Justice and the General Good: *Federalist* 51[*]

by

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James Madison said it:

> In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good. [*Federalist* 51, p. 325]

Elsewhere (*Federalis*t 63), Madison made clear that the rare occasion on which some other kind of coalition could take place would be the end of the extended republic of the United States. Accordingly, we must regard it as Madison's rule that, so long as the extended republic of the United States endures, it operates on the basis of the formation of majority coalitions grounded in principles of justice and the general good. Further, we must note that the condition for its so enduring is that restraints upon the majority do not reach so far as to transfer power to any minority—which the requirement of a super-quorum in the legislature would do.

> In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would he reversed. It would be no longer the majority that would rule: the power would be transferred to the minority. [*Federalist* 58,p. 361]

His definition of the general good therefore implies this: a form of social life wherein the weaker party may forcefully maintain its claims of right within the very structure and processes of the government. Under these conditions, political and social contradictions (e.g., class conflict) are eliminated. The majority confirms and protects the rights of the weaker party because the stronger party can exercise its powers only on behalf of the public good. Accordingly, there is "no pretext" for defending minority rights (qua *minority* rights) in a well-constituted republic.

This essay is a meditation upon the Madisonian vision of the dynamics of the American republic, setting forth the argument in a detail that the richly schematic and emblematic structure of *Federalist* 51 was required to forego. It further offers the argument that more impoverished versions of Madisonianism—typically presented as the doctrine of a multiplicity of interests within an extended republic—fail systematically to express the correct foundations of Madison's founding principle because they fail to take seriously *Federalist* 51's invocation of justice. The operative analogy throughout is that justice inheres as fully in the arguments of *The Federalist* as piety inheres in the *Torah*, although neither is frequently mentioned in either.[1]

THE MADISIONIAN PROJECT

Madison most fully reveals his idea of a decent regime in *The Federalist*. But Madison's draft of a "farewell address" for President Washington in 1792 merits consideration alongside

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The Federalist as a kind of commentary on the implications of its republican nationalism. In that address Madison spoke in unrestrained terms of America's providential advantages and achievements. He found the "theatre of our fortunes" well adapted to every important national consideration.

> All its essential interests are the same: while its diversities arising from climate, from soil, and from other local & lesser peculiarities, will naturally form a mutual relation of the parts, that may give to the whole a more entire independence than has perhaps fallen to the lot of any other nation.[2]

His efforts to construct a democratic nationalism had since 1780 been bent precisely to the search for this "entire independence." To that end, nothing was so essential as the elaboration of a national interest or identity even if, finally, it was constructed on the foundation of mutually interlocking particular interests.

Madison identified the popular establishment of a "common government, ... free in its principles" and "intended as the guardian of our *common right* and the patron of our *common interests*" as the decisive event in the achievement of the goal he sought. This work, the provision for amendment being admitted, "must approach as near to perfection as any human work can aspire...." Madison, we can see, did not underrate the achievements of the founding. What is less apparent is that this express claim—made at the very height of his efforts on behalf of the Republican party press in 1792—leaves no doubt that Madison imagined a common good to be framed in the new regime.

We may render this last conclusion even more convincing, however. And in the process we shall demonstrate that *Federalist* 51 stands at the very center of the Madisonian project, as much in 1792 as in 1787. The purpose in demonstrating this is to insist upon the political relevance of an interpretation of Madison's " Publius" contributions, and to indicate the range of interpretation to which *Federalist* 51 must be subjected before we can speak definitively of the Federalists' project.

At some point, probably in 1792, Madison seems to have envisioned writing a regular treatise on the foundations of government. His notes exhibit a plan to set forth the fundamental principles at stake in the party contests of that era; the editors of the Madison Papers have entitled these fragments, "Notes for the National Gazette Essays," and dated them between December 19, 1791, and March 3, 1792.[3] The foundation of their educated guess on both scores seems to have been that the notes contain direct passages and the obvious first drafts of other passages that appear in six of Madison's *National Gazette* essays, which were published contemporaneously.

Madison, however, published seventeen *National Gazette* essays, extending from November 19, 1791, through December 22, 1792. Further, of the eleven essays not reflected in these notes, three fell within the period assigned for the notes' composition. Those three are the essays on "Charters," "Universal Peace," and the "Spirit of Governments." If Madison's notes were merely first drafts of the essays composed during this period, it would be difficult to conceive why these three important essays were not included, especially since the notes do not correspond exactly with the essays. That is to say, some notes under one heading, "Public Opinion" for example, do not appear in the essay of that title but in another,

namely "British Government." Consequently, the organization of the notes departs significantly from the organization of the essays.

The three omitted essays are distinguished by the fact that they discuss principles or theories at the heart of the development of European political philosophy. "Charters" opens with the words, "In Europe," and proceeds to distinguish the notions of contract prevalent east and west of the Atlantic. "Universal Peace" tempers the spirit of Rousseau, and "Spirit of Governments" broadens the understanding received from Montesquieu. The main work of these essays, therefore, seems to be to correct mistakes that might be made if Enlightenment thought were simply applied to the American scene with main force. I submit, accordingly, that the notes reflect only the essays that they do ("Public Opinion," "Government," "Parties," "British Government," "Government of the United States," and "Republican Distribution of Citizens") precisely because Madison had set about organizing a separate and independent work, a principled response to the questions at issue between Federalists and Republicans—questions about the necessary relations of the parts of American government, rather than about philosophical antecedents.

What Madison's outline for a treatise on the foundations of government contributes to the present discussion is a solid indication of how *Federalist* 51 should be read. Madison's notes deserve a full exegesis in their own right; here, however, I limit myself to a summary in order to come to the main point—namely, the centrality of *Federalist* 51. Because my discussion must be limited, I will reproduce Madison's outline (without annotation, and indicating his pagination) so that the reader may more easily see the comprehensive scope of his work.

[Part A]	[Part B]
I. Influence of the size of a nation on Government page 1	IX. Checks devised in democracies marking self-distrust page 49
II. Influence of external danger on Government page 10	X. True reasons for keeping the great departments of power separate page 55
III. Influence of the stage of society on Government page 16	XI. Federal Governments page 55
IV. Influence of Public opinion on Government page 22	XII. Government of United States page 75
V. Influence of Education on Governement page 30	XIII. Best distribution of people in Republic. page 82
VII. Influence of Domestic slavery on Government page 40	
VIII. Influence of Dependent dominions on Government page 46	

Before turning to Madison's discussion of these matters, I hasten to forestall the easy assumption that Madison, metamorphosing from Federalist to Republican, had set out to redo *The Federalist*. For in the course of his inquiry he not only invokes "Federalists No. X et alia," but he also cites explicitly *Federalist* 7, 30, 51, as well as volume one's discussion of federal governments. Furthermore, he tacitly relies on *Federalist* 43 at the very heart of this outline (in chapter VII), making explicit what he had cautiously discussed in 1788 as the "natural majority."[4] The only portion of *The Federalist* he seems directly to call into question was written under a professed veil in any case, and that is Number 47, in which Madison aimed to express the meaning of Montesquieu and then only by describing Montesquieu's British model. Accordingly, he now promises to reveal the "true reasons for keeping great departments of power separate." I confine the implications of this statement to *Federalist* 47—and absolve *Federalist* 51—because under the section on the "Government of the United States" Madison refers the reader to the entire *Federalist*, but "particularly No. 51." The division Madison himself makes tells us that Number 51 in its true bearings is less a discussion of separation of powers than of the governing of the United States.

