WHY A SENATE?
THE FEDERALIST PERSPECTIVE, THEN AND NOW

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The Federalist, a collection of papers written and first published in 1787 and 1788, has been described as the finest political analysis ever produced in the United States and perhaps the finest example of applied political theory since Machiavelli wrote *The Prince.* Thomas Jefferson, though not an unbiased observer, proclaimed it the "best commentary on the principles of government which ever was written."[1] Be that as it may, there can be little argument that it is "the most authoritative, comprehensive, and profound contemporary interpretation of the political intention of the Framers."[2]

There were no official, *verbatim* transcripts kept of the debates at the Constitutional Convention that met in Philadelphia between May and September of 1787. Our best source of information about the deliberations are the copious and invaluable notes made during the daily sessions by James Madison, a delegate to the Convention and often said to have had more influence on the framing of the constitution than anyone else. After the Philadelphia convention completed its business, attention turned to the 13 state conventions that met to decide whether to ratify the proposed new constitution. Under the terms of that document, it would take effect when ratified by nine of the 13 states (and then only in those states), and ratification was no sure thing. The 85 essays comprising *The Federalist* were written to promote ratification. Although their tone is often dispassionate and sometimes theoretical, their avowed purpose was advocacy.

All 85 essays were published under the pseudonym of Publius, but were written by the trio of Alexander Hamilton, John Jay, and James Madison.[3] Illness limited Jay to contributing only five papers. Of the remainder, Hamilton may have written 50 of them, although even today some uncertainly lingers as to whether some of the essays should be attributed to Hamilton or to Madison, or to both.[4] In general, Hamilton wrote most, but not all, of the papers highlighting the defects of the Articles of Confederation, which the new constitution

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[1] Quoted in Ralph Ketchum, *James Madison*. Charlottesville, University of Virginia Press, 1971, p. 249.

[2] Marvin Meyers, "Federalist Papers," in Donald C. Bacon, et. al., (eds.), *The Encyclopedia of the United States Congress,* v. 2. New York, Simon & Schuster, 1995, p. 825. "By the year 2000, it [*The Federalist*] had been quoted no fewer than 291 times in Supreme Court opinions, with the frequency of citations rising with the years." Ron Chernow, *Alexander Hamilton*. New York, Penguin Books, 2004, p. 260.

[3] The use of such pseudonyms was a common practice of the time and did not disguise the identity of the authors for long.

[4] See Ketchum, pp. 239 and 660-661. Some essays evidently were joint products, written by Madison but with the benefit of Hamilton's notes. Also, "Hamilton and Madison forged a pact that they would reveal [who wrote which essay] only by mutual agreement, initiating two centuries of scholarly disputation over the authorship of approximately fifteen of the essays." Chernow, p. 249. In what follows, I use what seem to be the most generally accepted attributions.

would replace, although Madison's contributions to this group of papers included one of the most famous essays of them all: his No. 10, to be discussed later.[5] When the authors then turned to a defense of the proposed new structure of government, Hamilton focused on the executive and judicial branches, whereas Madison wrote almost all the essays that concentrated on the legislative branch, the separation of powers within the planned new national government, and the proposed division of powers between it and the various State governments.

CONTEXT

The Federalist was not produced in an atmosphere of leisurely contemplation. The essays first appeared in several New York newspapers, although they also were compiled in two volumes before the final ratifying convention finished its work.[6] One historian has calculated that Hamilton and Madison wrote 175,000 words in seven months.[7] Although the collected essays are similar in tone and style and flow smoothly from one to the next, the two primary authors worked more or less independently of each other.

> They agreed to deliver four essays per week (that is, two apiece) at roughly three-day intervals, leaving little time for revision. The essays then appeared in four of the five New York newspapers. The constantly looming deadlines meant that the authors had to draw on information, ideas, and citations already stored in their minds or notes. Luckily, they had both been in training for several years. Madison explained to Jefferson, "Though [the publication is] carried on in concert, the writers are not mutually answerable for all the ideas of each other, there being seldom time for even a perusal of the pieces by any but the writer before they are wanted at the press, and sometimes hardly by the writer himself."….Very often, Hamilton and Madison first read each other's contributions in print.[8]

What undoubtedly were the two most important state conventions, in Virginia and New York, also were among the last to vote on ratification, and *The Federalist* probably was better known in those two states than elsewhere. More generally, though, the essays became more influential during the following two centuries than they were at the time they first were published.

> [O]ur semi-sacred sense of *The Federalist* somewhat distorts an accurate understanding of its role while the ratification debates raged. First, the great deliberation on republican government was composed hurriedly, without much time for deliberation at all. Rather than serene political

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[5] "[P]erhaps in no other political writing by an American is there a more compactly logical, almost mathematical, piece of theory than in Madison's *The Federalist*, No. 10." Robert Dahl, *A Preface to Democratic Theory*. Chicago, The University of Chicago Press, 1956, p. 5.

[6] The last of the essays were included in the second volume before they appeared in newspapers.

[7] Chernow, p. 248. A close reading of the essays may reveal differences in the ideas and preferences of the two primary authors. However, such differences probably would have passed unnoticed by most of those reading the essays as they appeared in print, one day at a time. See Garry Wills, *Explaining America: The Federalist*. New York, Penguin Books, 1982, esp. pp. 3-93.

[8] Chernow, p. 249.

> philosophers, both Hamilton and Madison conducted themselves like harried journalists turning out copy on a deadline, or perhaps like beleaguered lawyers producing briefs for a crucial client. Second as an embodiment of "original intent," *The Federalist* represented only one side of the argument, an avowedly partisan case for ratification that made no pretense of detachment. Third, there is reason to believe that *The Federalist* has exerted more influence on modern-day constitutional arguments than on the eighteenth-century debates that occasioned it. Its distribution beyond New York was spotty; with a few exceptions, the language of the essays was inaccessible to ordinary readers; and its greatest impact was to galvanize support among Federalist delegates already committed to ratification.[9]

For these reasons, and also because of the parochial concerns often expressed during the ratification debates, it would be a mistake to give *The Federalist* too much credit for the state votes in favor of ratification.[10]

Nonetheless, the essays were written to persuade. Both Hamilton and Madison sought to defend the new constitution against the criticisms that had begun to be heard even before the drafting convention adjourned.[11] Both thought that a failure to replace the Articles of Confederation would have been disastrous for the future of the nation, and in fact might have led to its dissolution into three regional confederations, if not 13 separate nations. So both put aside their own reservations and disappointments and argued artfully and persuasively in favor of a document of which neither fully approved.

One of the first substantive decisions the Philadelphia convention made was in favor of a bicameral legislature. On only the second day of actual deliberations,

> Apparently without debate or dissent they [the delegates] agreed that the national legislature ought to consist of two branches. It was known that Franklin preferred a legislature of a single house, like that of Pennsylvania, but he did not speak, and the others saw no objection to the dual form to which Americans had long been accustomed under the British government and in most of the separate states both before and after independence.[12]

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[9] Joseph J. Ellis, *American Creation*. New York, Alfred A. Knopf, 2007, p. 117. "[A]t the time, though widely reprinted, Publius did not create much stir. Its arguments were reasoned, quiet, intellectual in content, and what citizens looked for was fireworks, denunciation, thunder." Catherine Drinker Bowen, *Miracle at Philadelphia.* Little, Brown and Company, 1966, p. 268. See also Chernow, p. 261.

[10] The final votes in both Virginia and New York were close, even though Madison and Hamilton were active participants in their respective conventions. In fact, New Yorkers voted to ratify the constitution only after learning that the requisite number of nine states already had done so.

[11] For this reason, the subjects of the essays, and the attention allotted to those subjects, do not necessarily reflect the issues that the authors considered most important.

[12] Carl Van Doren, *The Great Rehearsal*. New York, Penguin Books, 1986 [first published by Viking Penguin, Inc., in 1948], p. 40. On the political theories of such then-familiar authors as Locke, Montesquieu, Harrington, and Hume as they relate to the purposes and desired characteristics of a senate, as well as the pre-1787 experiences with bicameralism in the American colonies and states, see Daniel Wirls and Stephen Wirls, *The Invention of the United States Senate*. Baltimore, The Johns Hopkins University Press, 2004, pp. 11-70.

