

## “The True Principles of Republican Government”: Reassessing James Madison’s Political Science

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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, 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 rein-

roduced it more than a century later in his classic *An Economic Interpretation of the Constitution of the United States* (1912). 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.<sup>1</sup> 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 Madisonian 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.”<sup>2</sup> Madison’s critics have been matched by his admirers (Diamond 1959; Carey 1978; and many others) who have defended or sought to repair the model, typically by reinterpreting these *Federalist* essays in various ways. Both sides, however, accept Beard’s insight that the Madisonian model represents its namesake’s blueprint from which the Constitution was constructed.

In this essay I will leave it to others to appraise how well the Madisonian model describes essential features of the Constitution. Instead, we shall limit ourselves to the more problematic issue of how well it represents the theoretical views of its author. In short, I argue that 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 on constitutional reform, including arguments tendered at the Constitutional Convention; 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. We begin in the next section by reviewing the arguments of Numbers 10 and 51, in which we draw out the contradictory implications.

This raises the question of how Madison could embrace a contradictory argument. The answer is simply that he did not. Although at various times Madison enlisted factional competition and checks and balances as alternative solutions to the majority tyranny problem, 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. (Below we will trace an unambiguous lineage from the theoretical construct stated in Number 10 to the actual construction of the House of Representatives at the Philadelphia convention.) 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-cleaved 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.<sup>3</sup>

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.

More problematic in Number 10 is its failure to deal with the states and with the other branches in the new governmental plan, both of which had appeared as prominent potential sources of tyranny in Convention debates. Number 10 has the ideal constitution generating factionally moderated national policy that, among other goals, would check tyrannical impulses arising in the more homogeneous states. Publius hints at this in noting an "advantage . . . in controlling the effects of faction . . . enjoyed by the Union over the States," but with federalism entrenched in the new Constitution and with Anti-Federalists projecting the specter of a distant, inadequately bridled national government, he necessarily soft-peddles the Constitution's supremacy clause and dares not mention that James Madison, a known booster of ratification, was still quietly promoting a national veto over state policy.

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.<sup>4</sup> 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

From Number 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Par. 1: With "exterior provisions found to be inadequate" in the earlier essays, the solution must lie in "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."

Par. 2: "Each department should have a will of its own." Among other things, this requires that "members of each [branch] should have as little agency as possible with the appointment of the members of the others." Ideally, members of each branch would be elected directly by the "same fountain of authority, the people," but this may not be practical and would involve "additional expense." Especially for the judiciary whose members have special qualifications, elections would be awkward. Anyway, their "permanent tenure" would "soon destroy all sense of dependence" on popular authority.

Par. 3: Equally important, "members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices."

Par. 4a: But the best way to keep the branches separate "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments." Then comes the most quotable of Madison's passages: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." Of course, were men angels, he reminds us, none of this would be necessary. "You must first enable the government to control the governed: and in the next place oblige it to control itself."

#### Transition 1: From Rationale to Specific Separation of Powers Provisions

Par. 4b, the last sentence: "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

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Par. 5: Ideally, each branch would have the capacity to check the others.

Par. 6: But this is not possible. "In republican government, the legislative authority necessarily predominates." One solution is bicameralism, in which each chamber is independent by virtue of "different modes of election and different principles of action." An additional check on the legislature could be found in an absolute executive veto, but perhaps this would give too much to the executive. Instead, the same benefits might be obtained by arming the executive with a veto that can be backed up by the Senate, "a weaker branch of the stronger department." Clearly, the House of Representatives is the problem branch.

Par. 9: Madison finds a third check in federalism. "The different governments will control each other, at the same time that each will be controlled by itself."

#### Transition 2: Review of Factional Competition Thesis

Par. 10: It is of great importance in a republic not only to guard the society against the oppression of its rulers but also to guard one part of the society against the injustice of the other part.

Remainder of essay (about 45 percent of text): Madison recapitulates argument of Number 10.

TABLE 5.1. Synopsis of Number 51

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. To map Number 51's various arguments and their critical connecting statements, we will refer to the outline of this argument in Table 5.1.