Madison goes beyond *Federalist* 51 in making his conclusion explicit. "Partitions and internal checks of power" deserve high praise but not the highest praise. For "the chief palladium of constitutional liberty" is its "authors" and "guardians," the people. They are called upon to signal, judge, and "repel aggressions on the authority of their constitutions."[5] Madison later provides the reason why this is so, as the character "Republican" responds to "Anti-Republican," debating the question, "Who are the Best Keepers of the People's Liberties?"

> The people themselves.... The centrifugal tendency then is in the people, not in the government, and *the secret art lies in restraining the tendency, by augmenting the attractive principle of the governmen*t with all the weight that can be added to it.[6]

This is in Madison's eyes the real subject of *Federalist* 51. Through it he aims to explain how the essence of a "representative republic" is to "chuse the wisdom, of which hereditary aristocracy has the *chance*," while avoiding the oppression incident to the latter.[7]

To achieve this goal, the government must be brought more fully under the power of "public opinion," which means in the first place under the power of the natural majority to the extent possible.

> In proportion as slavery prevails in a state, the government, however democratic in name, must be aristocratic in fact. The power lies in a part instead of the whole; in the hands of property, not of numbers.... In Virginia ... the slaves and non-freeholders amount to nearly 3/4 of the State. The power is therefore in about 1/4. Were the slaves freed and the right of suffrage extended to all, the operation of the government might be very different.[8]

While "property" and "numbers" contend for political power in every state, and thereby influence it either toward aristocracy or toward democracy, Madison does not reduce the question of the character of the representative republic to the mere question of interests. Public opinion and not cash is the nexus, and the question is, in what "proportion" the government is influenced by public opinion in the true sense—the opinion of the whole instead of a part.[9]

Here Madison relies on Aristotle to authorize his conclusion. He reads the discussion of the cycle of regimes in *Politics*, Book V, to suggest that the cycle is not an iron law and is alterable by changes in opinion. Aristotle had arrayed three good forms of regime against their respective opposites: monarchy versus tyranny, aristocracy versus oligarchy, and polity versus democracy. The order represented an order of descent in terms of relative excellence. The forms were defined primarily by the number of persons participating in office and secondarily by the objective of their rule—that is to say, rule in the private interest of the ruler or rulers, or rule in the interest of the common good. He indicated, however, that the two bad regimes, democracy and oligarchy, each presented a partial view of justice, insisting on the one hand that the free born should rule and on the other hand that only the well-to-do should rule. Madison's reading yields an untraditional emphasis. Above all, by regarding the defenders of oligarchy as lovers of justice (they do not think it just that those who contribute unequally should share equally) instead of as lovers of money, Madison teaches that by replacing a partial view of justice with a whole view, one can provide the motive force for a change of regime which is not a corruption but an improvement.

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.[10]

This, then, is the subject of *Federalist* 51 and the heart of the Madisonian project. Simply by making Virginia a part of a true federal republic, and thereby reducing the effect of the number of slaves as a part of the whole, one may effect a change in the regime contrary to the iron cycle. Enhancing the republican character of the whole is necessary to perpetuate that salutary motion. And the question, how the system may operate so as to preserve and enhance its republicanism, is the burden not only of Madison's career as a partisan but of his analysis in *Federalist* 51. In undertaking an exegesis of that paper, we are assured only of one thing, that it "is a perversion of the natural order of things, to make *power* the primary and central object of the social system, and *liberty* but its satellite."[11]

REPRESENTATION AND THE SEPARATION OF POWERS

A reasonable objection to the approach I take here would be that I am giving short shrift to the role of the discussion of separation of powers in preparing a context for the exegesis of *Federalist* 51. I believe that the ultimate result of this discussion will justify my approach. Nevertheless, I shall add here a summary discussion of that principle, in order that those familiar with standard interpretations may judge how the interpretation to follow fits in with them.

Separation of powers forms a valid principle only by virtue of its goal, which is precisely the same as that of the system of balances and checks. The latter system renders the former an efficacious tool in ameliorating the evil consequences of popular government: the system of balances and checks provides the interior controls that supplement the partitions among the powers, in themselves insufficient controls. The interior structure of the government, then, is so arranged as to render each department an agent in keeping the others "in their proper places." Additionally, the officeholders in each branch are provided with "the necessary constitutional means and personal motives to resist encroachments of the others.... The interest of the man must be connected with the constitutional rights of the

place. .." (No. 51, pp. 321-322). That such a system is necessary is certainly "a reflection on human nature," but, then, government itself is the greatest of such reflections. In the system of *Federalist* 51 "you must first enable the government to control the governed; and in the next place oblige it to control itself" (p. 322). When this situation obtains, the American federal system boasts as much security as can be provided, with the added benefit of a further partition "between two distinct governments" that renders it still more secure than "a single republic."

Next, the role of the judiciary in sustaining the separation of powers is regarded as crucial. Fortunately for Publius, the need for an independent judiciary was not much questioned. Nevertheless, he is still required to elaborate its mode of appointment and term of office, revealing one of the decisively modern aspects of the Constitution. Not even Montesquieu—from whose principles the implication can well be drawn, Publius asserts—had raised "the standard of good behavior" as a requirement for the tenure of judges. But it is not too difficult to see that this strengthens the independence of judges and provides an "excellent barrier to the encroachments and oppressions of the representative body."

> [In a government of separated departments] the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.... [T]he judiciary is beyond comparison the weakest of the three departments of power.... I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that 'there is no liberty if the power of judging be not separated from the legislative and executive powers' ... as all the effects of such a union must ensue from a dependence of the former on the latter.... [*Federalist* 78, pp. 465-466]

The very nature of a "limited Constitution" encourages this particular construction of a judiciary that must "declare all acts contrary to the manifest tenor of the Constitution void."

Lastly, in judging the republicanism of the new Constitution, Madison explains that republican government must be derived from the great body of the people, "not an inconsiderable proportion or a favored class" (*Federalist* 39, p. 241). All, or practically all members of the society must be citizens even if all—women, for example—do not exercise the immediate rights of citizenship—for example, voting. Montesquieu erred—Publius hesitated to say it but is forced to by the nature of the case—in considering that a fairly large "proportion" is sufficient to render a society republican. But he rejects Montesquieu in this particular case in order to exclude the possibility that "a handful of tyrannical nobles, exercising their oppressions by a delegation of powers, might aspire to the rank of republicans and claim for their government the honorable title of republic" (*Federalist* 39, p. 241). A republic deriving its power from the whole society as nearly as possible and administering through persons appointed directly or indirectly by the people and serving for various terms, creates and thrives upon a dependence on the people. This dependence in turn protects a sovereignty that is indivisible, despite the fact that citizens alienate their collective legislative capacity (*Federalist* 63).

