2 THE CONSTITUTIONAL FRAMEWORK

2-1 Federalist No. 10

James Madison
November 22, 1787

When one reads this tightly reasoned, highly conceptual essay, it is easy to forget that it was published in a New York newspaper with the purpose of persuading that state's ratification convention to endorse the Constitution. Although after ratification this essay went unnoticed for more than a century, today it stands atop virtually every scholar's ranking of The Federalist *essays. Written in November 1787, it was James Madison's first contribution to the ratification debate. In responding to Brutus's claim that only small democracies are viable, Madison develops a persuasive rationale for a large, diverse republic—one that he had employed several times in debates at the Convention and that his pro-ratification allies had popularized. The modern reader can appreciate how it resonates with the nation's diversity of interests in the twenty-first century. And everyone, then and now, can admire the solid logic employed by this intelligent man, who begins with a few unobjectionable assumptions and derives from them the counterintuitive conclusion that the surest way to avoid the tyranny of faction is to design a political system in which factions are numerous and none can dominate. This essay repays careful reading.*

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that

the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence, of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects. There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them

everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. 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. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole. The inference to which we are brought is, that the causes of faction cannot be removed, and that relief is only to be sought in the means of controlling its effects.

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. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular

government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended. The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations.

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. 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. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic,—is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised

within the Union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

2-2 Federalist No. 51

James Madison
February 8, 1788

Where Federalist *No. 10 finds solution to tyranny in the way society is organized, No. 51 turns its attention to the Constitution. In a representative democracy, citizens must delegate authority to their representatives. But what is to prevent these ambitious politicians from feathering their own nests or usurping power altogether at their constituencies' expense? The solution, according to James Madison, is to be found in "pitting ambition against ambition," just as the solution in No. 10 lay in pitting interest against interest. In this essay, Madison explains how the Constitution's system of checks and balances will accomplish this goal. Note that he does not try to refute Brutus directly by defending the design of the Senate, which would have been a tough argument. Rather he assumes a different premise—namely, the popularly elected House of Representatives will push the envelope of its authority. He then avers that the Senate and the executive may find the House irresistible, requiring some future Convention to strengthen these institutions to buttress separation of powers.*

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

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 control 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 controls 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 control the governed; and in the next place oblige it to control 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.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

But it is not possible to give to each department an equal power of self-defense. 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. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? . . .

2-3 "The True Principles of Republican Government": Reassessing James Madison's Political Science

Samuel Kernell

On casual reading, Federalist *Numbers 10 and 51 so resemble each other, one might well view them as parts of the same argument. In both, James Madison, writing as Publius, considers how government can be configured to prevent politicians in power from keeping it by tyrannizing their opponents. In Number 10, we read how the solution rests with a legislature whose members represent a large, diverse nation. In Number 51, the secret lies in dispersing government power across the legislative, executive, and judicial branches. In this essay, Samuel Kernell argues that the resemblance between Numbers 10 and 51 is deceptive. The government system designed to mitigate active tyranny in Number 10 works at odds with the separation of powers in Number 51. In the former, all that is required to protect liberty is the healthy political competition found in a well-designed, popularly elected assembly—really, the House of Representatives. In the latter, however, Publius worries that the president and Senate might be too weak to keep the House of Representatives in its proper place. After examining Madison's views expressed at the Constitutional Convention and elsewhere, Kernell concludes that Number 10 reflects Madison's sincere views on the subject, while Number 51 marshals the best case for ratifying the Constitution that he (or anyone) could muster.*

Since Thomas Jefferson made *The Federalist* required reading for all University of Virginia students, professors have enlisted these essays to instruct each generation of undergraduates in the principles of American government. The two favorites in today's classroom are James Madison's *Federalist* Numbers 10 and 51. Each essay identifies an essential and distinguishing characteristic of the American political system. Number 10 offers an ingenious rationale for the nation's pluralist politics, while Number 51 dissects the formal constitutional system. The first grapples with the tyrannical impulses of society's factions and the second with self-interested politicians who might be tempted to usurp their authority. In both cases, concentration is the threat for which Madison finds similar solutions in "divide and conquer," a principle he had once described as the "reprobated axiom of tyrants." In Number 10, his solution takes the form of an extended republic containing numerous, diverse factions whose representatives reconcile their competing interests in a well-designed, deliberative national legislature. In Number 51, a republican equilibrium requires a strong form of separation of powers containing checks and balances. Given that factional competition and checks and balances are based on the same strategic idea and the fact that Number 51 closes with a recapitulation of the main points of Number 10,

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it is not hard to see that these twin principles should be regarded as establishing the theoretical foundation of the Constitution.

Harder to understand is how this "Madisonian model" went unrecognized for so long, from shortly after ratification until Charles A. Beard reintroduced it more than a century later in his classic *An Economic Interpretation of the Constitution of the United States* (1913). According to Beard, Madison and his nationalist allies fused these principles in a scheme to hamstring government action and prevent national majorities from raiding the purses of the propertied class. While Beard was not the first to level these charges, he appears to have been the first since the ratification campaign to fashion these two principles into a unified theoretical model.[1] Beard's class conspiracy long ago lost favor, but the Madisonian model and its conservative bias remain the conventional wisdom of modern scholarship on James Madison and the Constitution's founding.

