinions.
Federalist 37 similarly laments the “misfortune, inseparable from human affairs, that public measures are rarely investigated with that spirit of moderation, which is essential to a just estimate of their real tendency to advance, or obstruct, the public good.”

Madison wrote in the “Memorial and Remonstrance” that one problem with religious assessments was their propensity to invite passionate beliefs into the political realm and thereby “destroy that moderation and harmony” that enabled a diversity of sects to prevail in the United States without extracting the blood other societies had shed over religion.

Hints of that dangerous kind of zeal were, to Madison’s chagrin, already appearing. The bill for religious assessments that provoked the Memorial and Remonstrance had “produced some fermentation below the mountains & a violent one beyond them. The contest at the next Session on this question will be a warm & precarious one,” with “warmth” denoting the metaphor of heat that Madison often applied to the passions. The contrary—coolness—referred to reason, as in another remark about the assessments bill: “The Episcopal people are generally for it, tho’ I think the zeal of some of them has cooled.”

The zeal produced by the ratification debate, by contrast, was still burning when Madison warned Jefferson that an immediate convention to

---

8 Federalist 37:179.
9 “Memorial and Remonstrance,” PJM 8:298-304.
10 Madison to Jefferson, April 27, 1785, PJM 8:265-270.
11 Madison to Monroe, April 12, 1785, PJM 8:260-261.
consider amendments to the new Constitution would be unwise: “At present the public mind is neither sufficiently cool nor sufficiently informed for so delicate an operation.”\textsuperscript{12}

This dichotomy between reason and passion operated across Madison’s democratic theory from his first public writings in the 1780s to his death over half a century later. He hardly ever criticized a potential or actual majority as errant or unjust without also diagnosing it as being motivated by passion rather than reason. His pre- Constitutional Convention essay “Vices of the Political System of the United States” located the danger of majority abuse in those united by “an apparent interest or common passion . . . .”\textsuperscript{13} Majorities were “liable to err,” he said in Philadelphia, “from fickleness and passion.”\textsuperscript{14} Similarly, numerous bodies were “actuated more or less by passion . . . .”\textsuperscript{15}

So closely interwoven were passion and abuse that Madison linked them almost causally in his definition of faction in Federalist 10: a group “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”\textsuperscript{16} Federalist 49 worries that Jefferson’s proposal for occasional appeals to the people to correct abuses of the

\textsuperscript{12} Madison to Jefferson, August 10, 1788, \textit{PJM} 11:225-227.
\textsuperscript{13} \textit{PJM} 9:348-357. Notice that the interest is only “apparent.”
\textsuperscript{14} Madison in Convention, June 26, \textit{PJM} 10:76-77.
\textsuperscript{15} Madison in Virginia Ratifying Convention, June 18, 1788, \textit{PJM} 11:155-156.
\textsuperscript{16} Federalist 10:43.
Constitution poses the danger “of disturbing the public tranquillity, by interesting too strongly the public passions. . . .”\(^{17}\) The House, Madison predicted to Pendleton, would be susceptible to “capriciousness,”\(^{18}\) a quality that, significantly, Federalist 57 associated with “wickedness.”\(^{19}\) “Passion” was also associated with “fickleness.”\(^{20}\) In a 1790 Congressional debate, Madison denied that a proposal of his had been “dictated by passion,” insisting that “he considered it as a cool, as well as a proper measure, and believed, that the more coolly it was examined, the more proper it would appear.”\(^{21}\) During another debate, he criticized his opponents for making emotional appeals: “[W]armth and passion should be excluded from a discussion of a subject, which ought to depend on the cool dictates of reason for its decision.”\(^{22}\) An essay for the party press warned against consolidation of power in the Executive because “uncontrouled power, ever has been, and ever will be administered by the passions more than by reason.”\(^{23}\)

As tensions with Britain swirled early in Madison’s Presidential term, he noted that republics considered national “degradation” to be the only fate worse than war, but

\(^{17}\) Federalist 49:262.

\(^{18}\) Madison to Pendleton, July 15, 1789, \(PJM\) 12:289-290.

\(^{19}\) Federalist 57:298 (“… the caprice and wickedness of men”).

\(^{20}\) Madison in Convention, June 26, 1787, \(PJM\) 10:76-77.

\(^{21}\) \(PJM\) 13:216-219. Note that on this assumption, a longer debate is likelier to lead to a reasoned conclusion.

\(^{22}\) \(PJM\) 13:383.

that dispassion might avert the need to choose: “To avoid, if it be possible amidst the unbridled passions which convulse other nations, both of these alternatives, is our true wisdom, as well as our solemn duty. . . .” 24 When war erupted, Madison wrote that eastern states opposed to the conflict would mistake their true economic interest if they left the Union. Consequently, “[I] have never allowed myself to believe that the Union was in danger, or that a dissolution of it could be desired, unless by a few individuals, if such there be, in desperate situations or of unbridled passions.” 25

The passions were understood in direct contrast to reason, the “cool” faculty with which majorities or leaders could correctly identify their interests and the courses of action likeliest to attain them. Federalist 41 expresses confidence that while Anti-Federalists nitpicked the proposed Constitution, “[c]ool and candid” people would focus on the overall improvement it represented rather than its smaller imperfections. 26 Similarly, while Madison questioned the constitutionality of the Missouri Compromise, he comforted President Monroe with the observation that “there can be no room, with the cool and candid, for blame in a conciliatory course, the demand for which was deemed urgent, and the course itself deemed not irreconcilable with the Constitution.” 27 One of

24 Madison to the Republican Committee of Talbot County, Maryland, March 21, 1809. *PJM-PS* 1:69-70.


26 Federalist 41:207.

his *National Gazette* essays similarly predicted that a “temperate observer” would recognize that the republican majority of Americans would eventually rise up against what Madison believed to be the monarchical ambitions of the Adams regime.\(^{28}\)

Reason, in turn, was associated with two interrelated qualities: an openness of mind that considered facts and opposing ideas rather than reaching conclusions in advance, and impartiality, according to which decisions would be made on the basis of objective facts and principles rather than being bent to one’s interest or preconceptions. Madison’s initial concerns about political parties and factions centered in large measure on his belief that they lacked these reasoning qualities. The first time he expressed concern about “factions” pertained to the 1780 Congressional attempt to recall Benjamin Franklin as minister to France. The faction associated with Virginia’s Lee dynasty was, Madison believed, making decisions on the basis of personal animus rather than reason. Significantly, this first use of the term “faction” applied to a situation in which Madison believed the interests of the whole nation, not the rights of a minority, were at risk. Hence Madison wrote that he felt “great anxiety lest the flame of faction” overtake Congress.\(^{29}\) In Federalist 49, Madison argued that Jefferson’s occasional appeals “would


\(^{29}\) Madison to Pendleton, Nov. 11, 1780, *PJM* 2:165. For accounts of this dispute, see Jack Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Alfred A. Knopf, 1979), 243-275, and H. James Henderson, “Congressional Factionalism and the Attempt to Recall Benjamin Franklin,” *William and Mary Quarterly* 27.2 (1970): 246-267. Rakove, noting that the Lee faction took to the press to whip up public animosity toward Franklin, describes this episode—some of which took place before Madison took his seat in 1780—as the first time public pressure was immediately brought to bear on Congress. Henderson notes that voting blocs for and against Franklin were rigid, which also suggests that minds were closed and hence not subject to the faculty of reason.
inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself.” The defining feature of these parties was their adherents’ devotion to charismatic individuals who would have made their decisions in advance: “The passions, therefore, not the reason, of the public, would sit in judgment. But it is the reason of the public alone, that ought to control and regulate the government. The passions ought to be controled [sic.] and regulated by the government.” After ratification, Madison argued against calling an immediate second convention to consider a bill of rights because it would “be the offspring of party & passion, and will probably for that reason alone be the parent of error and public injury.”

The fact that Madison so strongly condemned parties only to become an early architect of the party system has prompted many observers to charge him with inconsistency. There is ample ground for this accusation, but the reason-passion dichotomy does weave one thread of consistency through the period: Madison was always the most concerned about the institutions or entities he perceived as most under the sway of passion. During the late 1790s, the same period during which Madison shifted his concern about abuses from popular majorities to leaders within the regime, he also began describing the latter, especially Adams, as impassioned. Signs of this concern

---

30 Federalist 49:264.

31 PJM 11:237-238.

preceded the Adams Administration, most clearly in Madison’s claim that extensive assemblies were inherently prone to passion because normal psychological controls collapsed in large groups. “In all very numerous assemblies, of whatever characters composed,” he warned in a famous passage of Federalist 55, “passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”

Moral or religious motives “lose their efficacy in proportion to the number combined together. . . .” Character could only be counted upon as a restraint in groups “so small, that a sensible degree of the praise and blame of public measures may be the portion of each individual. . . .”

By 1798, Madison feared this concern had been realized. It was impossible to make predictions about the outcomes of legislative battles, he told Jefferson, because “[t]here [was] too much passion it seems in our Councils. . . .” He rued Adams’ successful use of newspapers “in kindling a flame among the people, and of the flame in

33 Federalist 55:288.

34 Federalist 10:45-46.

35 Federalist 63:325. The sentence continues “… or in an assembly so durably invested with public trust, that the pride and consequence of its members may be sensibly incorporated with the reputation and prosperity of the community.” This, for Madison, was the Senate, which we shall discuss below. For now, though, the relevant observation is that the key word in this passage is “durably.” The unique quality of the Senate lay in the fact that it could resist public passions because they would dissipate over the course of a six-year term.

extending taxes[,] armies & prerogatives,” adding he hoped these “solemn lessons [would] have their proper effect when the infatuation of the moment is over.”

Unreason also manifested itself in majorities or leaders with a personal interest in a given question. The only majorities Federalist 10 spoke of inhibiting were those united by a “co-existent passion or interest.” When factions reigned, the essay observed, disputes were settled by “the superior force of an interested and overbearing majority,” a manner of resolution Madison counterposed to “rules of justice,” i.e., objective standards accessible by reason, and minority rights. Notice, in the well known phrase of Federalist 10, the explanation for why a man cannot judge his own cause: “No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment. . . .” Latent in this claim is an assumption of moral objectivity: Most questions have a “right answer” discoverable by reason so long as it is not distorted by interest.

In this sense, reason corresponded with “impartiality,” a standard evoking the moral philosophy of Adam Smith, for whom the criterion of moral conduct was the


38 Eugene Miller (“What Publius Says About Interest,” The Political Science Reviewer 19.1 (1990): 11-48) makes an intriguing argument that Publius uses the terms “interest” and “interests” in several senses, not all of which carry a negative connotation. But there are several instances in The Federalist in which the word does carry the same connotation as Samuel Johnson’s definition of “interested”: “having regard to private profit.” These are the instances on which I focus here. See Johnson’s Dictionary: Improved by Todd (Boston: Charles J. Hendee, 1836), 185.

39 Federalist 10:42.

40 Federalist 10:44.
hypothetical judgment of an “impartial spectator.” Early in his Congressional career, Madison advocated an impartial tribunal to assess the states’ competing claims to national relief of their Revolutionary debts, arguing that members of Congress were inappropriate for the task because they were sworn to be advocates for their states rather than neutral judges of the national welfare. This was the complaint he lodged against members of the Articles Congress in Federalist 46: They had “but too frequently displayed the character, rather of partisans of their respective states, than of impartial guardians of a common interest. . . .” Similarly, Madison’s “Detached Memoranda” contains his thoughts on bank reform, including the importance of appointing directors who are “impartial Judges.”

One recognizable stigma of interested or impassioned majorities and leaders was that they formed and sought to act quickly, a fact important for understanding Madison’s attempt to control them through the use of time. Madison, as we have seen, portrayed passion through metaphors that suggested rapid and uncontrolled spread: “fires,”


42 PJM 6:399-402. This preference for an impartial tribunal under the unique circumstances of the Articles does not impair Madison’s general commitment to majority rule and Congressional supremacy. The very problem with the Articles was the absence of a national majority to make decisions about the national interest.

43 Federalist 46:245.

“fevers,” “pestilence” and “contagions,” among others. For example, factious leaders would attempt to “kindle a flame,” but under the right circumstances, that flame would not “spread a general conflagration.” Among the defects of ancient and modern republics were “popular assemblages, so quickly formed, so susceptible of contagious passions, so exposed to the misguidance of eloquent & ambitious leaders; and so apt to be tempted by the facility of forming interested majorities, into measures unjust and oppressive to the minor parties.” The demand for paper money was always a popular "rage."

Madison often linked “passion” with “precipitancy,” a term whose connotation as “rushed” is evident from his use of it elsewhere as the opposite of “procrastinate.” During a 1782 legislative battle in Virginia, for instance, he hoped the Senate would have the “perseverance” to act as “a check to the precipitate acts of a single Legislature.” Virginia’s Assembly passed “sudden resolutions” so imprudent that members of that body would often “repent” and lobby the state Senate to block them. Majorities might

45 Federalist 10:48.
46 “Majority Governments,” 1833, WJM 9:520.
47 See, inter alia, Madison to Jefferson, Aug. 12, 1786 (PJM 9:93-99) and Federalist 10:48.
48 Madison to John Cartwright, 1824 (precise date unknown), PJM 9:180-181.
49 WJM 9:61.
50 Madison to Edmund Randolph, June 11, 1782, PJM 4:333-34.
51 Madison to Caleb Wallace, Aug. 23, 1785, PJM 8:350-357 (emphasis added)
“under sudden impulses be tempted to commit injustice on the minority.”\footnote{Madison in Convention, June 26, 1787, \textit{PJM} 10:76-77 (emphasis added).} In a memorandum documenting the dismissal of Secretary of State Robert Smith in 1811, Madison was keen to specify that he had delayed the action “for some time … in order that my communication might have the character of being not the result of any sudden impulse, but of a deliberate regard to public considerations. . . .”\footnote{\textit{PJM-PS} 3:255-263 (emphasis added). Cf. Hamilton: “The republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse. . . .” \textit{(Federalist 71:370)}.} As this memorandum indicates, acts based on “interest and passion” were frequently the result of “impulses,” a term that also suggests rapid formation and execution before the intellect can be consulted.\footnote{Madison to Jefferson, Oct. 17, 1788, \textit{PJM} 11:295-300 (emphasis added).} A Senate was thus needed to counteract “the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions. . . .”\footnote{Federalist 62:322 (emphasis added).} One reason republics were more volatile in small than in large territories was the danger in the former of “easy combinations under the impulse of misinformed or corrupt passions. . . .”\footnote{\textit{PJM} 14:159.} Writing to his old adversary John Adams from the quiet of their mutual retirements, Madison noted with praise that all the American States “placed the powers of Government in different depositories, as a means of controlling the impulse and
sympathy [i.e., spread] of the passions, and affording to reason better opportunities of asserting its prerogatives.”

That exchange was prompted by Condorcet’s critique of bicameralism. Madison sounded a similar note in warning the British reformer John Cartwright against the latter’s proposal for a one-house legislature:

The infirmities most besetting Popular Governments, even in the Representative Form, are found to be defective laws which do mischief before they can be mended, and laws passed under transient impulses, of which time & reflection call for a change.

Also in retirement, Madison speculated that the United States probably would be subject to partisan fervor at some point.

The most, perhaps, that can be counted on, & that will be sufficient, is, that the occasions for party contests in such a Country & Gov’t as ours, will be either so slight or so transient, as not to threaten any permanent or dangerous consequences to the character & prosperity of the Republic.

Therein, as will now be seen, lay Madison’s solution to the problem of impulsive politics: time. It was, in the phrase of Montaigne that the young Madison recorded in his commonplace book, “the sovereign physician of our passions.”

---

58 Madison to John Cartwright, op. cit.
2.2. TEMPORAL MAJORITARIANISM

The fact that Madison endorsed bicameralism as one outlet for “transient impulses” suggests that the diversity of interests he discussed in Federalist 10 did not exhaust the entirety of his concern about abusive majorities. Diversity, as will be seen in Chapter 3, reduced the likelihood that factious majorities would form, but as Madison acknowledged in Federalist 63, “this advantage ought not to be considered as superseding the use of auxiliary precautions.” To the extent that impassioned majorities formed, then, we seem to encounter a puzzle that may be summarized as follows:

A. Madison was concerned about impulsive or impassioned majorities.

B. Madison believed persistent majorities always prevailed, regardless of institutional attempts to restrain them.

C. Madison was confident impulsive or impassioned majorities would not prevail in the United States.

This formulation helps to reveal the latent premise that reconciled these views: By their very nature, impassioned majorities were not persistent. It is true that the “fit characters” of Federalist 10 played an important role in resisting popular abuses, a fact

---

60 As we proceed, it bears repeating that, unlike Calhoun, Madison did not regard all majorities as abusive, nor, in Hartz’s phrase, was he seized by a “neurotic terror” of them. Abusive majorities were one problem to be worked out as the Constitutional system was shaped. The primary problem was still the inability of national majorities to act on national issues.

61 Federalist 63:327.

62 This confidence is evident, among other places, in Madison’s Nov. 25, 1820, letter to Lafayette (WJM 9:35-38), with which we shall deal below.
that such commentators as Willmoore Kendall, George W. Carey and Isaac Kramnick have properly emphasized. But even more than others at the Philadelphia Convention, Madison also believed these leaders should be directly dependent on the public, so it seems difficult to assume they were to bear the primary burden of disciplining the public’s passions. Unless some other mechanism was presumed, the best for which Madison could hope was that impulsive majorities would postpone their abuses until the next election, at which time they would prevail. On this model, relief from majority abuse would only be temporary. Madison in fact presumed the opposite: that abuses would be temporary and relief would be sustained.

He must have assumed, then, that public passions themselves would dissipate of their own accord if given time to do so. While there may have been a role for moral tutelage in disciplining the passions, Madison was largely silent on this point. His premise was not that elected leaders would resist public passions until they were defeated at the polls; it was that passions would burn out before leaders stood for re-election. This was the import of Montaigne’s observation that time achieved its ends by supplying the mind with new diversions. Time itself was the leavening agent.

---


64 Madison does depend on “fit characters” to hold out until passions dissipate. Chapter 3 will discuss the issue of representation in more detail.
Commentators have often scoured Madison’s thought for a more active mechanism for controlling the passions. Martin Diamond, for example, understands Madison to have favored the proliferation of commercial interests as a comparatively safe outlet for the public’s energies.\(^6\) Gary Rosen’s thoughtful treatment of Madison’s attempt to enlarge the public’s conception of interest concludes that he was able to do so only because the pursuit of individual interest added up, without conscious intent, to a coherent whole.\(^6\) Madison’s need for such mechanisms, however, was less than these interpretations assume. Because individuals acted against the public interest only under the influence of passion, delay alone could carry a substantial part of the weight in the Madisonian system, a fact evident in his observation that “[o]pinions whose only root is in the passions must wither as the subsiding of these withdraws the necessary pabulum.”\(^6\) He frequently described passion or impulsiveness in a manner that suggested these qualities were inherently fleeting. The impulses to which bicameralism gave vent, he told Cartwright, were “transient.” Party conflicts in the United States would be “transient” and hence would not cause “permanent” damage.\(^6\) Amid the tariff dispute of 1828, he hoped Southern agitation for disunion would be “as transient as [it

\(^6\) “Democracy and the Federalist,” op. cit.


\(^6\) Quoted in McCoy, *Last of the Fathers*, 121.

was] intemperate. . . .”  

The Senate was necessary “to protect the people agst. the transient impressions into which they themselves might be led.” Indeed, the very reason religious motives could not be depended upon to restrain leaders was that such motives would have to be strongly felt to be effective, whereas “enthusiasm is only a temporary state of religion. . . .”

Federalist 10’s classification of factions underscores the point. As Douglass Adair has noted, Madison’s taxonomy appears to be compatible with David Hume’s analysis in the latter’s essay “Of Parties in General.” Hume, for instance, divided parties into those that were “real” and “personal.” “Real” parties, in turn, were subdivided into those based on interest, principle or affection. Madison, in a parallel analysis, distinguished between factions based on “[a] zeal for different opinions concerning religion, concerning government, and many other points” (Hume’s parties of “principle”); those based on “an attachment to different leaders” (Hume’s “personal” parties); and those based on “the various and unequal distribution of property” (Hume’s parties of “interest”).

---

69 Madison to Thomas Lehre, August 2, 1828, WJM 9:314-316.

70 Madison in Convention, June 26, 1787, PJM 10:76-77.

71 “Vices,” PJM 9:348-357.

Adair notes that Madison “greatly expanded the quick sketch of the faction from ‘interest’ buried in the middle of the philosopher’s analysis.” But Madison did more than this; he accepted Hume’s categories but completely reversed the Scottish philosopher’s analysis of them. Hume described parties based on interest—Madison’s economic factions—as “the most reasonable, and the most excusable.” By contrast, those based on “principle, especially abstract speculative principle” were irrational and dangerous. The human propensity to convince others to conform to such principles was “the origin of all religious wars and divisions.”

Madison, by contrast, located his primary concern in factions based on property. The particular route by which he reached this conclusion is instructive. Factions based on religion or personal attachment had “divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good.” Indeed, Madison, here echoing Hume, observed that “where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts.” Yet despite this vivid description, Madison did not join Hume in placing emphasis on this kind of faction. The reason was that such factions—again, note the metaphor—”kindle[d] [mankind’s] unfriendly passions.” These were naturally fleeting and hence less dangerous. The reason special consideration had to be

---

73 Adair, *Fame and the Founding Fathers*, 150.
given to factions based on property was that they were both “common” and, crucially, “durable.” That is, by their nature, the passions on which religious or personal disputes were based were transient. But property was not, to use Hume’s epithet, “abstract”; hence, disputes based on it did not vanish as quickly.\textsuperscript{74}

In turn, because impulses were transient, time was healing. Madison, as has been seen, thus resisted efforts to call a post-ratification Constitutional convention to consider a bill of rights, arguing that even a brief delay would induce a calmer and therefore more reasoned atmosphere: “An early Convention is in every view to be dreaded in the present temper of America. A very short period of delay would produce the double advantage of diminishing the heat and increasing the light of all parties.”\textsuperscript{75} The key to preventing impulsive politics, then, was to delay the point of decision long enough for passions to evaporate. Conversely, the foremost indicator of whether a majority was ripe to prevail was the length of time it had cohered.

This mechanism operates throughout Madison’s thought, most clearly in his treatment of the Senate. Its use, he said in Philadelphia was “to consist in its proceeding with more coolness, with more system, & with more wisdom, than the popular branch.”\textsuperscript{76}

\textsuperscript{74} Hume’s analysis appears on pp. 59-61 of “Of Parties in General” (italicization in the original). The quoted passages from Madison’s analysis may be found in Federalist 10:43-44. My analysis parallels but, as indicated above, exceeds Adair’s. Madison did, of course, believe economic disputes could draw forth the passions. The constant to-and-fro of state legislation on debts and paper money reflected precisely this dynamic. The important point is that disputes based on property did not dissipate as quickly as those based on abstract principle and hence required special attention.

\textsuperscript{75} Madison to Jefferson, August 23, 1788, \textit{PJM} 11:238-239.

\textsuperscript{76} Madison in Convention, June 7, 1787, \textit{PJM} 10:39-40.
In the *Federalist* essays concerning the Senate, the most important reason that body would serve a cooling function was the longer terms of its members, which allowed them to resist public passions on the assumption they would dissipate before Senators faced re-appointment or, in contemporary terms, re-election. Federalist 62 said a body whose purpose was to resist “the impulse of sudden and violent passions” should “possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.”\(^{77}\) While Madison unquestionably believed the Senate would be populated with even fitter characters than the House, this passage attributes their “firmness” not to superior character but rather to the longer duration of their terms. This assumption might be explicable in two ways. Longer tenures might mean senators would only want to serve a single term and that they would therefore be unburdened of any concern for public opinion. But this was clearly not Madison’s view. The Virginia Plan specified that Senators were to be eligible for re-election,\(^{78}\) and while Madison believed the Senate would help to ripen public opinion, he nevertheless regarded the public’s considered

---

\(^{77}\) Federalist 62:322.

\(^{78}\) *PJM* 10:15-17. The Virginia Plan also said that House members were not to be re-eligible, but the purpose of this could not have been to insulate them from public opinion since the Plan also said they were to be subject to recall and that they could return to Congress after an unspecified hiatus. Neither specification is present in Madison’s pre-Convention letter outlining the Virginia Plan to Randolph, which suggests they may have been inserted to placate the concerns of others. In either case, however, the case for ineligibility at the time was generally to prevent representatives from becoming an entrenched political class and growing distant from their constituents. In other words, the point was to tie them more closely to the people, not to insulate them.
views to be “the real sovereign in any free [government].” The second possibility is that senators could firmly resist public impulses in the moment while reasonably anticipating those passions would dissipate before they next faced reelection or re-appointment. This latter explanation seems to be what Madison had in mind, which helps to explain his persistent interest in the length of senatorial terms. Commenting, for example, on Jefferson’s draft of a Constitution for Virginia, Madison argued that “[t]he term of two years [for Senators] is too short. Six years are not more than sufficient. A Senate is to withstand the occasional impetuosities of the more numerous branch.” At the Convention, Madison went as far as saying he would not object to a term of nine years. Federalist 63, an entire paper devoted to the length of Senatorial terms, goes on to make the temporal function of that body explicit. The framework of this argument has already been discussed above:

As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers: so there are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.

Now, the importance of Madison’s explanation of precisely how the Senate would serve that function may be seen. It would be a speed bump, so to speak, rather than a roadblock:


In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow mediated by the people against themselves, until reason, justice, and truth, can regain their authority over the public mind?  

The chronology Madison implies is crucial for understanding why the critical reading is mistaken when it portrays the Senate as an aristocratic body whose purpose was to foil public opinion. The passage just quoted suggests that the people ordinarily act on the basis of reason, justice and truth. It is only at “particular moments” that either “passion” or “advantage” clouds their reasoning. By a temporary suspension of these impulses, reason, justice and truth regain their authority. Madison’s latent assumption about the calming effect of time was herein made explicit, and again, it was apparently time itself—not what happened in the interim, which Madison did not specify—that served this function. There was no indication of moral tutelage by leaders; on the contrary, the tacit premise was that public opinion was the primary force to which the Senate reacted. Nothing would have occurred except the passage of time, and this alone, Madison suggested, was sufficient to defuse the passions.

Of course, by this analysis, the Senate would still be subject to convulsions of passion every six years at the moment of re-election. That was, in fact, how the

---

82 Federalist 63:327 (emphasis added).
83 The fact that the Senate enables a majority to regain its senses also helps to illustrate why Madison championed it even though he remained a House supremacist. The Senate was a braking mechanism, but the House remained the main engine, a dynamic made clear in his description of the Virginia Senate as “a useful bitt [sic.] in the mouth of the house of Delegates.” See Madison to Caleb Wallace, Aug. 20, 1785, PJM 8:350-357.
Maryland Senate operated, a fact that elicited Madison’s anxiety when the state debated the issuance of paper money:

The Senate of Maryd. has hitherto been a bar to paper in that State. The clamor for it is now universal, and as the periodical election of the Senate happens at this crisis, and the whole body is unluckily by their constitution to be chosen at once, it is probable that a paper emission will be the result. If in spite of the zeal exerted agst. the old Senate a majority of them should be reelected, it will require all their firmness to withstand the popular torrent.  

Less than a year after Madison made this observation, he wrote a rough draft of what became the Virginia Plan. Madison left the exact term of senators open except to say it should be longer than the lower house, but he did think staggered rotation was important enough to specify. During the ratification process, Madison cited this mechanism as one reason adoption of the Constitution would make it less likely that rights to navigation of the Mississippi would be bargained away to Spain. Six years were necessary to change the entire membership of the entire Senate, whereas the Articles Congress “undergoes a revolution once in three years.” Because, as will be seen below, Madison regarded a sacrifice of the Mississippi to be an impassioned idea motivated by the Eastern states’ short-term greed, the longer period made it less likely that the majority in favor of such an action would persist long enough to prevail. The importance of staggered terms in this context was that an impassioned majority would have not simply to cohere for six years—a scenario in which it could, presumably, be


85 Madison to George Nicholas, May 17, 1788, PJM 11:44-51.
allowed to smolder for most of that time and be inflamed only at the time of elections or appointments—it would also have to remain uniformly passionate because changing the membership of the entire Senate would require it to prevail in three successive political cycles.\(^8\)

Generally, then, Madison’s Constitutional theory required majorities to cohere for long enough intervals to ensure they were guided by reason rather than passion. He did not specify the length of this interval, but as subsequent chapters will endeavor to show, it was generally proportional to the gravity of the topic under consideration. A clear majority favoring a comparatively routine matter of policy could prevail quickly, for example, while a close contest involving fundamental Constitutional questions required a longer period. The idea was to act as a metronome setting a tempo appropriate to a given circumstance. Sometimes, as in the case of basic Constitutional change, the tempo was to be slow and leisurely. At other times, when reasonable decisions had been reached and only needed execution, allegro was appropriate. This metronome, in turn, applied to the process of deliberation, not decision. As Madison’s frustration with the Articles period showed, some decisions needed to be executed quickly once a deliberate majority had emerged.

\(^8\) This analysis applies indirectly to appointment of Senators by state Legislatures, but even more clearly to the direct popular election that Madison preferred. Cf. H.B. Mayo’s description of an upper house that “can exercise only a delaying power over legislation. The effect is to introduce a short time lag, in which the majority support of representatives and public can crystallize while being put on the defensive.” Mayo, An Introduction to Democratic Theory (New York: Oxford University Press, 1960), 168-169.
This inherent power of time to defuse passions helped to make the Constitution a self-regulating system whose dependence on parchment barriers was minimal. To be sure, temporal majoritarianism relies to some extent on institutional mechanisms like the Senate, but it also minimizes the weight these parchment barriers must bear. On Madison’s assumptions, parchment needed to hold up only for as long as it took for the passions tearing at it to dissipate. Even were a majority determined to trample Constitutional barriers, it was likely to lose interest before it succeeded.

By this analysis, the critical school misreads Madison by judging the extent of his republicanism according a snapshot of any one moment in time at which a majority seems not to prevail. The relevant measure is a time-elapse photograph. This lateral perspective, in turn, makes it possible to address the following objection: To say Madison was a majoritarian because he favored the rule of dispassionate majorities but not impulsive ones may simply be a fatuous way of saying he favored those majorities with which he agreed. In other words, why should one majority prevail because it is motivated by the head while another fails simply because its impetus is the heart? By projecting Madison’s democratic theory across time rather than isolating it at a single

---

87 I have borrowed Martin Diamond’s metaphor, but applied it to a different set of concerns. Diamond argued that a commercial republic diverted popular energies from hotly contested and irreconcilable disputes like religion to commercial issues on which broad consensus was possible. Hence the viability of Constitutional barriers “depend[ed] upon a prior weakening of the force applied against them. . . .” See “Democracy and the Federalist,” 65-66. The analysis above is, I believe, compatible with Diamond’s interpretation.

88 This is the heart of Matthews’ critique in The Heartless Empire of Reason (op. cit.).

98
moment, it is possible to see that he did not favor some majorities over others, nor did he pose a choice between majorities and minorities at discrete points in time. His democratic theory addressed *at what point* the *same* majority should rule. The question was not who rules, but when.