A broadly based principle of representation mirrors the founding itself: it is the power in the people which, by means of consent, flows from the people. In the first instance, the people *exercise* their power in founding the system; in the second instance this very exercise of

power *delegates* its administration to representatives. Thus the nature of representation is that all power must flow from the people as directly as possible. "The streams of national power *ought* to flow immediately from that pure, original fountain of all legitimate authority" (*Federalist* 22, p. 152, emphasis added).

An apparent exception to this argument, namely, the Senate—whose members were elected by the state legislatures for six-year terms—reveals how considerations of the safety of the republic and the safety of the government work together. Two great desiderata compelled the creation of the Senate. The first was the need to include the states in their political capacities in the formation of the government. So far as this may expose the Union

> to the possibility of injury from the State legislatures, it is an evil; but it is an evil which could not have been avoided.... If this had been done it would doubtless have been interpreted into an entire dereliction of the federal principle, and would certainly have deprived the State governments of that absolute safeguard which they will enjoy under this provision. [*Federalist* 59, p. 364]

As for the second desideratum, one need only consult the histories of Rome, Sparta, and Carthage to discover the value of some body that will provide stability in a government all too prone to momentary passions. "The cool and deliberate sense" of the people must ever serve as a command for their representatives and agents; but the latter must always reflect just such sense rather than the spontaneous rages of the people. The examples cited are not intended as models for America, but they are "very instructive proofs of the necessity of some institution that will blend stability with liberty when compared with the fugitive and turbulent existence of other ancient republics." Nor, again, may one take comfort in the great extent of the country, since that alone will not render it immune to "infectious passions." To this real advantage it is necessary to add "auxiliary precautions," in the form of balances and checks and the separation of powers (*Federalist* 63).

Auxiliary precautions once provided, the benefits of an extended territory may be placed in proper perspective. The great diversity in the "state of property, genius, manners, and habits of the people" from the various parts of the country will reproduce itself in the government through the "dispositions in their representatives." The prevailing interest in each part will be reflected in the government, and there will be a sufficient variety to avoid the predominance of any single interest (*Federalist* 60). Secondly, the states can expect very material increases in population and diversification of interests, which will necessitate a yet "fuller representation." Next, the effect that an extensive territory has in thwarting foreign attacks will similarly thwart the designs of ambitious officeholders (*Federalist* 28). Finally, no greater protection can be afforded minorities than the extended republic, without which they would be all too easily threatened by clear and intractable majorities (*Federalist* 51). Evidently, to the degree one compresses the size of the territory, one augments the probability of injustice, therefore demanding for justice's sake a corresponding increase in the "stability and independence" of governing institutions. Hence discussions of the relative worth of liberty and justice are constrained by the necessity to take into account circumstances, as well as human passions and character. The "extended republic" of America renders it highly improbable that a viable majority could ever occur except on principles of "justice and the general good."

In this way we arrive at the central conclusion of Publius, even in the standard interpretation: a full determination of the worth and fitness of a government can be made on but one principle, "the public good, the real welfare of the people." No government is worthy except insofar as it is adapted to that end (*Federalist* 43). We threaten to lose sight of the fact, however, that the means to this end are not at all entirely clear at this point. Let us agree, then, that there are two requirements for a good government: faithfulness to the happiness of the people, and sufficient wisdom to attain that object. Concede that there has rarely existed a government that fulfilled the first requirement, and that many acknowledge neither. The key for us is the claim that until now, "American governments have paid too little attention to the last." Thus the new Constitution provides not only for the public happiness, but for the wisdom to attain it (*Federalist* 56). That wisdom is a wisdom as to means; and if the claim of Publius is to be vindicated, our exegesis must reveal not only the structures and general principles of the regime, but the peculiar means that will produce this excellent result. Let us therefore return to the exegesis of *Federalist* 51 in an attempt to discern how the standard interpretation of it omits something that may deepen significantly our understanding of the founding.

THE ARGUMENT OF *FEDERALIST* 51

The fifty-first *Federalist* follows the forty-fourth as logically as the fortieth could well precede the thirty-ninth.[12] When Madison closed the forty-fourth *Federalist* with the claim that only the propriety of a regime such as the proposed one remained to be discussed, he was partly right, partly wrong. Although it is true that the "mass of power" delegated had been discussed—and its particular arrangements remained to be discussed—it was not true that he had completely demonstrated that this government invested with energy and stability could act with safety. The fifty-first *Federalist* responds precisely to that question—the *safety* of the regime as a whole, once set in motion and without respect to the operation of one branch vis-à-vis another. In this sense the paper logically follows the general conclusion of *Federalist* 40-44, and the whole is the prelude to any particular consideration of the branches or offices of government. This is in keeping with the outline that opens the forty-first *Federalist*. [13]

The great desideratum that results from the emphatic defense of a regime of character and power sufficient to secure the public good is the necessity to account for its being *confined* to pursue the public good or "justice."[14] The strictly formal argument from the separation of powers seems to provide the account sought, which is why the papers detailing the separation of powers intervene between 44 and 51. But the formal account itself poses a problem. As *Federalist* 41-50 reveal, the separation of powers raises a pretext for constitutional adjudication of the powers—and abuses of power—of government. But the deeper question beneath the doubt as to who properly must do what is the question, what remains to give a regime thus impeded the impulse to do anything? The question of the safety of the regime is really a question of its safety in operation, safety in motion when all the parts move together. (It is correct to say "regime" rather than "government" here, for when the whole moves together its deeds are presumably determined by its character as a regime. What Aristotle means when he defines "regime" as an arrangement of offices is more than just an institutional framework; he means the human characteristics that predominate in a society and give it its decisive character.) The regime might be envisioned as some unchained behemoth, in keeping with that modern

appreciation of politics, which denies that the essential judgment of political life is founded on a judgment of the character of human beings as distinguished from beasts. No one would voluntarily unchain the behemoth without reassuring himself at least of the possibility of keeping it on a path of safety. In this manner the fifty-first paper continues the defense of the regime.

Federalist 51 specifically repeats key themes from Papers 40-44 at least five times. Beginning with an invocation of that "fountain of authority, the people," which recalls Papers 40, 42, and 43, and passing by way of a remark echoing Number 44 to the effect that the states are to be created anew by the Constitution,[15] the paper concludes with an emphatic rejection of the mere rule of the stronger, which possibility was raised in Number 43.[16] The fifty-first paper serves to disprove that the regime of *Federalist* 40-44 will be victim to any of the common illnesses of regimes. Its purpose is far wider than the opening claim would indicate.

> To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? . . . as all these exterior provisions are found to be inadequate the defect must he supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. [17]

Madison himself licenses the view that he will not pursue this narrow question when he immediately adds that he will only "hazard a few general observations"—rather than undertake a "full development" of this theme—sufficient *both* to make it "clearer" and to "enable us to form a more correct judgment *of the principles and structures*" (No. 51, p. 321) of the regime as a whole.