Subsequent scholars, many of whom rank among the Who's Who of twentieth-century political science, have relied on Beard to berate the Madison model. "If the multiplicity of interests in a large republic makes tyrannical majorities impossible," complained E. E. Schattschneider (1942), "the principal theoretical prop of the separation of powers has been demolished." By the 1950s, even those students of American pluralism who might be expected to number among Madison's most faithful boosters had joined the ranks of critics. Citing the presumed duplication of these principles, Robert A. Dahl (1956) concluded that the Constitution goes "about as far as . . . possible [in frustrating majority control] while still remaining within the rubric of democracy." And a few years later, James MacGregor Burns (1963) joined the chorus, again charging that Madison "thrust barricade after barricade against popular majorities." . . .

. . . The Madisonian model is a misnomer. It does not represent Madison's sincere theoretical views on the Constitution—at least before and during the Constitutional Convention, when they were consequential. Instead, the Madisonian model was formulated after the fact, specifically in *Federalist* Number 51 and its companion essays, in order to promote the Constitution's ratification. In parrying the nearly apocalyptic Anti-Federalist charges that the Constitution took a short path to tyranny, the nationalist campaign needed desperately to show that the new plan was constructed on sound republican principles and assuage the worries of fence-sitting delegates to the states' ratification conventions. The Madisonian model fulfilled that need.

I arrive at this conclusion after examination of several kinds of evidence—the internal validity of the central arguments of Numbers 10 and 51 and the consistency between them; similarities and differences between the Madisonian model and Madison's previous political science . . . ; and the model's value as campaign rhetoric during the ratification debates. In the next section (I), I argue that the Madisonian model is fundamentally flawed. Beyond the familiar charges of duplication—which, after all, may amount to no more than "too much of a good thing"—the Madison model contains a serious contradiction between its core principles. One simply cannot design a constitution that optimizes the performance of both factional competition and checks and balances. While the former prescribes essentially a majoritarian solution to the potential dilemma of majority tyranny, separation of powers—as implemented with the Constitution's strong checks and balances described in Number 51—succeeds only to the extent it frustrates this same majority control. . . . This raises the question of how Madison

could embrace a contradictory argument. The answer is simply that he did not. A review in Section II of Madison's relevant writings and activities fails to turn up an instance where he combined these principles prior to Number 51.

The joint appearance of factional competition and checks and balances in his *Federalist* essays might, as some have argued (Banning 1995), reflect the continuing development of Madison's theoretical views. Perhaps so, but there is little evidence from Madison's subsequent writings that he seriously revised his theoretical views on institutional design from those he took to the Convention (Riley 2001, 176–82). At least as strong an argument can be made that Number 51 springs from a strategic desire to dress up the Constitution in familiar principles in order to reassure delegates who were deliberating its fate at their states' ratification conventions. In section III I test this possibility by examining its value as campaign rhetoric. The Madisonian model presents a compelling case for ratification that is both different from the standard nationalist position and one Anti-Federalists probably found difficult to refute.

I conclude that Madison went to Philadelphia committed to replacing the Articles of Confederation with a constitutional system capable of positive action, both responsive to national majorities and protective of minorities in the states. He left Philadelphia with something quite different in hand. Despite privately expressing disappointment and lingering misgivings with the Constitution, he accepted it as superior to the Confederation and defended it vigorously in the ratification campaign. In doing so, he combined the principles of factional competition and separation of powers into a rationale for legitimizing a Constitution born of politics and its contradictions.

I. THE DISPARATE LOGICS OF NUMBER 10 AND NUMBER 51

The *Federalist* Numbers 10 and 51 are canon. And yet, I argue, they contradict each other. Nowhere is this more evident and destructive for the Madisonian model than in these essays' treatment of the House of Representatives. In Number 10, Publius unconditionally reposes government authority in a well-designed legislature, which closely resembles the House of Representatives in all of its essential features—membership composition, size and extent of its constituencies. . . . Yet writing Number 51 several months later, Publius singles out the House as posing the greatest potential threat to liberty and against which the Constitution must array the full force of checks and balances. To understand how these principles could generate such contradictory prescriptions, we need to understand their disparate logics.

I.A. Number 10: Institutionalizing Factional Competition

Madison opens this famous essay by declaring that the chief virtue of a "well-constructed Union" lies in "its tendency to break and control the violence of faction." He defines faction as "a number of citizens, whether amounting to a majority or minority of the whole,

who are united and actuated by some common impulse of passion or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." After exploring its properties, Madison concludes: "The inference to which we are brought is that the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*." This lays the groundwork for a government founded on factional competition.

Madison then constructs a constitutional system from some simple, mostly unobjectionable assumptions about the effects of size and diversity. He begins by noting that the advantage of representative over direct democracy lies in conveniently incorporating a large number of citizens. Greater numbers mean greater variety of interests, or factions, that will participate in the nation's collective decisions. As factions compete they hold each other in check and enact only those policies that command broad support. It is a simple yet profound idea. In that an extended republic supplies the diversity of interests vital for keeping factional tyranny in check, this argument allowed Publius to counter the favorite Anti-Federalist shibboleth that only small republics could endure.

As for institutional design, Number 10 presents two mechanisms for containing and aggregating preferences of numerous, potentially "turbulent" factions. These are representation and a deliberative legislature. On the former, Madison introduces a theoretical novelty, "a scheme of representation" that "promises the cure for [faction] which we are seeking." Republican theorists had traditionally regarded representatives as serving essentially as agents of a particular interest. Members of Britain's House of Lords, Montesquieu explained, were selected in such a manner as to guarantee their undistracted representation of the aristocracy. When Alexander Hamilton and John Adams explored possible constitutional arrangements in America, they had held fast to this conventional republican principle in formulating an American variant of "mixed government" in which the lower house of the legislature would represent the poor; the upper, the rich; and at least for Hamilton, the disinterested executive, the public good. For Madison, however, multiple-cleavaged constituencies implied a more complex role for politicians. These actors, he sensed, would embody "a change in the principle of representation" (Hunt 1900, 338). Like present-day members of the House of Representatives, but unlike all models of representation that preceded this essay, Madison's politicians succeeded electorally by building consensus (i.e., coalitions) across factions by discovering common policies that served their constituencies' competing interests.