By agreeing or tacitly consenting to the Constitution, then, a majority did not give up its right to rule; it agreed to rule on the basis of reason. Madison’s *Gazette* essay critiquing Rousseau’s ideal of a “Universal Peace” made this point by way of explaining that it was easier to prevent wars based on a sovereign’s will than it was to end those based on the public’s will:

As wars of the first class were to be prevented by subjecting the will of the government to the will of the society, those of the second, can only be controuled by subjecting the will of the society to the reason of the society; by establishing permanent and constitutional maxims of conduct, which may prevail over occasional impressions, and inconsiderate pursuits.

Viscount Bryce understands this to be the essence of constitutionalism:

Along with the principle of Liberty, a Constitution embodies also the principle of Self-restraint. The people have resolved to put certain rules out of the reach of temporary impulses springing from passion or caprice, and to make these rules the permanent expression of their calm thought and deliberate purpose. It is a recognition of the truth that majorities are not always right, and need to be protected against themselves by being obliged to recur, at moments of haste or excitement, to maxims they had adopted at times of cool reflection.

---

89 This does not address the objections of Matthews, who openly embraces a role for the emotions in addition to the intellect (*If Men Were Angels*, op. cit.).


Bryce, like Madison, refers to the *majority* recognizing its *own* propensity to passion and thereby protecting itself. Madison’s thought provides several reasons the majority might agree to delaying measures as a means of self-protection. In the course of dissipating passions, time seasoned majorities in at least three ways: by reorienting their view from immediate gratification to long-term interest; by ensuring they were relatively settled rather than capturing their oscillating views at one arbitrary moment in time; and by providing the benefit of maximum information before a decision is reached.

### 2.2.1. The Immediate vs. the Ultimate

Perhaps the greatest passion to which human beings were susceptible was instant gratification. One purpose of delay was to rectify what Drew McCoy, citing Hume’s essay “On the Origin of Government,” calls “the calamitous inversion of the proper hierarchy between the immediate and the remote.”

The concepts of the immediate and the ultimate operate in Madison’s thought as almost exact parallels to passion and reason. Reason, again, encompasses the idea that it is rarely in a majority’s *own* long-term interest to invade the rights of a minority. Consequently, Madison often qualified his descriptions of majority “interests,” referring instead to their “apparent” interests. His pre-Convention “Vices” essay, as has already been seen, observed that it was difficult to restrain a majority when united by “an *apparent* interest or common passion. . .” That difficulty, according to Federalist 10, arose in turn from the difficulty of “taking into

---

92 McCoy, *Last of the Fathers*, 42.

view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.”

In the following passage in Federalist 42, the desire to gratify immediate appetites is associated with impatience: “[T]he mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamours of an impatient avidity for immediate and moderate gain.” Madison told the Virginia Constitutional Convention of 1829 that “[a]s to the permanent interest of individuals in the aggregate interests of the community, and in the proverbial maxim, that honesty is the best policy, present temptation is often found to be an overmatch for those considerations.” This tendency to ignore the remote at the expense of the immediate was the basis of Madison’s objection in Federalist 50 to correcting constitutional abuses by “periodic appeals” to the people. If the appeals were held in the immediate aftermath of an abuse, the same passions that produced it would continue to reign. If the appeals were less frequent, “a distant prospect of public censure would be a

---

94 Federalist 10:45.

95 Federalist 42:219.

96 WJ 9:361.
very feeble restraint on power from those excesses, to which it might be urged by the
force of present motives.”

Delay could help overcome short-term temptations in part by bringing the remote
into closer and therefore clearer view, a dynamic evident in Madison’s 1786 comments
on the highly controversial Jay-Gardoqui treaty. The treaty, which would have given
Spain exclusive rights to the Mississippi for five years, sparked fierce opposition among
the “Western” states, prompting Madison to write one of his best known—and perhaps
most misinterpreted—expressions of concern about unfettered majority rule. Westerners
believed Jay had bargained away their livelihoods in exchange for concessions chiefly
benefiting the East. Madison argued in a letter to Monroe that the scheme was not
vindicated by the fact that an overall majority of states supported it:

The progression which a certain measure [the Jay-Gardoqui Treaty] seems to be
making is an alarming proof of the predominance of temporary and partial
interests over those just & extended maxims of policy which have been so much
boasted of among us and which alone can effectuate the durable prosperity of the
Union. Should the measure triumph under the patronage of 9 States or even of the
whole thirteen, I shall never be convinced that it is expedient, because I cannot
conceive it to be just. There is no maxim in my opinion which is more liable to
be misapplied, and which therefore more needs elucidation than the current one
that the interest of the majority is the political standard of right and wrong.
Taking the word “interest” as synonymous [sic] with “Ultimate happiness,” in
which sense it is qualified with every necessary moral ingredient, the proposition
is no doubt true. But taking it in the popular sense, as referring to immediate
augmentation of property and wealth, nothing can be more false. In the latter
sense it would be the interest of the majority in every community to despoil &
enslave the minority of individuals; and in a federal community to make a similar
sacrifice of the minority of the component States.

---

97 Federalist 50:265.
At first glance, the statement seems starkly at odds with Madison’s claims elsewhere that majority rule was the first principle of republican government. Madison even appears to share Calhoun’s inherent suspicion of majorities, and many commentators have indeed understood this passage to pit majority rule against individual rights. 99 John O. McGinnis, for example, points to the letter as support for his assertion that “Madison believed that the protection of natural rights, rather than the promotion of democracy, was the end of government.” 100  For James T. Kloppenberg, the passage is evidence that America’s primary political tradition is liberalism rather than merely majority will. 101  Ralph Ketcham similarly interprets the letter as an indication of Madison’s belief that “concepts of right and justice were paramount to expressions of majority rule.” 102

These commentators are not wrong to identify this passage as an important statement of Madison’s concern about abusive majorities. But fully considered, it is in


fact an affirmation of majority rule or, more precisely, temporal majoritarianism. Temporal overtones pervade the passage: An abusive majority emphasizes the “temporary” over the “durable,” seeking an “immediate” augmentation of its wealth, a modifier Madison contrasts with its “ultimate” happiness. The majority’s long-term interest is not to despoil and enslave the minority, which matters precisely because the “Ultimate happiness” of the majority is “the political standard of right and wrong.” A majority was to be delayed under these circumstances not because it was abusing minorities but because it was mistaken about its own interests. The fact that Madison valued the general good over the very minority rights to whom this passage is often understood to apply is evident in his complaint that the treaty sacrifices “partial” interests to those of “the Union.”

Madison’s underlying point was not that the majority had no right to infringe the rights of the minority, but rather that the interest of both was the same, a fact that only a near-sighted and therefore distorted view could obscure. During the Articles period, for example, Madison said it was safe to empower a majority of states to enact trade policy

---

103 In separate correspondence, Madison made clear to the Marquis de Lafayette that he viewed the free navigation of the Mississippi as a nationwide issue because, among other reasons, it affected the value of the nationally owned lands to the west and because the American states, unlike European countries, comprised a single people whose complex interdependence made it folly to speak of the Atlantic and western states having different interests. Madison to the Marquis de Laryfayette, March 20, 1785, PJM 8:250-254.

104 Their interests were the same because Madison believed the Western and Eastern states would both benefit from maintaining an open river. Drew McCoy also notes that free navigation of the Mississippi was central to Madison’s national vision of an agricultural society. See McCoy, The Elusive Republic (Chapel Hill, N.C.: The University of North Carolina Press, 1980), 124.
because “the fact is that a case can scarcely be imagined in which it would be the interest of an 2/3ds of the States to oppress the remaining 1/3d.” 105 This belief forms a pattern across Madison’s thought: He almost never perceived conflicts to be binary struggles between abusive majorities and victimized minorities. Rather, the problem was almost always the majority’s inability to perceive its own interest accurately, an interest that, clearly perceived, would often reveal that there was no conflict at all. Time and the easing of immediate appetites would bring this perspective into view.

A snapshot perspective of Madison’s letter to Monroe could easily misperceive it as a commentary on majority-minority conflicts, as Roberto Gargarella apparently does in interpreting it to mean that “Madison’s distrust of majority rule had achieved its highest point.” 106 Madison’s protégé and biographer, William Cabell Rives, however, understood that the relevant perspective was lateral—the majority’s ability across time to perceive its true interest:

Of the republican statesmen of America, Mr. Madison was undoubtedly the one who saw, the earliest and most clearly, the indispensable necessity of providing, the scheme of the new government, some safeguard for the rights of the minority, which should not be inconsistent with the fundamental principle itself of popular institutions. In a letter … to Mr. Monroe, he had expressed his sentiments most forcibly with regard to the abuses of the maxim which makes the temporary will of the majority the criterion of right and wrong. 107

105 Madison to Monroe, August 7, 1785, PJM 8:333-336.
Rives did not suggest an inherent tension between majority rule and minority rights. On the contrary, he characterized Madison as believing the two must be reconciled in order to guard rights without violating republican principles. They could be reconciled because the apparent conflict arose from the majority temporarily misperceiving its interest. Moreover, even in those cases in which the majority was wrong, nothing in this letter suggested they should not rule. The question was whether they ruled immediately; but in any case, Madison entertained no alternative to their ultimate authority. On the contrary, a passage that has been called “the first time Madison discussed his fear of majority tyranny”\(^\text{108}\) in fact identifies the long-term happiness of the majority as the proper object of political society.

Similarly, in his “Memorial and Remonstrance,” Madison affirmed majority rule even as he asserted the minority right to which he was most consistently devoted: conscience. “True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.”\(^\text{109}\) Nothing about the

---

\(^\text{108}\) See Liebman and Garrett, 873. Liebman and Garrett correctly interpret the passage as a rejection of the assumption “that the majority view is necessarily consistent with the public good.” But the passage in fact clearly states that the majority’s ultimate good is the public good. The relevant issue is a majority’s inability to perceive its own good accurately.

\(^\text{109}\) “Memorial and Remonstrance,” op. cit.
latter clause negated the former. Madison merely said that the majority’s legitimate right to make decisions did not exempt it from criticism.  

2.2.2. Settled vs. Unsettled Majorities

Democratic theory presents the following dilemma: During periods of ongoing oscillation in public opinion, enshrining a view in policy at any one given moment seems arbitrary. Temporal majoritarianism addresses this dilemma by postponing decisions until the public has coalesced around an opinion and persisted in it for an interval proportional to the gravity of the issue in question.

In his National Gazette essay “Public Opinion,” Madison thus drew a distinction between fixed and fluctuating majorities:

As there are cases where the public opinion must be obeyed by the government; so there are cases, where, not being fixed, it may be influenced by the government. This distinction, if kept in view, would prevent or decide many debates on the respect due from Government to the sentiments of the people.  

Constitutional delaying mechanisms require compliance only with persistent majorities. By contrast, the antics to which Madison objected in the states occurred because legislatures were instantly responsive to oscillating views. Forrest McDonald describes a

---

110 As will be argued in Chapter 4, the “Memorial and Remonstrance” was in fact a clear manifestation of Madison’s belief that the proper means of safeguarding minority rights was persuasion of the majority.

catalog of legislative escapades involving laws that fluctuated with every change in public opinion.  Edmund Pendleton portrayed this scene in a letter to Madison:

[I]t must be acknowledged that our Finance hath wanted Stability and System; different States will adopt various modes of complying with the requisitions of Congress, and Individuals in each will pertinaciously pursue their Opinions, so as to carry at one Session what they have been over ruled in at a former, & hence arises the mutability, so destructive of every Political measure. I fear this mischief hath its Origin in human Nature, & that a change will be difficult. . . .

As a result of these rapid changes, the law became unknowable and long-term planning became impossible—both defects that harmed the majority, not just the political minorities whose rights were violated. Madison described these problems as the “multiplicity” and “mutability” of laws:

The short period of independency has filled as many pages as the century which preceded it. Every year, almost every session, adds a new volume. … [E]very necessary and useful part of the least voluminous of them might be compressed into one tenth of the compass, and at the same time be rendered ten fold as perspicuous. . . .

We daily see laws repealed or superseded, before any trial can have been made of their merits: and even before a knowledge of them can have reached the remoter districts within which they were to operate. In the regulations of trade this instability becomes a snare not only to our citizens but to foreigners also.  

When he wrote of these concerns, Madison viewed the national negative on state laws as the cure for the internal problems of the states. That argument was lost, but other

---


114 “Vices,” op. cit.
Constitutional mechanisms nonetheless operated to require sustained consensus and therefore prevent mutability of laws at the national level. The Senate, Madison wrote in Federalist 62, was one of them:

> It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is to-day, can guess what it will be to-morrow. . . .

Significantly, it was the minority, not the majority, that profited from the mutability of laws: Constant change provided an advantage “to the sagacious, the enterprising, and the monied few, over the industrious and uninformed mass of the people.” Conversely, as will be seen in Chapter 4, requiring majorities to cohere for a sustained interval was fundamental to establishing both the predictability of law and the veneration of the Constitution that Madison saw as vital for the republic’s stability.

2.2.3. Information

Finally, time served the additional purpose of ensuring decisions were made on the basis of experience and adequate information, both of which were central to Madison’s idea of Aristotelian prudence. The problem with mutable laws in the states consisted not simply in the fact that the laws were unknowable but also in the fact that legislators could not possibly have made them with an adequate understanding of whether or how the laws had actually worked. One reason for the Senate, and the longer terms of

---

115 Federalist 62:323-324.
its members, was that the public was liable to be led into “temporary errors, thro’ want of information as to their true interest. . . .” Similarly, Madison argued repeatedly against a second Constitutional convention because delay would produce a better sense of what amendments were needed. A convention might be appropriate “as soon as time shall have somewhat corrected the feverish state of the public mind, and trial have pointed its attention to the true defects of the system.”

The fuller scope of information that could be collected during delays also included a comprehensive rather than partial sense of public opinion. During his House tenure, Madison worried that a rush to enact legislation placed more urban areas, where information spread and opinion formed quickly, at an advantage. In the first bank debate, he therefore sought delay so the public would have time to reflect: “The public opinion has been mentioned: If the appeal to the public opinion is suggested with sincerity, we ought to let our constituents have an opportunity to form an opinion on the subject.” He was concerned about a rush to ratify the Jay Treaty because “[t]here was not time for distant parts where the treaty was most odious to express their sentiments before the occasion was over.” In the aftermath of the XYZ affair, the eruption of pro-war opinion stimulated by the press in urban areas should not be considered the true public

---

116 Madison in Convention, June 26, op. cit.
sentiment: “There has not been time for any impressions on the public sentiment in this [rural] quarter. . . . [The initial public reaction was pro-war, but] the final impressions will depend on the further & more authentic developments which can not be far behind. . . .”

Endorsing Jefferson’s call for Congress to be adjourned so the sense of the public could be ascertained on the Adams Administration’s request for military funds, Madison wrote:

The expedient is the more desirable as it will be utterly impossible to call for the sense of the people generally before the season will be over, especially as the Towns &c. where there can be most despatch in such an operation are on the wrong side; and it is to be feared that a partial expression of the public voice, may be misconstrued or miscalled, an evidence in favor of the war party.

2.3. Gradualism

Madison’s concern about “sudden” convulsions, his emphasis on moderation and his respect for legislative supremacy were also conducive to a political gradualism whose clearest explication arose from his most direct discussion of the role of time in politics: his reply to Jefferson’s “earth belongs to the living” epistle in 1789. Their exchange of letters on the topic reveals a subtle yet deep difference in the two men’s approaches to politics and, more specifically, their attitudes toward reason. Jefferson emerges from the exchange as a devotee of what might be called a constructivist Enlightenment perspective that views reason as an unbounded tool of progress or insight, while Madison’s reply underscores his more classical understanding of reason as prudence.

---

120 Madison to Jefferson, April 22, 1798, PJM 17:118-119.

121 Madison to Jefferson, April 2, 1797, PJM 16:104-105.
The conversation began with Jefferson’s inquiry into the extent to which each generation had the right to incur debts or enact other measures that imposed obligations its descendants would inherit without having had the opportunity to consent to them. Jefferson wrote from Paris in September 1789, with the revolution there in full bloom:

The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water. Yet it is a question of such consequences as not only to merit decision, but a place also, among the fundamental principles of every government. . . . I set out on this ground, which I suppose to be self-evident, ‘that the earth belongs in usufruct to the living’: that the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when himself ceases to be, & reverts to the society.122

Jefferson sought to apply this observation to generations rather than merely individuals. Acknowledging that generations consisted of individuals who came and went in “a constant course of decay & renewal,” he nonetheless insisted that it was possible to affix a term for each generation’s authority “beginning at the date of their contract, and ending when a majority of those of full age at that date shall be dead.” Calculating on the basis of mortality tables, Jefferson set the upper limit for each generation’s lifespan at 19 years. On this basis, no generation had the right to contract debts or otherwise make commitments beyond that term. Moreover, “[o]n similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. . . . The power of repeal is not an equivalent.” Jefferson urged Madison to enshrine the 19-year term in the preamble to the new Congress’ first appropriations law. “Besides

familiarising us to this term, it will be an instance the more of our taking reason for our
guide, instead of English precedent. . . .”

Madison, who at the time was working to erect a constitutional government on the
basis of enduring fundamental law, could not oblige, for Jefferson’s argument amounted
to a claim that any such law, at least for any significant duration, was illegitimate. The
difference in his and Jefferson’s perspective is evident in the fact that Jefferson wanted a
constitution to last no more than 19 years, while Madison advised a friend that the new
state of Kentucky would need an introductory period of at least 15 to 20 years of trial and
experience before it could thoughtfully consider even revisions to its constitution. 123
Even worse, on Madison’s terms, Jefferson’s proposal would put the nation through
regular eruptions of sudden change—a concept with which Madison was already
uncomfortable, and one from which he had just seen the nation barely emerge intact.

Madison later flattered Jefferson by observing that the latter’s theory was gaining
ground in the face of Edmund Burke’s “extravagant doctrines” to the contrary. But
Madison’s own views on the topic were far more Burkean than Jeffersonian. In addition
to its careful and compelling rebuttal to Jefferson’s argument, Madison’s initial reply 124
deserves attention as a theoretical justification for a gradual, cautious pace for politics. 125

---

123 Madison to Caleb Wallace, Aug. 23, 1785, PJM 8:350-357.


125 Burke’s views on the respect due to posterity evoked strident opposition from Joseph Priestley,
who argued for a time limit on public debts. It was to this exchange that Madison referred. See Madison to
Jefferson, May 1, 1791, PJM 14:18.
Much of its contents were already evident in his thought, but this letter gathered them into a concise and theoretical whole. He began by observing that a short-lived Constitution would never achieve “those prejudices in its favor which antiquity inspires, and which are perhaps a salutary aid to the most rational Government in the most enlightened age[.].” This emphasis on constitutional veneration evoked the linchpin of so much of Madison’s democratic theory: Parchment is meaningless without the support of the people it purports to govern. At the same time, Madison’s subtle use of “prejudices” as a positive or at least necessary contrast to the “rational” and “enlightened” drew boundaries around what reason could achieve; even in “the most enlightened age,” the most rationally constructed regime still needed the assistance of prejudice.

Madison next offered a Lockean narrative of property: To the extent the earth belonged to the living, they were entitled to it only in its natural state. “The improvements made by the dead form a charge against the living who take the benefit of them.” A similar argument applied to debts, which “may be incurred for purposes which interest the unborn, as well as the living,” so the only limitation on transgenerational debts could be that they could not exceed the value of the advances made when they were contracted. Moreover, the idea of obligations being dissolved at regular intervals would have the effect of making “most of the rights of property” defunct. The only means of avoiding these undesirable conclusions was the device of tacit consent, without which, Madison noted, there would be no inherent justification for majority rule.
This emphasis on tacit consent had three implications for Madison’s thought. The first was to establish a prejudice in favor of existing institutions and therefore against sudden change. Second, and related, the idea of rapid and constant change ignored the complexities and interwoven obligations evident when political issues are viewed across time rather than in a snapshot of a given moment. This much was evident in Madison’s praise of the Senate as the one institution of government that could most effectively deal with and be held accountable for policies whose impact could only be known over an interval of several years.\footnote{\textit{Federalist} 63:326.}

Finally, Madison recognized, and gently suggested to Jefferson while the latter was enthralled with Enlightenment rationality, that attempts to devise ideal or unassailable institutions on the basis of unbounded reason would inevitably run aground on the shoals of political reality. This, he wrote in \textit{Federalist} 37, was why the draft Constitution could not be tested by \textit{a priori} theories of government alone. Science, he wrote, could fix laws of nature precisely. However:

\begin{quote}
When we pass from the works of nature, in which all the delineations are perfectly accurate, and appear to be otherwise only from the imperfection of the eye which surveys them, to the institutions of man, in which the obscurity arises as well from the object itself, as from the organ by which it is contemplated; we must perceive still the necessity of moderating still further our expectations and hopes from the efforts of human sagacity.\footnote{\textit{Federalist} 37:182. This was also the partial basis of Madison’s critique of Robert Owen’s utopian “New Harmony Colony,” which is reprinted in Meyers, \textit{Mind of the Founder}, 453-455. On that critique and Madison’s views on these themes more broadly, see Ralph Ketcham, “James Madison and the Nature of Man,” \textit{Journal of the History of Ideas} 19.1 (1958): 62-76.} \end{quote}
The model of Madisonian reason suggested by these arguments is the application of the intellectual faculties to the choices presented by reality rather than the heuristic construction of idealistic regimes or policies from the ground up. These more modest hopes for reason may help to explain why, in sharing the letter with a Jefferson biographer, Madison redacted a closing phrase lamenting that “the spirit of philosophical Legislation” evident in Jefferson’s proposal had not yet permeated the United States.\footnote{See the editor’s notes in the \textit{PJM} manuscript of this letter (op. cit.).} The lament was almost certainly no more than Madison’s occasional habit of opening and closing his writings about Jefferson with effusive praise while thoroughly deconstructing his arguments in between.\footnote{See, for example, Federalist 49.} But excerpted out of context, it would have appeared to endorse a kind of reason that was not only foreign, but also dangerous, to Madison’s prudential thought.

\textbf{2.4. Madison on Human Nature}

The perspective of temporal majoritarianism suggests one final dimension of Madison’s thought that merits attention. Commentators of several stripes have typically treated Madison as a pessimist deeply skeptical of human nature. Louis Hartz casts him as a Hobbesian whose idea of experience “seems to be exhausted by the human propensity to fight,” a view echoed by Robert Dahl, while Richard K. Matthews describes

116
Madison’s worldview as a Calvinist belief that “[h]umans are usually lazy and often unreasonable. . . .”

What we have seen above, however, suggests that Madison’s view was more nuanced. The picture that emerges from his discussion of passion and reason appears to assume that reasonableness is the normal or healthy state of affairs and that passion is the irregular and distorting influence. Indeed, Federalist 55 characterizes this nuanced view as reasoned and excessive pessimism about human nature as a “passion.” Anti-Federalists who assumed the darkest scenario of perfidy in elected officials renounce every rule by which events ought to be calculated, and to substitute an indiscriminate and unbounded jealousy, with which all reasoning must be vain. The sincere friends of liberty, who give themselves up to the extravagancies of this passion, are not aware of the injury they do their own cause. As there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust: so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.

The fact that Madison gave little overt attention to cultivating these qualities has led some observers, especially of the civic republican school, to assume that virtue vanished as a priority between the Revolutionary and Constitutional eras. Gordon Wood, for example, understands Madison to have believed that individually selfish pursuits

---


would add up to a general good, and that, by contrast, “the really great danger to liberty … was that each individual may become insignificant in his own eyes—hitherto the very foundation of republican government.”\textsuperscript{132} A related interpretation, offered charitably by Martin Diamond and less favorably by George Will,\textsuperscript{133} portrays Madison as actively favoring the proliferation and pursuit of individual interests, perhaps at the deliberate expense of loftier ideals.

Temporal majoritarianism calls many of these assumptions into question. Its passive character, again, is key to understanding how the doctrine operates. Reasonable people would ordinarily perceive their own interest in respecting the rights of others and pursuing the public good—again, what Tocqueville called “self-interest rightly understood.” It was only the distorting influence of passion—which was amplified by the group dynamics inherent in politics—that obscured this exercise of reason. The passage of time would help to restore focus—if not total clarity, at least enough of it to give fit characters in public office sufficient space to craft or identify measures that served the public good.

On this model, no heroic exertions of character were necessary to achieve civic-mindedness, nor did interests have to be set against one another in political combat.\textsuperscript{134} In

\textsuperscript{132} Wood, \textit{Creation of the American Republic}, 611-612.


\textsuperscript{134} Madison never actually \textit{favored} the proliferation of interests; he observed that a multiplicity of them already existed. His point in Federalist 10 was not that interests would neutralize one another in any
the sense that Madison understood it, civic-mindedness was the healthy perspective, one that could be depended on as long as the diseased condition—passion—had time to heal. A snapshot view might well show human beings behaving badly, but a time-elapse image was likely to show them being reasonable over the longer term.

To the extent Madison’s words portrayed human nature negatively, he was often describing the diseased rather than the normal state. Federalist 10, for example, said men are “inflamed with mutual animosity, and … much more disposed to vex and oppress each other, than to co-operate for their common good”—but this condition occurred only when “zeal” kindled “the human passions.” If that zeal could be dissipated by time, the healthy state—self-interest rightly understood—would be restored. Consequently, when Patrick Henry demanded to know what place virtue occupied in the Constitutional order, Madison’s reply suggested it need not be provided for because the basic conditions of reasonableness already existed:

I have observed, that gentlemen suppose, that the general legislature will do every mischief they possibly can, and that they will omit to do every thing good which they are authorised to do. If this were a reasonable supposition, their objections would be good. I consider it reasonable to conclude, that they will as readily do

---

active sense, but rather that there would be so many that no one faction would constitute a majority. This, like his view of time, is a passive mechanism.

135 Federalist 10:44.

136 It is for this reason that Madison did not need to specify how the public good would be represented or provided for in the constitutional order. He assumed the public good would be naturally evident and attainable barring the influence of obscuring forces. Consequently, his concerns pertained to mitigating those forces. On Madison’s reasoning, one could not infer from the absence of an explicit discussion of the public good that he did not believe it to be important. For a contrary view, see Edward Erler, “The Problem of the Public Good in The Federalist,” Polity 13.4 (1981): 649-667.
their duty, as deviate from it: Nor do I go on the grounds mentioned by gentlemen on the other side—that we are to place unlimited confidence in them, and expect nothing but the most exalted integrity and sublime virtue. But I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks—no form of government can render us secure.\footnote{PJM 11:158-165. With respect to Madison’s Aristotelian model of prudence, note that the people need only “intelligence” while leaders need “wisdom.”}

None of this adds up to an enthused portrait of human nature. Madison was a realist, not a Rousseauian, and as Chapter 5 will discuss, the flaw in his democratic theory may be that all he expected of citizens was a sort of technocratic competence. But neither was Madison the Hobbesian pessimist he is often assumed to have been. It is only by viewing human nature over time that, on Madison’s grounds, a balanced and realistic perspective may be gained. Men were not angels, but neither were they necessarily devilish.\footnote{Focusing on Madison’s more optimistic comments on human nature, Garry Wills (Explaining America, Ch. 22) associates him with Hume’s view that people were flawed but still capable of civic-mindedness. As has been seen, civic-mindedness arose not from the combat of interests or from any virtuous contemplation of the public good; it was, rather, the default position that reason would perceive over time. Madison’s view of human nature actually far more closely resembles the moral philosophy of Thomas Reid—of whom Madison’s teacher John Witherspoon was a champion—than Hume. Scottish thinking during the period was divided on the same question of passion vs. reason that occupied such an important position in Madison’s thought. Hume’s famous claim that “[r]eason is, and ought only to be the slave of the passions, and can never pretend to any office than to serve and obey them” arose from his understanding of passions as motivating agents of the will. Hume described passions on a spectrum ranging from calm to violent, arguing that the calm passions made the exercise of reason pleasurable. Thomas Reid, by contrast, understood passion and reason to be different in kind, and his understanding of the former as a distortion and the latter as the normal state closely parallels Madison’s. Reid defines passion in the following way: “I think it is commonly put to signify some agitation of mind, which is opposed to that state of tranquillity [sic.] and composure, in which a man is most master of himself. . . . It has always been conceived to bear analogy to a storm at sea, or to a tempest in the air. It does not therefore signify any thing in the mind that is constant and permanent, but something that is occasional, and has a limited duration, like a storm or tempest.” He continued: “[I]f we had no passions, we should hardly be under any temptation to wrong conduct. For, when we view things calmly, and free from any of the false
To recapitulate: Madison’s democratic thought contains an implicit doctrine that may be called “temporal majoritarianism,” according to which the primary criterion for whether a majority should prevail is the length of time it has cohered. This doctrine is fully compatible with Madison’s commitment to majority rule because it asks not whether a majority should prevail over a minority at any one moment but rather at what point the same majority’s opinion should be considered authoritative. Time is a passive mechanism whose foremost purpose is the dissipation of passions, which induce a diseased state that obscures the normal and healthy condition in which people are able to use reason to perceive their long-term interests.

The fact that reason was the ever-present underlying state therefore allowed Madison, from the perch of retirement, to express serene confidence in the American political system. He wrote to the Marquis de Lafayette in 1830:

Here, we are, on the whole, doing well, and giving an example of a free system, which I trust will be more of a Pilot to a good Port, than a Beacon warning from a bad one. We have, it is true, occasional fevers, but they are of the transient kind flying off thro’ the surface, without preying on the vitals. A Govt. like ours has so many safety-valves giving vent to overheated passions, that it carries within

_________

itself a relief agst. the infirmities from which the best of human institutions cannot be exempt.\textsuperscript{139}

We may now see those safety valves in operation in several areas of Madison’s thought.

\textsuperscript{139} Madison to LaFayette, Nov. 25, 1820, \textit{WJM} 9:35-38.
Chapter 3
“The Collision & Contagion of the Passions”
Factious Behavior in the Extended Republic

3.1. INTRODUCTORY CONSIDERATIONS

The extended republic thesis of Federalist 10 has long been the linchpin of Progressive critiques of Madison’s thought. Beard, we have seen, identified the essay as the smoking gun proving the Constitution’s unspoken aristocratic ambitions. Robert Dahl’s Preface to Democratic Theory characterized the Tenth Federalist as a failed attempt to justify institutional restrictions on majority rule. In both cases, the underlying assumption appears to be that the Constitutional system sets the boundaries of majority jurisdiction: It demarcates ground on which majorities may not tread. Thus Beard’s formulation that the Constitution sought to grant majorities “immunity from control by parliamentary minorities”¹ where property rights were concerned. Even redemptive readings of Madison have more or less accepted the idea that Federalist 10 sought to balance majority rule and minority rights, calibrating the system so as to maximize both or, conversely, restrict each the least.

There is, of course, much to support those interpretations, and Madison was undeniably concerned about majorities trampling the rights of minorities, especially at the state level. Yet the Tenth Federalist itself identifies majority rule as the limiting

¹ Beard, Economic Interpretation, 161.
condition of its analysis: “To secure the public good, and private rights, against the
danger of [a majority faction], and at the same time to preserve the spirit and the form of
popular government, is then the great object to which our inquiries are directed.”