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 (par. 6). Below we shall see that Madison hedges his bets on factional competition by stating probabilistically (the only instance where he ever does so) the efficacy of factional competition in preventing majority tyranny. Second, politicians pursue their self-interests (par. 2), 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.<sup>5</sup> 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. This prompted George W. Carey (1978, 156) to read Madison as saying: "At no point does separation of powers play a role in curbing majority factions." If this were so, and at the outset it certainly appears to be the direction the essay is heading, it might rebut any charges of contradiction between factional competition and separation of powers. Each would tackle a different kind of tyranny—majority and agency, respectively—and thereby complement each other. But Number 51 veers off this parallel path, and by the conclusion, there is little prospect of these principles avoiding a collision, much less complementing one another.

As early as paragraph 2, 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, much to Tocqueville's bemusement (Jardin 1988), 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.<sup>6</sup> 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. Equally revealing, while setting up a tripartite division of government, "Vices" ignores the opportunity that separation of powers presents for introducing checks and balances to address agency loss.

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" (par. 2).<sup>7</sup> If that were the only problem, he might still have combined factional competition with checks and balances. He illustrates these points, for example, with reference to judges' job qualifications and life tenure. So, here, where the primary controls are awkward or would prove ineffective, is a logical place to apply the "interior controls" of checks and balances. To check a band of life-tenured judges who might pursue a repudiated political agenda (as some Federalist partisans had briefly contemplated in the aftermath of their 1800 election debacle) Madison could have found safeguards in Congress' explicit authority (Article III, Section 1) to reorganize the federal judiciary, withhold salary raises, and mount impeachment proceedings. Similarly, the Constitution explicitly reserves for Congress the power of the purse and numerous other mechanisms for tethering some future president who might covet a mon-

arch's robe.<sup>8</sup> Oddly, provisions such as these go unmentioned because this is not where Publius is headed.

He forges on, but a little later (in Transition 1) 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, unlike his "Vices" essay, checks and balances appear as a useful "auxiliary" safeguard (par. 4b).<sup>9</sup> Foregoing better targets, paragraphs 5 through 9 apply 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. As a result Number 51 simply fails to follow through in the fashion needed to keep factional competition and checks and balances on the parallel and complementary tracks preventing the two kinds of tyranny to which republics are susceptible. In the end, separation of powers is brought to bear on the same institution that factional competition has already moderated. No wonder twentieth-century critics complain that the Madisonian model is overkill.

Ironically, in directing checks and balances against the House of Representatives, Number 51 highlights the inherently contradictory effects of these principles. Yet, in truth, even had this essay limited its application of checks and balances to unelected and indirectly elected agents, the president's veto and the coequal malapportioned and state-controlled Senate would still have restricted the capacity of the House of Representatives to legislate moderate policy. To see this we need to step outside the texts of Numbers 10 and 51 to consider the variety of ways in which a political system constructed on checks and balances could prevent gains from factional competition.

#### I.C. THE DAMAGE CHECKS AND BALANCES POSE FOR FACTIONAL COMPETITION

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.

One can easily read *The Federalist* as arguing that a little gridlock is a good thing. The damage checks and balances pose for collective action is irrelevant in assessing the Madisonian model, so the argument goes, because Numbers 10 and 51 posit a single public good—the prevention of majority tyranny. As long as checks and balances block immoderate House policies, they are performing their intended function. One might ask, however, why if the reformed government is configured to produce gridlock—confirming the suspicion of the Constitution's twentieth century critics—did Madison labor so ardently—first at Annapolis and then against initially indifferent responses to his proposed Philadelphia meeting—to reform a constitution that had already demonstrated its capacity for gridlock?

Clearly, fear of national-level tyranny did not bring Madison or any of the other delegates to Philadelphia. From across the political spectrum the delegates had come to realize the unacceptable costs of continuing to struggle with their collective concerns through the Articles of Confederation's weak national government. Although Madison's and his nationalist colleagues' commitment to install "energetic" national institutions has been exhaustively documented, it offers an admittedly unsatisfying rebuttal to the claim that beyond the prevention of tyranny, the Madisonian model was not designed to produce collective goods.<sup>10</sup>

These essays do, however, contain a rationale for positive government even within the narrow objective of preventing majority tyranny. From the vantage of the twenty-first century, one might assume that any limits on Washington's capacity to act serve to check potential tyranny. Yet, in 1787 whenever Madison and his nationalist colleagues expressed concern with majority tyranny, they were referring to majorities in the states. "It can be little doubted that if the state of Rhode Island was . . . left to itself," ponders Publius in Number 51, "the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it." This is what prompted Madison repeatedly to seek a national veto over the states at the Convention and

later in the First Congress as a provision in his draft of the Bill of Rights. Gridlock threatens the capacity of the new government to shield the citizenry from tyranny arising in the states.