And soon thereafter, without having decided how Senators were to be selected, the Convention evidenced its intent for the Senate to be a working legislative body, agreeing unanimously "that each branch ought to possess the right of originating acts…."[13]

These decisions did not resolve the most difficult questions about the proposed Senate[14]—how its seats were to be allocated and how its members were to be selected—which in turn reflected the most contentious issue the delegates faced. What was to be the relationship between the new central government and the existing state governments? Where was sovereignty ultimately to lie?[15]

Madison arrived in Philadelphia believing that "the legislative branch should be bicameral and, most crucially, both branches should be proportional according to population, thereby decisively shifting the core definition of representation from states to the citizenry itself."[16] But, of course, that was not to be the outcome. The "great compromise" of the Convention ultimately provided for seats in the House of Representatives to be allocated among the states in proportion to their populations and for its members to be elected directly by the people (or, more accurately, those people who were enfranchised). In the Senate, by contrast, each state was to be represented equally, and the two Senators from each state were to be elected by its state legislature.

In his first essay on the new constitution (No. 37), Madison acknowledged that the document that had been presented to the ratifying convention delegates in New York and the other states was a product of compromise.[17] To be sure, construction of the constitution had been guided by principles and experiences that the three authors explicated, but it also represented necessary accommodations among competing state and regional interests, or at least the widespread perceptions of those interests. The final document was replete with compromises that Hamilton and Madison usually did their best to justify as wise and well-chosen, or at least as better than the status quo and the other available alternatives to it. In the 38th essay, Madison observed that many criticisms of the new plan of government were mutually incompatible. Critics opposed ratification without being able to agree on an alternative and, even more, without comparing the strengths and weaknesses of the new plan against the weaknesses of government under the Articles of Confederation:

> It is a matter both of wonder and regret, that those who raise so many objections against the new Constitution, should never call to mind the defects of that which is to be exchanged for it. It is not necessary that the former should be perfect; it is sufficient that the latter is more

[13] Van Doren, p. 44.

[14] When capitalized, "Senate" refers to the U.S. Senate; "senate" in lower case refers to any second chamber.

[15] "[I]t is essential to remember that the term 'United States' began as a plural rather than singular noun, more like the modern-day European Union than a latter-day Roman Empire. Allegiances remained primarily local; they then clustered into state-based loyalties, then periodically enlarged to regional affinities and interests." Ellis, p. 88.

[16] Ellis, pp. 107-108

[17] The authors tended to write as if they had not been delegates to the Constitutional Convention and privy to what arguments were made and how decisions were reached. Hamilton and Madison were known to have been in Philadelphia, but not so the anonymous Publius.

> imperfect. No man would refuse to give brass for silver or gold, because the latter had some alloy in it. No man would refuse to quit a shattered and tottering habitation, for a firm and commodious building, because the latter had not a porch to it; or because some of the rooms might be a little larger or smaller, or the ceiling a little higher or lower than his fancy would have planned them. (No. 38) [18]

Foremost among the matters requiring accommodation, according to Madison, were "the interfering pretensions of the larger and smaller States":

> We cannot err in supposing that the former would contend for a participation in the Government, fully proportioned to their superior wealth and importance; and that the latter would not be less tenacious of the equality at present enjoyed by them. We may well suppose that neither side would entirely yield to the other, and consequently that the struggle could be terminated only by compromise….[T]he Convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations. (No. 37)

Later, in his first essay on the Senate (No. 62), Madison was candid about how "theoretical propriety" had been made to interact with "extraneous considerations":

> The equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and small states, does not call for much discussion. If indeed it be right that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government; and that among independent and sovereign states bound together by a simple league, the parties however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try by the standards of theory, a part of the constitution which is allowed on all hands to be the result not of theory, but "of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable." A common government with powers equal to its objects, is called for by the voice, and still more loudly by the political situation of America. A government founded on principles more consonant to the wishes of the larger states, is not likely to be obtained from the smaller states. The only option then for the former lies between the proposed government and a government still more objectionable. Under this alternative the advice of prudence must be, to embrace the lesser evil; and instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice. (No. 62; italics in the original)

If not for this compromise, the Philadelphia convention might have broken up in disarray and failure.[19] Nonetheless, Ellis is not alone in concluding that Madison interpreted

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[18] There are so many editions of *The Federalist*, each with its own pagination, that there would be no useful purpose served in citing page numbers in any one of them for the quotations used here. Fortunately, there probably is no essay among them that extends beyond ten pages. The punctuation and spelling in the quotations reflect the style of the time.

[19] E.g., Bowen, 185.

the compromise as a "devastating defeat."[20] Its effect was to finesse the all-important question of sovereignty, accepting theoretical ambiguity as a price necessary to reach agreement. Failure was too dangerous to contemplate, so when it came to write *The Federalist*,

> both Hamilton and Madison were forced by the political exigencies of the moment to frame their argument on behalf of the Constitution around a core idea that they had both strenuously opposed at the Philadelphia Convention….Madison had argued for the clear supremacy of the federal government and for the resolution of the sovereignty question at the national rather than state level. If anything, Hamilton was more of an outright nationalist, preferring that the states disappear altogether. Both men had regarded the more blurred resolution reached at Philadelphia as a terrible defeat that left the all-important question of sovereignty undecided. Now, however, they embraced the very ambiguity they had condemned as a fatal weakness of the Constitution as its central strength.[21]

For Hamilton,

> Throughout his career, he operated in the realm of the possible, taking the world as it was, not as he wished it to be, and he often inveighed against a dogmatic insistence upon perfection. Being a lawyer may have eased his transition from arch skeptic to supreme admirer of the Constitution, for he had the attorney's ability to make the best case for an imperfect client. He was not alone in making this transition: all the delegates at Philadelphia had adopted the final document in a spirit of compromise.[22]

And as for his collaborator,

> Madison's conversion did not occur because of intellectual conviction—he still preferred a sovereign nation-state—but rather because he now realized that if he had won the argument at Philadelphia and produced a constitution with an unambiguously sovereign central government, it would have enjoyed no chance at ratification. Like a politician who must accommodate himself to unwelcomed evidence about public opinion, Madison shifted his ground to become the chief advocate for the very argument he had opposed in Philadelphia: namely, that the Constitution institutionalized a unique form of shared sovereignty.[23]

As Madison put it in No. 62, "the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty."

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[20] Ellis, p. 110. "The so-called Great Compromise was to him [Madison] unconditional surrender to the notion of state equality…." Ketchum, p. 212.

[21] Ellis, p. 117

[22] Chernow, p. 246. See also Edward Mead Earle, "Introduction," in *The Federalist*. New York, The Modern Library, n.d., p. xi.

[23] Ellis, p. 118. "Though Madison would have been willing to create an even more powerful national government had it not been flawed by state equality [in Senate representation], he was by and large content with the balance of powers finally agreed upon both between the state and federal governments and among the three departments." Ketchum, pp. 228-229.

While Hamilton and Madison found common cause in advocating ratification of a plan of government that left both of them unhappy and concerned for the future, their paths later diverged, leading Ellis to characterize Hamilton as Madison's "greatest collaborator and then his most awesome enemy."[24] As Washington's Secretary of the Treasury, Hamilton soon came to personify the impulse toward a strong national government, whereas Madison joined Jefferson as the most influential defenders of "that residuary sovereignty" that remained with the states. *The Federalist*, therefore, cannot be fairly construed as an entirely accurate reflection of the personal beliefs and preferences of either of its primary authors. Each would have written the constitution differently if left to his own devices, and the thinking of each changed during the years remaining to them. Furthermore, it would be implausible to assume that the arguments that Hamilton and Madison made in their essays fairly and accurately summarized the arguments that actually had been made at Philadelphia. Our incomplete record of the convention debates reveals a body of men who were always serious, usually thoughtful, and sometimes erudite, but it does not justify the conclusion that they had entertained, and been persuaded by, the same arguments made in *The Federalist* in support of the decisions they had reached.[25]

The following, therefore, is not an analysis of why there is a United States Senate, nor why it took the form it originally was given, nor what Madison and Hamilton really thought about those decisions, then or later. Much already has been written on these subjects, each of which merits a far more extended treatment than would be possible here. The next section of this paper takes *The Federalist* at face value as political theory and then as political architecture, or what sometimes today is called constitutional engineering, asking what the essays have to offer to those who are either designing or assessing a senate, or weighing the need for one, at other times and other places. The question addressed here is not "Why the United States Senate?," but "Why a senate?". Does *The Federalist* offer an argument that a senate of some kind is a good or necessary element of republican government and, if so, what is that argument? The specific characteristics of the U.S. Senate, as designed in 1787, become relevant to the extent that, as we shall see, *The Federalist* argues that a senate is most likely to be good or necessary if it has certain characteristics, especially in relation to the other house of the legislature. By this approach, we are most likely to discover what relevance *The Federalist* may have in other historical periods and in other national settings.