He had said in Philadelphia that enlarging the sphere of the union was “the only defence agst
the inconveniences of democracy consist with the democratic form of Govt,” a
formulation that appears to exclude institutional limitations on majority rule. Federalist
39 reinforces the point that majority rule trumps other Constitutional concerns, apparently
including rights: “If the plan of the convention, therefore, be found to depart from the
republican character, its advocates must abandon it as no longer defensible.”

That essay goes on to identify republicanism with government accountability to the community—
which, we have seen, Madison equated with the majority. The very definition of a
republican regime, he later wrote, was that “the majority rule the minority. . . .”

Moreover, recapitulating the extended republic theory from retirement, Madison argued
that if majority rule was not safe in a large territory, it was not safe anywhere—which
suggests he regarded the extended republic theory as a means of facilitating rather than
impedig majority rule.

---

2 Federalist 10:45.
3 PJM 10:33.
4 Federalist 39:194.
6 WJM 10:528.
Critics like Beard dismiss claims like these as a rhetorical facade concealing an aristocratic edifice. And, to be sure, one can readily see how they would form that impression. The entire analysis of Federalist 10 was prompted by Madison’s pointed critiques of what he plainly regarded as abusive majorities in the states. The first question to be confronted in this chapter is which characterization is correct. Did Madison believe majorities should be prevented from making certain decisions, and, if so, did he thereby elevate minority rights above majority rule? Or, Conversely, did he adhere to the supremacy he elsewhere assigned to republicanism—and, if so, how could Madison possibly expect a majority to restrain itself, especially given his consistent empirical assumption that persistent majorities would always prevail?

That assumption illuminates the answer. Even had he wished to do so—which, we shall presently see, he did not—Madison believed it was futile to erect institutional barriers to persistent majorities. Instead, he always affirmed majority rule even when he criticized majority factions. We recall the lateral perspective of temporal majoritarianism: The question for Madison was not whether a majority or minority should rule at any discrete point in time, but rather at what point in time the majority should rule. One of the core insights of Federalist 10 is that the unique conditions of an extended republic naturally defer decisions until after passions have cooled, thereby enhancing the likelihood that national majorities will respect minority rights.

Examining the issue from the vantage point of national majorities, as will also be seen, is crucial for understanding the majoritarian perspective of the Tenth Federalist. By
exploring his proposal for a national veto over state laws, we shall see that commentators who claim that Madison’s complaints about abuses within the states belie his anti-republican tendencies view the problem from an inaccurate perspective, or at least from a different one than Madison did: Because he believed that every abuse he cited within the states also contravened national interests, both the extended republic theory and the national negative protected the right of national majorities to decide national issues—or, conversely, they denied the rights of state majorities that constituted minorities of the whole nation to decide national issues. One implication of the Tenth Federalist is that these national majorities are inherently cooler majorities because of the time required for them to form and prevail. Temporal majoritarianism thus lies at the heart of Federalist 10.

We begin with Madison’s complaints about abusive majorities within the states—the basis of the critical reading’s claim that he wanted to exempt certain subjects or spheres from popular authority. We shall presently see that Madison’s object was not to exclude majorities from certain issues but rather to ensure they acted in those areas accordance with the rule of law. 

---

7 Before proceeding to Madison’s analysis of the “internal vicissitudes” of the states, it may be worth emphasizing again that while these concerns produced some of Madison’s most theoretically significant work, the overwhelming balance of Madison’s correspondence in the 1780s pertained to a crisis of inadequate authority at the nation’s center. While Madison warned that abuses within the states might tar the republican name—hence solving the problem of faction would rescue republicanism “from the opprobrium under which it has so long laboured” (Federalist 10:45)—his palpable fears of an impending collapse of the confederation far overshadowed any other concern. The Articles Congress in which he served was completely unable to regulate commerce, raise revenue, pay debts, maintain a military or carry out a broad array of basic functions of government. A collapse of the confederation, he believed, would
3.2. Factious Activity in the States

3.2.1. Multiplicity, Mutability and the Rule of Law

It is necessary first to understand the particular circumstance to which the extended republic theory, and Madison’s concerns about factious activity in the states, applied: situations in which majorities exerted pressure directly on the regime.\(^8\) In such circumstances, Madison feared that the states might be exposed to recolonization by the British. This fear is manifest in a 1786 letter Madison wrote in frustration over a single state, New Jersey, on this occasion, resisting Congressional authority:

A Government cannot long stand which is obliged in the ordinary course of its administration to court a compliance with its constitutional act, from a member not of the most powerful order … The question whether it be possible and worth[while to preserve] the Union of the States must be speedily decided some way or other. Those who [are indifferent to its preservation would do well to look forward to the consequences of its extinction. The prospect to my eye is a gloomy one indeed. (Madison to Monroe, April 9, 1786, \textit{PJM} 9:25-26.)

Moreover, Hamilton’s summary of the September 1786 Annapolis Convention, the precursor to Philadelphia, makes no mention of internal affairs in the states. (See \textit{PJM} 9:127.) The import of these and many other of Madison’s reflections during the period is that the foremost crisis was not the internal turmoil of the states but rather Congress’ inability to impose its will on the members of the confederation. It is undoubtedly true that abuses within the states were part of this concern, but they did not appear as a significant theme in Madison’s writings until the immediately pre-Convention “Vices” memorandum. This was, of course, a watershed document, but even there, majority abuses ranked numbers 9, 10 and 11 on a list of 11 concerns. The preceding eight pertained to problems arising from the lack of adequate central authority. The fact that it was so often necessary for Madison to justify his own reflections on factious activity in the states with such qualifiers as “I am persuaded I do not err [in citing the topic as a significant issue in Philadelphia]” or “it seems to have been forgotten” also demonstrate the overwhelming importance of the crisis of national authority.

Nonetheless, Madison’s fears about majority abuses were real, and what we have seen thus far of Federalist 10 supplies ample material with which to construct a familiar narrative: Madison cared more about property rights than about majority rule, or, more charitably, valued individual rights and republicanism equally and hence sought to achieve a détente between them.

\(^{8}\) Federalist 10, it bears emphasis, pertains only to these situations. The fact that the essay encompassed some of Madison’s most original and theoretically significant thought may have led subsequent commentators to exaggerate its importance in understanding the routine operations of government. Madison did indeed see the extended republic theory as important to a viable republican system, but the essay was not meant to address all political situations. In many and perhaps most cases, Madison envisioned elected officials making choices on issues and from alternatives presented to them by the ordinary dynamics of statecraft: trade, revenue, the structure of government and so forth. These issues had to be resolved in a manner tolerable to majorities, but the Tenth Federalist applied to a different case.
cases, the government was “the mere instrument of the major number of the constituents.” A critic of Madison might reasonably ask whether such situations—a majority using government as an instrument—are not the very definition of majority rule, in which case he would have, in essence, gutted majority rule beyond recognition. But the idea of government being used as a mere instrument points toward a key insight into Madison’s thought. By “mere instrument,” Madison meant something like a weapon: The majority wished to steamroll the minority by brute force, and the apparatus of the state was simply the most convenient means for doing so.

We shall presently see that one of the first purposes of government was to avoid precisely this kind of situation—that is, individuals being constantly exposed to coercion based merely on superior force unbound to any known or predictable standard. On Madison’s view, this exposure to arbitrary force was among the defining features of the state of nature, one government was instituted by unanimous choice precisely to avoid. The point is implicit in a well-known passage of Federalist 51:

Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit. In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state

---

9 Madison to Jefferson, October 17, 1788, *PJM* 11:295-300. See also Madison to Andrew Stevenson, November 27, 1830, *WJM* 11:426 (see footnote): The Constitution reflects “not only an apprehension of abuse from ambition or corruption in those administering the Government, but of oppression or injustice from the separate interests or views of the constituent bodies themselves, taking effect through the administration of the Government.” Chapter 4 will return to this distinction in discussing the separation of powers.
of nature, where the weaker individual is not secured against the violence of the stronger. . . .

The passage implies that one of the fundamental purposes of government is not merely security but also predictability. This, in turn, may shed light on Madison’s otherwise unexplained claim that liberty could be lost in the pursuit of justice: The most predictable society is one with no freedom at all, so a too zealous attempt to impose the rule of law might indeed sacrifice liberal values. The lawgiver’s art, he went on to say in Federalist 37, was to balance justice and liberty: “Stability in government, is essential to national character, and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society.”

Madison justified the Constitution’s restrictions on bills of attainders, ex post facto laws and legislative interference with contracts—crucially, the only surviving Constitutional provisions traceable to Madison’s concerns about majority abuses within

10 Federalist 51:271.

11 Hobbes’ Leviathan would be a paradigmatic example of purchasing security at the expense of liberty. The general point is that the passage from Federalist 51 suggests that freedom and justice are potentially in tension with one another.

12 Federalist 37:181. Cf. Montesquieu’s definition of liberty as “that tranquility of spirit which comes from the opinion each one has of his security. . . .” See Montesquieu, The Spirit of the Laws (New York, Cambridge University Press, 2002). The context was Montesquieu’s discussion of separation of powers, with which Madison was certainly familiar. Carey (“Separation of Powers and the Madisonian Model,” op. cit.) has shown that the Constitutional system of separation of powers was directed against a state of affairs in which the individual is exposed to the constant possibility of the arbitrary exercise of authority. This problem, he shows in reply to the critiques of James MacGregor Burns, Robert Dahl and others, was different in kind from that with which Federalist 10 was concerned. I believe the analysis above to be compatible with Carey’s.
the states—on similar grounds: Such measures violated “the first principles of the social compact. . . .”13 The first principles were derived from the compact’s purpose, which was, first and foremost, to establish the security and predictability that were elusive in the state of nature. As such, the rule of law held the status of something like a natural right. Property, by contrast, was a political invention regulable by political processes. Only the rule of law was absolute and inviolable.

The catalog of complaints elucidated in Federalist 10 as well as the “Vices” essay, we may therefore see, were directed not against majority rule but rather against arbitrary majority rule. Put otherwise, the problem was not that majorities trespassed on property, it was that they did so arbitrarily—a problem to which the solution was the rule of law. It was this end—majority rule in accordance with the predictable standards necessary to the rule of law—with which Madison was concerned in the Tenth Federalist, not minority rights, at least as Beard understood the latter term.

The arbitrariness of majorities was the consistent complaint of the “Vices” essay, Madison’s most detailed statement of concern about factious activity within the states. The essay lists Madison’s concern as threefold. The first is the “multiplicity” of state laws, whose sheer volume was “a nuisance of the most pestilent kind”:

The short period of independency has filled as many pages as the century which preceded it. Every year, almost every session, adds a new volume. . . . A review of the several Codes will shew that every necessary and useful part of the least

---

13 Federalist 44:232.
voluminous of them might be compressed into one tenth of the compass, and at the same time be rendered ten fold as perspicuous.\textsuperscript{14}

Significantly, the quality lacking in these voluminous state laws was perspicacity: Madison’s complaint that the useful parts of the state codes were needles scattered in haystacks of presumably gratuitous legislative acts suggests the law was difficult for the average person to know. It will not surprise us to learn that the majorities enacting this multiplicity of laws did so in a fevered rush, passing statutes quickly enough to fill a volume at least every year. These were also the qualities Madison observed in his second complaint, one that was “intimately connected” with the first: the “mutability” of state laws.

We daily see laws repealed or superseded, before any trial can have been made of their merit, and even before a knowledge of them can have reached the remoter districts within which they were to operate. In the regulations of trade this instability becomes a snare not only to our citizens, but to foreigners also.\textsuperscript{15}

Again, this rapid oscillation in laws made them unknowable, so much so that by the time notice of a new law reached areas distant from the state capitals, it was likely already to have changed. Madison’s use of the metaphor “snare” indicates his concern that those unaware of these laws risked being entrapped and harmed by them.

We can readily see how both multiplicity and mutability would undermine the rule of law at its most fundamental level: the requirement that laws be propagated and known in advance. But Madison’s third complaint—the “injustice” of state laws—

\textsuperscript{14} “Vices,” PJM 9:353.

\textsuperscript{15} Ibid.
presents a more complex difficulty for our evaluation of his commitment to majority rule. His complaints about multiplicity and mutability were clearly directed at the way in which majorities reached decisions rather than the decisions themselves, but as we have seen, commentators have long understood his desire for “justice”—especially with respect to Federalist 10’s discussion of property—to mean that majorities should not be permitted to reach certain conclusions.

If this understanding of Madison’s views is accurate, then whether we regard it as salutary or sinister, we must conclude that he intended to curtail majority rule. What, then, does Madison mean by “injustice”? We shall now see that justice, like multiplicity and mutability, was a procedural standard guaranteeing that decisions would be made according to known rules. Beard’s error in this context is conflating “property rights” with “property.” Madison never suggested that regulating or even confiscating property would be unjust in and of itself. The problem arose when majorities did so arbitrarily, unpredictably or on the basis of sheer force.

3.2.2. Justice and the Rule of Law

Throughout Madison’s writings, justice is associated with fairness and rules rather than the substance of political decisions. Federalist 10 refers twice to the “rules” of justice, and “Vices” to its “rules and forms.” The Convention’s debate on whether to comprise Congress on the basis of population was a matter of “justice” precisely because

---

16 The literary allusion to Rawls (“justice as fairness”) is unavoidable, but I do not mean to associate Madison with him.
it pertained to the rules according to which future disputes would be decided.\textsuperscript{17} In the Virginia ratifying convention, Madison said the Articles regime produced “injustice” in part because the lack of Congressional taxing authority forced public needs to be financed through arbitrary seizures of property:

Is it not known to every member of this committee, that the great principles of a free government, were reversed through the whole progress of that scene? Was not every state harassed? Was not every individual oppressed and subjected to repeated distresses? Was this right? Was it a proper form of government, that warranted, authorized, or overlooked, the most wanton deprivation of property? Had the government been vested with complete power to procure a regular and adequate supply of revenue, those oppressive measures would have been unnecessary.\textsuperscript{18}

The fact that this entire passage laments the lack of compulsory taxing authority indicates that confiscating private property did not inherently violate property rights. The problem was “wanton” deprivations, which in this context referred to the sudden and arbitrary impressments of private property that became necessary during the Revolution.\textsuperscript{19} These “wanton” impressments were contrasted with a “regular”—that is, rules-based and therefore predictable—revenue.

Madison’s frequent critiques of paper money similarly demonstrate that his concern was maintaining the rule of law rather than protecting property \textit{per se}. From the Revolutionary period through the ratification debates, few issues more consistently

\textsuperscript{17} See, \textit{inter alia}, \textit{PJM} 10:86-87 and 92-93.

\textsuperscript{18} \textit{PJM} 11:90-98 (emphasis added).

\textsuperscript{19} See \textit{PJM} 11:99, n. 4.
provoked Madison’s ire than what he saw to be the states’ promiscuous printing of
currency as a substitute for precious metals. It was the subject of a lengthy circa 1780
essay in which Madison assailed paper money on economic grounds yet did not,
significantly, describe the issue as one of rights.  

As the use of paper money became
more rampant, his rhetoric escalated. By the time the ratification debates were complete,
Madison had deployed a battery of harsh adjectives against paper, calling it, at various
times, “pernicious,” “pestilent,” the cause of “numerous ills” and the product of
“wickedness and folly.” This is strong language, especially in contrast to Madison’s
normally mild rhetorical style. Several commentators—most persuasively the historian
Woody Holton—have argued that the landed class’ opposition to paper was less about
macroeconomic policy or questions of justice than keeping poorer Americans trapped in
endless debts that the crisis-level shortage of hard currency left them unable to pay. But

---

20 PJM 1:302-310. It was published in Freneau’s National Gazette in 1791 but was written
between September 1779 and March 1780. See editor’s note at 302.

21 Madison to Jefferson, March 18, 1786, PJM 8:500-504.

22 Federalist 44:231.


24 Madison to Edmund Randolph, April 2, 1787, PJM 9:361-62. He referred specifically in this
letter to Rhode Island, widely regarded to be the most promiscuous of the states, but Madison employed
equally strong language in describing paper in other contexts as well.

25 Woody Holton, Unruly Americans and the Origins of the Constitution (New York: Hill and
Wang, 2007). While my interpretation of Madison’s motives is of course far different from Holton’s, he
nonetheless makes a compelling argument that poor farmers were trapped in an impossible position—to
which one can only reply that everyone was. From Madison’s point of view, issuing more paper was no
more a solution to these genuine problems than it would be to solve the problem of compounding gambling
losses by placing ever larger bets.
the question of debts also illustrates why Madison described paper money as not only unwise but "unrighteous"\textsuperscript{26} and "unjust"\textsuperscript{27} as well. His complaint is difficult to see from a contemporary vantage point in which paper money commands widespread faith as legal tender. At Madison’s time, though, it was quite literally an IOU that could be exchanged for specie, which was the only trusted and universally accepted currency. To make matters more complicated, the issuing governments were notoriously unable to redeem their own paper. One result was runaway inflation—creditors and merchants demanded as many as 135 paper dollars for every one in specie form—which was why paper money was "unwise." Another result, though, was in effect to change contracts after they had been agreed to—a clear violation of the rule of law, and one that made political conditions unpredictable. The scenario was akin to the following: Person A loans money to Person B, and Person B repays A with an IOU he has received from Person C—who was not party to the first transaction and who is, to boot, widely known to be unable to pay his debts. Person A, to make matters worse, is legally bound to accept the IOU as payment. This was why Madison likened paper money to the practice, also widespread, of state laws that abrogated contracts.\textsuperscript{28} Similarly, he argued in the Articles Congress that

\begin{itemize}
    \item \textsuperscript{26} Madison to Jefferson, March 19, 1787, \textit{PJM} 9:317-322.
    \item \textsuperscript{27} Notes for speech on paper money, \textit{PJM} 9:158-159.
    \item \textsuperscript{28} Madison wrote his father, James Madison Sr., about an assize bill: "[A]n interposition of the law in private contracts is not to be vindicated on any legislative principle within my knowledge and seems obnoxious to the strongest objections which prevailed against paper money." See \textit{PJM} 9:205-206.
\end{itemize}
paper was “unjust” in part because it “affects property without trial by jury.” 29 The importance of this issue to the rule of law, and thus to predictability, is evident in Federalist 44’s lament that paper money had destroyed “the necessary confidence between man and man” and “the necessary confidence of the public councils” and that,

29 Notes for speech on paper money, PJM 9:158-159. Moreover, if we are to assume his sincerity, Madison cannot be accused of insensitivity to the poor. Note that in the following description of a near-riot involving paper money in Philadelphia—which ensued when merchants, with suspicious uniformity, suddenly stopped accepting paper currency on market days—Madison’s sympathies plainly lay with the “poorer Citizens” against the wealthy:

The paper money here ceased to circulate very suddenly a few days ago. … The entire stagnation is said to have proceeded from a combination of a few people with whom the Country people deal on market days against receiving it. The consequence was that it was refused in the market, and great distress brought on the poorer Citizens. Some of the latter began in turn to form combinations of a more serious nature in order to take revenge on the supposed authors of the stagnation. The timely interposition of some influencial [sic.] characters prevented a riot, and prevailed on the persons who were opposed to the paper, to publish their willingness to receive it. This has stifled the popular rage, and got the paper into circulation again. It is however still considerably below par, and must have received a wound which will not easily be healed. Nothing but evil springs from this imaginary money wherever it is tried. … (Madison to Jefferson, July 18, 1787, PJM 10:106-7.) (For an account and analysis of the incident in Philadelphia, see Farley Grubb, “The US Constitution and monetary powers: an analysis of the 1787 constitutional convention and the constitutional transformation of the US monetary system,” Financial History Review, 13.1 (2006), 43-71.)

By a coincidental but nonetheless illuminating confluence of events, this near riot took place on exactly the same day Madison stood inside the Convention making his final argument for constituting the Senate on the basis of population—that is, majority rule. This confluence suggests that Madison’s question was not whether the majority or minority should rule, but rather whether the majority should rule through institutional forms that dissipated passions or through direct mobs.

During the early debates about Hamilton’s proposal for a national bank, Madison similarly argued that national paper, even if issued on a sound fiscal footing, would simply fuel speculation that would benefit elites at the expense of the masses. “The true difference” between unreliable state paper and reliable national paper would be “that by the former the few were the victims to the many; by the latter the many to the few.” (Madison to Jefferson, August 8, 1791, PJM 14:391)
were states allowed to issue paper under the new regime, they might make “retrospective alterations in its value.”

Predictability and the rule of law also arose in other contexts in which Madison invoked justice. In 1790, Congress debated the status of paper securities that individuals received in compensation for property impressed during the Revolution. Because the long-term value of these securities was unclear while their holders’ needs were immediate, many resold the debts to speculators. The question in Congress was whether the original holders of securities were entitled to some compensation despite having sold them. Madison once more framed the question as one of justice, a measure of which he admitted lay on both sides. Those whose property was originally impressed in exchange for paper securities had resold them only because circumstances presented them with an onerous choice between doing so and receiving nothing at all. On the other hand, the speculators whom Madison otherwise despised had made investments on the basis of promises of future payment, so refusing to honor their securities would diminish the predictability on which public credit was built. Given the merit of both claims, Madison called for a compromise based “on the great and fundamental principles of justice” under which compensation would be balanced between original and secondary holders of securities. For purposes of the present analysis, the important point is that a dispute involving dueling claims of property rights was to be adjusted not according to any

30 Federalist 44:231.

predetermined outcome favoring any one group, but rather according to a rule based on both promises made to individuals and the public interest in economic predictability. Madison’s test was not which outcome met a preset criteria; it was which outcome best reflected the expectations of each group when the transactions were originally made.32

This is also the suggestion of Madison’s 1792 essay “Property,” which was published in the opposition press and closely tracks Locke’s Second Treatise. Madison wrote:33

This term [property], in its particular application, means “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”

In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right, and which leaves to every one else the like advantage.

In the former sense, a man’s land, or merchandise, or money, is called his property.34

Notice that the essay gives property an explicitly and inherently public rather than private meaning: Far from being the exclusive dominion of the individual, property exists because of a reciprocal agreement with other members of the community. This definition, combined with Madison’s obvious debt to Locke, demonstrates that when the

32 Significantly for purposes of the analysis above, a Congressional colleague of Madison accused him of seeking to “strip one class of citizens, who have acquired property by the known and established rules of law, under the spurious pretense of doing justice to another. . . .” (Banning, Sacred Fire, 316) The dispute, again, demonstrates that Madison thought of justice in terms of rules and promises rather than the absolute right of any individual or group to predetermined economic outcomes.


former spoke of the right to property, it was a civil as opposed to a natural right. As we have already seen in Madison’s claim that there was a “natural” right to rebel but no “civil” right for nullifiers to resist constitutional authority, this distinction makes a decisive difference in his thought. On Locke’s as well as Madison’s account, it is only in the state of nature that individuals can assert an absolute right to property in the sense of claiming that no legitimate authority can violate it. By contrast, political society is founded on the exchange of that absolute natural right for a civil right whose distinguishing feature is that the majority can regulate its boundaries so long as it does so in accordance with rules known and agreed upon in advance. The “Property” essay makes clear that Madison’s objection was to property being seized or otherwise violated arbitrarily. Three times, it employs the word “arbitrary” to characterize violations of property rights, indicating that they included “arbitrary seizures of one class of citizens for the service of the rest,” “arbitrary restrictions, exemptions, and monopolies,” and “arbitrary taxes.” These objections to “arbitrary” measures tacitly acknowledge the community’s right to regulate property provided it does so in a non-arbitrary way—i.e., in accordance with the rule of law.

During his Presidency, Madison again invoked “justice” in the context of rules and predictability. In 1816, he wrote to his Treasury Secretary, Alexander J. Dallas,

---

35 On the issue of the community’s authority to regulate property, see both Willmoore Kendall, *John Locke and the Doctrine of Majority Rule*, op. cit., and Gordon Tully, *A Discourse on Property* (New York: Cambridge University Press, 2006). More generally, my interpretation of Madison—that he was in all cases a majoritarian—parallels theirs of Locke.
concerning an economic crisis precipitated by the refusal of local banks to honor paper notes they had issued by exchanging them for specie. Madison suggested that the Treasury, which held several of the notes, file lawsuits to establish the date from which banks owed it interest. The notes then being interest-bearing and therefore valuable, the Treasury could issue them as payments in place of specie, “& so far injustice to the several classes of creditors might be lessened, whilst a check would be given to the unjust career of the Banks.”36 We are less concerned with the details of the episode than with the fact that creditors faced “injustice,” and the banks’ behavior was “unjust,” on the basis of the extent to which agreements previously made were honored: in other words, whether agreed-upon rules were followed.37 Similarly, another kind of impressments—those in which British sea captains captured Americans, deemed them to be British and forced them into naval service—was “indefensible” by “reason and justice” because it “leaves their destiny to the will of an officer” rather than a rules-based trial.38

Through the prism of the rule of law, we can also see why Madison believed that violating minority rights was never in the majority’s interest. One could easily imagine scenarios in which seizing or regulating property genuinely serves the interests of the majority, but there is never a situation in which it serves anyone’s long-term interest to abandon the rule of law. Every individual, in all situations, retains an unchanging interest

36 Madison to Alexander J. Dallas, August 29, 1816, WJM 8:359-362.


in predictability, as witnessed by the fact that—again, on the Lockean account to which Madison apparently referred—individuals unanimously formed political society to secure precisely that.

Madison’s emphasis on just dealings with minorities, then, does not mean they were to be preferred over the majority’s good or that the majority was to be prevented from reaching certain conclusions. Of course, a cynic might object that this analysis merely defines the problem away: Rather than admit to elevating minority interests over majority rule, Madison simply declared by fiat that what was good for the minority was good for the whole. But by the logic of Federalist 10, Madison could not mean that majorities and minorities (or different minorities) always had the same interests. Were such the case, it would have been superfluous to specify that the good of the whole should be measured by the good of the majority. It is only in cases of justice that majority and minority interests are equivalent. One reason embedded in the logic of Federalist 10 is that majorities and minorities in American society are fluid, so the members of a majority today may belong to the minority tomorrow and hence maintain an interest in establishing precedents for fairness.39 But Madison’s concern about justice cuts to the even more fundamental issue of predictability and the rule of law. The problem, again, was not that majorities regulated or otherwise affected property; it was

39 Cf. Hamilton, Federalist 85:456: “Many of those who form the majority on one question, may become the minority on a second, and an association dissimilar to either, may constitute the majority on a third.”
that they did so arbitrarily and unpredictably, and no one—majority or minority—had an interest in an unpredictable political condition.

Moreover, far from protecting an aristocratic class, Madison’s few writings about the propertied elite support preventing rather than protecting their accumulations of wealth. We have already encountered Madison expressing sympathy with the poor and describing America as more a country for the poor than the rich. In his circa 1819 “Detached Memorandum,” Madison explicitly endorsed the regulation of property—for, it is crucial to note, the express purpose of preventing the very same excessive accumulations of property that Progressives accuse him of protecting. The sale of public lands to individuals should be respected, he wrote, because such grants were made “according to rules of impartiality, for a valuable consideration” and because all citizens who purchased public lands held them in perpetuity—i.e., the sales were made according to the standards of impartiality and equality. However, Madison was sensitive to the concern that the wealthy might establish a de facto aristocracy. Consequently:

The evil of an excessive & dangerous cumulation of landed property in the hands of individuals is best precluded by the prohibition of entails, the suppression of the right of primogeniture, and by the liability of landed property to the payment of debts. In Countries where there is a rapid increase of population as the U.S. these provisions are evidently sufficient …

40 “Detached Memorandum,” 757-758. See also Madison to Jefferson, June 19, 1786, *PJM* 9:76-81. There, Madison responded to Jefferson’s observations about the wretchedness of European poverty by saying the “misery of the lower classes” could only be abated by political freedom as well as “laws [that] favor a subdivision of property”—an apparent reference to prohibiting entails.
Madison here sounds very unlike Beard’s aristocratic elite. He calls the “excessive” accumulation of property “evil” and “dangerous” and proposes preventing it by restricting entails and primogeniture—precisely the devices used to maintain the European aristocracies, and ones whose abolition, incidentally, Tocqueville predicted would lead to widespread equality in the United States. In addition, the fact that Madison believed that holding the wealthy liable for debts would disperse their property indicates that his concern about the rights of creditors cannot be regarded as code for protecting the rich against the poor. 41 Most important, notice that the devices Madison endorses for promoting economic equality are preventive: they are enforced before agreements are executed or property is transferred and thus comport with his conception of the rule of law.

The “Detached Memorandum” takes a similar tack in warning against allowing “ecclesiastical corporations”—and, apparently, other kinds of corporations as well—to stockpile unlimited wealth lest their political influence become disproportionate:

But besides the danger of a direct mixture of Religion & civil Government, there is an evil which ought to be guarded agst in the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations. The power of all corporations, ought to be limited in this respect. The growing wealth acquired by them never fails to be a source of abuses. 42

41 He also argued that paper money was potentially unjust to both creditors (if it was legal tender) and debtors (if it was not). See “Notes for Speech Opposing Paper Money,” ca. November 1, 1786, PJM 9:158-160.

42 “Detached Memorandum,” 761 (emphasis added).
While this passage is directed at ecclesiastical corporations, the memorandum’s discussion of other types of corporations—including banks—suggests he refers to all of them, as the logic he employs surely would. Madison notes that corporations are subject to unique restrictions because they are creations of the community and therefore subordinate to its good. But equally important, these restrictions must be made clear in advance in an entity’s articles of incorporation. He laments that the acts of incorporation often “give this faculty [the right to acquire property], without limit either as to time or as to amount . . . .”43 The fact that the community “gives” this right demonstrates Madison’s belief that at least in the case of corporations, there is no entitlement to acquire property separate from the public good. An 1824 letter to Jefferson—again referring to ecclesiastical corporations, but also again employing logic that would apply to others—makes the point even more explicitly. The context was a discussion of whether public charters granted to religious or charitable institutions should be considered irrevocable. The letter emphatically denies that they should be. Observe that the public good is, of itself, an adequate justification for regulating property, whose owners are entitled only to compensation for any deprivation:

[T]he time surely cannot be distant when it must be seen by all that what is granted by the Public Authority for the Public good, not for that of individuals, may be withdrawn and otherwise applied, when the Public good so requires; with

43 “Detached Memorandum,” 762 (emphasis added).
an equitable saving or indemnity only in behalf of the individuals actually enjoying vested emoluments.\footnote{44 Madison to Jefferson, December 31, 1824, \textit{WJM} 9:213-14. The letter goes on to compare irrevocable charters for religious institutions with irrevocable entails on individual estates—underscoring the fact that his logic applies equally to all forms and owners of property.}

The public nature of property, as well as the procedural nature of justice, is also suggested by the following question: If the analysis of Federalist 10 was directed against unjust laws in the states, and if unjust meant the government interfering in areas in which it had no business, why—not merely in Federalist 10 but also in the considerable trove of correspondence and other writings surrounding it—did Madison never mention the one right he held most inviolable and which, by his standards, the states commonly violated: the right of conscience?