Even when gridlock does not occur, checks and balances might still subtly undermine moderate public policy. In addition to rendering factional competition irrelevant, the prospect of a checking action can be reasonably expected to intrude insidiously in the House's deliberations and shift policies from those moderated by factional competition. Before incurring the high transaction costs Madison laid out for them, House politicians will look down the decision tree to determine the prospects for each policy alternative in the Senate and presidency.<sup>11</sup> The president can threaten to veto legislation, and the Senate can pass alternative provisions strategically designed to strengthen its hand in conference negotiations. Where a legislative faction finds an ally in one of the other branches, it can inject this leverage in negotiations with the other factional representatives. The framers were fully aware of these strategic implications as evidenced in the remark of Madison ally James Wilson, that the veto "would seldom be used," but its "silent operation" would nonetheless be felt: "The Legislature would know such a power existed, and would refrain from such laws, as it would be sure to defeat" (Farand 1966, 100).

In addition to corrupting the legislative process these "checking" institutions will discover at times that they can ignore the preferences of the House altogether and take independent action enlisting as necessary their agents in the bureaucracy and the judiciary. Opportunities for direct policy, authorized by the Constitution, include some of the major concerns that brought delegates to Philadelphia: trade treaties, westward expansion and security, and protection of American shipping on the high seas.

The issue is simple: only legislative supremacy of the kind contained in the Virginia Plan provides the republican solution to majority tyranny. One must give factional competition free rein over the political process rather than confining it to one of several independent branches. Either these checking institutions will themselves be subject to the same moderating forces, or the House of Representatives must have the capacity to trump opposition from these branches. The first is highly improbable given their intentionally dissimilar designs, and the Constitution disallows the second. How can one square this implicit requirement of legislative supremacy with Madison's long-standing reputation as "Mr. Separation of Powers?" There are several possibilities. Perhaps Madison failed to detect the contradictory implications of these principles. Or, perhaps, he was insincere in offering factional competition as a solution (Epstein 1993). Finally, our understanding of Madison's

political science might be misinformed by an over-reliance on Number 51.

To search for the answer we turn to Madison's previous efforts at institutional reform. 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 four episodes that deserve close investigation: two 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 two involving Madison's proposals for a new national constitution.

## II. James Madison's Political Science Prior to Publius

Madison's officeholding career tracked the course of the nation's institutional development. Everywhere he served—the Continental Congress during the war, the Virginia legislature, and the Philadelphia Convention—reform loomed as an urgent yet thorny and seemingly intractable issue. Institutional design always attracted Madison's careful attention. 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 chafed 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 1990, 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.<sup>12</sup> 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 1990, 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 Douglas Adair (1974b) 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 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.<sup>13</sup>

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. One need search no further than Number 51 to confirm the impact of Virginia's brief denominational battle on Madison's republican views: "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects." Both, he adds, will consequently gain security to the "extent of the country and number of people comprehended under the same government."

#### II.B. REFORM OF VIRGINIA'S CONSTITUTION: AN APPLICATION OF SEPARATION OF POWERS

With roots extending back to Aristotle's balanced polity and serving as a key design element for Montesquieu and other contemporary republican theorists, separation of powers enjoyed unimpeachable certitude among the delegates at Philadelphia. Everyone sought to associate his favorite constitutional reform with this design principle. Alexander Hamilton, one of the Convention's most ardent nationalists, casually summoned the language of separation of powers to argue in behalf of an active and authoritative presidency. With similar ease, George Mason and others, worried about a too powerful national government, favored separating authority into several independent and disconnected branches as a way of stifling all but the least controversial national policies. The only two constitutional features these and other plans had in common were bicameralism and the division of the government into legislative, executive, and judicial branches. The semantic slipperiness of separation of powers gave delegates, including Madison, the latitude to change their positions on specific institutional arrangements without having to recant their principles. It cannot be too surprising, then, to find references to separation of powers sprinkled liberally throughout Madison's speeches, letters, and scholarly writings.