WHY A SENATE IN 1788?

To place the Senate in its proper place within the constitutional order, it first is necessary to understand the fundamental nature of that order. In the 47th and 48th essays, Madison addressed what he said was "[o]ne of the principal objections inculcated by the more respectable adversaries to the constitution" (No. 47)—that it did not satisfy the requirements

[24] Ellis, p. 90.

[25] The portions of the Convention proceedings relating to the Senate are summarized by George J. Schulz in a monograph on *Creation of the* Senate, first published in 1937 as Senate Document No. 45 of the 75th Congress, 1st Session, and reprinted in 1987 as Senate Document No. 100-7 of the 100th Congress, 1st Session. The monograph is based on an 1840 edition of Madison's *Notes of Debates in the Federal Convention*.

of a separation of powers—and approached it from the perspectives of both experience and theory.

In No. 47, Madison went to some lengths to demonstrate that the planned mixture of executive, legislative, and judicial powers among two or more branches of government was no greater, and actually was less, than in the existing state constitutions. He could have rested his argument there, contending that the proposed national constitution violated the principle of separation of powers no more than the individual states already had done, and without evident risk to liberty. Perhaps he might have added that some or all of the divergences between theory and practice were due to the negotiated nature of the document, and that not all of the compromises it embodied could be expected to conform with any abstract political theory.

Instead, Madison was at pains to argue not that the draft constitution was defensible as a settlement that probably was the best that could have been negotiated under the circumstances, but that it actually did comport with the principle of separation of powers, if that principle was rightly understood. He framed the principled objection to the constitution as being

> its supposed violation of the political maxim, that the legislative, executive and judicial departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner, as at once to destroy all symmetry and beauty of form; and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts. (No. 47)

Madison responded by turning directly to Montesquieu, the sage he credited with popularizing if not first identifying the principle, and by arguing that the separation of powers, as rightly understood and as advocated by Montesquieu, neither required nor involved the construction of insurmountable walls separating each of the three branches from the others. After some discussion of the British constitution, which Madison took to have been Montesquieu's model, Madison concluded that Montesquieu

> did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted. (No. 47; emphasis in the original)

By this standard, the new constitution—as well as the various state constitutions, though to different degrees—satisfied the need for separation of powers, both in theory and in practice:

> What I have wished to evince is, that the charge brought against the proposed constitution, of violating a sacred maxim of free government, is warranted neither by the real meaning annexed

> to that maxim by its author; nor by the sense in which it has hitherto been understood in America. (No. 47)

Had Madison been satisfied to leave his argument here, he would have responded satisfactorily to the criticism of the draft constitution with which he opened essay No. 47. Instead, he took the argument further in the following essay, and thereby made one of his most enduring contributions to American political theory.

Madison might have argued that Montesquieu's theory and America's state experience both supported the conclusion that an absolute separation of powers, while desirable, was not necessary to preserve constitutional liberty. In No. 48, however, he transformed what might have been seen as deficiencies required by practical necessity into positive virtues. He did more than acknowledge that the new constitution proposed something less than a pure separation of powers. Instead, he praised it for creating what Richard Neustadt summarized many generations later as a system of separated institutions that share the powers of government.[26] This overlapping or admixture of powers was not a weakness in the new constitution, Madison explained, brought about either by muddled thinking or the consequences of compromise. Instead, it was one of the key strengths of the new national constitution because it would provide the essential protection against encroachments, producing excessive concentrations of power, by any one of the institutions it established.

Madison defined the danger that an effective constitutional order must anticipate:

> It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide *some practical security for each against the invasion of the others*. What this security ought to be, is the great problem to be solved. (No. 48; emphasis added)

Even if it were possible to "mark with precision the boundaries of these departments," it would not be enough to rely on "parchment barriers against the encroaching spirit of power." (No. 48)

The natural inclination in America had been to see this threat arising from the executive branch, in the person either of a hereditary monarch or his colonial governors. Indeed, that is a primary reason why the Articles of Confederation lacked a single executive and vested essentially all national power, such as it was, in the legislature. That was one of the sources of the inadequacies that led to the Constitutional Convention being convened and the convention drafting a new charter that provided for a president. The goal was to imbue the new national government with greater strength, energy, and efficiency, while also increasing its powers *vis-à-*

[26] Richard Neustadt, *Presidential Power*. New York, John Wiley & Sons, Inc., 1960, p. 33.

vis the states. But, Madison contended, independence having been achieved, the greater danger now lay elsewhere: "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." (No. 48)

> [I]n a representative republic, where the executive magistracy is carefully limited both in the extent and duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions. (No. 48)

This fear of legislative power undoubtedly rings false to the contemporary ear, accustomed as we now are to the executive branch, whether presidential or parliamentary, that is "every where extending the sphere of its activity, and drawing all power into its impetuous vortex." Yet understanding this context is essential to understanding Madison's argument and the design of the new constitutional order that he was advocating. The Articles of Confederation had protected all too well against a too-powerful national executive. Now the need was to establish effective counter-weights against "the encroaching spirit of power," especially legislative power, that constituted more than "parchment barriers."

As Madison argued in the 51st essay, which may well have had the most lasting influence of any, the alternative to "parchment barriers" lay in capitalizing on the self-interest of government leaders, and doing so by designing a constitutional order such "that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." (No. 51) It is evident, he continued, that each department should be so constituted that its members do not control the appointment or tenure of the members of another. That would imply popular election of the members of (or at least those members exercising most power in) each of the three branches. This would not be entirely practical or desirable, however. In particular, it would be unwise to elect judges because of the special knowledge and experience they need to have. Also, if judges were to hold office during "good behavior," and not for fixed terms of office (a position that Hamilton defended in No. 78), there needed to be a means to remove them from office when necessary. For that purpose, impeachment and removal by the legislature were the best of the alternatives.

Complete autonomy of each branch from the others not being a sensible option, it became that much more important that no branch could control the salaries and benefits—"the emoluments annexed to their offices"—enjoyed by members of the others. So Article 2 of the new constitution provided that "[t]he president shall, at stated times, receive for his services a compensation, which shall neither be increased or diminished during the period for which he shall have been elected….," and Article 3 stated that "[t]he judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." But these guarantees were not sufficient to protect against a dangerous

concentration of political power. An additional protection lay in the sheer size—and, therefore, the diversity—of the United States, both as it was then and as Madison thought it was certain to become.

In *Federalist* No. 10, Madison argued that a "well constructed Union" must cure "the mischiefs of faction", by which he meant

> A number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community. (No. 10)

A faction may constitute a minority or either a temporary or durable majority, and it may act contrary to the rights of other individuals or minorities, or contrary to the interests of the nation as a whole. As Madison put it succinctly during the Virginia ratification debates: "Give all power to the many, they will oppress the few. Give all power to the few, they will oppress the many."[27]

"The latent causes of faction" reflect "the division of society into different interests and parties," which are the inescapable result of, among other things, "the possession of different degrees and kinds of property." (No. 10) The "unequal distribution of property" may be "the most common and durable source of factions," but

> so strong is this propensity of mankind to fall into mutual animosities, 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. (No. 10)

"[T]he spirit of party and faction" is inescapably involved, therefore, "in the necessary and ordinary operations of Government." Factions are unavoidable, so an essential goal of a republican constitutional order must be to control their effects.

While we may tend to associate factions with minority interests, or what now are pejoratively labeled "special" interests, such factions were not Madison's primary concern. Majority rule usually should suffice to control them. In a republic, the most dangerous factions are those with majority popular support because of the real possibility that they will be able to prevail in the councils of government.

> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote: It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. (No. 10)

[27] Quoted in Dahl, p. 7.

Here Madison raised a fundamental question about the relationship between majority rule and republican government. Instead of arguing that the former is an essential, perhaps even the defining, characteristic of the latter, the prospect of untrammeled majoritarianism obviously worried Madison. Note that his definition of "faction", quoted above, is a group of citizens who, if empowered to do so, may act adversely to "the *rights* of other citizens, or to the permanent and aggregate i*nterests* of the community." (Emphasis added.) It must be that the interests of the community—perhaps what we have in mind today when we speak of the public interest—are something more than the interests of any majority within it; otherwise, Madison would have been asserting that a majority faction might act against its own interests.[28]

By necessary implication, therefore, the aggregate interests of the community somehow must combine or take account of the interests of both the majority faction and whatever minority or minorities are not part of it. Furthermore, a majority faction may act in a manner adverse to the rights of other citizens—i.e., those who are not included within the majority faction. So an unconstrained majority poses a threat to both the rights and the interests of minorities and thereby may act to the detriment of the community of the whole. An uncontrolled majority is not only a danger to minorities, it is a danger to the long-term best interests of the nation. And for such dangers to become real, a majority need not abuse its powers, it needs only to exercise them without constraint.

In true democracies, which must be small enough to enable all citizens to participate in government directly, "[a] common passion or interest will, in almost every case, be felt by a majority of the whole…and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual." (No. 10) Similarly, the dangers of faction actually are greater in small republics than in larger ones. For republics, size is advantageous, because with increased size comes greater diversity of economic and other interests and, therefore, a reduced likelihood of any single group (faction) becoming so dominant as to suppress the rights and consistently act contrary to the interests of smaller factions.[29]

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. (No. 10)

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[28] It might do so inadvertently or accidentally if "actuated by some common impulse of passion," but Madison also allows for a faction to be motivated by interest as well as passion.

[29] Madison had unveiled this argument during the Philadelphia debates. Ellis, p. 109; and Ketchum, pp. 200-201. It is less than clear whether Madison would consider a modern political party to constitute a "faction," or whether he would reserve that term for the groups of citizens supporting it.

As Madison returned to this argument and summarized it in No. 51, "[w]hist all authority in it [i.e., the United States] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority." The size and diversity of the nation, then, does not so much "guard the society against the oppression of its rulers" as it guards "one part of the society against the injustice of the other part."

Madison was concerned about corruption for personal benefit, to be sure. But his argument concerning size and factions focused more on the danger of a dominating branch of government becoming the effective agent for or captive of a single faction, and using that dominance to endanger "the rights of individuals or of the minority" or the "permanent and aggregate interests of the community"—that is, the public interest.

Madison's purpose in No. 10 was to defend the need for, and value of, a strong union by explaining how and why the individual states were more likely than a national government to become subject to the influence of a dominant faction. Although he referred back to this argument in No. 51, the primary purpose of the latter essay was to argue, in effect, that the potentially adverse effects of such a faction could be effectively controlled by specific institutional arrangements set forth in the new constitution that would protect against the excessive concentration of governmental power in any one of its parts. The size and diversity of the large republic might reduce the likelihood of majority (or majority coalitions of) factions, but institutional arrangements within the constitutional design would help more to "guard the society against the oppression of its rulers." Among these arrangements, one line of defense lay in federalism:

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself. (No. 51)

The history of 18th century North America—indeed, the Philadelphia debates themselves—evidently left no doubt in Madison's mind that the various states could be expected to guard their powers jealously, and to protect as best they could against those powers flowing to the central government. As it turned out, that is precisely what happened eventually, but Madison certainly can be forgiven for not anticipating in 1788 trends that did not emerge in full force until a century or more later.

We are left with a critical question. Even if the size of the republic reduced the potential dangers posed by the possibility of majority factions, and even if the federal arrangements of the new constitution protected against the concentration of political power by dividing it between the states and the new national government, the powers assigned to the latter, if abused, still were more than potent enough to threaten and eventually destroy the liberties of the people. So even if, as Madison argued, the two constitutionally-sanctioned levels of

government[30] would control each other through what we might call a vertical separation of powers, how and why should the national government be expected to control itself?

The paragraph of No. 51 in which Madison specifies the nature of the problem is so important—and, ultimately, so central to our concerns here—that it deserves to be quoted in full:

> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. (No. 51)

The goal is to control "the abuses of government" which can result from "a gradual concentration of the several powers in the same department."[31] Those abuses may take the form of corrupt behavior for personal benefit or self-interested behavior for the benefit of the factions or interests that dominate the dominant department of government. The former would be unconstitutional or illegal, or both. The latter might be both constitutional and legal, but no less destructive of the need for government to protect against any group, whether a majority or minority, invading the rights of others or the interests of the community as a whole. By asserting that men are not angels, Madison need not be taken to mean that they are inherently base or evil but just that they are not omniscient, so each of them cannot be expected to hold in his mind and heart the diverse range of interests in the nation, and to give each of them the same weight that he gives to the interests most familiar to his own experience.[32]

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[30] The Constitution did not address the subject of local governments, by implication leaving their design and control to State constitutions and laws.

[31] Note that Madison is concerned with a *gradual* concentration of power in the same department of the government, not with the prospect of a sudden *coup d'etat* within the government. If the latter had been his concern here, he surely would have recognized that such a danger could emanate only from the executive, the Constitution designating the President as commander-in-chief of the armed forces of the United States and "of the militia of the several states, when called into the actual service of the United States." (Article II, Section 2)

[32] At the end of No. 55, and when, perhaps not incidentally, it served the needs of the argument he was making in that essay, Madison wrote that, "[a]s 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."

So it is not only a question of who is to guard the guardians against self-aggrandizement, but also one of how to ensure that a concentration of power in any one part of the government does not distort government action in ways that can be destructive, and perhaps even fatal, to the republic. Madison's answer lay in the "auxiliary precautions" that encourage ambition to counteract ambition by connecting "the interest of the man" with "the constitutional rights of the place." Federalism is one such auxiliary precaution. Another lies in the overlapping, not complete separation, of powers that Madison acknowledged in essays No. 47 and No. 48. In a stable republic, the members of each branch of government will recognize that their influence, individually and collectively, is tied to the power of the institution in which they serve, whether it be the legislature, the executive, or the judiciary. Therefore, when any of these institutions shares a power of government with one or both of the others, its members will want to defend, preserve and, if possible, extend the power of their institution in order to defend, preserve and, if possible, extend their own influence. In this way, "the interest of the man" will benefit from protecting and even increasing the constitutional authority of the place. And maintaining a balance of institutional power within the government will minimize the danger of a concentration of power in the hands of any one faction.

The sharing of powers, therefore, among separated institutions of government creates a series of checks and balances, with the members of one branch checking the members of the other and, in the process, preserving the intended constitutional balances among the branches themselves. Instead of relying on individual virtue, self-restraint, and dedication to the constitutional order, it is precisely the self-interest of the governors that can be made to prevent the excessive concentration of power in any branch of the government and the destructive consequences that would ensue.[33]

Madison recognized, however, that the members of the three branches of the new national government would not be equally able to protect their constitutional powers. Judges would have the fewest weapons by which to protect the judiciary against legislative or executive encroachment, but so long as the courts exercised restraint and respect for the judgment of the directly- and indirectly-elected members of the other two branches, the judiciary would pose relatively little threat to the others and so would have relatively little to fear from them.[34] By contrast, as we already have noted, Madison saw the greatest threat to maintaining balance in the constitutional order as coming from the legislature. To protect against this threat, the new constitution proposed to so design the Congress as to divide it against itself:

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[33] Again, it should be emphasized that Madison is not so much concerned here with any sudden, extra-constitutional invasion by one branch of the proper authority of another as with a gradual nibbling away by one branch of the borders that separate it, and its influence, from another.

[34] When Chief Justice John Marshall issued a Supreme Court decision in 1832 with which President Andrew Jackson strenuously disagreed, Jackson is supposed to have said, "John Marshall had made his decision, now let him enforce it." Quoted in Marquis James, *Andrew Jackson, Portrait of a President*. New York, Grosset & Dunlap, 1937, p. 304. The story probably is apocryphal.