On the legislative process, Madison again enlists pluralism to take the rough edges off factionalism. He is clearly sanguine about the moderating effects of this new scheme of representation but allows that even were representatives "of factious tempers, of local prejudices, or of sinister designs" elected, they would be constrained by their need to coalesce with differently minded representatives. The only additional ingredient required was a sufficient variety of interests so that none could dominate. This fortuitously came in precisely the form that responded to the Anti-Federalist fears of a large republic. "Extend the sphere," Publius reassures us, "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." All three of Number 10's key features—representation, a well-proportioned legislature, and

an extended republic—follow logically from the presence of multiple factions whose divergent and conflicting interests must be represented and combined. Moreover, by identifying these institutional attributes as desirable, the argument served the ratification cause by highlighting prominent features of the House of Representatives as well as by rendering the Constitution suitable for a growing nation.

. . . Certainly if factional competition *is* the solution, then it should be the criterion for judging the internal design and power relations among the other branches of government as well. Of course, the Constitution did not implement the logic of factional competition beyond the House of Representatives, which undoubtedly explains why Publius failed to continue his exercise beyond a well-proportioned, popularly elected legislature. After all, the presidency, the Supreme Court, and even the Senate fall far short of satisfying the design requirements identified in Number 10 for generating moderate policy. This raises the question, how in the absence of factional competition do these other branches avoid capture by some faction or inappropriately configured coalition bent on pursuing immoderate policies? The answer, at least for the second part of the question, is offered in Number 51's checks and balances.

I.B. Number 51: Institutionalizing Separation of Powers

Where Number 10 makes a tightly reasoned, deductive argument, Number 51 approaches its task in a more empirical, discursive, and speculative fashion. Experience and widely accepted republican notions of good government are summoned to endorse the Constitution's provisions and to rule out governmental arrangements that do not survive in the final plan. Consequently, the constituent parts of Number 51's overall argument depend less on one another than did those in Number 10. Where all of Number 10 rests or falls on the integrity of factional competition, here particular claims or causal statements stand more on their own. . . .

This essay proceeds from a definition (stated in Number 47) that tyranny is tantamount to the "accumulation" of government power. Madison does not initially explain just why this should be so, but later in Number 51 he elliptically hints at two possible reasons. First, despite factional competition, aggrandizing majorities might occasionally materialize to endanger the civil rights of those factions in the minority. . . . Second, politicians pursue their self-interests, just as do their constituents, and if left unchecked, they will exploit their authority to the detriment of the general welfare. So, "first government must control the populace and then control itself." In the language of modern principal-agency theory, the problem of tyranny from politicians represents a severe form of "agency loss." This is an apt expression capturing Madison's conception of citizens as principals who delegate authority to representatives who act as their agents.[2] We adopt it here to distinguish it from Number 10's majority tyranny.

For the most part, Publius concentrates on agency tyranny in fashioning checks and balances as a system of "auxiliary" controls. . . . Publius acknowledges that in a democracy direct popular election is the preferred method for keeping politicians responsive to the citizenry. This passing homage to democratic creed immediately throws into question the need for separation

of powers and, ultimately, wreaks havoc on the seemingly neat division of labor between Numbers 10 and 51. Why not minimize agency loss by simply electing everyone? Indeed, this was standard practice in the states at the time and . . . remained so decades later. Moreover, in his essay "The Vices of the Political System of the United States," written shortly before the Constitutional Convention, Madison appeared to judge direct and indirect elections as fully adequate to the task of checking agency tyranny. After distinguishing these two forms of tyranny in much the same way as he would in Number 51, Madison observes that though agency tyranny is a particular curse of monarchies, republics may not be immune from it either.[3] Yet it is less likely to pose a serious threat to republics because "the melioration of the Republican form is such a process of elections as will most certainly extract from the mass of the Society the . . . noblest characters . . . [who] will at once feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it." Elections are at the core of Madison's new scheme of representation developed in this pre-Philadelphia essay—just as they are in Number 10, but not in Number 51—and are presented as adequate for solving the agency problem. . . .

Writing Number 51 eight months later, Publius finds elections to be problematic. The difficulty they present has more to do, I suspect, with political strategy than with any newly discovered theoretical concerns. Specifically, if elections sufficed to keep politicians in line, they would threaten to terminate the argument before Publius can make his case for the Constitution's checks and balances. Clearly, if Number 51 were to promote ratification, Madison had to get past the electoral solution to the one actually provided in the Constitution. He tries to extricate himself from this bind with what must be one of the most anemic (and charitably ignored) arguments Madison ever authored. He discounts the utility of universal elections as causing "some difficulties" and "additional expense." . . .

He forges on, but a little later . . . returns to elections as if to suggest a reconciliation. Again, Madison the democrat reminds us that elections must constitute the "primary" control mechanism in a republic, but here, . . . he applies these "auxiliary" controls exclusively to the only branch of the new American government that will already be subject to direct elections, the House of Representatives. Publius endorses a presidential veto that can be sustained by a one-third minority of the Senate. Even this check, he cautions, might prove inadequate to rein in a House of Representatives inclined, by virtue of its singular popular mandate, to act "with an intrepid confidence in its own strength." In sum, writing as Publius, Madison developed a rationale for a strong form of separation of powers best suited for checking the ambitions of unelected politicians in the executive and judiciary, but then, he turned it against the popularly elected House of Representatives. . . .