The particular strain of separation of powers that interests us contains a strong form of checks and balances. Madison's only important sponsorship of such a system before late summer in Philadelphia came in 1784 in a failed effort to reform the Virginia constitution. His proposals bore a close resemblance to the Constitution as described in Number 51, both in their specific checks and balances provisions and in the arguments summoned in their behalf.<sup>14</sup> In a speech on the floor of the state legislature, Madison decided to "stir the matter" (Ketcham 1990, 159) by labelling the Assembly's "union of powers that is tyranny." Untouched by checks and balances, this chamber elected the governor, appointed the judges, and held exclusive power to initiate legislation. Madison's proposals in Virginia, which were elaborated on the next year in correspondence with a friend seeking advice on Kentucky's state constitution, gave each branch independent authority and separate recruitment of its officeholders. The Senate would have been placed on an equal footing with the Assembly and its members insulated from external pressures with six-year terms. As long as the governor was appointed by the legislature, Madison reasoned, it could offer no counterbalance to intemperate legislation. Therefore, the governor should be popularly elected and a Council of Revision that included the governor created to review and veto imprudent state laws. With judges' salaries closely supervised by the legisla-



ture, constitutional interpretation fell back onto the chamber enacting the laws. Madison sought to insulate judges with executive appointment, life terms, and "liberal" salaries. With Patrick Henry implacably opposed and publicly haranguing against these reforms, Madison got nowhere. Henry even persuaded the Assembly to bar their reconsideration during the remainder of the session. Thoroughly defeated, ally Thomas Jefferson proposed to Madison that their only recourse was to "devoutly pray for his [Henry's] death."<sup>15</sup>

Service in the wartime Congress and the Henry-dominated state assembly provided Madison with the kind of education to which Henry Adams always aspired and never got—insight as to what was required next. Soon Madison took on the formidable task of revising the nation's constitution. With an assist from Daniel Shays, Madison found his opportunity in May, 1787.

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. C. 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."<sup>16</sup> 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.<sup>17</sup>

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 5.1. The National Legislature would elect the National Executive for a fixed term and without eligibility for re-election. 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.<sup>18</sup> If legislative selection 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.<sup>19</sup>

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.<sup>20</sup> 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 (*ibid.*, 67) reminded everyone: "No answer has been given to the observations of [Madison] on the subject."

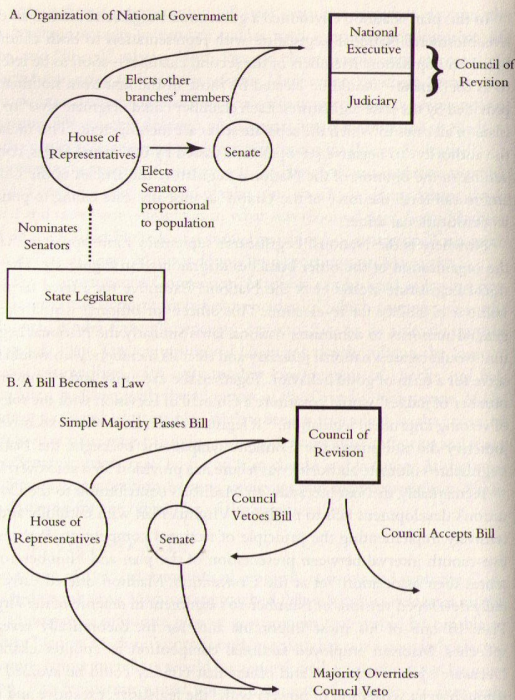


FIG. 5.1. The Virginia Plan

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. On June 4 (Farrand 1966, 1, 608) he defended a veto lodged in the Council of Revision: "A negative in the Executive is not only necessary for its own safety, but for the safety of a minority in danger of oppression from an unjust and interested majority." As to the Senate, its "use . . . is to consist in its proceeding with more coolness, with more system, & with more wisdom, than the popular branch." 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."<sup>21</sup> The upper chamber's "coolness" and "system" buys time and opportunity for reconsideration.<sup>22</sup> This is not the robust bicameralism proposed for Virginia with its separate recruitment of independent officers. Indeed, the Virginia Plan remarkably resembles the Virginia constitution Madison had sought to reform several years earlier.<sup>23</sup>

Note that Madison recommends neither the Council of Revision nor the Senate as trimming potential agency loss. In fact, during this phase of Convention deliberations the only time Madison acknowledges this as a potential problem comes in response to a proposed amendment to the Virginia Plan that would allow a majority of the states to instigate removal of the president. In that small states would enjoy an equal vote with more populous states, it would "enable a minority of the people to prevent the removal of an officer who had rendered himself justly criminal in the eyes of the majority" (*ibid.*, 1, 86). It appears majority control is as essential for properly monitoring agents as it is for ameliorating factional differences.