> [I]t is not possible to give to each department an equal power of self-defence. In republican government the legislative authority, necessarily predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit. (No. 51)

Bicameralism, then, is a necessary protection for republican government. Instead of a unified legislative institution that would be able to encroach successfully on the powers of the other branches of government, the new constitution would create a bifurcated legislature with the two halves sharing the legislative power and with each having some unique or predominant powers of its own. By dividing powers within the legislature, the members of the House of Representatives and the Senate would have the means and incentives to check and balance each other. Why a senate? Madison's answer in *The Federalist* was not limited to the prevailing demand that the states and state interests be represented in the councils of the national government. His argument went much further and even suggested that there would need to be a senate even if there were no states, because a bicameral legislature is instrumental in establishing and preserving a balance of power within the national government.

Not every bicameral arrangement is likely to have this desired effect, and it is here that Madison's theoretical argument began to merge with his defense of the particular characteristics of the proposed U.S. Senate. First, both halves of the legislature must enjoy real and substantial, if not precisely identical, powers. The more the allocation of constitutional powers between them is skewed in favor of one house or the other, the less the weaker house will be able to constrain its more powerful partner, and the less the stronger house will be constrained from encroaching on the power of the other branches of government. Consistent with this argument, the new constitution proposed to give both houses essentially the same legislative powers and to give each house unique powers of its own: the House of Representatives to originate money bills, and the Senate to try impeachments and to consent to key executive and judicial appointments and to the ratification of treaties.

Furthermore, for the division of the legislature to have its desired effect, the two houses must be more than two identical halves of a whole. Madison stressed that they should be characterized "by different modes of election" and "different principles of action," so as to render them "as little connected with each other" as possible, without preventing them from acting together to meet their shared constitutional responsibilities. The next fifteen of the essays were devoted to the individual and different characteristics of each house, supporting the conclusion that they would be sufficiently similar to achieve their shared purpose while being sufficiently different to transform the three branches of government into four for the purpose of checking and balancing each other.

Madison began his first essay on the Senate, No. 62, by highlighting some of the ways in which it would differ from the House of Representatives: in the age at which its members could be elected, and the number of years they must be citizens before being elected. These

differences were appropriate, he suggested, in light of Senators' unique responsibilities for giving their advice and consent to treaties and for acting as judges in impeachment trials. Next he noted the different ways in which Representatives and Senators were to be chosen; however, he did not defend the selection of Senators by their state legislatures, his opposition to it at the Convention being so well-known.

> Among the various modes which might have been devised for constituting this branch of the government [i.e., the Senate], that which has been proposed by the convention is probably the most congenial with the public opinion. It is recommended by the double advantage of favouring a select appointment, and of giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former; and may form a convenient link between the two systems. (No. 62)

Taken with the equal representation of the states in the Senate, something Madison also opposed, the result would be that "[n]o law or resolution can now be passed without the concurrence first of a majority of the people, and then of a majority of the states." (No. 62)

To explain why the U.S. Senate should be so much smaller than the House of Representatives, and why the terms of Senators should be so much longer than those of Representatives, Madison then proposed "to enquire into the purposes which are to be answered by a senate; and in order to ascertain these it will be necessary to review the inconveniences which a republic must suffer from the want of such an institution." (No. 62) Of the six reasons he offered in this and the following essay, the first rehearsed his argument about the wisdom of checking and balancing power within the prospectively dominant branch of the new national government:

> It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it, may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient….[A]s the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies; it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of responsible government.

Not any senate will do; it must be a distinct body, as dissimilar from the other as "the genuine principles of responsible government" permit.

So as Madison then identified five "other purposes which are to be answered by a senate," he now had in mind a particular kind of senate: one with fewer and older members, serving longer terms than the members of the other house.

There is a propensity, Madison argued, for "all single and numerous assemblies…to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions. If a senate is to "correct this infirmity," "it "ought itself to be free from it, and consequently ought to be less numerous. It ought moreover to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration." (No. 62)

"Another defect to be supplied by a senate lies in a want of due acquaintance with the objects and principles of legislation."

> It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. (No. 62)

Senators, with their longer terms of office, were expected to compensate for this deficiency among members of the House of Representatives. For the same reason, the Senate would lend a needed stability to the new government:

> The mutability in the public councils, arising from a rapid succession of new members, however qualified they may be, points out in the strongest manner, the necessity of some stable institution in the government. Every new election in the states, is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence, and every prospect of success. (No. 62)

Finally, a senate such as the one created by the Constitutional Convention would be more attuned to the nation's reputation in the world and more likely to remain sensitive to the long-term interests of the nation. More generally, a senate comprising fewer members serving longer terms than the other house

> May be sometimes necessary, as a defence to the people against their own temporary errors and delusions….[T]here are particular moments in public affairs, when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice and truth, can regain their authority over the public mind? (No. 63)

Jay made a similar argument in the 64th essay. By placing the selection of the President and Senators in the hands of an electoral college and the state legislatures, respectively, he explained, "[i]t confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant

appearances of genius and patriotism, which like transient meteors sometimes mislead as well as dazzle."

As these arguments remind us, the delegates meeting in Philadelphia did not set out to establish a republic that would satisfy contemporary democratic values. Only the House of Representatives was to be elected directly by the people, and then only by a limited franchise. Judges were to be appointed, and both Senators and the President were to be elected indirectly, by notables who were expected to know better than ordinary voters which other notables were qualified to act in these offices on behalf of the people.

> [N]one of the founders, to include Jefferson, regarded democracy as a goal of the American Revolution. Throughout the founding era, the term "democracy" remained an epithet, used to tar an opponent with the charge of demagogy or popular pandering. Those founders who lived long enough to experience the early manifestations of a democratic culture—Adams, Jefferson, and Madison—all expressed the same baffled disappointment that their hard-won republic was being corrupted by an alien force….
>
> [T]he core question posed at the founding was not whether the United States should become a democracy, but whether it should become a viable nation-state. And the chief difference of opinion was not a clash between elitists and egalitarians—both the Federalists and the Republicans were elitists—but between those favoring a wholly sovereign federal government and those anxious to preserve state sovereignty over all domestic policy."[35]

To summarize and, inescapably, to simplify:[36] There is an inherent danger in any republican government, which elects its leaders and enacts its laws by majority vote, that a majority group (or a combination of minority groups)—"factions," in Madison's parlance—may gain control of the levers of governmental power and use them in ways that benefit its leaders in corrupt ways or that benefit group interests at the expense of the interests of other, minority groups or a more general public interest (or all of the above). One way to minimize this danger, without eliminating it entirely, is to enlarge the republic and thereby reduce the likelihood that any majority group will emerge or that any majority coalition of minority groups will coalesce. So an enlarged republic is the first line of defense against the potential for abuse of governmental power in republics.

The second line of defense lies in federalism: a constitutional relationship between the individual states and the national government that is much more than confederation but far less than consolidation. By the innovative device of empowering both the national government and each state government to act directly on the citizens of that state, but on different matters and for different purposes, a form of shared or divided sovereignty is created. This amounts to a vertical separation of powers in which the national government can be expected to resist encroachments by the states into its enumerated powers, and the state governments can be

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[35] Ellis, pp. 241-242

[36] For a much more rigorous dissection and critical analysis of the logic of Madison's argument, see Dahl, pp. 4-33, and for a much more complex analysis which is sometimes provocative and sometimes abstruse, see Wills' *Explaining America: The Federalist.*

expected to resist encroachments by the national government into the states' residual powers. One result is to guard against a majority group monopolizing the levers of governmental power because they are shared among the states and between the state governments and the national government.

The national constitution that *The Federalist* was written to advocate creates a third line of defense in the form of its system of separated institutions sharing the powers that the constitution assigns to the national government. For the most part, officials of that government will be sincerely dedicated to the principles of the Constitution and the institutions of government it establishes. However, the Constitution also creates a collection of "auxiliary precautions" that stimulate a competition for influence among the three branches of government. The senior officials of each branch will understand that their reputations and ambitions are inseparable from the strength of the institution—whether legislative, executive, or judicial—of which they are a part. Furthermore, their ability to promote their preferred government policies (or those of their "factions") will depend on the relative power of their institution within the larger structure of government. They will have powerful incentives, therefore, to protect the branch of government in which they serve from encroachments by one or more of the others.