Where does the Constitution's separation of powers leave factional competition as *the* "republican solution?" It is unclear that factional competition will have more than an incidental, moderating influence on national policy. Given the vetoes held by the Senate and presidency, successful policy will have to pass through these institutions whose members are neither selected via the carefully configured representational scheme of Number 10 nor subject to the countervailing pressures from politicians representing other interests. Policies arising from the Senate and presidency can be expected to deviate frequently from the preferences of the median

member of the House of Representatives, and where they do they will be less desirable. The likely results are gridlock and bad public policy.

. . . If the inconsistencies of the Madisonian model reappear in his earlier political science, they might confirm Dahl's assessment of Madison as a brilliant politician but a second-rate theorist. But if Madison's previous political science turns up free from the flaws revealed here, we would be on firmer ground in suspecting that under the guise of Publius, Madison promulgated these contradictory principles to promote ratification. There are several episodes that deserve close investigation occurring in the mid-1780s when Madison crossed swords with Virginia's political leader Patrick Henry over religious subsidies and revision of that state's constitution and involving Madison's proposals for a new national constitution.

II. JAMES MADISON'S POLITICAL SCIENCE PRIOR TO PUBLIUS

. . . Even as the youngest member of Congress during the Revolution, he gained colleagues' notice for his compelling arguments in behalf of a strengthened national government. These included proposals to give the government coercive authority to remedy states' chronic shirking of their contributions to the war effort and beefed up executive agencies to which Congress could delegate important administrative decisions (e.g., the number of uniforms to purchase), thus freeing its time for making war policy. Not until he was back in Virginia in the mid-1780s, however, did he find himself confronting systematic institutional reform.

II.A. Virginia's Religious Wars: An Education in Factional Competition

On his return to Virginia after the war, Madison discovered Patrick Henry firmly in control of the state through his leadership in the Assembly and in turn through that chamber's domination of the other branches. The contrast with his recent experiences in the feeble national Congress was stark and instructive. And it helps explain the resolve with which Madison headed to Philadelphia in 1787 to strengthen national authority and set it up as a check on majority power in the states.

In the spring of 1784, Patrick Henry proposed a general tax on Virginians to support "teachers of the Christian religion." When a legislative majority appeared poised to pass this legislation, Madison rallied Methodist, Baptist, and Presbyterian leaders who had chaffed under years of Virginia's tax subsidy for the Episcopal Church and were understandably wary of any new proposals that would reintroduce state subsidies of religion (Ketcham 1971, 162–68). In the fall election they successfully challenged some of the bill's chief boosters and sent a message to other would-be supporters of the legislation. When the assembly returned to session the next spring, the leadership quietly dropped the measure.[4] Reporting candidly on the home front to Jefferson in Paris in August 1785, Madison (*The Papers of James Madison* [hereafter MP] 8,345) noted, perhaps for the first time, the political benefits of factional competition: "The mutual hatred of these sects has been much inflamed. . . . I am far from being sorry for it, as a coalition between them could alone endanger our religious rights."

During the next several years leading up to the Convention, Madison frequently returned to this theme. According to his first biographer and next door neighbor, Madison often recited Voltaire: "If one religion only were allowed in England, the government would possibly be arbitrary; if there were but two, the people would cut each other's throats; but, as there are such a multitude, they all live happy and in peace" (Ketcham 1971, 166). Not until the spring of 1787, however, in his penetrating essay "Vices of the Political System of the United States," did Madison fully secularize this principle: "The Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert." Establishing the desirability of a "greater variety of interests" allowed Madison to then conclude that an "extended" republic would limit the power of imprudent majorities.

James Madison was not the first to offer this rationale favoring large over small republics. Credit for that belongs to David Hume, who had made a similar argument nearly a half-century earlier. Until Douglass Adair (1974) identified striking similarities between the language of several of Hume's essays and Number 10, however, few scholars fully appreciated Madison's debt to this Scottish philosopher. So similar are some passages of Number 10—particularly, those defining factions—with those in Hume's essays "Of Parties in General" and "Idea of a Perfect Commonwealth," one might be tempted to conclude that without Hume's coaching Madison might not have made the transition from sects to factions or recognized the advantages of a large republic.

Hume undoubtedly influenced Madison's thinking, probably beginning with his undergraduate course work at Princeton under Professor John Witherspoon, a student of the Scottish Enlightenment. Yet Hume did not lead Madison toward factional competition as offering the "republican solution" to the conundrum of majority tyranny. To appreciate the development of Madison's political science and its original contribution to republican theory, consider what Hume had to offer on the subject and where his thinking stopped. Declaring "democracies are turbulent," Hume proposed an elaborate (and to Madison nonsensical) constitutional order designed to isolate society's different interests from one another as much as possible. The representatives to the political institutions that ultimately controlled decisions would not meet, but would vote from their communities, as if in a referendum. For Hume the virtue of an extended republic lay exclusively in its expanse (Hume [1777] 1985, 528): "The parts are so distant and remote, that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest." Only by disengaging politics could a peaceful republic, "steady and uniform without tumult and faction," be realized.[5]

In a little noted passage of "The Perfect Commonwealth," Hume caught a glimpse of the path Madison would take nearly a half-century later. "The chief support of the British government is," Hume admits, "the opposition of interests; but that, though in the main serviceable, breeds endless factions." His own scheme (ibid., 525), conversely, "does all the good without any of the harm." This passage offers a rare instance in which an earlier generation theorist, locked in a paradigm based on the cultivation of virtue rather than interest, discerns a critical, anomalous fact but does not know what to make of it. Whether standing on Hume's shoulders or not, Madison is the first to examine pluralism unflinchingly and to discover within it the "remedy

for the diseases most incident to republican government." He traveled to the Convention armed with this insight and a plan for the new government derived from it.