The actual "general observations" on the "mutual relations" of the separate departments of government are preceded by the recognition that the purest separation would surely arise from distinct popular appointment of each branch. Each would accordingly have "a will of its own"—that is, each would exercise the will of the people on the basis of a distinct authorization. This purity is attained only to some degree, however, because of practical difficulties. It is more nearly a question of the character of the branches than of the representatives themselves; but the succeeding question involves the character of the men as such, and introduces one of those "auxiliary precautions" that necessarily supplement the "primary control," dependence on the people. [18]

Madison drew the distinction here so finely that to fail to recognize it is to fail utterly to comprehend the essay. The regime must invoke the character of the representatives in order to supplement a separation (which cannot be absolute) of the branches of government.

> ... the great security against a gradual concentration of the several powers in the same department consists in giving to *those who administer* each department the necessary *constitutional means and personal motives* to resist encroachments.... Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. [No. 51, pp. 321-322, emphasis added]

This is not a discussion of interests or factions in the society itself (except perhaps indirectly). This is an invocation of that "ruling passion," fame, and perhaps, though surely to a lesser extent, of avarice.

The passions or interests that will make representatives in this government into "sentinels of public rights" are not the same passions or interests that will set the regime in motion. While the latter "enable the government to control the governed," the former "oblige it to control itself." The people are rendered amenable to government by means of those very private passions and interests that incline them to seek to win the influence of power to their causes, whereas representatives, driven by ambition, are charged with mastering those diverse private passions and interests as the price of maintaining their public standing. The representative must then at one and the same time satisfy the clamant interests of his constituents as far as possible, while fighting off the clamant interests of the constituents of fellow representatives as far as possible. In doing so, his regard is less for the interests at risk than for the office or station he holds. Accordingly, though it "might be" possible to trace "this policy of supplying, by opposite and rival interests, the defect of better motives ... through the whole system of human affairs," it is not necessary to trace "these *inventions of prudence*" beyond the "distributions of power." "Better motives" are wanted for the public good. Their absence—the "defect of better motives"—must be supplied not in the people but rather in those who would govern or, perhaps, administer the government.

This analysis does not pretend that the motives of representatives are less pure than those of the people. It is rather the case that, once the full force of separation of powers is admitted and the predominant "legislative authority" of republican government is safely left to be wielded by the people only indirectly, the defect of better motives in the people is far less dangerous than in the representatives. Madison insisted more than once that "force and right are not *necessarily* on the same side in republican governments."[19] The definition of tyranny—the concentration of all the powers of government in the hands of the one, the few, or the many—militates most strongly against the people's *direct* legislative authority.

The discussion of the "mutual relations" of the branches of government occupies but the first half of the paper. The second half examines the safety to be derived from the "federal system of America." Here Madison offers "two considerations." The first repeats the argument that the "compound" relationship of the general government and the states will operate to the same effect as the separation of powers among the branches of government, thus offering "a double security" to the people's rights. The entire discussion takes only four sentences. The remainder of the paper discusses the further question: after a society is guarded "against the oppression of its rulers," how is "one part of society" to be guarded against the injustice of the other part?

This argument is of peculiar interest not only because of its restatement (not merely a repetition) of *Federalist* 10. It is of peculiar interest because Number 51 had opened by invoking that "foundation of authority," society, as the "primary" ruler in republican government. Insofar as the people do indeed rule, the protection of one part of the people from the other is still a protection against the oppression of rulers—the critical problem of majority faction, which we find in *Federalist* 10 and think the only problem to be solved, inasmuch as minority faction would be handled by the "republican principle." But now, equally important, we see that once the people's *direct* authority has been qualified, it becomes important to protect one part of the people, namely, the ruling majority, against the violence or injustice of another part—namely, the minority or the few, since Madison writes explicitly of only two parts, "one part" and "the other part." But this, it seems, is identical to *our* original question: Once the regime has been made safe—impeded in its movement—how can it again be made to move, to attain the end

sought from the government, the public safety? Madison seems to say that this is something more than the familiar "deadlock" conundrum hackneyed in contemporary analysis.[20] For representatives as such, even with the defect of better motives supplied, seem insufficient to the task.

What sets the regime in motion—what will make the representatives *do something*—will be the clamant interests of the "different classes of citizens." I repeat: this is not the argument from *Federalist* 10, where the multiplicity of interests will prevent the action of a factious majority. Those interests have a second function, which is not merely to become the primary subject of "modern legislation" but themselves to set the agenda of modern legislation, thus setting the regime in motion. But what will make this motion safe? Auxiliary precautions would be no barrier to a majority that rules. And *the point* of this essay is that the people will rule! We are working with a distinction between the "opposite and rival interests" that must be *supplied* to the representatives and the interests that *exist of necessity* in "different classes of citizens." These more fundamental interests—*Federalist* 10 interests—may have to be worked with (or regulated), perhaps even manipulated; but they do not have to be created.

Precisely because the people do rule, "if a majority be united by a common interest, the rights of the minority will be insecure." The danger in this regime is in fact identical to the danger the natural majority[21] poses to every republic. It is inconsistent with republican principles to erect a "will in the community independent of the majority—that is, of the society itself." This means the minority is left exposed to the violence of the majority, which *appeared* to be the problem we were handed. So here Madison reaffirms the *Federalist* 10 solution, though it is still unclear how "one part" of the society is protected against "the other part." The reaffirmation does no more than assure that no minority "will" or veto is permissible. And the minority cannot otherwise be expressly defended without arresting the motion of the regime.

Hence, the minority must be left theoretically exposed. Majority rule must govern, but in such fashion that the minority no longer requires protection. The remedy in this regime, as under natural circumstances, is to render the majority unfit for concerted action in pursuit of unjust ends. Because the defect of better motives cannot be supplied, the only recourse will to be a diversity or confusion of motives. Suspicious self-interest must limit the seeking after extra advantages to the degree that minorities will benefit. This method "will be exemplified" in the new regime.

> ... in the federal republic of the United States. Whilst all authority in *it* will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority will be in little danger. [No. 51, p. 324)

The question, however, had been, given this hobbling of the majority, how could it then protect itself from minority violence? Madison's obtuse return to the question of preventing majority violence begins to be vexing, until, that is, this reiterated theme takes on another voice. The "multiplicity of interests" is a natural occurrence that is artificially encouraged in a "proper federal republic." The point is to avoid government under the majority's "unjust views." *That alone is at stake.* Not the majority's power, but its injustice is curtailed; hence it remains able to defend itself against minority violence.

The republican operation of the regime itself defends against minority-inspired injustice:

> ... justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty he lost in the pursuit. [No. 51, p. 324]

The interest of justice is served by distinguishing right and might. Where "the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature." The rule of the stronger faction, even a majority, is implicitly distinguished here from majority tyranny. The definition of tyranny applies most forcefully in democracy, where the actual separation of powers is not possible. The rule of the stronger faction, likened to the anarchy of the state of nature, is however not founded in the abuse of power as such. It is grounded in the denial that anything beyond force legitimizes the claim of right. It is a denial of a genuine public good, wherein the weaker maintain a claim of right as forcefully as the stronger.