For any majority group to become able to abuse national governmental power, for personal or parochial interests, it would have to gain control of most if not all the levers of power, distributed as they are among the separated institutions. And the likelihood of this occurring is reduced by the different ways in which the members of each primary institution of the government are chosen: Representatives by direct popular election; Senators by indirect election by the state legislatures; the President by indirect election by an electoral college of notables who are themselves elected by the people; and federal judges, who are appointed by the President with the agreement of the Senate.

All this, however, is not enough. A fourth line of defense also is necessary because of a natural, perhaps inexorable, flow of power from the other branches to the legislature. It cannot be assumed, therefore, that diligent efforts by members of each branch of government will suffice to maintain a requisite balance of power among them. To prevent that balance from tipping in favor of the legislature, the Constitution divides the Congress against itself. By creating a Senate that differs from the House of Representatives in how its members are elected, what qualifies them for election, and how long they serve, differences between the two houses are created that can be expected to emerge and affect their decisions as they exercise their shared and essentially equal legislative powers. Such a bicameral legislature is less likely than a unicameral alternative to have a unified interest in imposing its single will on the executive and the judiciary.

This is why a senate is desirable if not essential, but only if the constitution renders the two houses of the legislature, "by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit." (No. 51) To ensure that the senate is

sufficiently different from the other house, it ought to be populated by members who identify themselves with the house in which they serve and who recognize in the other house both a partner in legislation and a competitor for power. Finally, since in practice, senates tend to have fewer members serving longer terms of office than their companion house, they also may provide the additional benefits that Madison enumerated in essays No. 62 and No. 63.

The senate, then, lies at the end of a chain of argument about how a republican government can be made safe for the people it is supposed to serve. The starting point for Publius—primarily Madison on this subject—is that political power is "of an encroaching nature," so the question for him becomes whether the proposed new constitution provides practical and effectual protections against "the encroaching spirit of power." (No. 48) His affirmative answer to that question takes us through four successive lines of defense: the very size of the republic; the sharing of power between the state and national governments; the sharing of power among the departments of the national government; and, finally, the establishment of a senate to divide and thereby control the most dangerous of these departments, the legislature.

THEN AND NOW

There is no way to know how persuasive the arguments of *The Federalist* were in 1788-89 and how much influence they had on the members of the state ratification conventions. Suffice it to say that the Constitution was ratified, all three authors of the papers went on to distinguished careers under it (though Hamilton's was cut short by his mortal duel with Aaron Burr), and the reputations of Hamilton and Madison today rest in no small part on the essays they wrote then.

We can and should ask, however, how relevant and persuasive their arguments are today, especially with respect to the justification for having a senate. The answer, I submit, depends on how narrowly or broadly Madison's arguments are construed.

Again to summarize Madison's argument: (1) The sharing of constitutional powers among separated institutions of government should produce a competition for influence among the incumbent officials of those institutions, and especially between members of the executive and the legislature. (2) The result should be a balance of actual power between the executive and legislative, but only if each branch is strong enough to compete effectively with the others, even though "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." (No. 48). (3) A bicameral system which divides the legislature against itself should prevent legislative dominance, and permit maintenance of an actual balance of power that preserves popular rights and promotes national interests.

In the 1780s, then, Madison found in bicameralism a means to prevent a unified legislature from dominating the other branches of government and encroaching on their powers to the detriment of individual and collective liberties and interests. Now, after more

than two hundred years have passed since *The Federalist* was first printed and the Constitution was ratified, a key component of Madison's argument has a quaint and almost amusingly anachronistic ring to it. Today it would be difficult indeed to sustain Madison's argument that "[i]n republican government the legislative authority, necessarily, predominates." Instead, the arguments of our era are far more likely to be over what to do about—or whether anything can be done about—the imperial presidency, for example, or the decline of parliament. If there is one common or most prevalent theme in analyses during the past several decades of the condition of the legislative branch in the English-speaking world, it is the flow of power to the executive, with a consequent decline in the power and influence of legislatures and parliaments.

Our contemporary situation, then, would seem to undermine or even nullify Madison's core argument for the existence of a senate. If the legislative is no longer the potentially dominant branch of government, there is no need to constrain it by dividing it into two halves with incentives to compete as well as cooperate. Indeed, it might be a unicameral legislature that is better able to concentrate its remaining strength against encroachments of the executive branch without wasting any of that strength in intra-legislative competition. It is difficult enough for a collective legislative body to speak and act with unity when confronted by a single head of government. How much more fragmented and ineffectual should we expect it to be when it is divided into two halves that are "as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit." (No. 51)?

But this line of argument makes sense only if the legislature recognizes a need to protect itself against encroachments by the executive branch that produces a gradual concentration of governmental power, threatening the rights of minorities and the general interests of the community. What if, instead, the legislative and executive branches regard each other as allies with a common interest in joining their respective powers in pursuit of shared goals? Recall Madison's argument, in No. 51, that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." What happens if a majority of legislators lack the personal motives to resist executive encroachments even though they retain the necessary constitutional means to do so? In that case, ambition no longer would counteract ambition, and "[t]he interest of the man" no longer would be "connected with the constitutional rights of the place." (No. 51) To continue paraphrasing this essay, the government surely would be able to "controul the governed," but it would not have the necessary incentive "to controul itself." The result would be greatly to increase the risk of majority self-interest or even oppression that Madison feared.

In assessing and applying Madison's argument today, we would do well to look behind his now-indefensible characterization of legislative dominance, and focus on the underlying premise that drove his analysis: "[i]t will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." (No. 48).

Although the legislature is unlikely to be the dominant power today, that does not obviate the need to secure a balance of power among the institutions of government, however their powers now are distributed and however those institutions now are separated or linked together.

Modern political parties have created bridges to connect the separated institutions of Madison's system, and bring together members of the legislative and executive in common cause. As parties have grown stronger and as they have come to exert more control over the political futures of national elected officials, the connection between "[t]he interest of the man" and "the constitutional rights of the place" has grown increasingly tenuous. Legislators may visualize their futures in places of executive power or in places of greater power within the legislature. In either event, they understand that their ambitions for the future are most unlikely to materialize without the support of their party. With "the interest of the man" tied more and more closely to the preferment of his party, "the constitutional rights of the place," not surprisingly, tend to become a secondary concern. If the executive and legislative branches are in the hands of the same party, it matters less whether the power of government actually is exercised in one or the other. The mutual ambitions of their members already in office are, first, their collective ambition to remain in office and, then, their individual ambitions to advance in office. Their shared incentives, therefore, are for cooperation, not competition, between the branches and, in practice, a willingness for legislators to defer to the executive because there, after all, is where the leader of their party is almost always to be found.

The prospect of a single party uniting both the executive and legislative branches in support of a policy agenda that favors some interests over others raises precisely the spectre of a majority faction that Madison feared. Recall this from his No. 10:

> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote: It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens.

The core of Madison's argument rests on two premises: first, that a government in the interests of even a majority faction is all too likely to be "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community" (No. 10); and second, therefore, that the institutions of government can and should be designed to prevent any such faction from exerting a continuing dominance over government policy.

But is this not precisely the situation we are most likely to encounter in democratic governments today? In parliamentary systems, the legislature and the executive are in the hands of the same party; that is true virtually by definition. And in presidential systems, we end up in much the same place if the president's party also wins a majority of the legislative seats. Unless, that is, the legislature is bicameral, and the members of the two houses are

elected at different times and in different ways (as Madison urged), so that the same party is less likely to win a majority of seats in both of them. And unless each house has sufficient constitutional powers, and sufficient will to exercise those powers, to prevent one from becoming dominant over the other.