Chapter 4 will explore Madison’s views on this subject in more detail, but we may observe for present purposes that scarcely two years before composing the Tenth Federalist, his “Memorial and Remonstrance” describes state assessments to pay for religious instruction as violations of the principle of religious liberty. Such assessments were commonplace in the pre-Constitutional states, as were other measures that Madison regarded as violations of religious liberty, including religious tests for officeholders.\footnote{45 On state assessments to support established churches, see Leonard W. Levy, \textit{Original Intent and the Framers’ Constitution} (New York: MacMillan Publishing Company, 1988), 188-192.} Yet his catalog of state injustices in “Vices” does not mention them.\footnote{46 I grant that Madison’s \textit{National Gazette} essay “On Property” follows Locke in extending the right of property to property in one’s rights and conscience, but that is plainly not what he meant by property in the writings currently under consideration. His reply to Jefferson’s “earth belongs to the living” letter (\textit{WJM} 515) offers a more straightforward Lockeian account of property in the economic sense.} Conversely, the
“Memorial and Remonstrance” employs the term “justice” only once. 47 The reason is that freedom of conscience was a matter of liberty but not a matter of the public and procedural quality of justice.

Based on these considerations, we arrive at the conclusion that, contrary to the bulk of both critical and redemptive interpretations of Madison, he believed the majority could treat property more or less as it decided the public interest required, so long as it did so in accordance with rules and procedures known in advance. These procedures themselves, Madison assumed, were subject either to definition by majorities or, in cases in which the Constitution prescribed them, the ongoing sufferance of majorities. 48 The jurisdiction of majorities was essentially unlimited provided they followed procedures agreed upon in advance—an arrangement to which majorities consented because securing a stable and predictable environment was the very reason political society was instituted to begin with.

3.2.3. Private Rights and the Public Good

Indeed, not only did Madison believe private rights to be compatible with the public good, he did not regard the two as analytically distinct. He did, of course, express repeated concern that minority rights would be sacrificed to the majority’s immediate

47 The context there is limited: “We think too favorably of the justice and good sense” of denominations supporting the religious assessment “to believe that they … covet pre-eminences over their fellow citizens. . . .” Memorial and Remonstrance,” 1785, cite to PJM 8:300-301.

48 Again, we reiterate the crucial point that while the Constitution does require super-majorities in certain situations, the Constitution itself was ratified by simple and sometimes quite narrow majorities in each state.
appetites. Moreover, he equated the good of the majority with the good of the whole community. But Madison did not regard transient majority appetites as an expression of the public’s genuine long-term good. Far from making a choice between majority rule and individual rights, his writings knit them together in a mutually reinforcing relationship that more closely resembles a double helix than separate strands of thought. He rarely mentioned either of the two without simultaneously mentioning the other, and he repeatedly described them as though they reinforced rather than undermined one another.

Federalist 10 directly challenges the idea of a fundamental opposition between the public good and private rights, famously defining factions as groups whose agendas are “adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”49 The grouping of the public good and private rights in this context—a measure is factious if it violates either, or, conversely, to be non-factious it must satisfy both—refutes the idea that he assumed one might have to pick between the two. This is why Federalist 10 says a statesman needs both “patriotism”—that is, a commitment to the whole—and a “love of justice,” which pertains to treatment of minorities.50 Indeed, Madison repeatedly and without feeling any evident need for further explanation described the public good and private rights as simultaneous goals. A measure under consideration in the Articles Congress would receive backing from “all those who love

49 Federalist 10:43.

50 Federalist 10:46.
justice and aim at the public good. . . .” Abuses in the states were to be especially regretted because they caused skeptics to question whether popular majorities could protect both the “public Good and private rights.” New York’s Council of Revision provided “a valuable safeguard both to public interests & to private rights.” Federalist 14 praises American innovations “in favour of private rights and public happiness.” The separation of powers was to be maintained in order to secure both “private rights” and “public liberty.” And perhaps most starkly, Federalist 51 states that justice is the “end” of government while majority rule is the “means” of securing it. Conversely, Madison rarely discussed individual rights outside the context of the “public good,” “common good” or “public liberty.” He said in the First Congress that holders of public debt should be paid what they were due—a case Madison often associated with property rights—because “the public good is most essentially promoted by an equal attention to the interest of all.” The best case for protecting the right of property, he said in Philadelphia, was that doing so served the public purpose of encouraging industry.

---

51 Madison to Randolph, May 1783, *PJM* 7:59.
52 “Vices,” *PJM* 9:348-357.
54 Federalist 14:67.
57 Madison in Convention, August 7, 1787, cite to *PJM* 9:138-140.
This interconnectedness of the public good and private rights is underscored by the striking fact that Madison almost never described as “unjust,” “factious” or a violation of “rights” any policy that he had not also classified as harmful to the public good. Note the interrelatedness of “moral,” “political” and “economic” problems in this passage from a 1786 letter to Jefferson:

Another unhappy effect of a continuance of the present anarchy of our commerce, will be a continuance of the unfavorable balance on it, which by draining us of our metals furnishes pretexts for the pernicious substitution of paper money, for indulgences to debtors, for postponements of taxes. In fact most of our political evils may be traced up to our commercial ones, as most of our moral may to our political.\(^\text{58}\)

On this analysis, the issues Federalist 10 explicitly describes as factious exhibit moral, political and economic features that are woven into a set of concerns encompassing both private rights and the public good. Referring to many of the same issues, Federalist 10 groups paper money with abolitions of debts and equal division of property as “wicked project[s]”\(^\text{59}\) that are matters of “justice.”\(^\text{60}\) But both in the essay and elsewhere, Madison also explicitly described these policies as averse to the public good. Paper money again supplies a compelling illustration. While it clearly implicated questions of justice, it also threatened the public good. As early as 1780, Madison hoped the states would discontinue emissions of paper money because they were “manifestly

\(^{58}\) Madison to Jefferson, March 18, 1786, \textit{PJM} 8:500-504.

\(^{59}\) Federalist 10:47.

\(^{60}\) Federalist 10:44.
repugnant” to the national finance policy established by Congress. In 1786, Madison complained that “the States are running mad after paper money, which among other evils disables them from all contributions of specie for paying the public debts particularly the foreign one.” Both “Vices” and Federalist 44 warn that state-issued paper caused conflicts that transcended state lines. Paper was producing “the same warfare & retaliation among the States as were produced by the State regulations of commerce.”

If factious policies contravened both private rights and the public good, we should expect majorities deliberating in calm circumstances to arrive at just and reasonable conclusions. So it is no surprise that we have already seen Madison describe factions as the products of “rage,” “commotion” and other dynamics that fueled passion and distorted reason. Nor, consequently, is it surprising that one of the primary mechanisms on which Madison relied to thwart these dynamics was time.

3.3. TIME AND MAJORITY FORMATION IN THE TENTH FEDERALIST

The bulk of Federalist 10 asserts that an extended republic will inhibit factious majorities, leading Robert Dahl to raise an objection that George W. Carey has called the “filter problem”:

[S]o far as I am aware, [Dahl writes,] no modern Madison has shown that the restraints on the effectiveness of majorities imposed by the facts of a pluralistic

62 Madison to Ambrose Madison, August 7, 1786, PJM 9:89.
63 Madison to Jefferson, August 12, 1786, op. cit.
society operate only to curtail “bad” majorities and not “good” majorities; and I confess I see no way by which such an ingenious proposition could be satisfactorily established.\textsuperscript{64}

The challenge is reasonable: If that “ingenious proposition” cannot be established, then Madison either opposed majority rule outright or supported it only under conditions in which it could not be exercised. In fact, Dahl might press his case further. We have seen Madison call “justice” the “end of government” yet majority rule “the vital principle” of the Constitution. If Madison was consistent, we must demonstrate not merely that majorities \textit{can} prevail in an extended republic but also that the empirical conditions of an extended republic facilitate the emergence of majorities inclined to respect considerations of justice. As we may now see, the most important of these conditions was time.

\textbf{3.3.1. Time, Distance and Factious Majorities}

Madison, we recall, was no Calhoun: not \textit{all} majorities were factious; only those “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”\textsuperscript{65} Federalist 10 specifies that its object is only those majorities whose judgment was warped by “co-existent passion or interest.”\textsuperscript{66}


\textsuperscript{65} Federalist 10:47.

\textsuperscript{66} Federalist 10:45.
This diagnosis of the problem lays the basis for time as a treatment. The factious majority was driven by passion or interest rather than reason. Support for measures that arose purely or primarily from passion would dissipate naturally of its own accord, which was why Madison listed these—a “zeal for different opinions concerning religion, concerning government, and many other points,” “an attachment to different leaders,” and so forth—yet set them aside as though they presented no serious difficulty. These were apparently the kinds of conflicts Madison had in mind when he said of mankind that “the most frivolous and fanciful distinctions” could “kindle their unfriendly passions and excite their most violent conflicts.” Once kindled, these disputes flamed dramatically and burned out rapidly.

Property, on the other hand, belonged to a different category: factions based on “interest,” the tangible manifestation of which made them more “durable” than the passions. Durability, in turn, made property-based factions more dangerous because they could cohere long enough to prevail but remained subject to the same problem that plagued impassioned majorities: Interest, like passion, distorted reason, leading those under its sway to make not only unjust decisions about the rights of others but also short-sighted judgments about their own needs. Factious majorities were apt to sacrifice their

---

67 The multiplicity and diversity of religious sects was the primary reason Madison did not fear the ascendance of any one of them. But the analysis of Federalist 10 also suggests an underlying belief that religious zeal was short-lived, at least in the political realm. On this issue, see Marc M. Arkin (‘‘The Intractable Principle:’ David Hume, James Madison, Religion and the Tenth Federalist, The American Journal of Legal History, April 1995, 148-176).

68 Federalist 10:44.
own long-term and true interests to immediate appetites, a point evident in Madison’s lament that “enlightened statesmen” could not always be relied upon to elevate “indirect and remote considerations” over “the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.”

That was especially the case when government was called upon, as it frequently was, to adjudicate conflicts over property. These controversies, again, concerned “the rights of large bodies of citizens” and should be decided on the basis of “justice.” When majorities were directly involved and were also parties to the conflict, they were called upon to judge their own causes, yet interest distorted their judgment and was liable to “corrupt their integrity.” Hence the central difficulty: The rights of minorities could not be safely entrusted to interested or impassioned majorities. This was the theme to which Madison returned on every occasion on which he adduced the extended republic theory.

“Vices” is illustrative:

69 Federalist 10:45. Madison does, of course, solve the problem of faction. But this lament is one of the factors that compels him to do so without relying on institutional mechanics.

70 Federalist 10:44.

71 It appeared first in his thought in his pre-Convention research memorandum “Vices of the Political Systems of the United States” (“Vices,” Madison’s numbered point 11); again in a letter to Washington framing the choices to be faced in Philadelphia (Madison to Washington, April 16, 1787, PJM 9:382-387); in a June 6 address to the Philadelphia Convention (PJM 10:32-34); in post-Convention correspondence summarizing the proposed Constitution for Jefferson (Madison to Jefferson, October 24, 1787, PJM 10:206-219); most famously in Federalist 10, with a reprise in Federalist 51; and, finally, in a handful of retirement letters mostly directed against the doctrine of nullification (See, inter alia, 1833’s “Majority Governments,” op. cit.).
Place three individuals in a situation wherein the interest of each depends on the voice of the others; and give to two of them an interest opposed to the rights of the third. Will the latter be secure? The prudence of every man would shun the danger. The rules and forms of justice suppose and guard against it. Will two thousand in a like situation be less likely to encroach on the rights of one thousand?  

The answer, Federalist 10 observes, is no:

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority.

Consequently, Federalist 10 continues, factious majorities pose a fundamental difficulty:

With equal, nay, with greater reason, a body of men are unfit to be both judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? and what are the different classes of legislators, but advocates and parties to the causes which they determine?

Madison’s primary solution to this problem was to observe that the multiplicity and diversity of interests made it unlikely that a majority could form “upon any other principles, than those of justice and the general good. . . .” We shall return to the

72 “Vices,” Madison’s numbered point 11.

73 Federalist 10:42.

74 Federalist 10:44. Again, we refer here to a majority pressuring the regime. A majority need not “form” for most of the business of government to be conducted.

75 Federalist 51:271.
importance of that last phrase—"the general good"—but it is sufficient to observe at this point that Madison did not propose any mechanism for breaking up extant majorities; his point was that factious majorities often would not exist at all. Such a situation is, by definition, irrelevant to the question of whether Madison favored majority rule, for without a majority, there is no rule either to favor or oppose.

But Madison obviously assumed majorities, even factious ones, would emerge. In an important sense that literature on the Tenth Federalist has tended to overlook, interested majorities were not the exclusive problem of the essay; or, stated conversely, Madison’s solution was not to curtail their authority. The central problem of Federalist 10 was that the rule of interested majorities was unavoidable. To be sure, Madison did express reservations about interested majorities. But recall that criticizing how majorities behave in certain circumstances is not tantamount to criticizing their rightful authority. To impugn Madison’s majoritarian credentials, it would be necessary to show that he believed majorities should not be permitted to make decisions in cases in which their judgment might be biased by interest. Federalist 10 actually says precisely the opposite. Individuals are not allowed to judge their own causes, whereas in republican politics, there is no alternative: “[W]hat are many of the most important acts of legislation, but so many judicial determinations. . . . Justice ought to hold the balance between [parties to such decisions]. Yet the parties are, and must be, themselves the judges. . . .”76

76 Federalist 10:44.
Here we encounter once more Madison’s ever-present assumption that majorities that formed and persisted were bound to prevail: In the case of a dispute between a majority and minority, the majority “must”—that is, “will always”—win out. Nothing in the succeeding analysis of Federalist 10 or Madison’s other writings on the problem of faction repudiates this opinion. Quite the contrary: Federalist 51’s reiteration of the extended republic theory reinforces it. There, Madison warned that if majorities continued to abuse minorities in a small territory like Rhode Island, “some power altogether independent of the people, would soon be called for by the voice of the very factions whose misrule had proved the necessity of it.” Madison understood the Constitution to be the alternative to such an arrangement. Put otherwise, under the Constitution, factious conflicts would be adjudicated by a power dependent on the people—i.e., derived from majority opinion.

However, such a majority—that is, the majority that is to decide any given controversy—is not an organic entity. It must form; in Madison’s phrase in Federalist 51, a majority must “take place.” In an extended republic, some gravitational force must attract the disparate elements of a majority together, and it is difficult to see any such force other than a reason to care about the outcome of the dispute: in other words, an interest. On Madison’s reasoning, which we shall explore more fully in discussing his

77 Federalist 51:271.

78 Ibid. The context is Madison’s claim that a majority could “seldom take place” on a basis other than the public good. But the converse clearly applies as well: Majorities based on the common good can take place.
proposal for a national veto on state laws, the fact that a national majority coheres indicates it has an interest in the outcome. Otherwise, it would have no incentive to form or, if it does, to incur the political risks that are inevitable in controversial disputes. As will be seen, the nation’s interest in minimizing conflict between states might exert enough gravitational force for a national majority to coalesce. In any case, this national majority is not disinterested per se; its interest is merely less immediate and intense than a minority that is directly involved.

Why, as Dahl asks, can this majority form but not a factious one? Its interest is exactly the reason. The “public good” to which Madison referred was certainly not a metaphysical and perhaps not even an outwardly moral concept.\(^79\) He spoke instead of the “common good” and the “aggregate interests” of the community. If these interests are truly commonly held or aggregated from smaller political units, the building blocks of a national majority need only act on what appears to them as self-interest, which was why Madison could predict in Federalist 51 that in an extended republic, “a coalition of a majority of the whole society could seldom take place upon any other principles than those of justice and the general good,” a formulation whose converse indicates that majorities would commonly take place on those principles.\(^80\) Madison, we have seen, assumed individuals or groups could gauge such their own interests and good accurately barring distorting forces like passion or temptation. An extended republic naturally

\(^79\) Moral or not, it is certainly objective.

\(^80\) Federalist 51:271.
filters out proposals based on those forces because the time required for a majority to coalesce and prevail across broad expanses of territory exceeds the lifespan of a typical eruption of passion. Thus the idea of temporal majoritarianism.

In that sense, Madison’s challenge was not how to divert power from an interested majority to an impartial authority, at least not literally so. This is clear from the fact that Federalist 10 does not even contemplate property rights being protected by the courts. The essay assumes their fate rests in the hands of interested majorities. The question was how to ensure the interested majority ruled as impartially as possible. An essential feature of Madison’s answer was that the natural conditions of an extended republic imposed delays that, rather than shifting authority from majorities, postponed decisions until a point at which those same majorities were likely to feel less intensely about their immediate temptations and thus to perceive their true interests more clearly. The perspective, again, is lateral rather than vertical: The issue is not whether but rather when the majority should rule. If the point of decision could be deferred until passions had cooled and immediate appetites had ebbed, the interested majority was likelier to rule in accordance with both justice and the public good.

The complaints about injustice in the states that stimulated Madison’s thought on the problem of faction make this temporal dimension of his analysis clear. One of the most consistent stigmata by which arbitrary and factious majorities could be identified was the speed at which they formed and acted. Again, Madison’s diagnosis of mob rule in “the ancient republics” was that “popular assemblages [were] so quickly formed, so
susceptible of contagious passions. . .”

The history of the pre-Convention period, too, was rife with examples of mobs descending on legislatures and demanding passage of laws within days or even hours. As has already been seen, Madison tended to describe this factious behavior in temporal terms. A majority “might under sudden impulses be tempted to commit injustice on the minority.” Writing to Jefferson, he similarly described “interest” and “passion”—the characteristic features of faction in Federalist 10—as “impulses.”

Passion and impulse, in turn, were related to proximity. The comparatively small size of the states, he wrote in the “Detached Memorandum,” facilitated the “contagion & collision of the passions,” triggering demands for instant and unrelenting change. The compression of time in a small territory accelerated this process. Given the proximity of individuals to one another and of factions to the seat of government, scarcely any time passed, and therefore no passions cooled, between a factious proposal arising, its embrace

---

81 “Majority Governments,” 1833, WJM 9:520.

82 Madison in Convention, June 26, 1787, PJM 10:76-77 (emphasis added).

83 Madison to Jefferson, October 17, 1788, PJM 11:295-300 (emphasis added).

84 “Detached Memorandum,” 758.
by a popular majority and its translation into policy.\textsuperscript{85} By contrast, “the extent of our Country … prevent[ed] the contagion of evil passions. . . .”\textsuperscript{86}

The relevance of the country’s large geography was the time required to traverse it.\textsuperscript{87} Madison argued that extensiveness fundamentally altered the dynamics of majority formation in several ways. If a factious majority cohered, extensiveness would render its elements unable “by their number and local situation … to carry into effect schemes of oppression.”\textsuperscript{88} Put otherwise, in an extended republic, it would be difficult for the widely dispersed local components of a national majority “to discover their own strength. . . .” One reason was the fact that “where there is a consciousness of unjust or dishonourable purposes, communication is always checked by distrust,” but the fact that Madison introduced this remark with “[b]esides” suggests that distrust was not the primary reason a national faction would be unable to feel its own strength.\textsuperscript{89} The primary reason was apparently that members of such a faction in a dispersed territory simply would not know that one another existed.


\textsuperscript{86} Madison to Adams, May 22, 1817, \textit{WJM} 9:390-391

\textsuperscript{87} Scheuerman similarly emphasizes the temporal analysis of the extended republic thesis. See Scheuerman, \textit{Liberal Democracy and the Social Acceleration of Time}, 44.

\textsuperscript{88} Federalist 10:45.

\textsuperscript{89} Federalist 10:48.
But this assumption does not cohere unless we supply another: the effect of time. Communication was hardly impossible, a fact established by the 30 volumes of correspondence Madison carried on with contemporaries stretching from Vermont to South Carolina. His point, instead, was not that communication was impossible but rather that it was slow and the life expectancy of factions was short. As we now know, such was Madison’s assumption about impassioned or impulsive majorities. This was the pivotal reason majority factions were unlikely to prevail in an extended republic. By the time they discovered one another, communicated their ideas to the capital and engaged in debate back and forth, their impulsiveness would have dissipated.

One additional assumption is necessary to ensure the length of the process—Madison’s ideal of the “fit” representative, another feature of his thought that has provoked charges of aristocratism.

3.3.2. Time and Representation

“Considering the Federalist desire for a high-toned government filled with better sorts of people,” Gordon Wood writes, presumably with Madison among others in mind, “there is something decidedly disingenuous about the democratic radicalism of their arguments. . . .” 90 Emery G. Lee III ascribes “an elitist understanding of representation” to Madison. 91 These commentators, like their Progressive predecessors, place Madison in

---


largely the same position as did his contemporary detractors in the Anti-Federalist camp. Brutus, for example, said large electoral districts would only produce representatives from “the natural aristocracy of the country,” while the minority of the Pennsylvania ratifying convention feared that

from the nature of the thing, men of the most elevated rank in life, will alone be [elected to Congress]. The other orders in the society, such as farmers, traders, and mechanics, who all ought to have a competent number of their best informed men in the legislature, will be totally unrepresented.

These essayists adhered to what might be called a “reflective” model of representation whose assumption was that the representatives should precisely mirror their constituents and, therefore, their opinions. Thus the Federal Farmer: “[A] fair and equal representation is that in which the interests, feelings, opinions and views of the people are collected, in such manner as they would be were the people all assembled.”


93 “The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents,” The Anti-Federalist, 214. We have also already encountered Patrick Henry’s fears of a Congress composed of the high-born (see page 36 above). A subtext in these Anti-Federalist complaints was not merely the inadequacy of representatives but also the atrophy of public participation in affairs that were so seemingly removed from the community. Chapter 5 deals with these critiques in more detail.

94 Federal Farmer VII, The Anti-Federalist, 74. Madison’s most direct rebuttal to these critiques may be found in Federalist 57, which notes that representatives will be chosen by “the great body of the people of the United States,” not a favored or aristocratic class. We are nonetheless concerned chiefly in this section with the extent to which Madison’s idea of representation did directly conflict with that of his adversaries.

In Chapter 5, we shall encounter an important subtext of these debates: whether republicanism demanded a robust participatory ethic or merely that leaders be ultimately accountable to the people. As we have already seen, Madison’s criterion was the latter. Contemporary commentators like Wilson Carey
To be sure, Madison was explicitly opposed to such a model, but a closer look at his own theory of representation indicates it, too, was derived from public opinion. However, rather than merely reflecting his or her constituents’ views, Madison’s ideal elected official focused popular opinions via what may be called a “refractive” model of representation in which its purpose was to focus rather than mirror. He wrote in Federalist 10:

The effect of [representation] is … to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.\(^{95}\)

The temporal dimension of Madison’s thought is again evident in the assumption that support for factious proposals tends to be “temporary.” Consequently, in the case of popular movements pressuring the legislature, the representative’s role is less to defy than to delay. Moreover, Madison did not envision representatives routinely exercising judgment independent of the wishes of their constituents. On the contrary, his writings generally suggest he believed that cases in which representatives would have to resist their constituents would be rare. During his service in the Articles Congress, for example, Madison was acutely embarrassed when Virginia abruptly withdrew its support.

---

\(^{95}\) Federalist 10:46.
for giving the national legislature direct taxing authority. The incident prompted him to reflect on the role of the representative:

[A]lthough not only the express instructions, but even the declared sense of constituents as in the present case, were to be a law in general to their representatives, still there were occasions on which the latter ought to hazard personal consequences from a respect to what his clear convictions determine to be the true interest of the former. . . .96

Observe here that the “general” case is the representative adhering to the wishes of his or her constituents, whereas risking one’s popularity by resisting them occurs only on “occasions.” Federalist 63, it will be recalled, similarly describes situations in which the representative would resist the will of his or her constituents as “particular moments” deriving from “irregular passions.”97 Even in such cases, the decisive factor separating Madison from the aristocratic model of representation imputed to him is that the representative was to base his or her decisions on the public’s “true interest” and “views.”

Rakove likens this idea of representation to Edmund Burke’s,98 but Madison’s and Burke’s views actually differ substantially—and in illuminating ways. To illustrate the point, compare Madison’s dictum that the representative should “refine and enlarge the public’s views” with Burke’s “Speech to the Electors of Bristol.” There, Burke expressed the hope that a representative would “live in the strictest union” with his

96 Madison speaking in the Articles Congress, Jan. 28, 1783, PJM 6:141-149.

97 See pp. 6-7 above.

constituents but nonetheless said “his unbiased opinion, his mature judgement [sic.], his enlightened conscience” could not be sacrificed because these were derived from neither constituents nor even the Constitution but rather were “a trust from Providence, for the abuse of which he is deeply answerable.”

On Burke’s quasi-Platonic view, the representative’s judgment is ultimately directed toward a fixed and exterior objective good, while Madison’s is directed inward with a goal of focusing the public’s views. There remains, of course, substantial distance between Madison’s views and the Anti-Federalists’. For purposes of evaluating whether Madison was a majoritarian, the point is that both the reflective and refractive models of representation depend on majority opinion. Madison, after all, wanted representatives to “refine and enlarge,” not discard or ignore, the public’s views. Comparing Washington favorably to Adams, Madison found it to be a cause for praise that the former was “ever scrutinizing into the public opinion, and ready to follow where he could not lead it,” whereas the latter was “often insulting [public opinion] by the most adverse sentiments & pursuits. . . .”

Moreover, even when an enlightened statesman differed with his or her constituents, he or she could prevail only by persuading rather than thwarting them. And the most potent tool at the representative’s disposal was time. This was why Madison so

---


100 Madison to Jefferson, February 18, 1798, PJM 17:83.
often emphasized not merely the wisdom of fit characters but also their “firmness”—the quality they needed to resist factious proposals long enough for the passion behind them to cool. Here is Madison in the Convention, reflecting on what conclusions a people deliberating “in a temperate moment” might reach about the structure of government:

Another reflection equally becoming a people on such an occasion, wd. be that they themselves, as well as a numerous body of Representatives, were liable to err also, from fickleness and passion. A necessary fence agst. this danger would be to select a portion of enlightened citizens, whose limited number, and firmness might seasonably interpose agst. impetuous counsels.101

Because Madison believed a majority that clung to its beliefs would inevitably prevail, this “interposition” could only serve the purpose of persuasion—in which case a majority would have changed its own opinion, thus removing any pretense for questioning his commitment to majority rule—or of delay, which served much the same purpose. The time required for a factious proposal to travel to the capital, the representative’s reply to travel back and the majority to insist on its view—through election if necessary—created a built-in mechanism for dissipating the passions: the physical extent of the republic and the time required to travel it.

These dynamics help to explain why a factious majority could not cohere in an extended republic. For Madison, the converse was also true: If a proposal could survive the time necessary for a majority to form, its idea to be communicated to the capital, negotiations to be completed and so forth, it was highly likely on Madison’s reasoning that it was compatible with “justice and the general good.” The barriers that inhibit

factious majorities therefore do not impede worthy ones, a point Dahl, who denies the possibility of distinguishing between what he calls “good” and “bad” majorities, is understandably unwilling to accept.

All these factors were at work in Madison’s only proposal for a specific constitutional mechanism that flowed directly from the logic of the extended republic thesis: his much maligned idea for a national veto on state laws.

3.4. Temporal Majoritarianism and the National Negative

Madison’s proposal to empower Congress with a veto over all state laws remains perhaps his most vilified—and, critics claim, anti-majoritarian—idea. Madison described it as a republican alternative to the British king’s prerogative to veto acts of Parliament, but critics ranging from contemporaries like Jefferson to subsequent commentators like J. Allen Smith have described it as an overly blunt instrument whose purpose or at least effect would have been to limit self-government at the local level. They seem, by Madison’s own arguments, to have a point. While one major purpose of the veto was to protect the jurisdiction of the national government against incursions by the states—the very problem that rendered the Articles regime impotent and necessitated the Philadelphia convention—Madison also repeatedly cited its promise for taming unjust majorities inside the states. His case to Washington is typical:

Another happy effect of this prerogative would be its controll on the internal vicissitudes of State policy; and the aggressions of interested majorities on the

---

rights of minorities and of individuals. The great desideratum which has not yet been found for Republican Governments, seems to be some disinterested & dispassionate umpire in disputes between different passions & interests in the State. The majority who alone have the right of decision, have frequently an interest real or supposed in abusing it. In Monarchies the sovereign is more neutral to the interests and views of different parties; but unfortunately he too often forms interests of his own repugnant to those of the whole. Might not the national prerogative here suggested be found sufficiently disinterested for the decision of local questions of policy, whilst it would itself be sufficiently restrained from the pursuit of interests adverse to those of the whole Society?  

This passage presents several difficulties from the perspective of majority rule. One is that Madison himself describes the policies subject to the veto as “internal” and “local.” We may see the difficulty by imagining a local dispute that genuinely does not affect jurisdictions beyond the one deciding it: say, for example, whether to invoke the power of eminent domain to seize a privately owned plot of land for an exclusively local purpose such as building a new city hall. Referring that decision to Congress for review may be more republican than referring it to a hereditary monarch, especially insofar as the jurisdiction in question would at least be represented on Capitol Hill, but the residents of the town in question are unlikely to feel their right to self-government is vindicated by their comparatively minuscule representation in Congress. From their point of view, the neutrality and “disinterestedness” Madison desires would be precisely the problem: An issue with which they are closely concerned could be decided by a

---


104 Of course, this example must be considered before the judicial doctrine of incorporation gave the federal courts jurisdiction over such cases by applying the Bill of Rights to the states via the Fourteenth Amendment.
distant body that is almost entirely disconnected from it. Such a body may be in a position to resolve abstract claims of rights and justice, but it would be wholly incompetent to the crucial task of applying them to local questions such as the extent to which the community actually needs the land in question. If this is the kind of scenario Madison contemplates, the national negative may not violate the republican principle, but it certainly would place considerably more distance between public opinion and public policy than we have seen him endorse thus far.

To compound the difficulty, Madison’s repeated insistence that the veto’s jurisdiction extend to “all cases whatsoever” has prompted critics to charge that regardless of whether he intended the device to encompass purely local cases, it surely would have empowered Congress to interfere with them. Jefferson thus assailed the proposal:

Prima facie I do not like it. It fails in an essential character, that the hole and the patch should be commensurate. But this proposes to mend a small hole by covering the whole garment. Not more than 1. out of 100. state acts concern the confederacy. This proposition then, in order to give them 1. degree of power which they ought to have, gives them 99. more which they ought not to have, upon a presumption that they will not exercise the 99.107

---

106 Michael Zuckert emphasizes the negative character of the veto, suggesting the fact that Congress could block legislation but not enact it mitigates its anti-majoritarian dimensions. The distinction is valid, but because the power to block can be as substantively important as the power to enact, it cannot fully rehabilitate Madison on this point. See Michael Zuckert, “Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention,” The Review of Politics 48.2 (1986): 166-210, especially 196: “Arming the general government with a negative power to help secure rights and the steady dispensation of justice within the States, rather than with positive power to provide those things directly itself, helps to prevent the ‘due independence’ which the extent of the extended republic supplies from turning into a source of danger.