While essentially democratic tyranny affirms the bonds of citizenship, essentially undemocratic anarchy denies the bonds of citizenship. Anarchy, the rule of the stronger faction, is rule by a will independent of the society. It has more in common with "governments possessing an hereditary or self-appointed authority" than it has with either democracy or tyranny.[22] The provision for republican safety, the method for avoiding the evil of a majority united by a common factional interest, is to confine the formation of majority views to principles of "justice and the general good." This unexpected result comes from one source only: namely, the necessity for republicanism, *a conscious attachment on the part of the citizens to republican principles and processes*, in order to impart motion to the regime. This result is unexpected precisely because it had appeared that the regime would be set in motion by the diverse interests forcefully asserting their respective claims. Upon reflection, however, it would seem that no self-interested endeavor could be confined to channels so pure as those Madison described—"justice and the general good"—unless the self-interested agent was at the same time of the opinion that some principle either of right or necessity *obliged* him to have recourse to the prescribed channels. Majority rule, in short, is not just the republican mode; it is the mode for making republicans. Majorities there must be, at least formally. Accordingly, one cannot speak of rendering majorities as such powerless or impossible.

REPUBLICANISM AND THE COMMON GOOD

Another element of Madison's solution is to confine majority sentiment to salutary principles.

> In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.... [No. 51, p. 325]

It is a further refinement, once concession is made to the "fountain of all authority," to pose "justice and the general good" as the necessary *means* of action. Through this device, the *majority* is confined as nearly as possible to pursuit of the public good. The pursuit of self-interest is not incompatible with this result, so long as the road to profit runs through a "coalition" of do-gooders.

But how is the public good defined? Publius offers a negative characterization: It is that condition in which the weaker part of society may forcefully maintain its claims of right within the very structures and processes of government. Insofar as that condition obtains, political and social contradictions are eliminated. The majority confirms and protects the rights of the weaker

party when and only when the majority party can exercise its power in behalf of the public good.[23] Accordingly, there is "no pretext" for separately defending minority rights in a well-constructed republic. And the absence of these special precautions is itself evidence of a public good that animates the regime. What Publius calls self-government is then government by the majority for the sake of the public good without recourse to "a will independent of society." This he regarded as "the *republican cause*" which is made possible, made realizable by "judicious modification and mixture of the *federal principle*." This is, in other words, democratic nationalism—the regime quality—the character of public opinion—necessary for the protection and consecration of natural right in republican government.

We are within our rights to wonder exactly how far Madison was willing to carry his scheme. His 1792 outline suggests that he would carry it quite far indeed. We may take a more direct measure, however. For Madison himself returned to this subject—in some ways the most consistent theme of his lifework—at a time when he was confident that he would never hold office again, and in a manner that reveals lingering doubts about his solution.

More than thirty years later, Madison resurrected an argument he had raised in the 1787 Philadelphia Convention and wrestled with it anew. On August 7, 1787, the Convention had debated the report from the committee of detail, scrutinizing the fourth article's provision to leave in the hands of the states the rule of suffrage for choosing the national legislature. The leading alternative was a freehold or property qualification—and Madison was tempted by it, given the circumstances of the country. "The freeholders of the country would be the safest depositories of Republican liberty."[24] Above all, such a provision would guard against the abuses of power by a propertyless majority. Somewhere around 1821,[25] however, Madison re-thought his contribution to the debate of August 7. On his own testimony, his speech had been too much colored "by the influence of Virginia" on his mind. That is to say, the problem he had originally set forth, presumably including the original note he appended to it in his records of the Convention debate, had not taken sufficient account of the distinctively American solution to this problem.

In the original formulation, a property qualification had been a safe-guard against a *future* propertyless majority. But even then Madison had hastened to note that "this does not satisfy the fundamental principle that men cannot be justly bound by laws in the making of which they have no part."[26] The true solution, he had maintained, would assure security both for persons and property. Nevertheless, this rule had been breached only in principle and not in fact, and therefore Madison had been willing to suffer the violation in a society in which "conflicting feelings of the class with, and the class without property" were not yet mature. Originally he had been content to rely on enlarging "the sphere of power without departing from the elective basis of it" as a sufficient safeguard, as the best mode of forestalling the anticipated breach.

Thirty years later Madison thought it wise to advance beyond that expressly provisional formulation. His re-evaluation of his earlier discussion begins by admitting the problem:

> These observations [see Debates in the Convention of 1787, August 7th] do not convey the speaker's more full and matured view of the subject, which is subjoined.[27]

In his note Madison restates the problem, this time with clarity: "The right of suffrage is a fundamental article in republican constitutions." From here he proceeds to describe the "peculiar delicacy" touching this right, namely, that to secure the right with recourse to

persons could leave property exposed, and vice versa. In the nature of civil life, property requires as much to be safeguarded as every other essential right. Accordingly, a "just and free government" accomplishes both of these fundamental objectives. But how? Universal suffrage leads to severe problems; but then so does suffrage tied to a property qualification.

The correct solution depends on comprehending the nature of the problem in its details. Madison distinguishes *the degree* of exposure to danger in the two cases, namely, when property alone is represented and when personhood alone is represented. He notes that property holders participate in common with others in the rights of persons; but nevertheless a suffrage confined to freeholders creates tendencies that make it imperative that "the poor should have a defence." Similarly, because groups of men feel the sting ointerest no less than individuals—and are "less controlled by the dread of reproach"—property needs protection.

> Who would rely on a fair decision from three individuals if two had an interest in the case opposed to the rights of the third? Make the number as great as you please, the impartiality will not be increased, nor any further security against injustice be obtained, than what may result from the greater difficulty of uniting the wills of a greater number.[28]

To avoid the dangers either on the side of majority rule or on the side of a will "independent of the society," Madison turns to an examination of "the characteristic excellence" of the American system—its particular arrangement of powers—which secures "the dependence of the Government on the will of the nation" and at the same time provides protection against majority factions.

In addition, the United States enjoyed in 1821 the advantage that "the actual distribution of property" and "the universal hope of acquiring property" produced a situation in which perhaps "a majority of the nation are even freeholders, or the heirs or aspirants to freeholds." That advantage, however, would not continue forever and therefore is cause for special concern in a regime "intended to last for ages."[29] Hence, the fateful question, "what is to secure the rights of property against the danger from an equality and universality of suffrage, vesting complete power over property in hands without a share in it," when the moment of reckoning shall come? Madison is particularly worried by the dependence of more and more propertyless persons on the wealth of a few.

> In the United States the occurrence must happen from the last source; from the connection between the great capitalists in manufactures and commerce, and the numbers employed by them . . . such being the enterprise inspired by free institutions, that great wealth in the hands of individuals and associations may not be unfrequent. But it may be observed, that the opportunities may be diminished, and the permanency defeated, by the equalizing tendency of our laws.[30]

Against the equalizing tendency of the laws, there was the permanent and natural tendency of mankind to form into parties, above all along the line between those who own and those who do not own property.