So bicameralism remains critical even in an era of executive dominance, and perhaps even more than ever, when otherwise the same party might well control both the executive and legislative branches. And so we are brought back to Madison's insistence that, if bicameralism is to provide the fourth line of defense, it is essential, to repeat the familiar maxim once again, that the senate and the other house be "as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit." (No. 51) In a republic, legitimacy demands that both houses represent the people as a whole, not a special segment of them, but there are advantages in providing for them to be elected in different ways to at least create the possibility that the same political party will not unite the executive with both halves of the legislature.[37] Even so, a difference in the political coloration of the two houses will matter little if one has the constitutional power to dominate the other (invariably, the senate), either acting alone or acting in alliance with the executive branch. The two houses need not have identical powers. However, each needs some essential powers that the other institutions of government cannot exercise without its concurrence, and each needs a sufficient sense of its own legitimacy and responsibility to prevent it from subordinating itself to the other house, or to a partisan alliance between the other house and the executive.

Although the growth of executive power might seem at first blush to eliminate the need for a senate, according to the logic of Madison's argument, in fact it should have just the opposite effect. Obviously *The Federalist* must be understood in the context of its time and its place, and the reason for which it was written. Its authors were advocating a specific governmental design, so they presented arguments to defend it against the criticisms it was confronting. Some of their arguments, however, embody a wisdom that can be applied profitably in other contexts. Madison argued that a senate, or at least the right kind of senate, was needed to prevent the legislature from growing more and more powerful at the expense of the other institutions of government. His goal was to ensure a restrained government, a government that would control itself while controlling the governed. If the danger of encroachment now comes more from the executive than the legislative branch, that does not make a restrained government any less desirable. And if there is an even greater danger of the executive and legislative branches combining their powers and using them in concert, how else is such a government to be restrained if not by a muscular senate that is so designed that "[t]he interest of the man" and "the constitutional rights of the place" are best served when it is ready

[37] "One of the reasons Adams proposed a bicameral legislature—a core feature of his political thought that he kept harping on throughout his life—was that it created two arenas for different versions of 'the people.' When asked, Adams would always concur that a republic was bottomed on the principle of popular sovereignty, but the political expression of that sovereignty in any government must be plural rather than singular because the interests of 'the people' were diverse and often mutually exclusive." Ellis, pp. 48-49.

and able to stand against the combined pressure of the executive and its companion house in the legislature?

AN EXTENDED POSTSCRIPT

While thinking about this paper earlier this year, I was driving through rural West Virginia when I came across a series of placards along the side of the road, each proclaiming "Vote NO on Zoning." They were followed by a larger, more imposing sign that asked "Would You Trust YOUR Land to Your Local Government?"

Evidently, this was intended to be a rhetorical question, with the expected answer being a resounding "No!" The more elaborate answer presumably was to be, "No, of course I can't trust my local government, even though it's composed of other local residents, even neighbors, whom I elect, to control how I can use the land I own. So of course the only sensible thing for me to do is to 'Vote NO on Zoning," even if I don't really know exactly what is being proposed in what I suppose is going to be a referendum at the next election."

The zoning proposal appeared on the ballot in one West Virginia county and was soundly trounced by a two-to-one margin, just as it had been defeated by similar margins in the late 1970s and more recently in 1996. The proposal was reported to be about 200 pages long, so it's fair to assume that almost all voters based their decisions on more easily digested messages, such as the question posed on the road sign. Undoubtedly there were other considerations at work, such as the expected impact of zoning on local tax rates and the effects of zoning in other nearby counties. Yet I could not help but wonder—perhaps I had been driving for too long—what this local electoral campaign implied about the persistent strength of Madison's argument, and about its universality.

Clearly this campaign intended to capitalize on what was assumed to be a widespread suspicion of local government officials, not that they were personally corrupt but that it was too dangerous to assume that they would act in the voter's interest. And it was expected that this concern would resonate even in a single county with a population of roughly 100,000 (though only 17,000 voted for or against zoning). In modern American political debate, the argument often is made that the best decisions are made at the state instead of the national level and, even better if possible, at the local instead of the state level, because the smaller unit of government is "closer to the people" and, therefore, better able to understand their needs and reflect their interests and preferences.

This line of argument implies that the smaller the unit of government, the more homogeneous—economically, socially, culturally—it is likely to be. Yet, historically, local governments often have been characterized not by a homogeneity of interests, but by a single predominant (usually economic) interest—a majority faction, Madison would say—with the political strength to impose its preferences over much smaller, minority factions. It has been precisely because of a perceived need to protect or promote those ignored or disadvantaged

minority factions that U.S. state governments have been asked to intervene in what had been local matters, and for the national government to intervene in what had been state matters.

Still, I expect that most Americans would agree with the proposition that local elected officials understand local needs and conditions better than "some unelected bureaucrat in Washington, DC." Yet if that West Virginia county is at all typical, there remains in the United States a persistent doubt about the wisdom of government decision-makers, even at the local level, at the same time that the story of the last century in the U.S. has been one of growing government power and increasing government intervention in economic and social life at all levels of government, but especially at the national level.

So there seems to be an ambivalence in the U.S. today about the continuing need for multiple lines of defence against the "encroaching nature" of governmental power. On the one hand, by overwhelming popular consent, the national government is enormously more powerful than Madison or even Hamilton could ever have imagined. But on the other hand, there evidently is a strong, persistent, and residual doubt about how that power will be exercised "inside the Beltway," and even at the local level where government officials are most likely to be "people like us."

At the national level, this ambivalence has been reflected in debates over the desirability of divided government. Most observers would agree that American party politics are more polarized today than at any time in the last century. Yet for much of the period since the end of World War II, a president of one party has faced a majority of the other party in one or both houses of Congress. What is more, public opinion polls have shown majorities who believe that this is a desirable situation; some analysts even have argued that divided government is a consequence of deliberate voter choice, not an unplanned aggregate consequence of how millions of individual votes have been cast. Although some political scientists have concluded that divided government has been no bar to the enactment of major new legislation, divided party control must complicate the legislative process and require policy concessions that neither party would make if it enjoyed control of both the law-making branches in Washington.[38]

Several years ago, when President George W. Bush enjoyed majorities in both houses of Congress, he still had difficulties securing Senate approval of some of his nominees to become federal judges. By debating these nominations at length—filibustering them—and by other means, Senate Democrats prevented them from coming to votes on the Senate floor because ending a filibuster requires the concurrence of at least 60 of the 100 Senators, and no majority party in recent decades has enjoyed such a large majority. In turn, the Senate's Republican leaders threatened what became known as the "nuclear option," a procedural strategy that

[38] An exception may have been during the very early period of Ronald Reagan's presidency when some congressional Democrats, noting Reagan's popularity in their states or districts, evidently voted for his legislation even when they would have preferred to vote otherwise. Within a few years, however, many of those same Democrats concluded that much of Reagan's popularity was personal, and that they could vote against his bills without excessive political risk so long as they did not criticize him as a person and, to many, a national icon.

effectively would have precluded filibusters on a president's judicial nominations (and, thereafter, perhaps on other matters as well).

Republicans who defended this strategy made the unsupportable claim that the Constitution, in giving the Senate authority to give its advice and consent on judicial nominations, thereby requires it to vote, promptly and directly, on each of them. Of more concern here, though, was the Democrats equally specious argument that Senate filibusters were an integral element of the American system of checks and balances that is essential to preserving the constitutionally-mandated separation of powers. Consider these excerpts from a letter that the Senate's Minority Leader, Democratic Senator Harry Reid, wrote to the Majority Leader, Republican Senator Bill Frist, in March 2005:[39]

> [I]n recent press reports you have threatened to use extraordinary parliamentary tactics allowing the Republican majority to rubberstamp the handful of nominees already rejected and all future Bush nominees.…On behalf of every Democratic Senator, I urge you and your colleagues to reconsider this course of action, which would remove one of the constitutional checks and balances that has served our country so well for over two centuries…. The role of the Senate in the confirmation of presidential nominees is a central element of our democracy. The Framers of the Constitution created a system of checks and balances to limit the power of each branch of government, and in that way to protect the rights of the American people.