. . .

At the Constitutional Convention, Madison can be read as having promoted two distinct constitutional plans neither of which corresponds to the Madisonian model. From the opening day until July 14, he ardently pursued the Virginia Plan. This constitutional blueprint closely follows the logic of factional competition with only modest employment of checks and balances. After its defeat with the adoption of the Grand Compromise, Madison abruptly switched principles. With a Senate controlled by the states, he began to search for ways to salvage independent national authority and fence in the Senate's jurisdiction; he found it in checks and balances. At the same time factional competition became irrelevant and disappeared from Madison's discourse for the remainder of the summer.

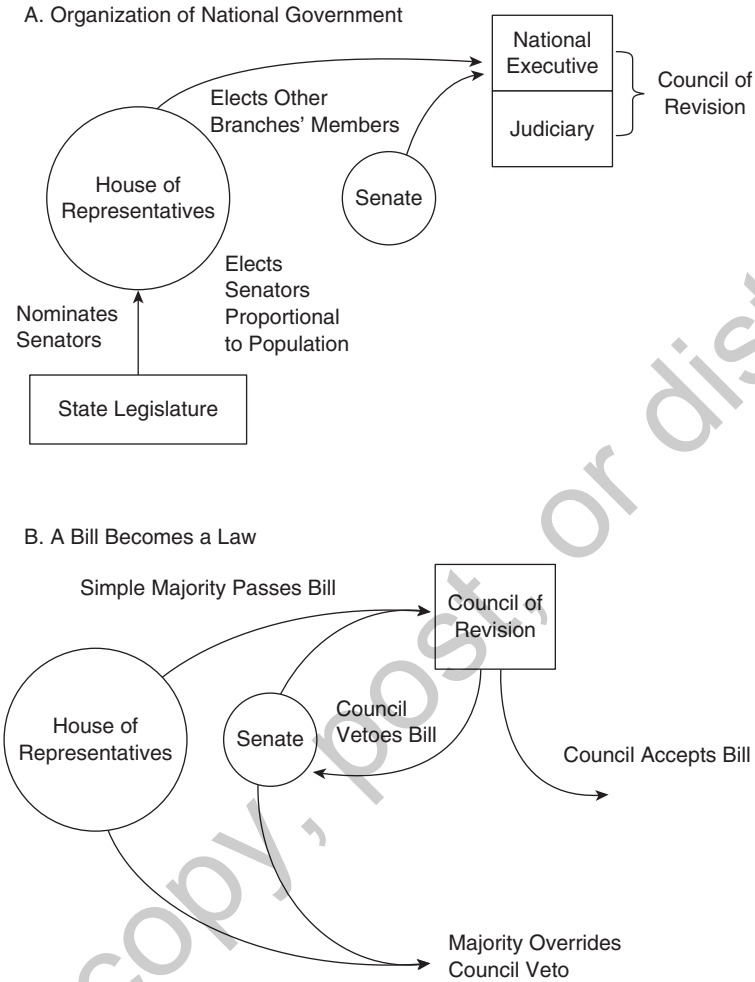
II.B. The Virginia Plan

In the spring of 1787, after months of scholarly research and with the Convention drawing near, Madison approached fellow Virginia delegates on the need to prepare a substitute plan of government that would be capable of "positive" action. Madison's correspondence sketches out a popularly elected legislature whose members would be apportioned across the states by population. This legislature would possess unequivocal authority to veto state laws to prevent them from "oppressing the minority within themselves by paper money and other unrighteous measures which favor the interests of the majority."[6] This passage and others like it show Madison arriving at Philadelphia, preoccupied with immoderate factional majorities in the states. In none of this preparatory correspondence does he address agency tyranny, the problem that subsequently motivates much of his discussion in Number 51. Madison arranged for the Virginia delegation to assemble in Philadelphia a few days early to draft a reform proposal and probably to plot strategy. The product of their collaboration (Matthews 1995) soon came to be known as the Virginia Plan.[7]

In this plan Madison envisioned a government organized around an elective, bicameral National Legislature with representation to both chambers based on population. Members of the second chamber—soon to be referred to as the Senate—would be elected by those in the first from nominations provided by the state legislatures. Each chamber could originate laws "to legislate in all cases to which the separate states are incompetent." This included the authority "to negative [veto] all laws passed by the several States, contravening in the opinion of the National Legislature the articles of the Union; and to call forth the force of the Union" against any state failing to perform its constitutional duties.

Nowhere is the National Legislature's supremacy more apparent than in the organization of the other branches diagrammed in Figure 1. The National Legislature would elect the National Executive for a fixed term and without eligibility for reelection. This officer (or officers) would exercise general authority to administer national laws. Similarly, the National Legislature would create a national judiciary and elect its members, who would then serve for a term of good behavior. Together, the executive and a "convenient number of judges" would constitute a Council of Revision with the sole task of vetoing imprudent legislation.[8] If legislative selection

FIGURE 1 ■ The Virginia Plan



of the executive and judiciary did not ensure the Council's sympathetic oversight, the National Legislature's ultimate authority was secure in a provision for a veto override.[9]