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.D. 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.<sup>24</sup> 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.<sup>25</sup> 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 (*ibid.*, 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, as the Virginia Plan and its theoretical rationale of pluralism faded from view, 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.

#### II.E. RECONCILING MADISON'S FOUR REFORM PROPOSALS

This chronology of Madison's reform politics from 1784 through 1787 includes every instance in which he enlisted either factional competition or separation of powers doctrine before sitting down to write Numbers 10 and 51. Clearly, by the fall of 1787 the arguments in these essays had been applied to reform both state and national governments. For the most part, the concepts, phrasing, and logic were well established by the time Madison wrote these *Federalist* essays. This helps to account for the alacrity with which he was able to churn out cogent arguments in the heat of the campaign. Yet there are some important differences, especially with respect to Number 51, that caution us from assuming that their arguments were the sincere extensions of ideas well tested elsewhere.

On two of the four occasions reviewed above, Madison appears to have employed one or the other principle opportunistically. In staving off re-establishment of religion we found him hurriedly assembling fundamentalist preachers to lobby members of the assembly and where necessary replace them in the next election. Similarly, in July after recovering from a disappointing setback at the Convention, Madison grasped for alternative institutional mechanisms to achieve his goals of blocking state dominance via the Senate. On the other two occasions, however, where Madison had the luxury of initiating constitutional revision, he was able to prepare and argue for more comprehensive and theoretically grounded reforms. In Virginia it took the classic form of Montesquieu's checks and balances directed against the popularly elected assembly, as it would again with Number 51. At the Convention, factional competition provided the blueprint.

Summarizing the analysis, Figure 5.2 shows that unifying Madison's political science was not so much a preference for particular constitutional architecture as it was the goal of frustrating majority tyranny in the states, and collaterally, of strengthening national authority. One way or another, Madison consistently pursued the rearrangement of federal-state power. From the sheer volume of endorsements in his speeches and writings, as well as from private correspondence, one may reasonably conclude that Madison did sincerely favor factional competition where the requisite pluralism was present. He did, after all, rely on it almost exclusively in the Virginia Plan. But clearly, where conditions were unsuitable—as in the states—or prior decisions precluded this avenue—as with the post-Great Compromise deliberations—Madison was fully prepared to fashion interior controls to advance his goal.

The only lapse in pushing institutional reform in the direction of promoting national over state power occurs in Number 51, when Publius enlists

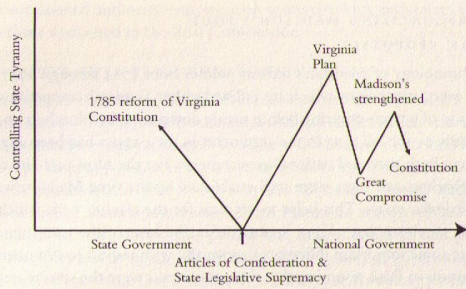


FIG. 5.2. Controlling State Tyranny as the Common Goal of James Madison's Constitutional Reform

both factional competition and separation of powers for the purpose of restraining national majorities and their politicians from intruding on the rights of the states and the citizenry. Of course, even this deviation can be reconciled *strategically*, in that it promoted ratification of the Constitution, which Madison acknowledged privately offered a heavier counterweight to imprudent state policies than currently provided by the Articles of Confederation.

Classifying Number 51 as highly sophisticated campaign rhetoric introduces its own difficulties. Why should Publius have believed that he could win popular support by having nonelective offices block the authority of a popularly elected House of Representatives? With Anti-Federalists charging that the new government would quickly transmogrify into a distant, unresponsive Leviathan, this kind of appeal would appear especially problematic. Before judging Number 51's core argument to be strategic, we must ascertain that it did, indeed, offer the target audience a compelling rationale for ratifying the Constitution.