Madison tests five possible "modifications" that might offer some security to the propertied minority. The first four seem to approximate progressively the final modification, out-and-out "universal suffrage and very short periods of elections."[31] At last, then, Madison embraces the feared prospect:

> the security for the holders of property, when the minority, can only be derived from the ordinary influence possessed by property, and the superior information incident to its holders; from the popular sense of justice, enlightened and enlarged by a diffusive education; and from the difficulty of combining and effectuating unjust purposes throughout an extensive country.. [32]

Madison, in the end, is thus willing to confront the future, not quite sanguinely, but with a determination to rely upon the principles of *Federalist* 51. "If the only alternative be between an equal and universal right of suffrage ... , and a confinement of the *entire* right to a part of the citizens, it is better that those having the greater interest at stake, namely that of property and persons both, should be deprived of half their share in the government, than, that those having the lesser interest, that of personal rights only, should be deprived of the whole."

Yet eight years later Madison seems to have qualified even this conclusion. He produced yet another statement on the subject, this time during the Virginia Convention called to amend the state constitution. One must pay close attention to the context, however. Again Madison opens with an affirmation that "the right of suffrage [is] of vital importance," and he proceeds from there to deal with the immediate question, namely, the extension of that right to "housekeepers and heads of families." In other words, in Virginia Madison is now defending a broadening of the suffrage! No longer under the influence of the "situation in Virginia"—slave-holding Virginia—as he had been at the 1787 Constitutional Convention, he undertakes the task of bringing the state into line with the broadened basis of republicanism that he had done so much to create in the nation at large. He reassures the Virginians, however, that even if "an unlimited" extension of the suffrage were attempted in the "present circumstances," it would "vary little the character of our public councils."[33]

Accordingly, Madison encourages efforts to widen the franchise as the surest means to regulate the changes sure to follow. In effect, in 1829 Madison seeks to produce what he had promised in 1792, namely, that Virginia's inclusion in the larger republic would ameliorate the dangerous situation in which Virginia then found itself, concentrating the franchise in the hands of one-quarter of the people subject to its laws.

> What is to be done with this unfavored class [the other three-quarters] of the Community? If it be, on the one hand, unsafe to admit them to a full share of political power, it must be recollected, on the other, that it cannot he expedient to rest a republican government on a portion of society having a numerical and physical force excluded from and liable to be turned against it, and which would lead to a standing military force, dangerous to all parties and to liberty itself.[34]

Accordingly, Madison silently invokes the problem of the "natural majority," first set forth clearly in *Federalist* 43, and demonstrates the true nature of the solution he had envisioned in the beginning. The genius of the peopl is to be cultivated to the point where it can embrace as citizens all of the people subject to the laws. Thus, the images of disfranchised and unpropertied masses, constantly increasing in population, serve not to foreclose extension of the suffrage but to defend a prudent extension of it. The result is to "embrace in the partnership of power every description of citizens having a sufficient stake in the public order, and the stable administration of the laws." Joining them to the "owners" of the country would serve to

increase the numbers of those who would benefit from "the political and moral influence emanating from the actual possession of authority, and a just and beneficial exercise of it."

Many practical considerations may affect and qualify the instant application of this principle, but it is the unqualified tendency of the laws encouraged by Madison. His project—the heart of *Federalist* 51—is to generate that attachment to republicanism that alone can safeguard the regime. To that end he recommended such changes as would foster in the motion of the regime a further motion toward its ultimate salvation. His words alone can describe the desired result: "To the effect of these changes, intellectual, moral, and social, the institutions and laws of the country must be adapted, and it will require for the task all the wisdom of the wisest patriots."[35]

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[1] This paper is indebted to Colleen Sheehan, who brought James Madison's 1792 "Notes on the foundations of government" to my attention, and to David F. Epstein's *The Political Theory of the Federalist* (Chicago: University of Chicago Press, 1984). Epstein's work is not cited in the text only because it is largely an exegesis of *Federalist 10,* the centrality of which I mean to call into question here.

The following analysis assumes an orientation toward the founding that is not made explicit herein. The question of the character of the American regime, given its foundation in modern principles, constitutes an important point of difference among many profound interpreters of our past. I refer above all to the exchanges that have taken place for more than ten years now among Harry V. Jaffa, Martin Diamond, Paul Eidelberg, Irving Kristol, and others. This analysis reflects my understanding of those exchanges, as I expressed it even ten years ago. The central question in those exchanges has been the role of equality in the founding; that the discussion of *Federalist 51* has been possible without a special consideration of equality does not imply its insignificance.

As I understand Jaffa, the differences stem precisely from the necessity of discovering philosophy in an understanding of this regime. The thought of studying philosophy *instead* of American government, in Jaffa's terms, is a non sequitur. His chief criticism—or mine read into his intentions—is that a studied indifference to kinds of regimes and a pretense of a universal standard of judgment that transcends modern regimes in particular is no more than an uninformed parroting of a regnant morality. They who assume such a posture are intellectuals. Only by coming to terms with the quasi-philosophic demands of this regime can one fully judge of the requirements of philosophy. This runs the risk of nihilism.

Harry Neumann's essays on *Madame Bovary* and *Salambo* describe the necessity of a cosmopolitan horizon to judge both prephilosophic piety and cosmopolitan humanitarianism. But that transcendent cosmopolitanism shows both the impossibility of prephilosophic piety and the evil of *all* cosmopolitan horizons. Hence its nihilism. Only prudent intellectuals escape this nihilism, because, in fact, their cosmopolitanism, their philosophy, is nothing more than the ascetic application of a regnant morality. They judge of prephilosophic men as examples of mankind; they judge of universalistic moralities as examples of mankind: they maintain that there exist irreconcilable differences; and yet they say that we must examine—nay, insist on the existence of—diverse forms of regime as a counter to the modern project. Yet, what is their entire study but *the* manifestation of the intent of the modern project? Studied indifference is not, itself, indifferent.

The other alternative is to resist—i.e., refute—both studied indifference and an eros for philosophy independent of the love of justice. That is, one may immerse—not lose—himself even in this regime. The key: to know and perhaps love it not for its quasi-philosophic demands but for itself. And what do we find behind the door? A particular regime which dedicates itself to the relief of man's estate. But is there no difference between a particular regime so dedicated and the *idea* of such a

project? According to Aristotle there must be. Hence, it is not the idea—the modern project—that compels Jaffa's attention. That is but an intellectual pretense. It is rather the fact of the regime and those things required for its health.

Diamond and Kristol argue in effect that the moderns deny that (1) moral virtue is the proper purpose of a well-constructed regime, and (2) that it is even—whether laudable or not—necessary for it. If this is so, then the regime is essentially hostile to virtue, which means that those who are not must take their bearings from non-American sources. I would caution us, however, not to take our bearings from a form of speculative positivism: "As the moderns say, so shall it be." Giving due allowance for the weight of a regnant morality, once created, it remains the task of philosophy to consider the human end not as man decrees it but as nature decrees it—or to put an end once for all to the notion of nature. This latter alternative we recognize from the "second wave" of modernity, and therefore we can more fully appreciate the distinction between ancients and moderns in the context of the American regime by grasping this impulsive "transcendence" on the part of modernity itself. The real thrust of the "second wave"—the antirational modernity—is to reject the possibility of utopia and thereby to consider the modern project in its rational bearings as superseded. This is the manner in which the intelligible question, "Is man essentially hostile to virtue?" comes to be replaced by the unintelligible question, "Is modernity essentially hostile to virtue?"