Remarkably, the vast literature on Madison's contribution to the Constitution's development fails to credit the Virginia Plan with faithfully and extensively implementing the principle of factional competition. Perhaps the five-month interval between presentation of the plan and Number 10 obscures their association. Yet at the Convention, Madison offered early, partially developed versions of Number 10's argument in defense of the Virginia Plan. In one of his most important and, for us, theoretically revealing speeches, Madison employed factional competition to counter claims by Delaware's John Dickinson and others that tyranny could be avoided only through strict separation of powers with "the legislative, executive and judiciary departments . . . as independent as possible." Madison beat back strict separation of powers and defended legislative supremacy with factional competition.[10] During floor debates on June 4,

Madison unveiled the argument that would become Number 10. William Pierce from South Carolina discerned in it "a very able and ingenious" outline of "the whole scheme of government" (Rakove 1996, 61). During the next four days, Madison repeated the argument no less than four times, and fellow nationalists picked it up in their speeches. At one point, after listening to the familiar recitation of the small state arguments, James Wilson (1990, 67) reminded everyone: "No answer has been given to the observations of [Madison] on the subject."

Madison, no less than anyone else, also wanted to associate his proposals with separation of powers, but during these early deliberations, he employed it mostly to describe the division of labor that would strengthen the capacity of the new national government. Reminding his colleagues of the wartime Congress's dismal performance in administering the government with legislative committees, Madison commended separation of power as fostering government efficiency.

There are elements of checks and balances in the Virginia Plan. These remained implicit in the general outline in "Vices," but Madison drew them out more explicitly during the Convention's deliberations. In that these mild checks were tendered in response to other delegates' insistence for creating truly "separate" branches, one might be tempted to dismiss them as rhetorical embroidery offered to allay some small state delegates' misgivings. Yet, the weak form of checks and balances Madison offers at the Convention is wholly consistent with the Virginia Plan's legislative supremacy. The two constitutional features that Madison emphasized as checks are the Council of Revision with its weak veto and the Senate with nearly coequal legislative authority. . . . Clearly, in Madison's view the checking benefits from the Senate derived not from representing different interests, since these men would in fact be elected by the "popular branch." Rather it came by representing the same interests in a different deliberative setting. "Enlarge their number," added Madison in the next sentence, "you communicate to them the vices which they are meant to correct." The upper chamber's "coolness" and "system" buys time and opportunity for reconsideration. . . .

With the demise of the Virginia Plan, Madison's interest in separation of powers turns from efficiency and a system of modest checks to a radically different form of checks and balances. He had worked against a hemmed in Congress when the Virginia Plan was under consideration, but now needing a means to quarantine the state-infested Senate he switched to a dispersion of governmental authority—stronger on some checking provisions, in fact, than those contained in the final Constitution.

II.C. After the Grand Compromise

After losing the legislature and the national veto over the states in the Grand Compromise, Madison sought unfettered national authority in a more independent executive and judiciary.[11] To achieve this Madison continued to invoke separation of powers during the second half of the Convention and apparently succeeded in that no one in the sometimes heated exchanges accused him of changing his mind.[12] From Madison's numerous statements, proposals and votes during this period one can fashion a second plan—a plan that does not so much add up to a formal system of government as a collection of provisions that consistently worked to shift authority away from the poorly designed Congress. Most directly, he endorsed the proposed enumeration of powers for Congress, an idea he had resisted during consideration of his Virginia Plan. When the states' rights delegates advocated state election of the president, Madison countered with direct national

election. The result was yet another compromise, the Electoral College. Similarly, some states' rights supporters wanted the president to serve at the pleasure of Congress. Madison had equivocated on this matter earlier, but now he insisted that separation of powers required a fixed term without term limits. Others wanted administrative and judicial officials appointed by Congress, but Madison, sounding increasingly like Hamilton, countered that the appointment power struck to the core of executive responsibility. By late July, this recent proponent of legislative supremacy was fashioning an independent, assertive president. Noting the tendency of a "legislature to absorb all power in its vortex," Madison (MP 2, 586–87) defended a veto with a three-fourths override provision as necessary "to check legislative injustice and encroachments."

When it came to the judiciary, neither side appears to have decided which arrangement best served its interest. Early on, the nationalists won adoption of a judicially enforceable supremacy clause—consolation, they were reminded, for losing the national veto over state laws. Subsequently, Madison and his allies faced down a half-hearted attempt to leave constitutional interpretation and enforcement of federal laws to the separate state judiciaries. During the late days of the Convention, . . . Madison used these numerous, small victories to fend off additional state incursions and to stamp onto the Constitution his nationalist preferences, at least as best one could with the negative instruments of checks and balances.

. . .

III. *FEDERALIST* NUMBER 51 AS CAMPAIGN RHETORIC

Right up to the time he began writing his *Federalist* essays, Madison privately expressed reservations about the Constitution and could bring himself to muster only tepid support for the overall plan. In his letter (MP 10, 163–64) to Jefferson on September 6, 1787, in which he explains the Convention's work during the summer, Madison devoted more space to excusing the Constitution's deficiencies than to celebrating its strengths. The new national government will "neither effectually answer its national object nor prevent the local mischiefs which everywhere excite disgusts against the state governments."[13] This and other private statements reveal Madison working for ratification mostly from an aversion to the Articles of Confederation. They certainly give a hollow ring to Publius's boosterism.

From his private views and public activities before and during the Convention one can reasonably surmise that Madison's *sincere* public endorsement of the Constitution would have gone something like this: "The nation is presented with a choice between two imperfect governmental systems. Unquestionably, the Constitution is superior to the Articles of Confederation and therefore, deserves ratification. Its advantages include a popularly elected and fairly apportioned House of Representatives, federal taxation authority, and provisions for amendment that will allow it to be strengthened as the need arises." This halfhearted endorsement would have befitted Madison's modest won-lost record at the Convention, but it would not, of course, have served the ratification cause.[14] All this adds up to an image of Madison wanting Publius to succeed, but not having much to offer in the way of compelling, sincere arguments.