### 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 na-

tional government will "neither effectually answer its national object nor prevent the local mischiefs which everywhere excite disgusts against the state governments."<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> The antirratification side conducted essentially a negative, single-issue campaign. More than 90 percent of their published arguments raised the specter of tyranny.<sup>30</sup> 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.<sup>31</sup> 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 antirratification 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.<sup>32</sup> 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 increasing 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 prorratification 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.<sup>33</sup> 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?<sup>34</sup>

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. Or he could have discounted the danger by stressing the asymmetric character of the veto. 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.<sup>35</sup>

To test Madison's (and to a lesser extent Hamilton's) specialized role in the ratification campaign, I counted all references to Montesquieu and separation of powers published in an exhaustive five-volume compilation (Kaminski and Saladino 1988) of extant newspaper and pamphlet arguments for and against ratification. The results show that Publius summoned Montesquieu twice as frequently as did the other proratification writers, although only half as often as did the Anti-Federalists. With respect to separation of powers, however, Publius eclipsed everyone—three times as frequently as the other Federalists and nearly twice as frequently as the Anti-Federalists. Moreover, unlike the other proratification references including Hamilton's *Federalist* essays, Madison's Publius consistently invokes these sources favorably. There was a constitution to be won, and Number 51 appears to have been masterfully contrived to respond to critics.

#### 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. In the confined territory and comparatively homogeneous population of Virginia and the other states, the transaction costs to majority formation were naturally lower and so, Montesquieu's mechanical controls had to be superimposed onto politics.

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. So understood, the presence of contradictory elements poses no problem. After all, the contradiction between factional competition and checks and balances describes well the ever-present tension between America's transient, rarely dominant majorities and the irrepressible claims of entrenched, particularistic 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.

## Notes

1. Beard reintroduced readers to the long neglected Number 10, "the most philosophical examination of the foundations of political science"; then, several pages later he grafted it onto the already famous checks and balances provisions of Number 51. Beard characterized Number 51's argument as "fundamental theory . . . the basis of the original American conception of the balance of powers."

2. Dahl also questioned the quality of Madison's theorizing. The concept of tyranny in Number 10 proved to be so differently defined from Number 51, he could not interchange them and have the rest of the argument make sense. He concluded, "as political science rather than as ideology the Madisonian system is clearly inadequate" (31).

3. Perhaps these actors are not the fully realized, modern-day professionals—Madison, after all, throws out the prospect that the process will favor the recruitment of virtuous officeholders—but their success would hinge in part on their success as brokers. For a comparison of Madison's with other contemporary views on representation see Pitkin (1967). Morgan (1974) finds in this new class of self-interested political entrepreneurs the need for checks and balances, but I dispute here that Madison shared Morgan's inference.

4. Constitutional law professor Richard A. Epstein (1993) suggests that this missing discussion reveals that Madison did not take factional competition seriously. After all, if he had found this argument convincing, why would the Constitution's chief architect have lavished attention throughout the *Federalist* on the composition and authority of the executive and judicial branches, on bicameralism and on federalism? He concludes that Madison offered it as a "bit of leg-ferdmain" inspired to promote ratification.

5. One familiar passage of Number 10 illustrates Madison's agency perspective. In distinguishing democracy from republic Madison notes "the delegation of the government, in the latter, to a small number of citizens elected by the rest." Wood (1969, 543–53) cites numerous instances of the widespread use of agency theory at the Philadelphia convention and in the ratification debates. In the Virginia ratification convention, John Marshall maintained that since the citizenry could not "exercise the powers of the government personally," they "must trust to agents."

6. "The great desideratum in Government is such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions, to controul one part of the Society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole Society."

7. Although he explains why this might be justified for the judiciary, Madison is silent on the matter of the presidency. Number 51 even offers a curious endorsement of direct elections: "Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear."

8. And Publius could have described the protective wall the Constitution constructs around this vital chamber by making its members ineligible for the

kinds of corrupting executive appointments and other emoluments that the Framers universally viewed as suborning the British House of Commons.

9. Carey reads this passage differently (Carey 1978, 166): "Clearly the phrase 'auxiliary' precautions refers to additional obstacles to governmental abuses [that is, agency loss] and not to majority tyranny."