107 Jefferson to Madison, June 20, 1787, PJM 11:480-81.
Indeed, many commentators have cited the universal jurisdiction of the veto as evidence that Madison intended it to be used primarily to control injustices within the states, not to protect the national government against incursions of its authority. Garry Wills echoes Jefferson:

> Some have tried to minimize this call for central power, saying it was to be used only defensively by the national legislature, to fend off invasion of its authority. If that were the case, Madison should have [limited its jurisdiction]; but he went on to say that all laws fall under this power, with no norm but the opinion (judgment) of the national legislator. He was an experienced enough legislator to know that this was no way to frame a limited power.108

And, finally, Michael Zuckert draws a distinction between “Madison Federalism”—equipped with a universal veto directed at the “national ends” of securing justice and protecting rights—and “Randolph Federalism,” based on the Virginia Plan’s call for a negative limited to constitutional violations affecting the distribution of power between the state and federal governments.109

These analyses require careful attention, for they seem to square in major respects with Madison’s own description of the veto. We may observe at the outset that in nearly every description of the negative Madison offered, protecting national jurisdiction was paramount and taming local majorities was ancillary. Moreover, his foremost motive in making its jurisdiction universal was to prevent states from evading it through legal technicalities: Contrary to Wills’ analysis, Madison was an experienced enough legislator


109 Zuckert, “Federalism and the Founding,” see especially 189-90. Zuckert, it should be emphasized, is not a critic of the veto.
to know there was no other way to frame the power successfully. But more to the point of the present study, commentators from Jefferson to Zuckert mistake Madison’s analysis in one important respect: He did not regard the local abuses to which he objected and the national issues for which the veto was also necessary as entirely distinct. In Jefferson’s terms, Madison believed that far more than one of 100 “local” issues did affect the confederacy; in Zuckert’s, Madison believed the national end of preventing injustice and the federal end of protecting national jurisdiction were intertwined. By describing majority abuses as “local” or “internal,” he referred to the jurisdiction in which the decisions were made, not to the scope of their impact; and by calling national majorities “disinterested,” he meant that their interest was vastly diluted compared to that of local majorities, not that the interest did not exist. On the contrary, much like his assertions of private rights always implicated public goods, every specific abuse of which he accused local majorities also involved national or interstate interests. The “Vices” memo actually first cites these abuses not under the heading of “injustices” within the states but rather in an earlier section entitled “Trespasses of the States on the rights of each other”:

Paper money, instalments of debts, occlusion of Courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States. As the Citizens of every State aggregately taken stand more or less in the relation of Creditors or debtors, to the Citizens of every other States [sic.], Acts of the debtor State in favor of debtors, affect the Creditor State, in the same manner, as they do its own citizens who are relatively creditors towards other citizens. This remark may be extended to foreign nations.  

Even in pivoting from interstate to intrastate issues, “Vices” reinforces their interconnectedness:

In developing the evils which viciate the political system of the U.S. it is proper to include those which are found within the States individually, as well as those which directly affect the States collectively, *since the former class have an indirect influence on the general malady* and must not be overlooked in forming a compleat remedy.\(^{111}\)

Madison’s discussion of paper money under the heading “Injustice of the laws of States” thus laments the interstate and even international implications of that policy: “Is it to be imagined that an ordinary citizen or even an assembly-man of R. Island in estimating the policy of paper money, ever considered or cared in what light the measure would be viewed in France or Holland; or even in Massts or Connect.?”\(^{112}\) Madison adduced similar arguments about paper money on other occasions. Opposing it in the Virginia Assembly, he said that the power to print currency should reside with Congress—i.e., the national government—“for the sake of uniformity” and “to prevent fraud in States towards each other or foreigners.” Furthermore, he added, paper money “serv[ed] dissentions between States.”\(^{113}\) Similarly, he had complained during the Articles period that state emissions of currency were “manifestly repugnant” to Congressional acts on finance and that they rendered states unable to comply with Congressional requisitions.\(^{114}\)

\(^{111}\) *PJM* 9:353.

\(^{112}\) *PJM* 9:355-356.

Consequently, the decision of one state to print paper money potentially affected citizens of other states as well as the whole nation. In these cases, local majorities trespassed on the authority of national majorities. These considerations, whose reasoning applies equally to Madison’s other complaints about such local abuses as legislative interference in contracts, indicate that his intention was not merely to inhibit local majorities but rather to protect the right of national majorities to decide national issues. Put otherwise, the purpose of the negative was to ensure an issue was decided by the largest majority that shared an interest in it. One might argue that a dispute between, say, two states should therefore be decided only between the two of them. But such an approach would require an infinite proliferation of governing institutions, and given Madison’s repeated assumption that all 13 states had to cohere to achieve and maintain independence—a belief he first articulated during the Revolution but reiterated at the end of his life—Congress was a logical locus of decision because any dispute between two

---

114 See Madison to Joseph Jones, November 14, 1780 PJM 2:172-74, and Madison to Ambrose Madison, August 7, 1786, PJM 9:89, *inter alia*.


116 For illustrations, see Madison’s handling of the Vermont land dispute during the Articles Congress—during which he sought Congressional resolution of Vermont’s claim to independence from New York and New Hampshire, in large part out of fear that Vermont would jeopardize the Revolution by making its own peace with Britain (*PJM* 2:86-87, 113, *inter alia*)—and his political testament, “Advice to My Country,” which emphasized the maintenance of the union as the key to the United States’ future (*WJM* 9:611-12). The process by which Madison proposed that the Vermont dispute be settled bears a strong resemblance to how he would eventually see the negative working: an issue with national implications being decided by national majorities, which, while having a stake in the outcome and thus authority to render judgment, were less intensely interested and therefore more reasoned than local majorities in Vermont, New York and New Hampshire.
or more states could be reasonably said to involve the interests of national majorities. Madison supplies several reasons to believe these national majorities would make more temperate decisions. One is that their interest in the outcome of such disputes would be highly diluted compared to the intense and immediate interests of local majorities. As we have seen, this is what Madison meant by describing them as disinterested or neutral. In addition, we have also seen that the time required for these larger majorities to cohere enhanced the probability that they would render decisions on the basis of reason rather than passion.

Still, this analysis does not entirely answer Jefferson’s complaint, reiterated by Wills, that the universal jurisdiction of the veto merely assumed that Congress would not exercise it in cases that did not involve national issues. It does indeed seem very unlike Madison to propose a power on the belief that it would often not be used. Yet this is in fact Madison’s assumption, and it arises clearly from the logic of Federalist 10. Recall the answer to Dahl’s “filter problem”: that given the empirical conditions of an extended republic, national majorities will arise only in response to issues of general interest. By the same analysis, one ought not expect Congress to insert itself in a local dispute unless the national interest is at stake. Again, a majority—whether of the public or of Congress—is not a pre-existing, organic entity. It must form, and there is no reason to

See also Federalist 43’s justification of the national power to quell domestic violence: “In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms and tearing a state to pieces, than the representatives of confederate states, not heated by the local flame?” (Federalist 43:227) Again, Madison’s point is not that the confederation would have no interest in a domestic dispute—its interest would be to contain it—but rather that its interest would be diffuse compared to that of the direct parties.
believe a majority would form in favor of overturning a popular local measure—a step that would involve substantial political risk—without some interest beyond the state concerned; i.e., on Madison’s reasoning, a national interest. The fact that majorities form for a reason—that is, their own interest—was why Madison could be confident that natural political dynamics would confine the veto to genuinely national issues.

Following this reasoning further, however, we might lodge another objection to the veto: that it would have been the flimsiest of parchment barricades, something that, as we know, Madison despised. The relevant question is this: If Madison’s assessment of the relative interests between national and state majorities is correct—that the former would be dilute and the latter intense—why would the states comply with a Congressional veto? Moreover, not only would the national government be only weakly interested, it would also be naturally weak in power. Madison predicted in Federalist 46 that popular opinion—the source of power, he believed, in free societies—would lie with the states over the national government, at least until such time as the latter proved its superior administrative skills.\footnote{\textit{Federalist} 46:242-48.} This would seem to leave a weak and weakly interested national government in the unenviable position of merely asking the states—which were already more powerful than it—to desist in implementing a popular policy in which their interest was intense. In fact, the following argument, one of many Madison made in
Philadelphia in his futile attempts to secure support for the veto, all but openly suggests the national government would be unable to enforce such a measure:

A negative was the mildest expedient that could be devised for preventing [state abuses]. The existence of such a check would prevent attempts to commit them. Should no such precaution be engrafted, the only remedy wd. in an appeal to coercion. Was such a remedy eligible? was it practicable? Could the national resources, if exerted to the utmost enforce a national decree agst. Massts. abetted perhaps by several of her neighbours? It wd. not be possible. A small proportion of the Community, in a compact situation, acting on the defensive, and at one of its extremities might at any time bid defiance to the National authority. Any Govt. for the U. States formed on the supposed practicability of using force agst. the unconstitutional proceedings of the States, wd. prove as visionary & fallacious as the Govt. of Congs. The negative wd. render the use of force unnecessary.\footnote{Madison in Convention, June 8, 1787, \textit{PJM} 10:41.}

What purpose, then, would the negative serve if it could not be imposed by force? The answer may lie in Madison’s prediction that such a power would “prevent” state-national conflicts. The idea was for a conflict involving the negative never to reach a point at which force was necessary. On his own assumption that persistent majorities always prevail, the only reason to believe a veto would divert such conflicts is that it would impose a delay between a local majority making a factious decision and that decision being implemented—a delay across which the majority in fact would not persist because it would have been initially been motivated by short-lived passion. Presumably, the passion that would have initially motivated an unjust majority—passion that would also have been necessary for it to resist a decree of the national government—would dissipate in the time required for a local law to be communicated to the capital and Congress’
decision to be communicated back. In these senses, we may see that Madison’s call for a
national negative on state laws “in all cases whatsoever,” far from an attempt to curtail
majorities, instead affirmed temporal majoritarianism at the national level.

So, as will presently be seen, was another device widely understood to be a
Madisonian restraint on popular majorities: the Bill of Rights.
Chapter 4

“To Counteract the Impulses of Interest and Passion”

Rights, the Judiciary and Constitutional Interpretation

4.1. Introductory Considerations

Conservatives look upon the so-called “rights revolution” unleashed by the Warren Court in much the same way that progressives saw the era of substantive due process epitomized by Lochner. In each case, the objection is that claims of individual rights should not trump majority rule.\footnote{For examples of the conservative perspective, see, \textit{inter alia}, Robert Bork, \textit{The Tempting of America: The Political Seduction of the Law} (New York: The Free Press, 1990), and Mary Ann Glendon, \textit{Rights Talk: The Impoverishment of Political Discourse} (New York: The Free Press, 1991). To their credit, these critics are consistent in condemning the \textit{Lochner}-era decisions alongside those of the Warren Court.} We shall see in this chapter that Madison’s understanding of rights is, broadly speaking, as compatible with the conservative majoritarian position as we have seen it to be with the progressive majoritarian position: The public good remains the regulative standard for evaluating rights, and majorities retain the authority for adjusting their boundaries.

As we shall endeavor to show, Madison’s analysis is substantially at odds with a contemporary ethos that tends to read J.S. Mill’s harm principle into the Bill of Rights, claiming zones of individual autonomy for all actions that do not impinge on others.\footnote{J.S. Mill, \textit{On Liberty and Other Essays} (New York: Oxford University Press, 1998).} According to a related contemporary understanding, the claims of majorities are irrelevant in cases of rights; or, conversely, individuals need not justify their exercise of rights to the majority. Ronald Dworkin, for example, understands this immunity from...
public claims to be the very definition of a right: When we say someone has a right to do something, “we mean that he is entitled to do so even if this would not be in the general interest.” Madison, by contrast, affirmed majority rule even when assertions of individual rights are at stake, a point we shall see in the narrow basis on which he defended the two freedoms with which he is most prominently associated: those of conscience and political expression. In the former case, Madison’s near absolutist position derives not from any inherent zone of individual autonomy but rather from his Lockean conclusion that the public good cannot rationally be served by regulating the realm of conscience. In the latter, his defense of political expression is also based not on individual autonomy but rather on the essential role of open debate in majoritarian government. In each instance, Madison reaches his conclusions by way of, rather than by circumventing, majority rule.

Moreover, as will be seen, Madison believed that disputes over rights were ultimately to be settled by majorities, not the courts. In exploring this feature of his thought, we must bear in mind that the issue at stake is not the extent of Madison’s commitment to what have come to be called “individual rights”—on the contrary, his

---

3 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 271. Dworkin makes the remark in connection with freedom of speech specifically, but his general claim is that all rights are by definition exempt from questions of social utility; or, conversely, that when we say something can be balanced against the general good, as Dworkin plainly believes many things can and should be, we do not mean to describe it as a right per se. Dworkin does not associate this view with Madison; the point above is merely to use his view as a contrast.
views of legitimate legislative authority were often narrower than those of his contemporaries, especially where freedom of conscience was concerned—but rather how best to protect them. Madison’s derision for “parchment barriers” was especially acute in the case of institutional protections for rights. His simultaneous beliefs that majorities would inevitably prevail in the United States and that majorities would present the most serious threat to rights in the American system compelled him to think in terms not of dictating protections from on high but rather of creating conditions in which majorities were likeliest to behave tolerantly. As will be seen, Madison believed a Bill of Rights could facilitate those conditions both by encouraging majorities to pause in what might otherwise be headlong rushes to trample the rights of minorities and by providing a common vocabulary that would make discussions of rights productive in the political realm. The Bill of Rights was, in this sense, a device of temporal majoritarianism.

From there, we shall explore Madison’s view of constitutional interpretation, an area in which—contrary to the practices of the Lochner era and the Warren Court—Madison envisioned the judiciary playing a comparatively limited role. The ultimate arbiters of the Constitution were those who made it: popular majorities. And once again, the criteria for whether a majority’s interpretation was authoritative was the length of time it cohered. In this regard, as we shall see, Madison believed the authoritative

---

4 It is significant, however, that Madison tended to describe these as the rights of “minorities”—that is, in the plural. He generally assumed that rights were issues to be resolved in community contexts rather than the atomized “individual vs. the majority” dynamic in which they tend to be construed today.
meaning of the Constitution could change, but only gradually and on the basis of persistent consensus: It was, so to speak, a living Constitution with a slow metabolism.

4.2. Freedom of Conscience

In summarizing Madison’s doctrinaire view of freedom of conscience, commentators have tended to emphasize the frank conclusion of the first article of his “Memorial and Remonstrance against Religious Assessments”: “We maintain therefore that in matters of religion no man’s right is abridged by the institution of Civil Society, and that religion is wholly exempt from its cognizance.” But that claim’s most important word may be “therefore,” for the conclusion proceeds from a precise argument whose most revealing feature may be its applicability to freedom of conscience alone. The narrowness is crucial to the purposes of the present study: Without that limiting context, Madison’s conclusion might easily appear conducive to a liberal state of nature narrative that confines the justifiable exercise of authority in any realm to the initial purposes of the social compact, in which case the Memorial and Remonstrance would accomplish precisely what we have just suggested he did not mean: exempting rights from the purview of majorities. Thomas Paine’s understanding of the social compact typifies the liberal interpretation:

The natural rights which [man] retains are all those in which the power to execute is as perfect in the individual as the right itself. The natural rights which are not retained, are all those in which, though the right is perfect in the individual, the power to execute them is defective. … [T]he power produced from the aggregate of natural rights, imperfect in power in the individual, cannot be applied to invade

---

5 “Memorial and Remonstrance,” *PJM* 8:299.
the natural rights which are retained in the individual, and in which the power to execute is as perfect as the right itself.\(^6\)

We are less concerned with the specific beliefs Madison and Paine espoused on freedom of conscience—on the contrary, Paine’s conclusion in the passage just quoted, that political society has no authority of matters of religion, closely tracks Madison’s views on the subject—than with accentuating the different paths by which they reached them. Note that while Paine’s analysis in the passage just quoted leads him to defend freedom of conscience, it does not depend on any qualities especially unique to that right. Paine claims that individuals do not need the protection of society in order to follow their own religious convictions, so society—in a republic, the majority—cannot regulate that realm of life. That standard might apply to any number of what Mill would call self-regarding acts, thereby isolating them from the jurisdiction of majorities.

By contrast, the analysis that leads Madison to conclude that religion is “wholly exempt” from political authority applies only to conscience and could not, consequently,

---

\(^6\) Thomas Paine, \textit{Rights of Man} (New York: Viking Penguin, 1984). Paine’s mode of argument continues to dominate many liberal interpretations of social contract theory today. See, for example, Louis Henkin: “Individual rights, then, are ‘natural,’ inherent. They cannot be taken away, or even suspended. … They do not derive from any constitution; they antecede all constitutions.” The rights individuals retain upon establishing the social contract are “determined also by what they agreed to give up in creating a political society and establishing a government. Individuals pooled some of their autonomy when they formed ‘the people,’ subjecting themselves to majority rule; the people also gave up some of their autonomy to their government, retaining the rest as individual rights and freedoms under government. … The authority granted to government was not particularized either, but its scope is defined by the purposes for which governments were formed, purposes commonly understood.” Henkin, \textit{The Age of Rights} (New York: Columbia University Press, 1990), 86-87. If Madison espoused this view, he could have dismissed religious assessments merely on the grounds that regardless of the question of their utility, the social compact was not formed for that purpose, in which case the Memorial and Remonstrance would have been a much shorter document. The fact that he felt compelled to answer the question of whether the proposed assessment served a public purpose says a great deal about his view of rights.
establish a standard for exempting other rights from majority review. The Memorial and Remonstrance begins by reprising Locke’s argument—much acclaimed in America—that religious observance demands purity of intention, which the sovereign cannot as a matter of rational possibility compel.\textsuperscript{7} Madison, quoting the similarly Lockean Virginia Bill of Rights, wrote:

\begin{quote}
[W]e hold it for a fundamental and undeniable truth, “that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.” The religion then of every man must be left to the conviction and conscience of every man, and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men.\textsuperscript{8}
\end{quote}

The crucial word is “cannot.” The literal impossibility of compelling inward religious belief separates conscience from property—indeed, from every right expressed through outward action—because there is no public good that can rationally be served by regulating it. As opposed to property—charters to which, as we have seen, could be both granted and withdrawn for the public good—society has no claim to make, no balancing act to perform, in the case of conscience. While the theoretically richest portion of the Memorial and Remonstrance is its first article’s analysis of political obligation, the bulk of the document is in fact devoted to disproving claims made by proponents of the


\textsuperscript{8} Memorial and Remonstrance, \textit{WJM} 8:299.

183
religious assessment that it would serve the public good. The fifth through 14th articles oppose the assessment on prudential grounds such as the sovereign’s incompetence in matters of conscience and the corrupting influence of public funding on religious institutions. What Madison never argues, as Dworkin might, is that claims of the public good are irrelevant: The Memorial and Remonstrance’s point is that they are unsuccessful, which was why Madison’s draft of what became the First Amendment specified that the rights of conscience could not be “on any pretext” infringed.

None of these observations is intended to suggest that Madison would have countenanced state involvement in religion were it capable of fulfilling a hypothetical public purpose. Madison generally foreclosed that possibility on the basis of equality:

---

9 On the structure of the Memorial and Remonstrance, see Munoz, op. cit.

10 PJM 8:304.

11 While Madison’s position on state involvement in religion was absolutist on almost all occasions, an exchange of memos with Jefferson in 1803 nonetheless contains an intriguing suggestion that he might have been willing to relax his stridency if a public purpose could reasonably be served. The memos concern Jefferson’s draft of a message to Congress summarizing a treaty with the Kaskaskia Indians under which the U.S. government would pay a Roman Catholic priest to provide educational and religious services to the tribe. We know from Madison’s later opposition to using public funds to pay for clergy in Congress and the military—as well as the treaty’s similarity to the religious instruction he opposed in the Memorial and Remonstrance—that he would have regarded the measure as violating the principle of religious liberty. Yet not only did Madison raise no objection, he also advised Jefferson to omit specific mention of the measure from his message to Congress because “[t]he jealousy of some may see in it a principle, not according with the exemption of Religion from Civil power &c.” It is, of course, possible if not probable that Madison’s advice was partly or even primarily political in nature. Nevertheless, it seems equally plausible that he relaxed his usual strictness because the funding could indeed serve a public function insofar as its intended purpose was diplomatic rather than religious. (See Madison’s memo of October 1, 1803, PJM-SS 5:479-81. Similarly, the “Detached Memorandum” admits that chaplains might be more justifiable in the Navy than in the Army because sailors at sea form a contained society that might have no other religious influence. (Madison nonetheless comes down against naval chaplains, stating that he prefers principled to prudential reasoning on the issue.) See “Detached Memorandum,” 762-764.
Because “all men are to be considered as entering into Society on equal conditions, as
relinquishing no more and therefore retaining no less, one than another of their natural
rights,” it was unfair to force any of them to subsidize a religious practice with which
they disagreed—a possibility that, on Madison’s account, any state involvement in
religious affairs could scarcely avoid.¹² Significantly, Madison’s proposal for the Bill of
Rights forbade the national and state governments from infringing the “equal rights of
conscience,” not the right of conscience simply.¹³ This concern with equality was the
basis of his opposition to official chaplains in both Congress and the military.¹⁴ In a
similar vein, Madison objected to presidential proclamations calling on the people to fast
or practice other religious observances, especially when these used, in his words, “the
language of injunction” rather than recommendation. The particular problem with these
proclamations was not the inherent incompatibility of religion and politics but rather the
fact that they “lost sight of the equality of all religious sects in the eye of the
Constitution.”¹⁵ But notice, first, that Madison never allowed this observation alone to
resolve the argument without simultaneously rebutting claims that a given measure would

¹² “Memorial and Remonstrance,” PJM 8:300.

¹³ “Speech Introducing Proposed Constitutional Amendments,” WJM 442. The provision applying
to the national government would have protected the “full and equal” rights of conscience. We do not
mean to attach any significance to this distinction. The point is merely that the right of conscience arose
for Madison in a social context—that is, via reciprocity.

¹⁴ “Detached Memorandum,” 762-764.

¹⁵ WJM 9:100-101. Madison noted that while he sometimes felt compelled as President to follow
this practice, his own proclamations always used the recommendatory form.
serve the public good, and, second, that his choice of equality as the basis for this objection gives it an interpersonal and distributive character that further belies any suggestion that he meant substantively to isolate assertions of individual rights from the social realm. The Memorial and Remonstrance cautions: “Whilst we assert for ourselves a freedom to embrace, to profess, and to observe the religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us.” The first phrase in the sentence would be unnecessary if Madison intended merely to isolate the individual from the majority. The obligation to respect others’ freedom of conscience arises not from their autonomy but rather from reciprocity: We are bound to respect others’ freedom of conscience because they respect ours, not because their individuality is inviolable.\footnote{To be sure, Madison did believe in something like individual autonomy in cases involving conscience. Our concern here is understanding the particular reasoning by which he reached that conclusion.}

Madison’s denial that political interference in religion could serve a public purpose—especially combined with his invocation of equality—would be sufficient to conclude the point, but the Memorial and Remonstrance extends his argument in a way that further confines it to freedom of conscience: Religion, to put the matter simply, outranks politics. Observe the particular basis of that claim:

It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe. And if a member of Civil Society, who enters into
any subordinate association, must always do it with a reservation of his duty to the general authority, much more must every man who becomes a member of any particular Civil Society do it with a saving of his allegiance to the Universal Sovereign.\textsuperscript{17}

Whereas Paine’s argument protects the internal realm of the individual, Madison’s is based on a ranking of \textit{external} obligations. Religion is exempt from civil society not because the individual is autonomous but, on the contrary, because the individual is obligated to two external entities—the Creator and society—the first of whom trumps the second. The fact that religious obligation precedes political obligation in time cannot of itself establish Madison’s point, especially since the entire basis of the Lockean social contract theory to which he is obviously indebted is that a broad array of rights that become subservient to society—such as property—antedate it as well. The key to Madison’s argument lies in its syllogistic hierarchy of associations and the obligations that attend them. These rise from “subordinate associations” to the “general authority” to the “Universal Sovereign.” Conscience is the only assertion of right one could imagine that outranks the general authority on this scale.

Conversely, and equally important, every other right deals with associations or activities—such as the individual’s possession of property—that would be located below the general authority on the same scale and thus be regulable by it. That is not to say the individual is at the mercy of the general authority—that is, the majority. We have already observed that the majority is obliged to maintain the rule of law, including in its

\textsuperscript{17} Memorial and Remonstrance, \textit{PJM} 8:299.
regulation of rights. The relevant point for our analysis is that the individual’s right of conscience actually derives from the individual’s obligation to an authority that outranks society. For another right to be comparably immune from majorities, it would have to entail obligations exceeding the individual’s obligation to society as well. No other right contemplated in Madison’s writings meets that criterion. The point, in sum, is not that society is not entitled to interfere with the individual. Madison indicates clearly that it can. What society is not entitled to do is interfere with the Creator’s superior claim to the individual’s allegiance.

The majoritarian basis of Madison’s argument is further evident not merely in its content but also in the fact that he makes an argument to begin with—and to whom it is addressed: namely, the legislature. Recall that one consistent feature of contemporary rights discourse is the assumption that the individual is not obligated to explain himself to the majority. The assertion of a right constitutes its own explanation. But the preamble to the Memorial and Remonstrance plainly assumes the burden not just of “declar[ing] the reasons by which we are determined” to oppose the policy in question, but also of persuading a political institution—the legislature—of their justice.18 Even in the course

18 On Madison’s reasoning, a legislature would be the proper forum for such a discussion because defining the precise boundaries of the right of conscience requires prudential judgment. In an 1832 letter, Madison attributed his own absolutism on freedom of conscience to the impossibility of “trac[ing] the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst. by an entire abstinence [sic.] of the Gov’t from interference in any way whatever. . . .” In other words, his absolutism bore a prudential dimension: It was better, he concluded, to err on the side of caution than to risk violating the right of conscience. What Madison did not contend was that the boundaries of freedom of conscience were absolute and self-evident in themselves. See WJM 9:485.
of describing the proposed religious assessment as a potential violation by the majority of minority rights, the Memorial and Remonstrance acknowledges the legitimacy of majority rule: “True it is,” the first article says, “that no other rule exists, by which any question which may divide a society can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.”

The point of the document was to declare that the majority would be making such a mistake, not to deny its authority to do so. Jefferson’s Virginia Statute for Religious Freedom”—which Madison steered through the legislature and later described as the best synopsis of the principle of religious liberty that “words can admit”—announced a similar purpose for itself:

And though we well know that this Assembly, elected by the people for their ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operations, such act will be an infringement of natural right.

Significantly, Madison praised this statute as “having been the result of a formal appeal to the sense of the Community and a deliberate sanction of a vast majority,” whereas the

19 “Memorial and Remonstrance,” PJM 8:299.

20 “A Bill for Establishing Religious Freedom” in Bruce Frohnen, ed., The American Republic: Primary Sources (Indianapolis: Liberty Fund, 2002), 331. For Madison’s praise of the statute, see the “Detached Memorandum.”
Memorial and Remonstrance warned that the community’s views on the religious assessment were not yet fully known, and “a measure of such singular magnitude and delicacy [as the religious assessment] ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens. . . .”21 The need to appeal to the community on matters of religious freedom was especially important because public support was the only reliable protector of the right of conscience. “And in a Gov’t of opinion, like ours,” he wrote in 1822, “the only effectual guard must be found in the soundness and stability of the general opinion on the subject.”22

This self-conscious appeal to the community to resolve questions of rights refutes the assumption that Madison believed the purpose of declaring individual liberties was to isolate them from popular majorities. Commentators would later assume that Madison drafted the national Bill of Rights to empower the courts to break the force of public opinion,23 but the Memorial and Remonstrance—which repeatedly invokes the Virginia Bill of Rights—conspicuously lacks any reference to the judiciary. On the contrary, it assumes that the proper forum for debating whether a religious assessment would violate

---

21 “Memorial and Remonstrance,” WJM 8:303. The reference to the Statute for Religious Freedom as having resulted from an appeal to the community is contained in the “Detached Memorandum,” 759-766.

22 Madison to Edward Livingston, July 10, 1822, WJM 9:98-103. Note the importance of “stability,” a theme we shall encounter in exploring Madison’s views of constitutional interpretation below: The meaning of the Constitution was ultimately to be determined by persistent and settled public understandings of it.

23 See, inter alia, Robert A. Rutland, The Birth of the Bill of Rights: 1776-1791 (Boston: Northeastern University Press, 1983), 219. We shall encounter this interpretation in more detail in discussing the federal Bill of Rights below.
the right of conscience is the legislature. The Memorial and Remonstrance does, to be sure, deny that “the will of the Legislature is the only measure of their authority,” but his choice of the word “will” is revealing. We have already seen Madison counterpose “will” unfavorably to “reason.” The suggestion may be that one purpose of appealing to the legislature on questions of rights is to slow its deliberations and enable reason to prevail over an impulsive will. Failing that, the Memorial and Remonstrance says its purpose is to appeal to the very entity Madison is often assumed to be trying to thwart: the majority itself. The document warns that the views “of the Representatives or of the Counties” (i.e., of public officials) may not yet reflect that of “the people,” but in any case, “[o]ur hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence that a fair appeal to the latter will reverse the sentence against our liberties.”

This passage in many ways encapsulates Madison’s treatment of rights. “Due consideration” may relieve a legislature’s impulse to violate rights. If the legislature violates rights anyway, the result is “disappointing” but not illegitimate—and the proper remedy is an appeal to the people at the next election. Such, we may now see, was also

24 See “Universal Peace” (n. 90 in Chapter 2 above).

25 “Memorial and Remonstrance,” PJM 8:303.
the remedy Madison sought to what he believed to be the young republic’s first major test of freedom of political expression: the Alien and Sedition Acts of 1798.

4.3. **Political Expression**

Madison’s views on the freedoms of speech and press, especially as he expressed them in reaction to the Alien and Sedition Acts, initially seem as doctrinaire as those he espoused on the right of conscience. Supporters of the acts defended them as not merely necessary in the chaotic political environment surrounding the Quasi-War with France but also as liberalizing measures that relaxed common law standards for freedom of press by making truth a defense against sedition. Madison countered that the First Amendment was “a denial to Congress of all power over the press.” The freedoms of press and conscience, he added, “rest equally on the ground of not being delegated by the constitution, and consequently withheld from government.” But press and conscience were also equal in another sense: Madison reflected the broad consensus of his time in

---

26 To my knowledge, Madison never used the phrase “political expression” to refer to the rights expressed in the First Amendment. I employ it here and throughout merely, first, to encapsulate the freedoms and speech and press—the differences between which are important but not germane to our concerns in this section—and, second, to set aside the question of whether the First Amendment protects non-political speech. It clearly never occurred to Madison that it would, and as we shall see, his analysis of the topic applies uniquely to political expression.


29 Ibid., *PJM* 17:346.
assuming the parameters of each were to be determined by the community and that
majorities retained ultimate authority to settle disputes regarding them.

Indeed, it could hardly be any other way, for the phrases “freedom of the speech”
and “freedom of the press” already require definition, and hence parameters, that could
only come about from the deliberation and prudential judgment that Madison associated
with the legislative branch of government. The need for definition makes absolutism on
these rights something of a non sequitur—what Mary Ann Glendon describes as “the
illusion of absoluteness.” Alexander Meiklejohn frames the problem in the following
way:

[The First Amendment] does not forbid the abridging of speech. But, at the same
time, it does forbid the abridging of the freedom of speech. It is to the solving of
that paradox, that apparent self-contradiction, that we are summoned if, as free
men, we wish to know what the right of freedom of speech is.31

That paradox was known to Madison’s contemporaries. Benjamin Franklin, a printer
who must have reflected on the matter in his professional capacity, candidly admitted that
“few of us, I believe, have distinct Ideas of its [freedom of the press’] meaning,” adding
that he personally would be willing to exchange his own right to libel others in exchange
for protection from others libeling him.32 Such an exchange was precisely what

30 Glendon, Rights Talk, op. cit. (see Chapter 2). On the communal setting in which rights were
typically contemplated, see also Barry Alan Shain, The Myth of American Individualism: The Protestant

31 Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (New York,
Harper & Brothers, 1960), 21 (emphasis in original).