Normally, politicians' issue stances are anchored in the vicinity of core constituency commitments and by the threatened loss of credibility were they to drift too far from their established

positions. But the guise of Publius relaxed these constraints and freed Madison to tailor his message closely to the preferences of his audience. Thomas Jefferson (*The Papers of Thomas Jefferson* [hereafter JP] 11, 353) thought he had detected such strategic writing in Madison's *Federalist* essays and averred to his friend: "In some parts it is discoverable that the author means only to say what may be best said in defense of opinions in which he did not concur." If so, the contradiction that arises in Number 10 and Number 51 might reflect Madison's need to modify his sincere views with campaign rhetoric to appeal to fence-sitting voters and delegates.

The absence of public opinion data for this eighteenth-century, national election severely handicaps our ability to assess the relative merits of campaign arguments. The situation is not hopeless, however. If one assumes that each side's campaign strategists knowledgeably adapted their issue stances to the median voter or delegate, we can by tracking the course of campaign rhetoric discover which issue stances received the greatest play and required a response from the other side. By examining the shifting positions and issues over the seven-month campaign we can evaluate the merits of Number 10 and Number 51 as campaign statements.

The data for this exercise comes from William H. Riker (1991, 1996), who systematically compiled and analyzed all of the pro and con arguments that appeared in the nation's newspapers during the ratification campaign.[15] The antiratification side conducted essentially a negative, single-issue campaign. More than 90 percent of their published arguments raised the specter of tyranny.[16] Clearly, the untested Constitution gave the Anti-Federalists superior material for imagining hypothetical dangers, and wherever they searched among the Constitution's provisions, they uncovered a potential source of tyranny.[17] Ultimately, the Federalist had to answer these charges. "Just as the plaintiff-like position of the Anti-Federalists forced them to be negative," observed Riker (1996, 244), "so the defendant-like position of the Federalists forced them to be positive in the sense that they had to refute the Anti-Federalists' criticisms." The Constitution's provision for a standing army supplied early fodder for Anti-Federalist attack. They dropped it after the nationalists successfully answered that with America flanked by three foreign powers, this feature of the Constitution remedied one of the glaring vulnerabilities of the defenseless confederation. A little later the antiratification forces discovered that the missing Bill of Rights exposed a major chink in the nationalists' armor. After initial insistence that "paper guarantees" were neither effective nor necessary in a limited government, Madison and his allies recognized that these responses were not working and agreed to introduce appropriate constitutional amendments as soon as the new government was under way.

A careful examination of the charges and countercharges flying back and forth when Numbers 10 and 51 were written shows both essays directly responding to a variant of the tyranny currently being advanced by the Constitution's opponents.[18] On October 17, 1787, Brutus (probably Robert Yates, who served as one of New York's delegates to the Constitutional Convention) published an article in a New York paper charging "a free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, and these encreasing in such rapid progression." Hamilton quickly countered (Ball 1988, 162) with *Federalist* Number 9, arguing that Montesquieu's prescriptions, on which Brutus relied, were based on societies with aristocracies that had to be accommodated. Shortly thereafter, Madison issued Number 10. Fortunately for Madison, Brutus's essay limited its attack to the "extended republic" variant of tyranny and did not venture into the structure of new national government

for which factional competition could offer no justification. Brutus's narrow argument allowed Madison to truncate his factional competition discussion precisely at the point where this principle's institutional prescriptions diverge from the Constitution's provisions.

Later in the fall, the Anti-Federalist campaign began hammering the new government as providing insufficient checks and balances against national tyranny. The arguments took a variety of forms, from name-calling to informed theoretical exposition. One widely reprinted Anti-Federalist article, "Dissent of Pennsylvania Minority," stated a familiar mainstay of the opposition to which the ratification forces clearly needed to respond.

> The constitution presents . . . undue mixture of the powers of government: the same body possessing legislative, executive, and judicial powers. The senate is a constituent branch of the legislature, it has judicial power in judging on impeachment, and in this case unites in some measure the character of judge and party, as all the principal officers are appointed by the president-general, with the concurrence of the senate and therefore they derive their offices in part from the senate. . . . Such various, extensive, and important powers combined in one body of men, are inconsistent with all freedom; the celebrated Montesquieu tells us, that "when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." . . . The president general is dangerously connected with the senate; his coincidence with the views of the ruling junta in that body, is made essential to his weight and importance in the government, which will destroy all independence and purity in the executive department. (*Debate* 1993, 1, 546)

Of the various charges in "Dissent," possibly the most damaging is the image of a "junta" forming between the president and the Senate. Riker (1996) logged more Anti-Federalist references to a presidency that might evolve into an elective monarchy than any other dire scenario. As with the extended republic variant on the tyranny argument, one can imagine a couple of rebuttals available to proratification strategists. They could, as did Hamilton in Number 9, deny the premise from which tyranny could be deduced. In the following passage, fellow nationalist Americanus (John Stevens, Jr.) adopts this approach and ices it with a vivid ad hominem.