Senator Reid would have failed if he had combed through the debates in Philadelphia and the state ratifying conventions for evidence that the Senate filibuster then was envisioned as part of the scheme of constitutional checks and balances to which he referred. However, his position became much more defensible and more historically-grounded when he cast his defence of filibusters in terms of political, not constitutional, checks and balances:

> Democrats in the Senate may be in the minority, but we represent millions of American citizens. The nuclear option would deny these Americans their rightful voice in the governance of the nation. Moreover, we will not always be in the minority. The nuclear option would trample on the rights of whichever group of Americans -- Republicans or Democrats -- happen to be represented by the Senate minority at any given time.
>
> Listen to the words of two of our great Senate Leaders: Former Republican Leader Howard Baker wrote in 1993 that limiting the right to extended debate "would topple one of the pillars of American Democracy: the protection of minority rights from majority rule. The Senate is the only body in the federal government where these minority rights are fully and specifically protected." And half a century earlier, Democratic Leader and later President Lyndon Johnson said: "In this country, a majority may govern but it does not rule. The genius of our constitutional and representative government is the multitude of safeguards provided to protect minority interests."

Here is the Madisonian argument in contemporary terms. We can think of a political party as an organization that attempts to create a majority coalition of factions and, if

[39] The full text of the letter is available at http://democrats.senate.gov/~dpc/press/05/2005315B18.html.

successful, wins elections in order to advance the interests of all the components of that coalition.[40] The Madisonian dilemma then becomes how to protect against a majority party that, in Lyndon Johnson's words, rules as well as governs, that fails to "protect minority interests"—the interests of those minority factions that are not part of the majority coalition of factions. For much of the 20th Century, the national party coalitions were relatively weak, diffuse, and sometimes incompatible—for example, most Northern versus most Southern Democrats on the rights of African-Americans. In the last several decades, however, American political parties have become more homogenous and their positions have become more polarized, leading to levels of party unity in congressional voting that are very high by historical standards, even though imperfect when compared to party voting in some national parliaments.

Under these circumstances, divided government in Washington often has been a reasonably effective solution in recent decades to Madison's dilemma. If the president's party lacks a majority in one or both houses of Congress, the legislative process inescapably becomes one of inter-party negotiation, which one would expect to produce results that take more account of interests (factions) that are marginal to, or even incompatible with, the core policies of the president and his party. In times of unified government, though, the ability of the minority (opposition) party in the Senate to filibuster bills, nominations, and even treaties is the only effective leverage that party has. It is the only thing preventing the governing party from ignoring or short-changing "minority interests," other than the prospect of the next election which may be two or four years distant.

The question that remains is to what extent this concern with protecting minority factions against finding themselves at the mercy of a majority faction—or a majority party that stands for a majority coalition of minority factions—is a peculiarly American concern?

In many countries, suspicion and fear of government are perfectly rational and appropriate. Government corruption for reasons of power and financial gain are widespread, even if sometimes explained as a response to traditional cultural norms that require support for family, clan, or tribe. But in well-established democracies, instances of such corruption are relatively rare, the occasional headlines to the contrary notwithstanding. Among the 179 countries that Transparency International ranked in its 2007 Corruption Perceptions Index (the countries' "perceived levels of corruption, as determined by expert assessments and opinion surveys"), the four English-speaking democracies of Australia, Canada, the U.K., and the U.S. all ranked among the twenty least corrupt regimes.[41] Yet there is at least some evidence to suggest that the citizens of local communities in Canada, the U.K., and Australia probably would be more likely than Americans to trust *their* local governments with their land.

[40] Indeed, when structural-functional analysis was popular in American political science, political parties were described as being engaged in interest aggregation.

[41] www.transparency.org/policy_research/surveys_indices/cpi/2007.

A recurring theme in Seymour Martin Lipset's 1990 *Continental Divide*, comparing the values and institutions of the U.S. and Canada, was that "the northern people [Canadians] are basically less suspicious of the state than their southern neighbors."[42]

> Americans do not know but Canadians cannot forget that two nations, not one, came out of the American Revolution. The United States is the country of the revolution, Canada of the counterrevolution. These very different formative events set indelible marks on the two nations. One celebrates the overthrow of an oppressive state, the triumph of the people, a successful effort to create a type of government never seen before. The other commemorates a defeat and a long struggle to preserve a historical source of legitimacy: government's deriving its title-to-rule from a monarchy linked to church establishment. Government is feared in the south; uninhibited popular sovereignty has been a concern in the north.[43]

Consequently, "[t]he chronic antagonism to the state derived from the American Revolution has been institutionalized in the unique division of powers, the internally conflicted form of government that distinguishes the United States from parliamentary regimes, such as Canada's, where the parliament (more realistically, the cabinet), has relatively unchecked power, much like that held by an absolute monarch."[44]

This "internally conflicted form of government" in the U.S. evidently is a good thing. Lipset attributes to Canadians the belief that "the presumed greater political intolerance in the United States is a consequence of the Revolution, that repression of minority opinion must occur in a society with unlimited popular rule."[45] And Lipset evidently agrees:[46]

> Americans are utopian moralists who press hard to institutionalize virtue, to destroy evil people, and to eliminate wicked institutions and practices. They tend to view social and political dramas as morality plays, as battles between God and the devil, so that compromise is virtually unthinkable.

If so, and I think Lipset overstates the case, the need to control the exercise of power in America by, or on behalf of, a majority faction or coalition of factions, is real and great. If policy disagreements are seen as differences between right and wrong, good and bad, and not as reflections of real but different needs and interests, those who hold the powers of government are less likely to defer, even in part, to the preferences of those who do not.

Several commentators also have attributed a generally more benign attitude toward government among Australians and British than among Americans. Ian McAllister has written that, in Australia, "the state exists primarily in order to resolve problems and disputes, not to preserve individual liberty," quoting Hancock in 1930 that "Australians have come to look upon

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[42] Seymour Martin Lipset, *Continental Divide*. New York, Routledge, p. xvi.
[43] Lipset, p. 1. Of course, as we have seen, "uninhibited popular sovereignty has been a concern" in the south as well.
[44] Lipset, pp. 20-21.
[45] Lipset, p. 14.
[46] Lipset, p. 77.

the state as a vast public utility, whose duty it is to provide the greatest happiness to the greatest number."[47]

This characterization is consistent with Lord Bryce's comments on the Australian constitution shortly after it was written, when he compared it with its U.S. counterpart:[48]

> When that instrument [the U.S. constitution] was enacted, the keenest suspicion and jealousy was felt of the action of the Government to be established under it. It was feared that Congress might become an illiberal oligarchy and the President a new George the Third. Accordingly great pains were taken to debar Congress from doing anything which could infringe the primordial human rights of the citizen….The English however, have completely forgotten these old suspicions, which, when they did exist, attached to the Crown and not to the Legislature. So when Englishmen in Canada or Australia enact new Constitutions, they take no heed of such matters, and make their legislature as like the omnipotent Parliament of Britain as they can….Parliament was for so long a time the protector of Englishmen against an arbitrary Executive that they did not form the habit of taking precautions against the abuse of the powers of the Legislature; and their struggles for a fuller freedom took the form of making Parliament a more truly popular and representative body, not that of restricting its authority.

If we accept what Bryce, Hancock, and McAllister have written, we still may ask whether the Australians, British, and Canadians were wise to think better of their governments and governors than have Americans. Have their confidence and deference put them at too great a risk even if, thus far, they have not had to pay a heavy price for taking that risk, or have Americans hamstrung their governments too much in order to protect against a risk that they and their media are too inclined to exaggerate? Is the question of "who guards the guardians" less in need of a convincing answer in Canberra or London or Ottawa than it is in Washington?

Finally, it bears reiterating that the dangers of public corruption and abuses of power are only part, however important a part, of Madison's rationale for an elaborate series of defenses against potential encroachments of power. While Madison was fully aware of the dangers of abuses of power, he also was concerned—perhaps more concerned—about the dangers of destructive uses of power, providing excessive government benefits to some interests (factions) at the expense and to the detriment of others. Establishing and maintaining a balance of power within government is important not only to prevent power from being abused but also to promote balanced government policies as they affect the often different and sometimes conflicting interests and preferences of its citizens.

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[47] Ian McAllister, "Political Culture and National Identity," in Brian Galligan, Ian McAllister, and John Ravenhill (eds.), *New Developments in Australian Politics*. South Melbourne: Macmillan Education Australia, 1997, p. 9, quoting W. K. Hancock, *Australia*. London, Ernest Benn, 1930, p. 69.

[48] James Bryce, *Constitutions*. London, Oxford University Press, 1905, pp. 298-299.