32 Rutland, Birth of the Bill of Rights, 91.
distinguished the civil right of free speech from its natural counterpart. In the state of nature, the natural law permitted individuals more or less to do as they pleased but also restrained them from injuring one another. Because individuals possessed property in their reputations, libel constituted an injury in the same way theft of physical property would. Civil society arose from the difficulty of enforcing those restraints, just as it arose from the impossibility of resolving property disputes peacefully. Philip Hamburger argues that Americans broadly understood civil law to permit the limits natural law already placed on freedom of speech in the pre-political condition, including restraints on libel and obscenity. As Hamburger notes, the Virginia Ratifying Convention of 1788 thus saw no inconsistency in recommending that the Constitution be amended to protect the freedom of speech and provide legal remedies for individual injuries to one’s “person, property, or character.”

The fact that Madison cited the convention’s resolution on freedom of speech in the course of arguing against the Sedition Act indicates his familiarity with and approval of it. The question, of course, was where precisely the boundaries of political

33 The idea of having property in one’s reputation was commonplace at the time. See, for example, Blackstone’s Commentaries: “The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, limbs, his body, his health, and his reputation.” Blackstone, Commentaries on the Laws of England, Volume I (San Francisco: Bancroft-Whitney Company, 1915), 129.


expression were to be fixed, not whether limits were permissible. The Virginia Report acknowledges this fact explicitly. What it denies is the claim, made by adherents of the Sedition Act, that British common law was the relevant regulative standard:

The committee [that produced the report] are not unaware of the difficulty of all general questions which, may turn on the proper boundary between the liberty and licentiousness of the press. They will leave it therefore for consideration only, how far the difference between the nature of the British government, and the nature of the American governments, and the practice under the latter, may show the degree of rigour in the former to be inapplicable to, and not obligatory in the latter. … [In the United States], magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible. Is it not natural and necessary, under such different circumstances, that a different degree of freedom, in the use of the press, should be contemplated?36

Note that, as in the case of freedom of conscience, Madison declines to defend freedom of speech on the basis of individual autonomy. Its relevance—and, crucially, the standard for judging its proper extent—lies in the purpose it serves in society, which is facilitating majority deliberation. For that reason, Madison continued, the British enjoyed especially wide-ranging freedom of the press when commenting on “the responsible members of the government, where the reasons operating here [that is, the need for free commentary to facilitate public deliberation on officeholders the people have the power to remove], become applicable there. . . .”37 On another occasion,

---

36 “Virginia Report,” *PJM* 17:337. Jefferson, too, acknowledged the permissibility of restraints on the press. His Kentucky Resolutions complained that such determinations were the province of the state governments. In forming the Constitution, Jefferson claimed, the people or the states retained “to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed. . . .” (Frohnen, 400.)

Madison associated freedom of political expression with “the nature of republican government”—i.e., as we have seen, majority rule—in which “the censorial power is in the people over the government, and not in the government over the people.”

He did claim an individual right to property in one’s “opinions,” but as in the case of the equal rights of conscience, that entitlement was established in a social context: property “embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.”

Similarly, Madison’s draft of the Bill of Rights, like the state bills of rights on which it was based, justified itself with exactly the type of apologia contemporary discourse assumes is unnecessary where individual liberties are concerned: the freedom of the press would be inviolable not in and of itself but rather because it was “one of the great bulwarks of liberty.” The Sedition Act, Madison further explained in the Virginia Resolutions, should arouse “universal alarm, because it is leveled against that right of freely examining public characters and measures, and of free communication among the

38 Madison in Congress, November 17, 1794, *PJM* 15:390-392. The context was Washington’s condemnation of so-called “self-created societies.”

39 “Property,” *PJM* 14:266

40 “Speech Introducing Bill of Rights,” page cite to *PJM* 12:201. Madison’s draft also limits what became the First Amendment right of free assembly to “assembling and consulting for their common good”—this as opposed to asserting an inherent right to assemble for any reason. In all these respects, Madison followed the form not only of the Virginia Bill of Rights but also of those of other states. North Carolina, for example, joined Virginia in calling the freedom of the press “one of the great bulwarks of liberty,” while Massachusetts specified that “the liberty of the press is essential to the security of freedom. . . .” See Donald S. Lutz, “The State Constitutional Pedigree of the U.S. Bill of Rights,” *Publius* 22.2 (1992): 19-45.
people thereon, which has ever been justly deemed, the only effectual guardian of every other right.\textsuperscript{41} Equally important, these benefits had to be weighed against the risks of an abusive press. In observing that it had been the American practice to resolve these questions on the side of license rather than restriction, much as he had advocated should be done in the case of freedom of conscience, Madison tacitly acknowledged their prudential character:

Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true, than in that of the press. It has accordingly been the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour of those yielding the proper fruits.\textsuperscript{42}

The dispute, again, concerned how much latitude the social purposes of freedom of speech required. But when Madison denied Congress any power over the press—rejecting the Federalist argument that the freedom of political expression could be regulated so long as it was not abridged—he did not mean that the freedom in question could admit of no boundaries. He meant that once the boundaries were determined—and \textit{freedom of} the press or speech was thereby established—it was to receive absolute protection.\textsuperscript{43}

\textsuperscript{41} “Virginia Resolutions,” \textit{PJM} 17:189. Note that public discussion—that is, appeal to majorities, not the courts—is the “only” effective guardian for liberties.

\textsuperscript{42} “Virginia Report,” \textit{PJM} 17:338.

\textsuperscript{43} As we have seen, Madison also argued that the freedom of speech, like the freedom of conscience, had been “withheld” from the government. However, he referred to the specific fact that the Constitution did not enumerate a Congressional power over either religion or speech. In speaking of a
The fact that such decisions required prudential judgments made the task of adjusting the boundaries of rights the proper sphere of the legislature and therefore of popular majorities. The case of British common law, which supporters of the Alien and Sedition Acts invoked in their defense, supplies an illustration. Madison consistently argued that it was up to the legislature, and thus majorities, to determine the content of a uniquely American common law. Madison thus objected that empowering courts to undertake that endeavor “could confer on the judicial department a discretion little short of a legislative power.”44 The more liberal standards of common law that Madison advocated for America involved “questions of expediency & discretion,” thus placing them inherently within the province of Congress—not, significantly, the courts.45 In an unrelated context that nonetheless illuminates Madison’s belief that areas requiring detailed or prudential judgments were appropriate for the legislature alone, the Virginia Report warns that “those who place peculiar reliance on the Judicial exposition of the constitution, as the bulwark provided against undue extensions of the Legislative power” should resist excessively broad interpretations of the necessary and proper clause because it would thereby no longer be “sufficiently precise and determinate for judicial


45 Madison made this remark during his retirement in a letter to Peter S. Duponceau, who had claimed that the courts could legitimately apply British common law in the United States. The context was not the Sedition Act. Our point in quoting Madison’s reaction to Duponceau is that he believed Congress and not the courts should set the common law standards for constitutional interpretation—which had in fact been the relevant debate with respect to the Sedition Act.
cognizance and control.” If the necessary and proper clause was rendered unlimited, its scope would involve “questions of mere policy and expediency, on which legislative discretion alone can decide, and from which the judicial interposition and control are completely excluded.” These were the kind of questions involved in determining the latitude guaranteed by the freedom of political expression—questions it was up to the community, acting through the legislature, to resolve.

Indeed, one of the most striking features of the debate over the Alien and Sedition Acts is that it seems not to have occurred to even their most strident opponents to present their grievances in court. Madison did hope, as we shall see in more detail below, that individual judges and juries would derail prosecutions under the Sedition Act, but he never contemplated the courts setting aside the law per se. On the contrary, the entire

46 “Virginia Report,” PJM 17:335. Madison made a similar point with respect to the general welfare clause in his 1816 veto of the Bonus Bill: An essentially unlimited view of the general welfare clause “would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.” (See WJM 8:386-388.)

47 On this point, see Adrienne Koch’s and Harry Ammon’s account of a petition Jefferson drafted in collaboration with Madison calling on the legislature to have jurors elected by the public rather than chosen by what they took to be politicized courts. “These jurors [Koch and Ammon write] would be able to hamstring the activities of Federalist dominated courts.” See Koch and Ammon, “The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties,” The William and Mary Quarterly, Third Series, 5.2 (1948): 145-176. The quoted passage appears on page 154. On the role of judges, the impeachment of Justice Samuel Chase is illustrative. One of the charges against him stemmed from his allegedly biased conduct of James Callender’s trial under the Sedition Act. He was accused of preventing Callender from obtaining a fair hearing, but no one suggested he ought to have overturned the underlying law itself. (Madison, to be clear, did not express himself on the Chase impeachment specifically.) See Richard B. Lillich, “The Chase Impeachment,” The American Journal of Legal History 4.1 (1960): 49-72. Lillich also reports, incidentally, that one of the offenses Jefferson thought to be impeachable was Chase’s “seditious” charge to a grand jury in Baltimore.
purpose of his Virginia Report was to rebut resolutions passed by other states that said Virginia had no business rousing public opinion against an act of the national government. Rhode Island, for example, had claimed that the Constitution “vests in the federal courts exclusively, and in the Supreme Court of the United States ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States.” Madison, however, insisted that the Virginia Resolutions were intended not to disrupt the constitutional operation of the government but rather simply to appeal to public opinion. They were “expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection.” The Virginia Report concluded on a similarly rhetorical note: The Virginia Assembly “do hereby renew their protest against ‘the alien and sedition acts’ as palpable and alarming infractions of the constitution.” Madison would later insist that the Virginia Resolutions and Report meant to serve no other function than urging the people to undo the Alien & Sedition Acts by majoritarian processes:

Concert among the States for redress against the alien & sedition laws, as acts of usurped power, was a leading sentiment, and the attainment of a concert the immediate object of the course adopted by the [Virginia] Legislature, which was that of inviting the other States “to concur in declaring the acts to be unconstitutional, and to co-operate by the necessary & proper measures to be concurrently and co-operatively taken, were meant measures known to the Constitution, particularly the ordinary controul of the people and Legislatures of

---

48 Frohnen, 403.

49 Virginia Report, PJM 17:348.

50 Ibid., PJM 17:350.
the States over the Gov’t of the U.S. cannot be doubted; and the interposition of this controul as the event showed was equal to the occasion.51

His determination to limit the Virginia Resolutions’ scope to this rhetorical purpose is accentuated by Madison’s self-conscious choice not to join Jefferson’s Kentucky Resolutions in declaring the Alien and Sedition Acts to be “utterly void and of no force.”52 Whereas Jefferson declared a right of the states to “nullify” federal laws, Madison opted for the more nebulous right of the states to “interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them.”53 Madison would later say that even his somewhat more conservative approach was appropriate in “extreme cases only, and after

51 Madison to Edward Everett, August 28, 1830, WJM 9:383:402 (emphasis in original). Madison’s attempt here to confine the meaning of “interposition” to calling on the people to speak out against the Alien and Sedition Acts was arguably self-serving. The meaning of “interposition” was always nebulous, but it seems to have been understood in 1798 and 1799 to mean something more than merely speaking out or voting the Federalists out of office. Moreover, in a separate but contemporaneous letter, Madison said the “necessary and proper” measures included “the control of the Legislatures and people of the States over the Congress.” (See footnote at WJM 9:387.) This reference to the “Legislatures” resurrects the possibility that he meant for the states to interpose in some official capacity. Madison’s communications on this topic are obviously informed by his deep alarm at the nullification controversy, perhaps to the point of attempting to roll back his own meaning in 1798 and 1799. The best we can do is attempt to ascertain the general tendency of Madison’s reflections, which do seem to have been that the Virginia Report and Resolutions were rhetorical appeals.

52 Frohnen, 401. Jefferson sent Madison a draft of his more radical Kentucky Resolutions on November 17, 1798. Madison’s Virginia Resolutions are dated in his papers on December 21, likely soon after he received Jefferson’s draft. The Virginia Resolutions as initially introduced by John Taylor declared the Alien and Sedition Acts to be not merely “unconstitutional” but also “not law, utterly null, void and of no force or effect.” Jefferson, who received Madison’s original draft from a mutual friend, had insisted on adding this phrase. See Editor’s Note, PJM 17:190. Madison later recalled approvingly that the Virginia Legislature deliberately struck the words declaring the Alien & Sedition Acts to be “unconstitutional.” See Madison to Edward Everett, August 28, 1830, WJM 9:402.

53 “Virginia Resolutions,” PJM 17:308.

201
a failure of all efforts for redress under the forms of the Constitution. . .”

The form of the Constitution under which Virginia sought redress was an appeal to public opinion. Madison had, in fact, wanted both the Virginia Resolutions and the Virginia Report to be offered in the name of the people of the state “alone” so as to avoid any suggestion that the state was objecting to the Alien and Sedition Acts in its corporate capacity. He argued to Jefferson at the time that the power to determine the constitutionality of an act of the national government lay with the “states”—whose people had consented to the Constitution via conventions—but not their “legislatures.” Phrasing the claim in this way “would leave to other States a choice of all the modes possible of concurring in the substance [of the Virginia Resolutions], and would shield the Genl. Assembly agst. the charge of Usurpation in the very act of protesting agst the usurpations of Congress.”

The Virginia Resolutions and Report were ultimately, he insisted, an appeal by the people of Virginia to the national majority to settle the boundaries of the right of political expression liberally. That strategy, Madison later reflected, succeeded, triggering a backlash against the Adams administration that resulted in its ouster, the Sedition Act’s expiration and presidential pardons for those convicted under it. Significantly for our

---

54 Madison to Joseph C. Cabell, August 16, 1829, PJM 341-345.

55 Madison disclosed this desire in an 1829 essay (see WJM 9:352) in which he blamed much of the subsequent confusion over nullification to the omission of that single word from the Virginia Report and Resolutions.

analysis, Madison—in the course of denying Calhoun and other nullifiers the right to his legacy—would later describe Virginia’s appeal to popular majorities as a “constitutional remedy” available against any unwarranted assertion of national authority: An aggrieved state had recourse to “constitutional remedies such as have been found effectual; particularly in the case of alien & sedition laws, and such as will in all cases be effectual, whilst the responsibility of the Gen’l Gov’t to its constituents continues: Remonstrances & instructions—recurring elections & impeachments; amend’t of Const. as provided by itself & exemplified in the 11th article limiting the suability of the States.” Madison’s reference to aggrieved states and to the 11th Amendment pertained to the nullification controversy specifically. For our purposes, the point to observe is that he believed complaints over the Alien & Sedition Acts—and thus the proper boundaries of the right of political expression—were appropriately, and successfully, settled by an appeal to the majority.

The power of delay is also latent in Madison’s analysis, which may be seen by asking the following question: Given his repeated assertions that majorities would present the most serious threat to rights, why would he seek to redress those violations by an appeal to the same majorities? The answer is twofold. First, in the specific instance of the Alien and Sedition Acts, Madison believed power was being usurped by a cabal in

57 Madison’s 1829 “Outline,” WJM 9:352-353. Also significant for our analysis of temporal majoritarianism, Madison described the Alien & Sedition Acts as having been “crushed at once” by the public outcry—a process that actually took two years. See Madison to Spencer Roane, May 6, 1821, WJM 9:57-58 (emphasis added).
Washington that genuinely did not reflect majority opinion. However, and second, in a case in which a majority supported such a measure, it might be possible to slow its consideration and overcome its impulsiveness by reminding it that it was trampling rights that all had agreed to abide. Such an appeal might work if it occurred against a backdrop of broad consensus on what those rights were. Madison hoped a national Bill of Rights might facilitate precisely that.

4.4. **The Bill of Rights as Majoritarian Instrument**

Many if not most 20th century commentators have assumed that the Bill of Rights was intended as a tool the judiciary could use to protect individuals against popular majorities. Beard described the judiciary as the anti-majoritarian linchpin of the entire constitutional enterprise. “The radicals of 1788,” Charles Warren adds, including Madison among that number, “knew full well that only through the Courts of law could these rights be enforced. One does not have to infer such knowledge; for they themselves [again including Madison] specifically stated that the chief value of the Bill of Rights lay in the existence of the Judiciary.”58 Warren joins many other commentators in citing what does, we must acknowledge, seem to be a rather emphatic endorsement of judicial review on the basis of the Bill of Rights. Madison said in introducing the proposal before Congress:

---

If [these protections] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.\(^59\)

But if Madison intended the Bill of Rights to be available to the judiciary as such a weapon, the courts were remarkably slow to take up the sword. As Charles Epp documents, the Supreme Court decided almost no cases on the basis of the Bill of Rights before the 20\(^{th}\) century.\(^60\) Madison himself was reticent at best about the proposal. When Jefferson first confronted him about the absence of a Bill of Rights in the proposed Constitution, Madison replied with essentially the same argument Hamilton had made in Federalist 84: A Bill of Rights would be dangerous, first, because it might imply that rights not specified were not held, and second, because prohibiting the government from exercising powers it had not been explicitly granted might imply the existence of latent powers beyond the enumeration of Article I, Section 8.\(^61\) By the time he introduced the Bill of Rights, the best Madison could say for his own proposal was that it might not be “altogether useless.”\(^62\) “[I]t was,” Donald S. Lutz reflects, “perhaps the most lukewarm


introduction in political history.”63 By late in life, Madison’s view of his achievement was hardly more aggrandized. The amendments enshrined in the Bill of Rights were, he reflected in 1821, “safe, if not necessary” and “politic if not obligatory. . . .”64

Before considering the limited uses Madison believed a Bill of Rights might serve, it may be worth pausing to observe that the fact that he introduced the amendments to begin with reflects his commitment to majority rule. We are accustomed to dismissing any action politicians take in response to public opinion as crass pandering, but far from the image of Madison as an aristocrat who believed a representative’s function was to resist majorities, he took his campaign promise to introduce a Bill of Rights to be a serious obligation. While Madison’s speech introducing the proposed amendments did speak of the need to protect minorities against majorities—although not, as we shall see, in quite the sense in which those remarks are typically understood—he did not invoke that explanation for the Bill of Rights again in the extensive Congressional debate that followed. The majority of times he engaged in debates over wording, he argued at least in part—and often primarily—that a given alternative should be preferred not because it would do more to control majorities but rather because it was the language the public seemed to prefer. His speech of August 14, 1789, was typical: He “insisted that the


64 Madison to John G. Jackson, December 27, 1821, WJM 9:75.
principal design of these amendments was to conciliate the minds of the people. . . .”

True to his belief that the only dependable guarantor of the Constitution was establishing public opinion in its favor, Madison counseled his colleagues repeatedly that the amendments were advisable in order to build support for the new regime, as he did on August 13: “If this is an object worthy the attention of such a numerous part of our constituents, why should we decline taking it into our consideration, and thereby promote that spirit of urbanity and unanimity which the government itself stands in need of for its more full support?”

Still, Madison did believe a Bill of Rights might serve a purpose beyond mollifying the lingering suspicions of Anti-Federalists—a purpose directly relevant to temporal majoritarianism: In those cases in which majorities were directly involved in policy-making, a Bill of Rights might help to establish a political culture that would disincline them to abuse and provide a common understanding of rights that would facilitate appeals to the majority’s sense of fair play. Once this common understanding was established, it would also serve a delaying function that would help defuse any passions that were fueling attempts to violate rights. In these senses, Madison viewed the Bill of Rights less as a control on majorities than as a majoritarian instrument—one that

---


both reflected and, as Patrick J. Deneen notes, came to enhance his comfort with “the
democratic capacities of the populace. . . .”\textsuperscript{67}

This rhetorical and educative as opposed to judicial function of the Bill of Rights
is first evident in the fact that many of Madison’s proposals—the ones, in fact, that he
placed under the heading “Bill of Rights”—could scarcely serve any other purpose, and
least of all could they be legally enforceable. Madison proposed a list of nine
amendments, one of which—his fourth—contains most of the provisions we today
identify as the Bill of Rights. His first would have amended the preamble to the
Constitution—a section whose contents he elsewhere said could not trump the main body
of the document\textsuperscript{68}—with such obviously rhetorical declarations as, “That all power is
originally vested in, and consequently derived from, the people,” and “[t]hat Government
is instituted and ought to be exercised for the benefit of the people. . . .”\textsuperscript{69}Interestingly,
after listing all nine of his proposals, Madison said: “The first of these amendments”—
i.e., the explicitly rhetorical one—“relates to what may be called a bill of rights,”\textsuperscript{70} a


\textsuperscript{68} See his references to the phrases “we the people” and “general welfare” in Madison to M.L. Hurlbert, May 1830, WJM 9:370-375.

\textsuperscript{69} Madison in Congress, June 8, 1789, PJM 12:197-209.

\textsuperscript{70} Ibid., PJM 12:203.
description he did not apply to the more specific and therefore enforceable protections that we today have come to call by that name.

Why, then, did he describe the courts, empowered with a Bill of Rights, as “an impenetrable bulwark”? To understand the phrase, we must pay careful attention to the structure of the speech in which he made the remark, using a contemporaneous dispatch to Jefferson to clarify some key phrases. In doing so, one theme we shall notice is that those instances in which he claimed a role for the courts did not apply to situations of direct majority engagement. The speech and letter identify two distinct threats to individual liberties—a distinction we have already seen via Federalist 10 and that we shall see once more in exploring the separation of powers below: first, abuses arising from within the regime and committed against the people; and second, abuses committed against the minority by majorities using the apparatus of government as a weapon. The first kind of abuse, in turn, he subdivided into threats presented by the executive and those presented by the legislature. The state Bills of Rights, for example, were directed “sometimes against the abuse of the Executive power, sometimes against the Legislative, and, in some cases, against the community itself; or, in other words, against the majority in favor of the minority.”\footnote{Speech Introducing Bill of Rights, PJM 12:204.} Bills of Rights had traditionally been directed against the plenary power of monarchs, but the American system of government presented different threats. We must examine this classification of dangers at length:
In our Government it is, perhaps, less necessary to guard against the abuse in the Executive Department than any other; because it is not the stronger branch of the system, but the weaker. It therefore must be leveled against the Legislative, for it is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper. But I confess that I do conceive, that in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the Legislative body. The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority.\(^72\)

The first thing we notice is Madison’s tacit assumption—suggested by the use of the transitional word “[b]ut” in the sentence beginning, “But I confess”—that Bills of Rights naturally apply to abuses committed by the regime against the people, not those committed by majorities against minorities. Writing privately to Jefferson, Madison in fact employed this distinction not as a reason to enact a Bill of Rights but rather as a reason he did not believe a Bill of Rights to be necessary: It would not, he wrote, deal effectively with abuses committed by majorities.

I have not viewed [a Bill of Rights] in an important light … because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments to real power lies in the majority of the Community, and the invasion of private rights is chiefly [sic.] to be apprehended, not from acts of Government contrary to

\(^72\) Speech Introducing Bill of Rights, *PJM* 12:204.
the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.\textsuperscript{73}

Despite his skepticism, Madison proceeded in the Congressional speech to speculate that a Bill of Rights might help restrain majorities:

> It may be thought that all paper barriers against the power of the community are too weak to be worth of attention. I am sensible they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defence; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might otherwise be inclined.\textsuperscript{74}

In other words, the purpose a Bill of Rights might serve in cases of majority abuse was facilitating appeals to the majority, and it would do so by means of temporal majoritarianism: A Bill of Rights might both prevent majority abuses by instilling a common understanding of rights and providing occasion for majorities to stop and think. Again, we need not assume a long delay. If a common understanding of rights enables even a moment’s reflection, that might be sufficient to, as it were, break the majority’s trance. Moreover, this educative function would perform a key role in facilitating constructive majority deliberation on the issue of rights.\textsuperscript{75} One reason contemporary

\textsuperscript{73} Madison to Jefferson, October 17, 1788, \textit{PJM} 11:295-300. The passage after the ellipsis is numbered as the fourth reason Madison provides for why he did not believe a Bill of Rights to be important. The first three reiterated the concerns Hamilton expressed in Federalist 84.

\textsuperscript{74} Madison in Congress, June 8, 1789, \textit{PJM} 12:204-205.

\textsuperscript{75}
conversations about rights are often unproductive is that the consensus Madison envisioned building on what precisely constitutes a right, something we have already seen requires definition and therefore deliberation, has broken down—in no small part because the courts have, in assuming this role, relieved majorities of the necessity of engaging in the conversation. In the absence of such a consensus, rights discourse consists primarily of parties lobbing assertions of rights at one another with no common vocabulary to guide the conversation and help them evaluate one another’s claims.

Madison believed, moreover, that productive majority deliberation was the only reliable guarantor for rights. Rights, he assumed, were inherently fragile as long as they lacked public support, a belief borne out by public reactions to rights discovered and imposed by the courts today. As Gerald Rosenberg has shown, attempts to impose change through the courts have generally been ineffective and have often produced backlashes that resulted in the rights they sought to establish being even further curtailed.\(^76\) Partisans of the “rights revolution” have tended to suggest there is a certain indignity in forcing individuals into the public square to plead for what supporters of individual rights assert should naturally be theirs.\(^77\) The question Madison forces us to


\(^{77}\) On the other hand, as Glendon (Rights Talk) and others have argued, the collapse of discourse that has occurred around the surge in rights claims is not conducive to dignity either.
confront, however, is not whether it should be necessary to plead for rights—although we have seen evidence to suggest he did indeed believe argumentation on the subject was both unavoidable and appropriate—but rather on what basis they are apt to be left more secure. Referring the issue to majorities and thus drawing the debate into the public square has the effect also of drawing individuals out of their otherwise atomized modern-day realms, thereby humanizing, so to speak, their grievances. Madison’s assumption is that Americans will respond to such grievances reasonably—which is, of course, open to debate. But Madison’s reply would likely be that if the population of a republic is not capable of behaving reasonably even in circumstances that dissipate passions, rights are a lost cause regardless.

The Supreme Court’s decision in the case of Goldman v. Weinberger supplies an illustration of how Madison envisioned majorities handling the issue of rights. The case pertained to Simcha Goldman, an Air Force officer and rabbi who was instructed by a superior that his practice of wearing a yarmulke violated military regulations prohibiting the wearing of non-uniform headgear. Goldman sued, asserting a First Amendment right to wear religious garb; the Department of Defense responded that the regulation in question pursued a reasonable military interest in uniformity of appearance. The fact that Goldman argued that the yarmulke was “unobtrusive” while the military asserted its need

to enforce uniformity demonstrates that the boundaries of rights turn on the kinds of prudential questions to which Madison believed the judiciary to be incompetent. We need not speculate as to what position Madison would have taken on this particular case to note how it was resolved: The Supreme Court ruled against Goldman, but Congress subsequently decided to change the uniform regulations legislatively, thereby permitting the officer to wear the yarmulke. It was this latter mode of resolution that Madison generally preferred, both on the grounds that the balancing act inherently involved was the proper province of the legislature and that the rights of an individual like Goldman would stand on sounder footing if they were attained through a persuasive and deliberative process that engaged rather than circumvented majorities. The contemporary rights theorist might be inclined to argue that Goldman should not have had to plead with the community for the right to observe his religion. The thrust of Madison’s rights theory, by contrast, would respond, first, that the community has an interest in an effective and disciplined military and is thus entitled to weigh the pros and cons of the issue; second, that whether Goldman should or should not have to plead for his rights, there simply is no alternative in a republic; and third, that Americans are generally apt to respond reasonably to reasonable requests, especially insofar as the Bill of Rights provides them with a shared vocabulary—as opposed to merely bald assertions of rights—on the basis of which to resolve the issue.79

79 The issue of same-sex marriage provides an equally apt, if more volatile, example. Beginning in the early 1990s, partisans of same-sex marriage began arguing in court that the equal protection clause of
We note, once more, that Madison’s assumption of reasonability would be completely pointless if, according to the common misunderstanding, he viewed human beings as wholly depraved creatures unable to bear the rigors of self-government without succumbing to constant temptation. One reason, again, that majorities would tend to behave reasonably is that the Bill of Rights might disrupt their passions just long enough to enable them to take note of the promises they have made to others and their own long-term interest in those promises being kept to themselves.

This temporal dimension became even more explicit when Madison made the same point to Jefferson. A Bill of Rights might, he wrote, serve two purposes:

1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion. 2. Altho’ it be generally true as above stated that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter sources; and on such, a bill of rights will be a good ground for an appeal to the sense of the community.

the 14th amendment entitled them to what amounted to a right to marry. One need not espouse any particular view on the underlying issue to see that the result was a dramatic backlash that resulted in the Defense of Marriage Act at the federal level and a wave of state constitutional amendments that have, on the whole, curtailed rather than expanded rights. By contrast, pursuing such claims at the ballot box requires those who wish to marry to persuade their neighbors to permit them to do so. A supporter of same-sex marriage might believe same-sex couples should not have to ask permission but might also readily see that such a process is likelier to be successful, especially insofar as it forces the community to confront the human impact of the issue more directly. Many voters who might react negatively to the more impersonal milieu of a court case might be likelier to be persuaded if they recognized that many of them have friends, neighbors or relatives who are affected adversely by the restrictions. Again, I emphasize that the intent here is not to enter this controversial debate—even less to project Madison into it—but rather to show how, on Madisonian grounds, the right in question is likelier to be established securely.

Notice that Madison pivoted between points one and two from his concern with abusive majorities to his concern with abusive regimes. He made the same turn at the identical point in the speech and, crucially, did not return to the theme of abusive majorities—so that, as we shall presently see, when he reached the description of the judiciary as an “impenetrable bulwark,” he referred not to its impenetrability against popular majorities, something he never believed either empirically or normatively, but rather to its potential to control abuses arising from within the regime.

The first issue Madison tackled in this next section of the speech was whether Congress, having only been granted 18 enumerated powers, needed to be restrained from exercising what would seem to be extraneous ones. His answer was yes, because Congress’ discretion to implement its enumerated powers could lead to the kinds of abuses against which a Bill of Rights might protect. Madison supplied one specific example: Congress might enact a law providing for general warrants—as opposed to those directed against specific premises on specific evidence—in order to ensure taxes were properly collected.\footnote{Madison in Congress, June 8, 1789, \textit{PJM} 12:205-206.} It is this kind of abuse that we can readily imagine the judiciary overturning and to which Madison referred in describing the courts as an impenetrable bulwark. By contrast, the kinds of abuses that majorities might commit against minorities—such as violating the right of conscience—are ones we have already
seen that Madison thought best handled by appeals to the majorities themselves.  