10. Biographer Ralph Ketcham (1990, 301) emphasizes Madison's positive view of government power: "In seeking separation of powers, Madison meant not only to prevent simple tyranny but to tap more fully the latent increment to power for constructive action afforded by the republican principle. In this insight Madison transcended the traditional dogma . . . that freedom meant *release* from the authority of government. Under a government of consent, properly constructed to prevent domination by faction, freedom could mean the *use* of power in the public interest." See also Diamond (1959).

11. As Riker (1992) noted, the aggregation of constituencies in the Senate should not lead to different median preferences across the two institutions. Rather it is their differences in mode of election and distribution of seats without regard to population that should generate differences between the House and Senate.

12. Sensing his sudden advantage in the backlash, Madison dusted off Jefferson's stalled "Bill for Establishing Religious Freedom" and won its speedy enactment. Three years later at the Virginia ratification convention, Madison (Miller 1992) reminded delegates of this recent controversy while defending the absence of a bill of rights from the Constitution. Declarations are merely "parchment barriers." "The utmost freedom of religion" rests with the "multiplicity of sects . . . which is the best and only security for religious liberty in any society."

13. Adair p. 148. David Epstein (1984, p. 102) also stresses the fundamental dissimilarities of Madison and Hume. To achieve such a solution, Hume constructs a dubious, three-tiered system of government. The nation is divided into 100 equally populous counties whose citizens elect 100 county representatives (for 10,000 in all), who in turn elect eleven county magistrates and one senator. Only the 100 senators ever convene as a deliberative body, and any policy they adopt must be ratified by a majority of the county magistrates or representatives meeting in their separate locales. Ultimate authority would reside with officeholders who never meet.

14. The most direct evidence of Madison's reliance on the same separation of powers doctrine as stated in Number 51 is a topical outline he proposed for a speech in the House of Delegates in June 1784. It consists of two lists of phrases and sentence fragments—e.g. "Judiciary dependent for am. of salary"—almost all of which covers some aspect of the division of power among the several branches of the state government. Hunt 1900, II: 54–55.

15. Undaunted, Madison came back the next session and led the legislature to modernize the state's legal code—117 statutes in all. Reflecting on this one legislator wrote another, "Can you imagine it possible that Madison can shine with more than the usual splendor in this Assembly? . . . He has astonished Man-

kind and has by means perfectly constitutional become almost a Dictator . . . . His influence alone has . . . carried half . . . the revised code." (Ketcham 1990, 161).

16. Madison listed other advantages of the "negative" over state policies: resolve state boundaries; "guard the national rights and interests against invasion"; and restrain the states from "molesting each other." (*Papers*, March 19, 1787, 9: 318–19). In his subsequent letter to Randolph, Madison suggests that the veto be lodged with the upper chamber (the Senate) because its membership would be more divorced from politics. (*Papers*, April 8, 1787, 9: 369). Hobson (1979) persuasively places this frequently neglected federal veto at the center of Madison's republican theory.

17. Historians agree (Miller 1992; Ketcham 1990) that it represents Madison's ideas for the new Constitution.

18. Madison's paternal preference for the Virginia plan is revealed in the extent to which he resisted proposed changes. Early on, he opposed the convention's decision to substitute a presidential veto for the Council of Revision. He subsequently sought to reinstate it. See Farrand (1937, 1:236 and 2: 74, 298).

19. Unlike Madison's endorsement of a three-fourths supermajority override rule later in the summer, after the Great Compromise, the Virginia Plan did not broach a supermajority requirement.

20. Moreover, he used this tactic on other occasions, but once the Great Compromise was narrowly adopted, he dropped the argument until Number 10. In his record of the day's events, William Pierce of Georgia described it as "a very able and ingenious speech." (Farrand 1937: 1, p. 110). On June 26 Madison returned to this argument in defending a population basis for representation in the Senate. Jilison and Eubanks (1984) examine the theoretical novelty of Madison's ideas.

21. In the same speech, Madison emphasizes that the Senate's value as a check on the lower house lies in institutional design and not the recruitment of philosopher kings: "When the weight of a set of men depends merely on their personal characters: the greater the number the greater the weight. When it depends on the degree of political authority lodged in them the smaller the number the greater the weight. These considerations might perhaps be combined in the intended Senate; but the latter was the material one" (June 7, Farrand, 152).

22. This conclusion is little different from that reached by William H. Riker (1992) who similarly assumes that the median voter preference in the two chambers is the same.