> Montesquieu's *Spirit of the Laws* is certainly a work of great merit. . . . On an attentive perusal, however, of this celebrated performance, it will manifestly appear, that the main object of the author, and what he seems ever to have most at heart, was to mollify the rigors of Monarchy, and render this species of Government in some degree compatible with Liberty. . . . But tho' his work has been of infinite service to his country, yet the principles he has endeavored to establish will by no means stand the test of the rigid rules of philosophic precision. . . . It ever has been the fate of *system mongers* to mistake the productions of their own imaginations, for those of nature herself. (*Debate* 1993, 1, 487–93, emphasis added)

Madison could have sincerely signed his name to this argument, including the slap at Montesquieu.[19] Instead Publius takes a more ambitious, if circuitous, approach by reconciling Montesquieu and separation of powers doctrine with the Constitution. The volume and variety of pro-ratification campaign arguments suggest that this issue had to be neutralized, but could it be by simply denying its validity for the American case?

Consider, in comparison, the gambit Number 51 offers. After elevating Montesquieu as "the oracle who is always consulted," Publius stipulates that tyranny is indeed a serious threat for which a well configured separation of powers is the preferred solution. No problem so far, since he has matched Anti-Federalist arguments almost word for word. Only late into the argument does Publius depart from the path taken by the Constitution's opponents. Sizing up the distribution of authority across the branches differently, he reassures readers that they need not worry about a coalition forming between the president and a Senate junta. These politicians, if they are lucky, might manage to stave off an overreaching House of Representatives prone to act with "intrepid confidence." If they are not so lucky, the Constitution might need to be amended to bring interbranch relations into balance. But certainly, one need not worry that the executive and judiciary possess the kind of authority that would allow them to usurp a democratic government.

This is a terrific campaign argument. First, Publius shifts the debate to safer ground for engaging his adversaries. He takes exception to Anti-Federalist conjecture over the operation of a hypothetical government rather than by arguing against the universally accepted separation-of-powers principle and needlessly picking a fight with the illustrious Montesquieu. Second, Publius adroitly configures his argument to avoid a variety of possible Anti-Federalist rebuttals. He might, alternatively, have invoked the judicial branch in its acknowledged role—with or without judicial review—as referee over jurisdictional disputes, but he would have opened the door to a favorite Anti-Federalist retort that Publius was prepared to entrust the fate of the Republic on unelected justices. . . . But instead, he minimizes the president-Senate threat by introducing the possibility that all of its authority might be insufficient to withstand an overreaching House of Representatives. He knows full well, as Riker's analysis verifies, that the Anti-Federalists will not attack the House of Representatives, the one popular branch.

Whatever difficulties Number 51 presents Madison's political science, its strategic value cannot be doubted. Clearly, the generality of separation of powers doctrine opened the way for this tactic, but its success depended on a sophisticated understanding of subtle, institutional design arguments, a talent for which Madison was peerless. He, more than anyone else, could figure out a way to abduct Montesquieu and steal the separation-of-powers issue from the opposition.[20]

. . .

IV. CONCLUSION: MADISON, A NATIONALIST AND PLURALIST

Several weeks after the close of the Constitutional Convention in September 1787, James Madison (MP 10, 163–65) wrote a long letter to Jefferson in Paris reporting the results of the recently concluded Constitutional Convention. After singling out various provisions of the new Constitution for praise and criticism, Madison noted that on balance private rights would be more secure "under the Guardianship of the General Government than under the State Governments." Madison then posed to his friend a riddle: why should this be so, assuming both levels are "founded on the republican principle which refers the ultimate decision to the will of the majority, and are distinguished . . . by extent . . . than by any material difference in their structure?" Solving this puzzle, Madison averred, would "unfold the true principles of Republican Government." Indeed it does. Without explicitly solving the puzzle, Madison proceeded to lay out the rationale for factional

competition. The puzzle fully encapsulates the goal orientation of Madison's political science. The stated goal of republican government is to protect private rights while empowering majority rule. Moreover, the "principles" for achieving this goal are found less in the "interior" design of institutions (as in Number 51) than in the quality of pluralism. Where this condition is satisfied, the task of institutional design is to harness this pluralism with factional competition.

This is a riddle composed by a nationalist and pluralist. The former label is a familiar one for Madison. His nationalist credentials were well established among his contemporaries. Calling Madison a pluralist is more controversial. It squarely disputes familiar critiques of Madison and the Constitution that began most prominently with Beard and continued with Dahl (1956), both of whom judged Madison as embracing "the goal of avoiding majority control." He "goes about as far as possible," Dahl added, without having to drop the republican label, but in reality he belongs "in the camp of the great antidemocratic theorists." Both critiques rely chiefly on Number 51.

Madison's pluralism does not make him a majoritarian democrat in the modern sense of the phrase. He accepted unfettered representative democracy only in circumstances that imposed serious collective action problems for the formation of governing majorities. These conditions could be satisfied in an extended republic in which governmental institutions gave full expression to the nation's pluralism. When these conditions were met, the design requirements of America's national government could be simple: representation that reflected the preferences of the population and a fairly apportioned, well designed national legislature. This Madison implemented, not in the Constitution, but in the Virginia Plan. . . .

Where does this leave the Madisonian model, the presumed theory behind the Constitution? First, associating it with Madison is a misnomer, since Madison does not offer it until late in the ratification campaign in Number 51, and then only behind the cloak of Publius. It might not represent Madison's political science, but the model does describe the Constitution. Number 51's combination of factional competition and checks and balances should be recognized as Madison's brilliant effort to justify theoretically a Constitution born of politics and facing an uncertain future. The Madisonian model (or perhaps more felicitously, the "Publius model") rationalizes a plan created from numerous logrolls and compromises that reconciled competing interests. . . . To conclude, Numbers 10 and 51 carry a division of labor quite different from that with which we opened the discussion. Number 10 states James Madison's prescriptions for republican government, when the necessary conditions are present, while Number 51 explains the Constitution.

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