We are now in a position to see the significance of Madison’s remark about the judiciary quoted in full context: “[The courts] will be an impenetrable bulwark against every assumption of power in the Legislative or Executive”—not every assumption of power by an abusive majority. Indeed, had Madison meant to refer to majorities rather than the regime, he would be guilty not simply of inconsistency but of incoherence, for in the same speech—as in the same letter—he denied the possibility of restraining majorities by any means other than appealing to them directly. Reflecting on the Alien and Sedition Acts during his retirement, he reiterated both the distinction between abuses committed by the majority and those committed by the regime, as well as his belief that majorities could be controlled only by appeals to their own reason. Note the use of the word “recollections”—i.e., reminding people of the mutual promises they had made via the Bill of Rights—in this passage, as well as Madison’s assumption that an aggrieved party had no choice ultimately but to acquiesce to majorities:

In seeking a remedy for [abuses of the Constitution], we must not lose sight of the essential distinction, too little heeded, between assumptions of power by the General Government, in opposition to the Will of the Constituent Body, and

---

82 We recall that in all these cases, Madison believed the rights themselves had to be defined by majorities. In the Bill of Rights speech as in his other discussions of rights, Madison recognized that individual liberties could not be—and therefore ought not to be—absolute. His letter to Jefferson counseled against “absolute restrictions in cases that are doubtful.” Similarly, as has been seen, Federalist 41 warned against attempting to impose restrictions that were bound to be violated in crises. In both writings, Madison’s concern was that violations in emergencies would seem to legitimate further violations in calmer circumstances.

83 See n. 59 above (emphasis added here).
assumptions by the Constituent Body through the Government as the Organ of its will. In the first case, nothing is necessary but to rouse the attention of the people, and a remedy ensues thro’ the forms of the Constitution. This was seen when the Constitution was violated by the Alien and Sedition Acts. In the second case the appeal can only be made to the recollections, the reason, and the conciliatory spirit of the Majority of the people agst their own errors; with a persevering hope of success, and an eventual acquiescence in disappointment unless indeed oppression should reach an extremity overruling all other considerations.\textsuperscript{84}

Moreover, even to the extent Madison envisioned a role for the courts in curbing abuses emanating from the regime, he still believed the ultimate—and only reliable—recourse was the supremely majoritarian device of the ballot box. In his opening speech at the Virginia Ratifying Convention, he thus assured the people that they were secure against abuses by the new government because the legislative power would be held by representatives just like them, bound by the same laws, and replaceable at short intervals. “As long as this is the case,” he observed, “we have no danger to apprehend.”\textsuperscript{85}

The fact that Madison did not contemplate a role for the courts in restraining majorities via the Bill of Rights is further evident in the fact that when he first previewed the speech in the letter to Jefferson, he did not mention the judiciary at all. It was

\textsuperscript{84} Madison to Thomas Ritchie, December 18, 1825, \textit{WJM} 9:231-232. See also Madison to Martin Van Buren, September 20, 1826 (\textit{WJM} 9:251-255): “In all these cases, it need not be remarked I am sure, that it is necessary to keep in mind, the distinction between a usurpation of power by Congress against the will, and an assumption of power with the approbation, of their constituents. When the former occurs, as in the enactment of the alien & sedition laws, the appeal to their Constituents sets everything to rights. In the latter case, the appeal can only be made to argument and conciliation, with an acquiescence, when not an extreme case, in an unsuccessful result.”

\textsuperscript{85} \textit{PJM} 11:81-82. This view is compatible with Joseph Priestley’s \textit{Treatise on Government}, a copy of which Madison requested by correspondence in 1774. (\textit{PJM} 1:145) Priestley argued that because an unjust law could best be undone first by remonstrances to Parliament and, failing that, by electing new representatives, political liberty was the best safeguard for rights. I do not mean to assert any direct influence beyond pointing out the compatibility.
Jefferson who brought this to Madison’s attention: “In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary.”

Jefferson’s letter proceeds to specify that a Bill of Rights would be useful in restraining “the tyranny of the legislatures,” and it was this threat to which Madison referred when adding the remark about the judiciary at his friend’s behest.

It might be objected that this analysis of Madison’s views on the judiciary and the Bill of Rights is glib: The fact that he did not empirically believe the courts were capable of withstanding majorities does not mean he would not have welcomed a role for them had he thought—as has turned out historically to be the case—that they could. After all, majoritarian or not, his concerns about abusive majorities are undeniable. Might Madison have thought it proper, at least in principle, for the judiciary to assume the leading role in determining the boundaries of rights, settling the meaning of the Constitution and protecting minorities against majorities? The answer, we shall presently see, is no.

4.5. The Judiciary and Constitutional Interpretation

Madison’s views on the proper role of the judiciary are neither entirely consistent nor entirely clear, which may say less about his skill as a theorist than about the Constitution’s own opacity on the topic. Nonetheless, while he never delineated a clear

---

role the courts should play, he was consistently emphatic in stating that they should never outrank the more immediately majoritarian branches of government. He thus wrote to Jefferson: “In a Govt. whose vital principle is responsibility, it never will be allowed that the Legislative & Executive Depts. should be completely subjected to the Judiciary, in which that characteristic principle is so faintly seen.”

Madison’s ambivalence toward the judiciary was evident when, at the Philadelphia Convention, he raised doubts about a proposal to extend the judicial authority to cases arising under the Constitution in addition to those arising under federal law. Madison’s reaction to this proposal to imbue the court with constitutional authority was that it should be restricted to cases “of a judicial nature” rather than being imparted “generally.” His concern, apparently, was that the Court not be placed in a position to dispense constitutional judgments suddenly or at will—which would have undermined the interpretive authority of the other branches—as opposed to expounding the meaning of the document through gradually accumulating precedents rendered in the limiting circumstances of individual cases. This constitutional gradualism may also help to explain Madison’s tendency to refer to the courts in the plural—as in “independent tribunals of justice” in the Bill of Rights speech—rather than to the Supreme Court as a single institution. His preference for Supreme Court opinions to be delivered *seriatim*—

---


88 Madison in Convention, August 27, 1787, *PJM* 10:157-158. Ironically, one of the commentators to take notice of Madison’s ambivalence about the role of the courts was Charles Beard. See Beard’s *The Supreme Court and the Constitution* (Union, N.J.: The Lawbook Exchange, Ltd., 1999), 29-33.
that is, by individual justices rather than a single voice pronouncing itself for the court—
might have had a similar effect of causing precedents and therefore constitutional change
to accumulate more slowly rather than being imposed at one swoop.\textsuperscript{89} The Virginia
Report noted, furthermore, that the Supreme Court could not be considered the sole
repository of constitutional questions because many such issues would never come before
it. In cases in which they did not, “the decisions of the other departments … must be
equally authoritative and final with the decisions of that [the judiciary] department.”\textsuperscript{90}

The impropriety of the judiciary exercising final authority, even on constitutional
matters, was among the foremost reasons Madison advocated the creation of a Council of
Revision comprised of judges and executive officers. In addition to guarding against
impetuous majorities, a council in which the judiciary participated would be able to
express itself on constitutional matters before a bill became law—thus giving the
legislature the option to overrule them on subsequent consideration and preventing the
courts from annulling acts of Congress after they had been enacted, a practice with which
Madison was clearly uncomfortable. The alternative to a pre-enactment role for the
judiciary was for it improperly to assume \textit{de facto} supremacy based on the fact that it
would always be the last in sequence to pronounce on constitutional questions:

In the State Constitutions & indeed in the Fedl. one also, no provision is made for
the case of a disagreement in expounding them; and as the Courts are generally
the last in making their decision, it results to them, by refusing or not refusing to

\textsuperscript{89} See n. 94 below.

\textsuperscript{90} Virginia Report, \textit{PJM} 17:312.
execute a law, to stamp it with its final character. This makes the Judiciary Dept
paramount in fact to the Legislature, which was never intended, and can never be
proper.\footnote{PJM 11:293.}

This frank admission of constitutional imprecision assumes what we have repeatedly seen
Madison express: All three branches of government possess both the authority and the
responsibility to weigh in on constitutional questions.\footnote{The tendency today for the other
departments not merely to defer to the judiciary but also to
abdicate their own responsibility to consider constitutional matters is typified by President George W.
Bush’s decision to sign the McCain-Feingold law despite having described it as unconstitutional. Bush’s
signing statement specifically listed areas of constitutional concern but swept them aside: “I expect that the
courts will resolve these legitimate legal questions as appropriate under the law.” Madison, by contrast,
followed the practice of the time in vetoing bills he thought to be unconstitutional. See “President Signs
0327.html.} Not only would the Council of
Revision have involved Congress in constitutional debates, it would have made the
legislature the last in sequence to pronounce on them, thereby, on Madison’s reasoning,
making its judgment appropriately supreme. Later, ruing the controversy swirling around
the Marshall Court, Madison grew nostalgic for his original proposal, noting that it would
have retained Congress’ policymaking and constitutional supremacy while facilitating
temperate consideration of constitutional disputes:

These considerations remind me of the attempts in the Convention to vest in the
Judiciary Dept. a qualified negative on Legislative \textit{bills}. Such a Controll, restricted to Constitutional points, besides giving greater stability \& system to the rules of expounding the Instrument, would have precluded the question of a
Judiciary annulment of Legislative \textit{Acts}.\footnote{Madison to Monroe, December 27, 1817, \textit{WJM} 8:403-407 (emphasis in original).}
Moreover, while Madison supported life tenure for judges, he nonetheless believed they should be susceptible to public opinion to a greater degree than today’s judicial ethos would countenance. Among his reasons for preferring that court opinions be delivered *seriatim* was to expose individual judges to public scrutiny and criticism.94 Madison also suggested that the power of impeachment—and even the ordinary power of legislation—might be used to restrain judges on the basis of their opinions, not just to punish them for unethical behavior. He argued in Federalist 39 that their impeachability was why the judiciary complied with his criteria for republicanism.95 Impeachment was also the constitutional mechanism that assured that judges would not overly aggrandize the power of the national government, a claim that strongly suggests Madison contemplated using the removal power as a means of preventing or correcting objectionable rulings.96 During the nullification dispute, he was even more explicit:

> Such is the plastic faculty of Legislation, that notwithstanding the firm tenure which judges have on their offices, they can by various regulations be kept or reduced within the paths of duty; more especially with the aid of their amenability to the Legislative tribunal in the form of impeachment. It is not probable that the Supreme Court would long be indulged in a career of usurpation opposed to the decided opinions & policy of the Legislature.97

---


95 Federalist 39:194-195.

96 See Madison to Edward Everett, August 28, 1830, *WJM* 9:395-396, in which he listed the power of impeaching and removing judges as among the guarantees for states “agst. an undue preponderance of the powers granted to the Government over them in their united capacity. . . .”
Seeking to quell the states-rights movement simmering in opposition to the Marshall Court, Madison rejected the idea that state legislatures could overrule rulings of the federal judiciary. Such a practice “could not fail to be criticised as requiring a surrender of the Constitutional rights of the majority in expounding the Constitution, to an extra Constitutional project of a protesting state.” Instead, he counseled that critics of the Supreme Court utilize majoritarian political processes to bring the judiciary to heel. Those who felt court rulings gave the national government excessive power over the states should state their objections and attempt to convince Congress. “Congress if convinced of these may not only abstain from the exercise of Powers claimed for them by the Court, but find the means of controuling those claimed by the Court for itself.” If those processes failed, constituents could push for a constitutional amendment, an option that would harness the power of time because the duration of the amending process would require the public to have reached a point of “deliberate judgment and settled determination.” In any scenario, the people, having imbued the Constitution with its authority, possessed the ultimate right to interpret it.

97 Madison to Spencer Roane, May 6, 1821, *WJM* 8:58.


99 Madison to Roane, *WJM* 8:59. The case to which Madison specifically referred in this letter was *Cohens v. Virginia*, in which the Marshall Court asserted an unqualified right to review decisions of the state courts. The legislative means of restraint to which Madison referred may thus have been limiting the Court’s jurisdiction statutorily, which Congress was constitutionally entitled to do. See *Cohens*, 19 U.S. 264 (1821).
Madison did, to be sure, believe the courts had a role to play in the constitutional system, but his views have often been misrepresented by overly broad interpretations of the one situation in which he did say the judiciary would render the final word: adjusting the boundaries of state-federal jurisdiction. The task of ascertaining Madison’s views is complicated by the fact that he was not wholly consistent even within *The Federalist*. Writing as Publius, Madison provided evidence for understanding him to believe in both of two models that George W. Carey has called “constitutional federalism” and “political federalism.”

Political federalism, which finds its clearest expression in Federalist 44 and 46, holds that the boundaries of national and state authority will be adjusted through normal political processes, with voters lodging power with whichever entity they think best equipped to exercise it. According to constitutional federalism, the boundaries are fixed in the Constitution, a doctrine Madison expressed in Federalist 39, in which he clearly indicated that the Supreme Court was to resolve state-national disputes: “It is true, that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government.”

This is the kind of case to which Madison seemed to refer in advocating that the court’s constitutional power be confined to “cases of a judiciary nature,” and during the nullification controversy, he repeatedly affirmed the court’s primacy over such disputes.

---


101 Federalist 39:198.
“I have never yielded my original opinion indicated in the Federalist No. 39” on the topic, he wrote. On another occasion, he specified: “[T]here is an Arbiter or Umpire … provided for deciding, controversies concerning boundaries of right and power [between the state and national governments]. The provision in the U.S. is particularly stated in the Federalist, no. 39. . . .”

However, Madison never described the judiciary as the highest power in cases not involving federalism, and even beneath the constitutional federalism he clearly espoused late in life, a form of political federalism lurked: To the extent federalism remained disputed, it would have to be resolved by the settled opinion of the people expressed over time.

That in a Constitution, so new, and so complicated, there should be occasional difficulties & differences in the practical expositions of it, can surprise no one; and this must continue to be the case, as happens to new laws on complex subjects, until a course of practice of sufficient uniformity and duration to carry with it the public sanction shall settle doubtful or contested meanings.

102 Madison to Jefferson, June 27, 1823, WJM 9:137-144. Madison acknowledged in the letter that the judiciary might have abused this power but insisted that the authority nonetheless remained.

103 Madison to Joseph C. Cabell, August 16, 1829, WJM 9:342-343. Madison went on to supply a page reference from the Gideon Edition that corresponds to the passage from Federalist 39 quoted above.

104 Madison to M.L. Hurlbert, May 1830, WJM 9:372. David M. O’Brien argues that during this stage of his thought, Madison shifted toward a more expansive view of the court’s role in settling constitutional disputes, reserving appeals to the majority for extreme cases alone. While O’Brien is accurate in many respects, we should not discount the fact that Madison saw the majority as the source of the Court’s authority and a control on its behavior even in ordinary cases. See O’Brien, “The Framers’ Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretivism,” The Review of Politics 53.2 (1991), 251-288.

The fact that the Court’s role was limited even in cases involving federalism is also suggested by Madison’s own pessimism as to whether the judiciary would wield sufficient clout to prevent the states from encroaching on the national jurisdiction. Part of his case for the negative was that it would be easier
Madison’s thinking on the role of the courts was, to be sure, imprecise at best and inconsistent on more than one occasion. Again, though, that may reflect less his own clarity of thought than the inherently awkward position the judiciary occupies in a republican system. It seems highly difficult if not impossible to delineate a precise theory of judicial restraint: Restraint, after all, must be based on exacting constitutional standards that minimize judicial discretion, but faithfully abiding by exact standards does not necessarily yield restrained results. The result is that theories of judicial restraint often amount to saying the court should defer to the legislature except when it should not. Some prudential judgments seem unavoidable, as Madison implied during the nullification controversy:

The real measure of the powers meant to be granted to Congress by the Convention, as I understood and believe, is to be sought in the specifications, to be expounded indeed not with the strictness applied to an ordinary statute by a Court of Law; nor on the other hand with a latitude that under the name of means for carrying into execution a limited Government, would transform it into a Government without limits. 105

This analysis leaves a great deal of latitude, as did Madison’s views on the judiciary more generally. He was able to do so because of the empirical reality that such judgments would be decided not according to theoretical precision but rather according to the natural mechanics of the system. Especially given the inherent weakness of the

---

judiciary, the long-term will of the people would settle the meaning of the Constitution irrespective of parchment standards. That does not make the standards, or the courts, irrelevant: Their utility lay in thwarting impulsive or opportunistic constitutional judgments and instead requiring the people to arrive at a settled and consistent opinion in order for their interpretations to take hold. On both empirical and normative grounds, Madison believed this to be the only plausible method of constitutional interpretation—a perspective he articulated in his much criticized decision to endorse the constitutionality of an institution he had once considered anathema: the Second Bank of the United States.

When Hamilton first sought to charter a national bank in 1791, Madison opposed it bitterly. We shall see presently how he explained his eventual change of mind, but the original basis of his objection to Hamilton’s proposal is also illuminating. Madison claimed that the word “necessary” meant that a power not explicitly authorized by Article One, Section Eight, was unconstitutional if any more clearly enumerated power could be shown to be adequate to the intended purpose. That is, while a bank might be proper insofar as it might be a means of facilitating Congress’ borrowing power, it would not be necessary if that end could be attained by less contested means. Madison added that

106 See Madison’s speech in Congress on the bank bill, February 2, 1791, *PJM* 13:373-381. This construction seems so strict that it would inhibit the exercise of a broad array of powers Madison plainly thought to be necessary. The understanding of implied national powers articulated in Federalist 44 seems much more permissive. Madison’s stronger argument against the constitutionality of the bank, presented in the same speech, was that the Convention explicitly rejected a proposal—Madison’s own, ironically—to empower Congress to grant charters of incorporation.

Madison addressed the court’s potential role in the bank dispute in another context as well. In *Hayburn’s Case*, the Supreme Court blocked as unconstitutional a Congressional attempt to involve the judiciary in decisions involving disabled veterans’ applications for disability benefits. The case was the
when an implied power was contested and the Constitution’s meaning was unclear—as he admitted might be the case with respect to the bank—the constitutionality of the power depended in part on the “degree of its importance.” Regardless of whether his argument against the bank’s importance is persuasive, it is clear that the kinds of questions on which he believed its constitutionality turned were prudential and deliberative in nature. The issue was therefore one for the Congress and not the courts to settle: “[W]e are told for our comfort that the judges will rectify our mistakes; how are the judges to determine in the case; are they to be guided in their decisions by the rules of expediency?”

By 1815, Madison reversed his opinion on the constitutionality of the bank. The fact that this decision corresponded with his policy views led his contemporaries to charge him with opportunism, but Madison reacted to that accusation with what seems to have been genuine surprise. While there was no question that his views on the bank’s first instance in which the Court ruled an act of Congress to be unconstitutional. Madison remarked, somewhat elliptically: “The judges have also called the attention of the Pu[b]lic to Legislative fallibility, by pronouncing a law providing for Invalid Pensioners, unconstitutional & void—perhaps they may be wrong in the exertion of that power—but such an evidence of its existence gives inquietude to those who do not wish congress to be controuled or doubted whilst its proceedings correspond with their views. I suspect also that the inquietude is increased by the relation of such a power to the Bank Law, in the Public contemplation, if not in their own.” (Madison to Henry Lee, April 15, 1792, PJM 14:287-288. For background on the case, see the Editor’s Note to a letter from Pendleton on page 295.) It is true that these remarks raise the possibility of the court overruling the bank as unconstitutional, but Madison was clearly ambivalent about that assertion of judicial authority (“they may be wrong in the exertion of that power”), and to the extent he looked upon it kindly, it was only because it served the political purpose of calling the public’s attention to what he believed to be Congress’ mistake.

107 Madison in Congress, February 8, 1791, PJM 13:386.

108 See, for example, Madison to C.E. Haynes, February 25, 1831, WJM 9:442-443, in which he responded to an article that accused him of changing his mind on the bank opportunistically: “I am far from regarding a change of opinions, under the lights of experience and the results of improved reflection, as exposed to censure; and still farther from the vanity of supposing myself less in need of that privilege than
constitutionality evolved, Madison denied that his *standard* for evaluating its compatibility with the Constitution had changed. Further constitutional disputation of the bank was “precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation. . . .”

Here we see the central role of temporal majoritarianism in Madison’s theory of constitutional interpretation. The Constitution’s meaning depends on two factors. The first is the people’s *settled* understanding of the document, which is identifiable by their repeated expression over a considerable period of time. If the people’s understanding at any given moment determined the meaning of the Constitution, then of course there would be no difference between fundamental and ordinary or statutory law, and hence no Constitution to speak of. Time, according to Madison’s understanding, is what preserves

---

109 Message to Congress, January 30, 1815, *WJM* 8:327-330. Madison vetoed the bank bill on this occasion because of a specific policy dispute but indicated he was waiving his constitutional objections. If Madison is chargeable with opportunism, it lies less in this standard for constitutional interpretation—which is theoretically coherent and compatible with his majoritarian beliefs more generally—than with his application of it to this particular situation: The bank remained hotly disputed at the time and for many years afterward, including its constitutionality—as evidenced by the fact that Madison remained under criticism for the decision as late as 1830.
the authority of fundamental law while ensuring its ongoing compatibility with popular sovereignty:

In resorting to legal precedents as sanctions to power, the distinctions should ever be strictly attended to, between such as take place under transitory impressions, or without full examination & deliberation, and such as pass with solemnities and repetitions sufficient to imply a concurrence of the judgment & the will of those, who having granted the power, have the ultimate right to explain the grant.\(^{110}\)

Put otherwise, the requirement of time ensures both that the statutory majority is heard on questions of policy and that the constitutive majority is heard on matters of fundamental law. Hence one key standard for constitutional interpretation is “[t]he early, deliberate & continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies.”\(^{111}\)

Madison therefore explained that the foremost reason he withheld his notes of the Convention until after his death was that this settled practice was a more authoritative source of constitutional meaning than the intentions of the framers.\(^{112}\) In fact, once the people had settled the meaning of the Constitution over an extended period, only they could override it. He thus wrote in 1827 that the states could not suddenly discover the


\(^{112}\) Madison to Thomas Ritchie, September 15, 1821, \textit{WJM} 9:71-73. We must be careful to separate this opinion of Madison’s from that of the contemporary school of constitutional interpretation that says the “original intention” of the framers is not authoritative because it cannot be conclusively known. (For this argument, see Rakove, \textit{Original Meanings}, op. cit.) Madison did not claim the framers’ intention was unknowable, nor did he argue it was irrelevant—although he did say that the intention of the ratifying conventions was more relevant than that of the Philadelphia Convention. On the contrary, we have already seen him invoke the intentions of both the framers and the ratifying conventions in Congressional debates over such issues as the constitutionality of the bank. Rather, his point was that the Constitution’s meaning \textit{ultimately} had to be determined by settled practice with the concurrence of the people.
unconstitutionality of tariffs that those states’ citizens had countenanced since the Constitution’s inception. “A construction of the Constitution practised upon or acknowledged for a period, of nearly forty years, has received a national sanction not to be reversed, but by an evidence at least equivalent to the National will.”

As we have seen Madison repeatedly assume, an opinion held by the public for a persistent period of time would be likely to be based on reason rather than passion. It was for this reason that Madison claimed the more conservative Virginia Report was more authoritative than its comparatively radical predecessor, the Virginia Resolutions: The Report “proceeded from Representatives chosen by the people some months after the Resolutions had been before them, with a longer period for manifesting their sentiments before the Report was adopted; and without any evidence of disapprobation in the Constituent Body.” Similarly, constitutional change should “be applied not in the paroxysms of party & popular excitements: but with the more leisure & reflection,” which would occur if the people had to persist in a constitutional opinion for a period of years in order to prevail. The likelihood that such decisions would be based on reason was further enhanced because constitutional practice was “settled” based on the passive assent of the people, which registered their approval—or the absence of their disapproval—without the kind of direct engagement that Federalist 49 warned should be reserved for “great and extraordinary occasions” as opposed to frequently “disturbing the


public tranquillity [sic.] by interesting too strongly the public passions.\textsuperscript{115} The veneration Madison recommended in that essay, in turn, imposes a sort of compounding deceleration on the process of constitutional change: The more the Constitution is venerated, the more pause the public is given before contemplating change, so that the more time that passes, the longer change takes. Veneration, of course, is voluntarily given, the result of which is a passive mechanism by which the people implicitly consent to require gradually longer and longer periods of time for the Constitution’s meaning to change. The process of change is further slowed by Madison’s assumption that experience will increasingly reveal the most ideal constitutional arrangements to reason.

In the following passage, Madison appears to assume that most constitutional questions have a more or less “right” answer that will become increasingly evident with experience, so that variation in both judicial and public understandings of the Constitution’s meaning should decrease with time:

\begin{quote}
Is it not a reasonable calculation also that the room for jarring opinions between the National & State tribunals will be narrowed by successive decisions sanctioned by the Public concurrence; and that the weight of the State tribunals will be increased by improved organizations, by selections of abler Judges, and consequently by more enlightened proceedings? … Is it too much to anticipate even that the federal and State Judges, as they become more & more coordinate in talents, with equal integrity, and feeling alike the impartiality enjoined by their oaths, will vary les & less also in their reasonings & opinions on all Judicial subjects; and thereby mutually contribute to the clearer & firmer establishment of the true boundaries of power. . . .\textsuperscript{116}
\end{quote}

\begin{flushright}
\textsuperscript{115} Federalist 49:261 (“great and extraordinary occasions”) and 262 (“disturbing the public tranquillity”).
\end{flushright}

\begin{flushright}
\textsuperscript{116} Madison to Roane, June 29, 1821, \textit{WJM} 9:67-68.
\end{flushright}
Time therefore acts on the Constitution much like an anchor does on a heavy ship in deep water: It is not actually immovably tied to the bottom, but it makes drift require such force that it can occur only gradually and in minuscule increments. The result of all these observations, to employ the common metaphor, is that the Constitution is indeed living, but its metabolism is exceedingly slow and grows slower with time—a process on which Madison could dependably rely because it drew its power from the natural conditions of republican political culture.

Time, then, is the first criterion for legitimating constitutional change. Recall that the bank’s constitutionality had also been repeatedly upheld not just over time but by all three branches of government as well. Hence the second criterion: The people must examine constitutionality from the multiple perspectives represented by each branch of government. This was also an auxiliary effect of the system of separation of powers, to which we now briefly turn.

4.6. TEMPORAL MAJORITARIANISM AND THE SEPARATION OF POWERS

As has been seen, Madison believed any political system must be attentive to the potential for abuse from its most powerful element—in a republic, popular majorities. But a republic would also face the same danger as monarchies—indeed, all forms of government: that elected officials, once installed by the people, would turn on them and rule arbitrarily. This they could do if the same officials exercised all powers of the state—executive, legislative and judicial, a combination Federalist 47 describes as “the
very definition of tyranny."117 The solution was a regime of separate powers that would prevent any one institution from exercising total authority. Tyranny would require the acquiescence of three distinct institutions of government, each of which, Madison famously explained in Federalist 51, is contrived to resist the encroachments of the others.

Still, setting this issue aside, we may see the influence separation of powers exerts on Madison’s democratic theory by asking, with James MacGregor Burns, whether this mechanism is duplicative.118 After all, it was Madison himself who repeatedly described all three branches of government as emanating, in the final analysis, from the people. Witness, for instance, his 1831 claim that judicial precedents are authoritative if, over time, they carry “the sanction of those who, having made the law through their legislative organ, appear … to have determined its meaning through their judiciary organ.”119 All three branches—including, we note again, the judiciary—”deriv[e] their existence from the elective principle. . . .”120 If, as Burns notes, the extensiveness of the republic already

117 Federalist 47:249. As Carey has shown, the system of separation of powers is intended to protect the people against exposure to arbitrary rule, not to prevent discrete acts of oppression committed by majorities against minorities. (”Separation of Powers and the Madisonian Model: A Reply to the Critics,” In Defense, op. cit.) This is the most persuasive response to Burns. The effect of separation of powers described above—that is, forcing examination of the same issue from multiple perspectives—is an auxiliary benefit. While I argue that the system does in fact serve this purpose, Madison did not explicitly say he intended for it to do so.

118 Burns, Deadlock of Democracy, op. cit.

119 Madison to Charles J. Ingersoll, June 25, 1831, Mind of the Founder, 497 (emphasis added).

120 Madison to Adams, May 22, 1817, WJM 9:390-391.
inhibits abusive majorities, why erect further barriers to majorities that—on Madison’s own argument—survive only because they are devoted to justice and the general good? Unless we can find some basis for the separation of powers in Madison’s democratic theory, we may be compelled to conclude that whatever its other anti-tyrannical virtues, it includes anti-majoritarian features as well.

That basis does exist: One result of the separation of powers is to force the same popular majority to reconstitute itself and consider problems from a variety of different perspectives. This was, Madison wrote, a result of “our complex system of polity”:

> [T]he public will, as a source of authority, may be the Will of the People as composing one nation; or the will of the States in their distinct & independent capacities; or the federal will as viewed, for example, thro’ the Presidential Electors, representing in a certain proportion both the Nation & the States.

The requirement that these perspectives be combined ensures comprehensive consideration of issues. More immediate and parochial interests are likely to be felt most intensely in a Congressional majority. The requirement of concurrence from the presidency introduces a broader, more national and longer-term perspective. Meanwhile, the potential for judicial review forces majorities to consider the more fundamental commitments of constitutionalism. That each of these majorities is drawn from the same fount does not make them duplicative, for in each case the same majority deliberates from a different perspective.

---

121 This seems to me to be among the implications of Willmoore Kendall’s analysis of “The Two Majorities” (*Midwest Journal of Political Science*, 4.4 (1960): 317-445), which explores the simultaneous operation in American politics of Congressional and presidential majorities.

Equally important, separation of powers forces majorities to deliberate within—and persist across—the different periods of time each branch represents. Recall that one purpose of the staggered terms in the Senate is to prevent sudden change in the regime, so that a majority whose ambitions are substantial enough to require change in the entire Senate would have to cohere across three election cycles. Separation of powers compounds this protection, adding the feature that the more dramatic a majority’s desires, the longer it must cohere. In this sense, Beard perceives the system accurately: “A sharp differentiation is made in the terms of the several authorities, so that a complete renewal of the government at one stroke is impossible.” A majority seeking fundamental regime change might consequently have to persist in that belief for long enough to work a change in all three branches of government. One effect, therefore, of separation of powers is to require a majority to cohere for a period of time proportional to the gravity of the change it seeks.

Consider, then, what a majority might regard as the worst of all scenarios under the separation of powers: all three branches of government opposing its desires. History provides such an example: the wholesale transformation of the government’s role represented by the New Deal. As we have seen, the Progressive critique of the founding was triggered by the Court’s repeated opposition to economic reforms, which Beard and

---


124 Beard, *Economic Interpretation*, 162.
other critics treated as a roadblock to reform. The Court was, in reality, a speed bump—and not, from history’s perspective, a terribly steep one. It would be difficult to identify a persistent national majority in favor of dramatic economic reforms before 1932’s election of Franklin Roosevelt. Once that majority emerged, however, the constitutional system permitted dramatic change in reasonably rapid order. It took only until 1937’s *West Coast Hotel v. Parrish* for the Supreme Court to yield to persistent majorities: five years to work what was, regardless of one’s perspective on it, a nearly complete transformation of the nature of the national government. Equally important, the change occurred through Madisonian means: ordinary political pressures, including those that produced the Court’s famous “switch in time that saved nine.”