To question what bearing we should take in this context is a problem indeed. We take "non-American" to mean non-modern, in the context. Thus, it would follow that we cannot become conversant with the demands of virtue save through our acknowledgment of the demands of ancient, particularistic piety. Nevertheless, the only access we have to ancient, particularistic piety in the nature of things is through the radical attack on that particularity. To rephrase: If we can discover virtue's demands only by means either of birth in an ancient regime or the universalizing inquiry that destroys the basis of that virtue, we are forever barred from appreciating virtue. There can be none of us who is not hostile to virtue! It is at this point that we seem forced to recall that the battle of the ancients and the moderns is a *Battle of the Books,* not a battle of cities and nations. And because we enter this battle of philosophers from the protective precincts of a nation, we are enabled to discover the ways of cities. Still, to forget the necessary condition of our discovery and seek bearings we cannot have is to foreclose prematurely the prospect of reaching an end.

That possibility remains open to us when we confront the fundamental demands of the American regime, which collapse into an argument about equality and speak in a manner wholly intelligible to ancient souls. That no one can decide (Locke says "judge") for another the means necessary to preservation does *not* suggest that no one can *know* better than another the means necessary to the other's preservation. Consequently, the question is still whether the wisdom (natural superiority) of the few confers upon the few a title to rule. The insistence on consent is the formal means of denying this. Thus, men never consent to be ruled by their superior as such; they consent rather to be ruled in accord with their own judgment of the necessities of preservation (however they arrive at that judgment). Within that horizon the rule of the naturally superior as such will always be an accident. The enlightenment that legitimizes consent is this radical understanding of a necessary equality—an equality that abstracts from the unequal faculties of men.

[2] Victor Hugo Paltsits, *Washington's Farewell Address* (New York: New York Public Library, 1935), pp. 162-163.

[3] "Notes for the National Gazette Essays," in Robert A. Rutland et al., eds., *The Papers of James Madison,* (Charlottesville: University of Virginia Press, 1983), vol. 14, pp. 157-169.

[4] Ibid., pp. 160-161.

[5] "Government of the United States," for the *National Gazette,* February 4, 1792, in *Madison Papers,* vol. 14, pp. 217-218.

[6] December 20 [1792], in *Madison Papers,* vol. 14, pp. 426-427, emphasis added.

[7] "Government," for the *National Gazette,* December 31, [1791], in ibid., vol. 14, pp. 178-179.

[8] "Notes for the National Gazette Essays," pp. 163-64.

[9] "Charters," in *Madison Papers,* vol. 14, pp. 191-192.

[10] "Of Property," for the *National Gazette,* March 27, 1791, in *Madison Papers,* vol. 13, pp. 266-267.

[11] "Who Are the Best Keepers of the People's Liberties?" for the *National Gazette,* December 20, [1792], in *Madison Papers,* vol. 14, pp. 426-427.

[12] An uncomfortable hiatus intervenes between *Federalist* 39 and *Federalist* 40. Number 39 poses several questions about constitutional authority and the performance of the Constitutional Convention. That essay answers only one of those questions. Number 40 turns immediately to the "second point." Where is the hiatus? Number 40 establishes the purpose of the Convention after a summary of enabling documents and political necessity. The provisional form of its conclusion is that the convention was to frame *a "national government ... adequate to the exigencies of government and the preservation of the Union..."* Number 39, however, had already *proved* that the Constitution was neither federal nor national! Apparently, Number 40 proves, in light of Number 39, that the Convention failed to achieve its goal. This only apparent paradox stems from the fact that the "second point" was in fact the original question, hence the first point in Number 39. Insofar as the latter does prove the government to be neither national nor federal, the Convention's task, as conceived in Numbers 40-44, remained unfulfilled. Insofar as that is not the case, Number 40 stands in the place of, rather than follows, Number 39.

I therefore dissent from Martin Diamond's judgment that *Federalist* 39 "is in a sense the central essay." See his essay "The Federalist," in Leo Strauss and Joseph Cropsey, eds., *History of Political Philosophy* (Chicago: Rand McNally, 1972), p. 651, n. 5. For the best account of the results of Number 39, consult Diamond's "What the Framers Meant by Federalism," in Robert A. Goldwin, ed., *A Nation of States* (Chicago: Rand McNally, 1962).

Madison's sleight of hand in Numbers 39-40 sets the stage for all the following essays, which purport to prove that the advice given by the Constitutional Convention is good—that is, for the public good. Not accidentally, Madison returns to strict Declaration of Independence language in order to answer his own questions. And not surprisingly, he dedicates papers 41-44 to a detailed discussion of the institutions of government with the intention of vindicating their faithfulness to the Declaration. Accordingly, the argument of Number 39, there said to be secondary to the question of the Convention's authority, *logically* follows rather than precedes the argument developed in Numbers 40-44. The national-federal dispute, in logical terms, is a mere sidelight to the question of the architectonic scope of the vision of the public good which animated the fathers. That, in turn, leads ineluctably to Number 51.

[13] Madison offers a sixfold consideration of those capacities essential to realizing the public good of America. They are the following: (1) the capacity to secure the nation against foreign dangers; (2) the capacity to regulate relations with foreign nations; (3) the capacity to maintain "harmony and proper" relations among the states; (4) the capacity to provide "certain miscellaneous objects of

general utility"; (5) the capacity to restrain "the states from certain injurious acts"; and (6) to provide that all these "powers" are efficacious. Number 41 discusses the first capacity, Number 42 the second and third. Number 43 treats the fourth, and Number 44 discusses the fifth and sixth.

Madison announces the "necessary and proper" clause as the last hurdle in this discussion. His analysis makes clear that there is no "pretext" for "drawing into question the essential powers of the Union." We note that what is actually accomplished in his discussion is to display the devices employed to avoid debilitating constitutional adjudications of the powers of government. This enabled the founders to focus on strict construction of the public good as opposed to strict construction of the Constitution. According to Madison, the "necessary and proper" clause restricts not the government but those factions that form the base of free government. That conclusion alone explains how a provision can be defended as a restriction on government after being introduced as an instrument "by which efficacy is given to all the rest" of the powers of government. The question of possible abuses of public authority is not allowed to undermine authority itself. Madison turns to the people, via the states, to reform officers of government who would corruptly wield these extensive powers. *Federalist* 51 explains how the people fulfill their assignment. Accordingly, Number 51 logically follows Number 44, as part of the scheme which is revealed in the analysis of the relation between Numbers 39 and 40.

[14] Consult Edward Erler, "The Problem of the Public Good in *The Federalist," Polity* 13, no. 4 (Summer 1981): 649-667.