23. On this issue, and perhaps only this issue, I disagree with Rakove (1996), who finds in these remarks Madison's abiding suspicion of the popular branches at any level of government.

24. The loss of the national veto came in two stages. Over Madison's objection, the Convention limited it to instances when national and state authority intersected. Then the *coup de grace* came when any mention of this essential feature was left out of the Grand Compromise.



25. His success continues today as scholars locate Madison's *Federalist* arguments in his Convention speeches but fail to recognize that he was enlisting the same language to promote much different conceptions of the Constitution. Carey (1978), for example, enlists passages of Madison's June Convention speeches in behalf of the Virginia Plan to validate for Madison's support in Number 51 for provisions of the Constitution that are inimical to the Virginia Plan.

26. It would probably soon require fixing, he added. In fashioning a rationale for the actual Constitution—whether designed to be persuasive or not—many of Madison's sincere views on republican governance were simply irrelevant. In *Federalist* Number 37, he speculates, "the convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations."

27. Lance Banning (1995), one of the few scholars to confront the striking inconsistencies between Madison's earlier writings and his *Federalist* essays, asserts that this is precisely what happened. "Madison's opinions changed as he was working on the series," Banning (1995, 400) concludes, "a possibility that ought to seem entirely likely to anyone who has completed a major piece of writing." The main evidence Banning offers for this claim is that Madison never subsequently retracted or contradicted positions taken in these essays. The absence of evidence, however, does not offer a very compelling case for anything other than a null hypothesis. Moreover, this explanation does not resolve the contradictions that appear within Madison's *Federalist* essays.

28. This assumption does not strictly require their perceptions to be accurate in order for them to generate strategic appeals, but at the same time, we presume that ratification strategies actively enlisted less precise technology to arrive at approximately accurate measurements of their campaigns' success.

29. Riker's analysis covered some 617 entries ranging from "minor squibs" to *The Federalist*. These he decomposed into 3268 segments which he then weighted according to the frequency with which they were reprinted across the states.

30. Riker's (1996) classification found 49% of Anti-Federalists' appeals concerned tyranny:

General threat stated	14%
With respect to civil liberties	14%
With respect to governmental structure	14%
With respect to national authority	7%
Total	49%

31. In a frequently cited essay, Cecilia Kenyon (1955) judged Anti-Federalists to be "men of little faith." If one considers the decision facing the nation, a negative campaign has a lot of strategic merit. Why make promises, on which Anti-Federalists might disagree, when a negative campaign succeeds in keeping one's adversaries on the defensive? This, and not the absence of core beliefs about the character of government, might explain the distinct differences that emerged across the two sides' campaigns. Perhaps the best known Federalist effort at scare

tactics is John Jay's *Federalist* Number 2 in which he predicted the nation would splinter into regional, competing confederacies if the national government were not strengthened.

32. New York's support was critical and yet most of the delegates elected in the fall had publicly stated varying degrees of displeasure with the Constitution. When the Anti-Federalist governor, George Clinton, delayed consideration in the hope that Virginia and other states would vote down ratification, making it easier to do so, the state became one of the most hotly contested battlegrounds of ratification. Campaign editorials, essays and letters flowed daily through New York City's five newspapers—three of which were declared supporters of ratification, one opposing and one neutral. In addition to reprinting articles published outside the state, the New York campaign spawned substantial local campaign writing enterprises that included some of the most persuasive and theoretically ambitious essays from both sides of the issue. See Eubanks (1989).

33. In the February 18, 1792, issue of the *National Gazette*, Madison was more reserved: "Montesquieu was in politics not a Newton or a Locke, who established immortal systems, the one in matter, the other in mind. He was in his particular science what Bacon was in universal science: He lifted the veil from the venerable errors which enslaved opinion, and pointed the way to those luminous truths of which he had but a glimpse himself." See MP 14: 233–34.

34. Evidence of this issue's durability can be found in amendments to their ratification resolutions adopted by the last four states to ratify the Constitution reminding everyone that "the legislative, executive and judicial powers of Government should be separate and distinct" (Carey 1978, 152–53).

35. This is not all the nationalists stole. They had beaten the more deserving opposition to the Federalist label, occasioning Patrick Henry's complaint that the nationalists would be better named the "Rats," presumably because they favored ratification.