Of course, five years seems like less time from the perspective of history than it would have to an aggrieved individual at the time, particularly against the backdrop of the Great Depression. Burns observes:

> One can view this drift and delay with a certain philosophical calm. In the end American government, like the belated hero in the horse opera, seems to come to the rescue. Delays may be hard, of course, on certain persons. A man whose working life stretched from 1900 to the mid-thirties might be a bit concerned in retrospect over the delay in federal social welfare programs. A twelve-year-old boy working in a textile mill during the 1920’s, or even in the 1930’s, might wonder, if he had a chance to wonder about such things, how a great nation like the United States had been unable to outlaw child labor despite general condemnation of it, while most of the civilized world had accomplished this

125 The more than five years Calvin Coolidge (“the business of America is business”) spent in the White House during the intervening period belies any claim that national majorities persistently favored the kinds of economic reforms enacted by the New Deal.

primitive reform years earlier. A Negro in the 1960’s might not be so detached toward states’ rights and congressional obstruction as some of his fellow Americans. Still, most of us could reflect that progress has almost always come in the long run, even if the run has been longer for some than for others. And the slowness of change has meant, perhaps, less tension and disruption of the social fabric.127

Burns’ complaint, of course, is fair, especially when viewed from the perspective of an individual who must defer his or her needs during the interim period necessitated by the slow pace of change. Still, Burns’ description of the Madisonian order, and the outlook it reflects, is precisely correct. The reduced disruption Burns credits to the Madisonian system also means that change, once attained, rests on a more stable foundation. From Madison’s perspective, there is no reliable alternative: Change might be rushed, but it would not endure. It would appear, then, that despite Madison’s desire to depend on no more than the natural dynamics of republican politics, tolerance of the constitutional system does in fact depend on a virtue: patience.

It is in this respect that temporal majoritarianism stands most starkly in conflict with the ethos of contemporary political life.

127 Burns, Deadlock of Democracy, 3.
Chapter 5: Conclusion

‘Greater Effects Than Activity’

*Patience, Temporal Majoritarianism and Politics at the Speed of Light*

The foregoing chapters have attempted to establish several features of Madison’s democratic thought. The first is that he never entertained, much less endorsed, any alternative to majority rule. Majorities were the natural locus of political power in republican societies, and the American experience had repeatedly shown that persistent majorities inevitably prevailed. Attempts to erect barriers to them based on parchment alone were futile at best and dangerous at worst. This empirical belief acted as a linchpin for Madison’s democratic theory, and it was matched by a deep normative commitment to majority rule, which he repeatedly identified as the “vital principle” of the Constitution. However, majorities might in some circumstances be tempted to behave impulsively, especially when their immediate appetites were at stake, and these impulses imperiled both the rights of minorities and the long-term interests of majorities themselves. Madison believed that these impulses inherently cooled with the passage of time. His democratic theory consequently relies on delaying mechanisms that compel majorities to cohere for an interval sufficient to dispel passions. This use of time to season majorities enhances the likelihood that they will behave reasonably and avoids the necessity of a tradeoff between majority rule and minority rights.

This interpretation, which we have called “temporal majoritarianism,” operates in several areas of Madison’s thought. Among the reasons factious majorities are unlikely
to prevail in extended republics is that the passion that animates them is unlikely to survive the delays inherent in communicating and acting across long distances. By establishing a common political lexicon in which appeals to the community can be made, the Bill of Rights helps to slow the pace of decision-making and thereby increases the probability that majorities will make decisions on the basis of reason rather than passion. Similarly, the separation of powers requires majorities to persist across the lengths of time for which each branch of government serves. The courts, likewise, could at best act as a speed bump, not a roadblock, before popular majorities.

In exploring these mechanisms, we have also seen, however, that Madison believed majorities were entitled to rule even in those cases in which their decisions were unwise or unjust. The best that could be done was to establish conditions in which poor decisions would be less likely. Consequently, Madison saw rights and justice—two terms often cited in portrayals of him as anti-democratic—not as substantive roadblocks to majority decisions but rather as procedural mechanisms that compelled the majority to treat individuals predictably rather than arbitrarily. Individuals who object to the substance of majority decisions should, on Madisonian grounds, attempt to persuade the majority rather than deny its legitimacy by appealing to institutions like the courts. The process of doing so is slow and might therefore be frustrating and even, from the point of view of aggrieved individuals, unfair. But such is also the pace at which majorities are likeliest to reach decisions that relieve those grievances. There is, on Madison’s reasoning, no reliable alternative. Burns is correct to observe, of course, that the
temporal perspective is hardly comforting to an individual experiencing acute disappointment or even injustice. But the fact that an individual in such circumstances might be tempted to seek immediate yet ultimately, as we shall see, ineffective redress is among the reasons that individuals are not permitted to judge their own causes. Ultimately, the Constitution must be judged at the systemic rather than the individual level.

With these basic features of temporal majoritarianism in mind, we may now consider several of the theory’s implications, especially for contemporary politics. We begin with the direction in which temporal majoritarianism suggests we should calibrate our expectations of the speed at which the constitutional regime will produce results that satisfy us: namely, downward.

5.1 QUANTUM CONSTITUTIONALISM AND THE LAW OF COMPOUNDING DISAPPOINTMENT

Perhaps because of the prevalence of rights rhetoric, especially in Americans’ understanding of the foundational purposes of the regime, we are accustomed to sharp disappointment when the Madisonian order fails to produce results in accordance with our expectations. Americans tend to see such moments as episodes of systemic failure. When Congress fails to pass a bill that seems to enjoy public support, this “gridlock” is taken as evidence that the political system is broken. Similarly, the impulse to transfer disputes to the judiciary results in part from the perception that the regime is supposed to protect rights above all else, so any instance in which it apparently fails to do so
represents an injustice that calls for swift correction from the only branch that seems capable of acting with appropriate speed.

But temporal majoritarianism suggests that this episodic means of evaluating the regime—that is, according to its results at discrete moments in time—is mistaken. We should assess it over time instead. Hence a corollary to temporal majoritarianism, one we shall call “quantum constitutionalism”: Viewed at any given instant in time, the constitutional order cannot guarantee precise outcomes, only probabilities of them. These probabilities grow with time, so that the longer the period over which the constitutional order is viewed, the likelier it is that its results will accord with such values as majority rule and minority rights. A time-elapsed photograph will thus yield a more accurate portrait of the regime than a snapshot, and the longer its exposure, the more illustrative it will become.

Consequently, the single moment at which a bill has not passed or an unjust decision has been rendered is, from Madison’s point of view, uninformative. Any given day may well find Congress failing to respond to a majority view; a majority, likewise, may on a particular occasion oppress a minority. Such imperfections must be expected in part because even the most perfectly crafted parchment cannot dictate the outcomes of a regime whose true power rests with fallible majorities. But they are equally to be expected not in spite of parchment but because of it. The Constitution is specifically designed to require majorities to persist over time, so there is no reason to believe a majority would or, crucially, even should prevail at a point arbitrarily chosen in time.
The Alien and Sedition Acts illustrate quantum constitutionalism at work in the case of rights. Consider a snapshot of the constitutional order taken on April 21, 1800. On that day, the newspaper editor Thomas Cooper was convicted under the Sedition Act and sentenced to six months in prison for publishing a handbill critical of the Adams Administration.¹ We need not take sides on that specific case to observe that Madison believed prosecutions like Cooper’s represented a failure of a system he believed would protect minority rights. Yet we have already heard Madison call the imbroglio surrounding the Alien and Sedition Acts a vindication rather than a failure of the constitutional system. The reason is that he evaluated the Acts from a time-elapse perspective whose exposure stretched from their enactment to their expiration. Madison never predicted that the system would not produce days like April 21; he believed, on the contrary, that such episodes were unavoidable and that snapshots of them would therefore be unappealing. But the longer the film was exposed, the likelier it became that the portrait would correct itself. The Virginia Report of 1800 thus betrayed neither surprise nor irritation that the Alien and Sedition Acts remained in operation a full year after the Virginia Resolutions first objected to them. The shutter had to be held through the election of 1800—a political event, we emphasize again, not a judicial one—as well as the expiration of the Sedition Act and Jefferson’s pardons of those convicted under it in order for an accurate image of the Constitution to be captured. Note, then, the standard

¹ For details of the case, see James Morton Smith, “President John Adams, Thomas Cooper, and Sedition: A Case Study in Suppression,” The Mississippi Valley Historical Review 42.3 (1955), 438-465.
of constitutional success as Madison, reflecting on the sedition controversy, expressed it: “Nor do I think that Congress, even seconded by the Judicial Power, can, without some change in the character of the nation, succeed in durable violations of the rights & authorities of the States.”

Quantum constitutionalism also suggests that discrete instances provide misleading portraits of whether the Madisonian order defers to majority opinion as well. We have just seen an illustration of this point in the early 20th century controversy surrounding economic reforms. In that case, Beard and other Progressive critics faulted the system as anti-majoritarian because the judiciary obstructed majority opinion in favor of economic reforms. Their mistake was both evaluating the system on the basis of a snapshot and depressing the shutter prematurely. As we have seen, persistent majorities in favor of national economic reforms did not emerge until 1932. A time-elapse image exposed from that point through West Coast Hotel in 1937 would have showed the system to be so rapidly adaptable to majority opinion—including a dramatic adjustment of the Constitution’s meaning—that it was arguably conservatives and not progressives who should have had the greater quarrel with Madison.

---

2 Madison to Spencer Roane, May 6, 1821, WJM 8:58. The fact that Madison was acutely conscious of the temporal dimension is evident in the fact that he emphasized the word “durable” in the original. (The context of the remark was federalism, but Madison’s use of the Alien and Sedition Acts as an illustration in this letter indicates the breadth of its applicability.)

3 Their misreading of Madison, incidentally, is not limited to his understanding of majority rule. Madison also would almost certainly have objected to Lochner as a judicial usurpation. Indeed, his view of justice as procedural rather than substantive would likely have dismissed “substantive due process” as a contradiction in terms.
From this quantum perspective, again, the fact that a majority has not prevailed at any one moment does not mean the Constitution does not respect majority will. It means, instead, that the majority in question has not persisted for the interval the Constitution requires in order to assure that it is reasonable rather than impassioned and settled rather than fluctuating. The hand wringing that has typically accompanied the defeat of health care reform is an excellent case in point. It is true that majorities of Americans have expressed themselves in favor of substantial health care reform at a conceptual level for at least two decades, but there have been few if any points—and certainly no intervals—at which clear majorities have favored any specific reform proposal. In Madisonian terms, the failure of health care reform in the case of the 1994 debate hardly merited the subtitle Haynes Johnson and David Broder gave to their book-length treatment of its collapse—*The System: The American Way of Politics at the Breaking Point*. Regardless of one’s views on the substantive issues at stake, majority support for any given proposal during the period was transient at best. If the system to which Johnson and Broder referred was the Madisonian one, it held up precisely as intended. The failure was political, not systemic: No party to the debate convinced a majority of its views. To the

---

4 Again, we should roughly expect this interval to be proportional to the gravity of the decision in question. It should not take longer than a biennial congressional election—recall here that Madison believed the House to be the naturally stronger branch of the legislature—for a majority to express itself on a more or less routine policy dispute. At the opposite end of the spectrum, one that involves fundamental constitutional questions—and therefore such mechanisms as presidential vetoes or judicial rulings—should take longer.

extent individuals or interest groups wanted to pursue the issue further, Madison’s counsel would have been to reapply themselves to the task of building consensus. Few did, even as most funneled their energies into complaining that the system was unresponsive, with the predictable result that when the issue was resurrected in 2009, consensus remained elusive. Once reforms were finally enacted in 2010, even their supporters—her rhetorical fanfare notwithstanding—described them as an incremental first step rather than the dramatic changes for which they initially hoped.

Indeed, the perception that the system was rigged or otherwise incapable of responding to public concerns arguably dampened the enthusiasm for the very civic engagement that might have succeeded in making it responsive. Here we arrive at another important corollary of temporal majoritarianism, one that derives from quantum constitutionalism and which we may call “the law of compounding disappointment”: Excessive expectations for immediate results produce disappointment; the contemporary reaction to disappointment tends to be disengagement from majoritarian institutions; yet disengagement virtually assures political defeat, thereby perpetuating and progressively deepening the cycle. As we have seen in the case of the Alien and Sedition Acts, Madison believed frustrations with the constitutional system should be channeled toward rather than away from political institutions.6 This was the case even, perhaps especially, when

6 Of course there are too many differences between the Alien and Sedition Acts, 20th century economic reforms and the health care debate to draw direct comparisons, but one cannot help but notice that the one among these in which political institutions were most directly and rapidly engaged—the protest against the Alien and Sedition Acts—was also the most rapidly and conclusively resolved.
he viewed the frustrations as legitimate. In addition to the Alien and Sedition Acts, this was also the approach Madison counseled southern states to adopt during the nullification controversy, and it was the one the Memorial and Remonstrance signaled he was willing to employ in the case of the religious assessment: “Should the event disappoint us, it will still leave us in full confidence that a fair appeal to the latter will reverse the sentence against our liberties.” Madison’s willingness to undertake the arduous task of convincing majorities of his views, even in a case in which he believed majorities exercised no rightful authority, is especially striking in comparison to the contemporary inclination to react to defeat by circumventing or rejecting majoritarian institutions, either by taking one’s case to the courts or through a dejected assumption that defeat is the result of corrupt or dysfunctional institutions. Yet Madison correctly perceived the peril of the contemporary approach: The farther we recede from majoritarian institutions, the likelier they are to disappoint us. According to the law of compounding disappointment, excessive expectations defeat themselves.

If this assessment of the contemporary ethos is correct, it may help us to understand a phenomenon that is otherwise so inexplicable in Madisonian terms that it could justly be called “the Madisonian paradox.” The phenomenon may be described as follows: Madison believed barriers to majority rule were futile because persistent majorities always prevail. Yet today, such barriers seem to have the endorsement of

7 “Memorial and Remonstrance,” WJM 8:303-304.

persistent majorities. A situation of which Madison could not have empirically conceived and which he refused constitutionally to endorse—widespread deference to the courts—has therefore acquired a sort of Madisonian legitimacy. How, on Madison’s reasoning, could this be so? We might interpret deference to the courts as a form of constitutional maturity: Americans have learned the importance of fundamental law and hence yield, even in defeat, to the institution they task with safeguarding the Constitution. It is conceivable—questionable, but conceivable—that Madison himself might endorse a form of judicial supremacy in constitutional interpretation if the meaning of the Constitution and the rights it asserts admitted of the precision that he associated with judicial interpretation. But as we know and as ongoing disputes have repeatedly proved, they do not. Moreover, Americans’ deference to the judiciary is uneasy at best. Both conservatives and progressives endorse judicial supremacy when it suits their goals and decry it when their oxen are gored. Rather than being a sign of maturity, the courts may simply have supplanted the state legislatures of Madison’s time as a seductive arena for instant results. Judicial deference is, in an important sense, a creed that allows its adherents both to have and eat their political cake: achieve instant results when they can, rail against the system when they fail, but in neither case undertake the actual work of building consensus. Put otherwise, majorities may be less committed to majority rule per se than to the most convenient avenue for promoting their immediate preferences.

\[9\] And in fairness to both sides, we reiterate that a consistent standard of judicial restraint seems elusive even at the conceptual level. Simply counseling deference to political institutions does not provide the judiciary with the precise standards of interpretation Madison believed they needed.
The question is whether, on Madison’s own account of politics, he can fault them for that.

5.2 TRANSACTIONAL POLITICS AND THE LOST SKILLS OF CIVIC ENGAGEMENT

To be sure, Madison did assign inherent normative value to majority rule as the only just form of government. He presumably would object to the idea of majorities alienating their right to self-rule in exchange for a politics of convenience or material gain. But it is not clear that intellectual consistency would entitle him to do so. Madison’s Constitution is concerned far more with the basic conditions of material wellbeing than with the classical goods of political life. While he clearly regarded majority rule as the only just form of government, it was not a good in itself; it was, rather, the most defensible means of carrying out a necessary task, an idea we have already seen him imply in the following passage:

It has been said that all Govt. is an evil. It wd be more proper to say that the necessity of any Govt. is a misfortune. This necessity however exists; and the problem to be solved is, not what form of Govt. is perfect, but which of the forms is least imperfect; and here the general question must be between a republican Govern’t in which the majority rule the minority, and a Govt in which a lesser number or the least number rule the majority.¹⁰

Majority rule, clearly, is instrumental: It is the fairest mechanism for carrying out a necessary task. But note Madison’s suggestion that politics, as a “necessity,” itself serves instrumental purposes. While Madison never articulated these purposes in any systematic sense, whenever we encounter him describing them, they are transactional and material in

¹⁰ WJM 9:523.
nature: Government exists to enable us to attain material goals that are elusive in its absence. Again, it bears emphasis that we must not impute this doctrine to Madison explicitly. But it is reasonably inferable from the fact that he repeatedly invoked these material purposes for the regime and almost never described any others. His overwhelming emphasis in describing the flaws of the Articles regime was its inability to establish conditions for economic stability. The regulation of material interests, Federalist 10 announced, was “the principal task of modern legislation.” Madison certainly believed the abuses of the critical period represented something of a moral collapse, but even this collapse was significant, we have seen, chiefly because it caused majorities to mistake their own true interests. And of course we have encountered Madison arguing repeatedly that the regime must draw its sustenance from self-interest and not virtue.

Conspicuously absent from these discussions is any sense of political community as an inherent good that is necessary for human flourishing or as the forum in which virtues are given tangible rather than merely theoretical expression. The public’s role in Madison’s thought is largely confined to giving or withholding assent, and even this role

---

11 Federalist 10:44.

12 We have in mind, for example, Aristotle’s idea of man as a political animal who flourishes in the company of others. For more contemporary discussions, see George Will, Statecraft as Soucraft (op. cit.) and Claes Ryn, America the Virtuous: The Crisis of Democracy and the Quest for Empire (New Brunswick, N.J.: Transaction Publishers, 2004). Ryn, to be sure, is explicitly cautious of a politics of virtue. His point as it relates to the present discussion is that virtue is expressed in community settings through tangible dealings with actual individuals.
is largely confined to the technocratic competence necessary to identify fit characters. Wilson Carey McWilliams casts this instrumental view of government, which he imputes to the framers generally, as a “rejection of the ancients.” The essence of democracy, McWilliams argues, is not merely the voting by which assent is given or withheld but rather the civic engagement that precedes it. “Common sense tells us,” he observes, “that speaking and listening precede voting and give it form.”

Madison, of course, was a practicing statesman, not a systematic theorist, and virtually any candid realist serving in that capacity, even one concerned with virtue, would be compelled to acknowledge that the working agenda of statecraft consists mostly of the material needs of the community. Moreover, on Madison’s own reasoning, it would be a mistake to infer from his failure to provide directly for these higher goods in his institutional design that he believed they were unimportant. Certainly he appreciated the need for a baseline of civic virtue. “Is there no virtue among us?” he had asked Henry at the Virginia ratifying convention. “If not, we are in a wretched situation.” It would be entirely consistent with Madison’s reasoning to assume that he believed virtue to be important and that he believed it to be the province of institutions—local government, religion, Tocquevillian intermediary associations and so forth—that simply

---

13 McWilliams, “Democracy and the Citizen,” op. cit., 74. The phrase “rejection of the ancients” appears in a subheading on page 86.

14 We have also seen Madison indicate that these moral and material issues are inseparable. See Chapter 3, n. 58.

15 PJM 11:158-165. See Chapter 2 for a more detailed discussion.
happened not to be within the purview of the national institutions with which he was concerned in his most important theoretic writings. The very fact that Madison did not focus on virtue or the higher goods of politics in detail might easily reflect an assumption that they were well attended to, not that they were unimportant.

Still, as George W. Carey has noted, Madison “can be faulted for not having urged upon his audience the observance of that morality necessary for the perpetuation of the regime he envisioned.” Even more than this, Madison’s audience could be forgiven for understanding him to mean that the regime exists for their material improvement, and that a politics that eviscerates majority rule is therefore acceptable, even preferable, if they believe it best serves that purpose. This is substantially the dilemma presented by the centralizing aspects of the modern entitlement state, which largely alleviates the need to practice the civic skills—it seems difficult not to call them “virtues”—on which quantum constitutionalism shows Madison to rely while also undermining the institutions likeliest to inculcate them. These skills include accepting defeat graciously and reacting to it industriously—that is, by seeking to change the community’s mind, which in turn presumes the skills of persuasion, openness to persuasion, empathy and reasonableness.

Yet whence, in the Madisonian order, these virtues? Madison sought to transfer important decisions to a level of government whose attractiveness was precisely the ways in which it inhibited political participation. On Madison’s own assumptions about political psychology, the national level is also the most anonymous and hence the

---

unlikelyst place we should expect to find qualities like empathy and reasonableness. This emphasis on decision-making at the national level arose, as we have seen, from a belief that national majorities were entitled to make national decisions. Yet even as he endorsed majority rule in this sense, its application at the diffuse and impersonal national level makes Madison something of a communitarian without community. Moreover, even as Madison discouraged direct participation, he encouraged a politics of self-interest that hardly counsels restraint in the service of republicanism. And his transactional politics, combined with his theory of constitutional change ratified by persistent majorities, could scarcely question the legitimacy, even the advisability, of the contemporary entitlement state—which fuels ever-growing appetites while subsuming the functions of local and private institutions in which the habits of civic participation are likeliest be developed. Further: The entitlement state not only generates expectations that we have seen are self-defeating; it has also been conducive to the growth of an entitlement mentality in democratic discourse itself. The rush to the courts and the tendency to withdraw in dejection from the public sphere when majoritarian institutions fail to yield results to one’s liking are nothing if not manifestations of an entitlement to be agreed with.

Several ripostes are available to Madison, of which at least three are relevant here. First, as we have already suggested, a vibrant society provides a wide range of institutions capable of teaching civic skills. Local politics is not the only one of these; at least during the critical period, Madison might argue that it was not even an especially
good one. Far from developing habits of toleration, politics had become a forum for opportunism and self-seeking. Second, he never contemplated the kind of direct civic engagement we are describing occurring at the national level in the first place, not least because he did not envision the national government deciding issues that would draw forth the passions, perhaps even the sustained attention, of the citizenry. He clearly believed it was inevitable that government would make decisions with substantial economic consequences, but he saw these as essentially passive acts rather than as an active role in economic distribution. Still less did he believe that the national government would involve itself in the very kinds of emotionally intense social issues that Federalist 10 specifically sets aside as irrelevant to the national government.

The question, however, persists: Precisely how did Madison expect the national regime to confine itself to a passive role? The answer could not be Article One’s enumeration of powers alone, except to the extent this parchment barricade, like the Bill of Rights, served to guide public debate. The likelier answer is Madison’s analysis in Federalist 46, which concluded that the national government would be naturally weak until such time as it proved itself to be a superior administrator and hence attracted popular support. Yet even this standard merely counsels individuals to distribute political power not on the basis of such moral concerns as subsidiarity but rather on the basis of material interests alone. A kindred process to Madison’s “superior administration” test has occurred: The national government has become supreme because it has proven itself most able to deliver material comforts. The resulting erosion of Constitutional
limitations on national power seems, again, difficult to criticize from the perspective of Madison’s underlying beliefs about the purposes of politics. And its effect has been to draw both popular majorities and volatile issues into an arena—that is, the national one—whose dynamics are least hospitable to developing the skills necessary to resolve them.

Madison’s third riposte is the more compelling—and, from the point of view of contemporary politics, more troubling—reply: Even to the extent he saw the basic purposes of government as material, he counseled a politics not of immediate appetites but of true—that is, long-term—interests. Madison would be entitled to say that the political arrangements that have enervated majority rule do not serve the community’s long-term interests, not least because they ultimately place public institutions farther from majority control. We repeat: He did not have to rely on individuals to exercise moral restraint in order to choose their long-term interests over their immediate appetites. The inherently gradual pace of decision-making would allow long-term issues to come into focus at the same time momentary urges faded. Once this occurred, individuals needed only to follow what would appear to them as their own interest. All Madison required was time, breathing room, for this system to work: So long as majorities did not attempt to force decisions before time could season their desires, the natural dynamics of the system would tend toward reasonableness.

In Madison’s time, majorities would not attempt to force premature decisions at the national level because doing so would not be an option. The naturally slow tempo of communication and transportation limited majorities’ options. Today, of course, such is
no longer the case—which means that for Madison’s system to operate as intended, a virtue must intervene: patience. Patience, we shall see by way of bringing the present study to conclusion, has now replaced Madison’s assumption about the inevitability of majority rule as the linchpin of his system. It is the central constitutional virtue, and it is, by all signs, a lost one.

5.3. The Lost Virtue

As William E. Scheuerman’s perceptive study Liberal Democracy and the Social Acceleration of Time both documents and explores, a—perhaps “the”—dominant fact of contemporary political life is speed.\(^\text{17}\) We need hardly recount the technological reasons that this is so. Madison himself saw the pace of politics quickening at the hands of technology. In 1833, shortly before his death, he reflected with some satisfaction that the country was able to operate on a larger and larger scale:

> It is true that the sphere of action has been and will be not a little enlarged by the territories embraced by the Union. But it will not be denied, that the improvements already made in internal navigation by canals & steamboats, and in turnpikes & railroads, have virtually brought the most distant parts of the Union, in the present extent, much closer together than they were at the date of the Federal Constitution. It is not too much to say, that the facility and quickness of intercommunication throughout the Union is greater now than it formerly was between the remote parts of the State of Virginia.\(^\text{18}\)

In fact, Madison had noted the significance of improvements in communication as early as 1791:

\(^{17}\) Scheuerman, op. cit.

Whatever facilitates a general intercourse of sentiments, as good roads, domestic commerce, a free press, and particularly a circulation of newspapers through the entire body of the people, and Representatives going from, and returning among every part of them, is equivalent to a contraction of territorial limits, and is favorable to liberty, where these may be too extensive.19

Both passages clearly celebrate the projection of republican government across a wider territory. But the careful reader of Madison will also observe that, in the terms of the extended republic thesis, “a contraction of territorial limits” is not an entirely welcome development. It is unsurprising, then, that the acceleration of these improvements in communication to an infinite—indeed, now instant—degree has had the effect of resurrecting many of the factious dynamics Madison feared. While the republic may have become more diverse by dint of growing more extended, majority factions that do exist can also “discover their own strength” readily, communicate their views instantly and, most important, demand and therefore expect results before the seasoning process that was so crucial to Madison’s thought can take hold.

Not only is it now possible for results to be delivered rapidly, speed is considered to be a positive virtue. It is, indeed, the very hallmark of the effective modern leader. Today’s political ethos, reflecting the new activist purposes of the regime, measures success not by governing but rather by policymaking—a standard that is so ingrained that it is necessary to specify that these are not the same thing. Whereas governing calibrates the extent of policymaking to public needs, the more or less permanent assumption of the

policymaking ethos is that the current state of affairs, whatever it may be, is, to varying degrees, inadequate. The drive for perfection and “rational” results, even from systems of infinite complexity such as a modern economy, makes satisfaction a vice and change a constant need. Political leaders are thus judged by the volume of policymaking rather than outcomes. In congressional campaigns, for example, it is taken to be self-evident that a legislator who has not written or sponsored a considerable volume of bills has not done his or her job.\textsuperscript{20} Mutability and multiplicity of lawmaking—which Madison specifically hoped the Constitution would halt—are thereby encouraged. Whereas Madison believed decisions should take longer to make as their gravity increased, the contemporary ethos holds the opposite: The more urgent change is assumed to be, the more quickly it must be delivered.

This standard exerts particular pressure on presidents, whose legacies in history depend not only on the extent to which they cause affairs to be different from what they otherwise would have been but also the speed at which they do so.\textsuperscript{21} Such is the implicit demand of the “first 100 days” test attached to each presidential term, a length of time that originated with the crisis Franklin Roosevelt confronted at his 1933 inauguration but

\textsuperscript{20} Consider two among ample illustrations: Scarcely one year into the 111\textsuperscript{th} Congress, Representative Charles Rangel’s web site was already boasting that he had sponsored “over 100 bills.” (See http://rangel.house.gov/cosponsored-legislation.html, accessed February 19, 2010). On the other side of the aisle, a writer at the conservative journal Human Events complained that Democratic Representative Alan Grayson “has only sponsored 4 bills, of which only one has been made into law, placing him in the basement of Congressional effectiveness.” (See Ross Kaminsky, “The Biggest Jerk in Congress,” www.humanevents.com, February 3, 2010, accessed February 19, 2010).

which now persists regardless of whether any such crisis exists—including the second terms of presidents who are re-elected precisely because the country is satisfied. The standard of presidential success, but also of the successful application of political power of any sort, may be expressed as follows: Success equals change divided by time (s=c/t). The more change a political actor can deliver in a shorter period of time, the more successful he or she is assumed to be.

The application of this formula is problematic for several reasons, including the fact that it inherently classifies prudence as failure, at least insofar as prudence values inaction when change is not specifically warranted and gradualism when it is. Change is not always necessary; sometimes, Madison might even say “usually,” mere governance is. The chief flaw of the speed standard, however, is that it places stresses on the constitutional system that it was not designed to bear and was, on the contrary, specifically engineered to avert. The result, we have seen, is a simultaneous and apparently endless escalation of both expectations and disappointment.

Madison thus occupies an awkward position: A foundational assumption of his order—the leisurely pace of politics and its attendant quality of patience—has been transformed from an empirical reality into a virtue. Put otherwise, one of the most important features of his democratic thought began as the very kind of empirical reality

---

22 The first 100 days standard may now be escalating. Dawn had literally not yet broken over President Obama’s 100th day in office when, at 4:16 a.m. on April 29, 2009, the influential news site www.politico.com posted an article entitled, “10 decisions for Obama’s next 100 days.” (http://www.politico.com/news/stories/0409/21852.html, accessed February 19, 2010). Other news outlets followed. These developments suggest that the constant appetite for news also fuels a never-satisfied appetite for change for the simple reason that the media cannot cover inaction.
he regarded as the surest basis for enduring institutions yet now depends on exactly the kind of foundation of which he was most skeptical: a virtue. Madison knew, toward his life’s end, that the American regime would have to rely increasingly on “moral causes” as time progressed and the once unifying memories of past emergencies faded. The memory of the Revolution, he thought, might help to inspire the necessary virtue:

Still the increasing self-confidence felt by the Members of the Union, the decreasing influence of apprehensions from without, and the natural aspirations of talented ambition for new theatres multiplying, the chances of elevation in the lottery of political life, may require the co-operation of whatever moral causes may aid in preserving the equilibrium contemplated by the Theory of our compound Government. Among these causes may justly be placed appeals to the love and pride of country; & few could be made in a form more touching, than a well-executed picture of the Magical effect of our National Emblem, in converting the furious passions of a tumultuous soldiery into an enthusiastic respect for the free & united people whom it represented.²³

Temporal majoritarianism suggests that an appeal to another “moral cause” may now be necessary to preserve the Madisonian order: patience. If time is to act as the “sovereign physician of our passions,” in Montaigne’s words, patience must act as its nurse. We thus conclude this study where we began: in Madison’s childhood commonplace book, where, just before transcribing Montaigne’s dictum about time and passions, the future founder recorded an aphorism from the memoirs of Cardinal DeRetz: “Patience,” de Retz counseled and Madison transcribed, “works greater effects than activity.”²⁴

²³ Madison to Benjamin F. Popoon, May 18, 1833, WIJ 9:518-519. Note Madison’s description of political life as a “lottery” rather than as a rational system from which perfection can be expected.

²⁴ PJM 1:12.
BIBLIOGRAPHY


265


272


273