[15] Madison describes the relation between the states and the nation thus in Number 51: "In the compound republic of America, the power surrendered by the people is *first* divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments" (emphasis added). By placing the line of division between the states and the nation on the same grounds as that among the departments of the government, Madison implies that both divisions are created in the same instant by the same authority. Accordingly, one may say the states are created anew in 1787-1788.

[16] In Number 43 Madison had reflected that reality may contradict theory and place right on the opposite side of might even in republican governments. Accordingly, it was necessary to investigate the question of the legitimacy of the republican form in those cases in which the majority of citizens did not amount to the majority of persons. Far from vindicating an idea of the right of the stronger, however, this consideration led Madison to emphasize more strongly the inherent tendency of republicanism. In Number 51, therefore, he is able to make still clearer the inadequacy of might as a standard of legitimacy: "where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful" (p. 324). In short, the popular form of government—and rights therefore—is secure only insofar as it is distanced from the idea of the right of the stronger.

[17] *Federalist* 51, p. 320. Note that Madison implies by these words a continuation of the discussion in Papers 46-49.

[18] Ibid., p. 322.

[19] The fullest statement of this theme is in *Federalist* 43. It appeared before in the private note, "Vices of the Political System of the U. S.," in Marvin Meyers, *The Mind of the Founder* (Indianapolis: Bobbs-Merrill, 1973; reprinted Shelburne, VT: The New England Press, 1985), and subsequently in the party press essay, "A Candid State of Parties," September 22, 1792, in *Madison Papers*, pp. 370-372.

[20] James McGregor Burns, *The Deadlock of Democracy: Four-Party Politics in America* (Englewood Cliffs, N. J.: Prentice-Hall, 1963), is the celebrated progenitor of this view, which Gordon Lloyd has described as reading "the history of American democracy and the history of democracy backwards." Akin to Burns's theory that Madison's fear of majority faction produced a veto-ridden, ineffective political system is the work of Burns's spiritual ally, Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1966). Lloyd reviewed the recent performance of this theory for the Western Political Science Association at its annual meeting in Sacramento, California, in 1984. His essay is titled, "The Burns Thesis Twenty Years Later: Has the Deadlock Interpretation Stood the Test of Time?"

[21] Consider Thomas Hobbes's *Leviathan,* in which in chapter 13 Hobbes argues that the strong cannot be ever watchful in the state of nature and thus cannot escape fear of the weak.

[22] Madison likened rule by the stronger party to the anarchy "in a state of nature." By this he seems to mean that it is less a form of rule than a condition of individual oppressions, "where the weaker individual is not secured against the violence of the stronger." When "a will independent of the society rules," individuals may yet be governed if only tyrannically. This is the way of "hereditary or self-appointed authority." In this discussion in Number 51 Madison drops the terms "elective" and "many," as they applied in an apparently similar case in Number 47: "The accumulation of all the powers, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." When the passages from these two essays are compared a singular meaning emerges: not only is nontyrannical pure democracy impossible by definition (for how could the powers be separated at all in that situation?), but insofar as tyranny is rule by a will independent of the society, rule by a majority faction is better understood as anarchy—no rule—than any form of rule whether legitimate or illegitimate. The reason seems to be that although the majority faction may appear to express the will of the many or the society, it is in fact only a concurrence of individual wills. In this situation, every man is for himself. In other words, if there were the direct, nonfactious rule by the many, it would be tyrannical, while factious rule by the many would be anarchical. The only way for a majority to rule dependent on the will of society, then, is indirectly—the Hamiltonian argument. Hamilton's coining the term "representative democracy" in 1777 set the tone for these conclusions. We can see then that where, in the interest of republicanism, Madison elevates our notion of the conceptions of oligarchs, he also depreciates our expectations of democrats.

[23] Consult W. B. Allen, "Federal Representation: The Design of the Thirty-Fifth *Federalist Paper," Publius* 6, no. 2 (1976): 61-71, where such qualification as this principle admits is discussed in terms of *Federalist* 63. Also, see Harry V. Jaffa's analysis of the causes of political parties, the second and central of which is "the partisanship of those animated by a knowledge of human nature, who would set up a regime of liberty and so dispose the competing interests of an emancipated human nature that they are permitted or compelled to cooperate for the common good." Jaffa, "The Nature and Origin of the American Party System," in his *Equality and Liberty* (New York: Oxford University Press, 1965), p. 20.

[24] Max Farrand, ed., *The Records of the Federal Convention of 1787,* 4 vols., (New Haven: Yale University Press, 1966), vol. 2, p. 203; the debate of August 7.

[25] See "Property and Suffrage: Second Thoughts on the Constitutional Convention," in Meyers, *The Mind of the Founder,* pp. 501-509.

[26] Farrand, *Federal Convention,* note 17, p. 204.

[27] Meyers, "Property and Suffrage," p. 502.

[28] Ibid., p. 504.

[29] Farrand, *Federal Convention,* vol. 1, June 26 debate, p. 422. 30. Meyers, "Property and Suffrage," p. 505.

[30] Meyers, "Property and Suffrage," p. 505.

[31] After reviewing the possibilities Madison says that "three modifications present themselves." He went on to list five, however. The first was to confine "the right of suffrage to freeholders." The "objection to this regulation is obvious," namely, it "violates the vital principle of free Government" relative to non-freeholders. Secondly, he speaks of confining "the right of suffrage for one Branch to holders of property," while leaving the other to the propertyless. This would *seem* fair, for "the rights to be defended would be unequal, being on one side those of property as well as persons, and on the other those of persons only." Nevertheless, the frank class division would create Roman-like tensions. Thirdly, one could confine "the right of electing one Branch to freeholders" and admit all others in common with freeholders to elections for the other. The theory of this system is that non-freeholders would ultimately gain a majority and thus ultimate defensive power. "Experience alone can decide how far the practice in this case would correspond with the theory." Nor, it must be said, is it clear how in the eventuality foreseen, it would not simply become a special case of the second option. Madison says nothing further, but that is perhaps the reason he goes on to a fourth modification: namely, to grant "an equal and universal suffrage for each branch." In this case, however, we may protect the propertied by "an enlargement of the Election Districts for one Branch of the Legislature, and an extension of its period of service." Madison offers no objection to this back-door approximation of the remedy achieved by the Constitutional Convention, but he does propose a fifth modification. He offers it in case the fourth modification should "be deemed inadmissible, and universal suffrage and very short periods of elections within contracted spheres be required...." In that case, the security for property holders must be "derived from the ordinary influence possessed by property, & the superior information incident to its holders; from the popular sense of justice enlightened and enlarged by a diffusive education; and from the difficulty of combining & effectuating unjust purposes throughout an extensive country Meyers, "Property and Suffrage," pp. 506-508.

[32] Meyers, "Property and Suffrage," p. 508.

[33] See "Partnership of Power: The Virginia Convention of 1828-1830," in Meyers, *The Mind of the Founder,* p. 516.

[34] Meyers, "Partnership of Power," p. 517.

[35] Ibid., p. 519.