Publius's Political Science

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Introduction

How does Publius’s treatment of politics in The Federalist measure up as “political science”? On one hand, the purpose of the essays was polemical rather than scientific: “The Federalist” sought to persuade New Yorkers to adopt the proposed constitution, not merely to make scientific predictions. On the other hand, Publius’ rhetorical method for this polemical task necessarily required predictions about the ways in which the new institutions would work. In that sense Federalist necessarily made use of positive (empirically based) political science to ground normative political arguments to defend the novel constitutional scheme.

Political science has two aspects. First, it claims to possess some substantive principles or generalizations, either inducted or derived, that are useful in making and criticizing political choices. The content of these propositions are necessarily conditional on history and context. Secondly it urges the use of empirical methods as the best way to gain and revise such generalizations. In this sense, political science (like any science) is dynamic: its substantive content can be expected to change with experience.

In this paper we seek to characterize Publius’s essays as “political science,” focused on the solution of what we today call collective action problems – that is problems of coordination
among large numbers of agents with diverse interests. While both Hamilton and Madison, writing as Publius, revealed substantive beliefs about how institutions would work, we think they also shared the methodological commitment to revisit and update their beliefs based on experience. Both saw the new nation as embarked on an experiment to see if a stable and effective republican government was possible in the United States. They saw the proposed constitution as the best attempt to establish such a government on the tricky political terrain of the new United States. The Federalist presents the constitutional project in this light and asks its readers to understand the new design and to see that it does not threaten their attachments to liberty and self-government, while emphasizing that the Constitution would remain open to modification if things did not work as they expected.

Two interconnected issues might interfere with our project. First, we must ask if Publius can usefully be understood as a “person” with coherent beliefs and a commitment to rational discourse? There is a large and contentious literature that addressing this issue. We assume that, whatever their differences in beliefs and expectations before or after the ratification debates, during the ratification process itself Hamilton and Madison shared the project of implementing the strong national government embodied in the proposed Constitution – and that this was enough for them to write coherently in support of that project as “Publius.”

The second issue is whether either Madison’s (or Hamilton’s) beliefs changed after ratification in some way that would make it dubious to use information from after that event (or

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1 We do not doubt that normative beliefs may also be rationally revised in light of experience. We may always question what it makes sense to want or aim at as well as how best to attain what we want. Could either of us rationally pursue a career in theoretical physics?

before, for that matter) to make inferences as to what Publius (as a person) “believed” during the ratification debates. One version of this problem has been called the “Madison question:” Did Madison change his views substantially after 1790 (as Hamilton appeared to believe) or did the evidence provided by post-ratification political events give Madison reason to infer new conclusions from his stable premises? One could ask the same question about Hamilton.

Obviously the two took very different political positions after 1790 on various issues. Indeed they had differed with each other on some questions during the Convention itself.

We doubt, however, that either of them really changed either their underlying normative objectives or their beliefs about human psychology. On the contrary, we argue that the best way to understand their divergent post-ratification positions was in terms of their changing empirical beliefs about how the constitution would work, what political problems the new nation would face, and how public opinion would evolve. In other words, we argue that change in their empirical beliefs -- political science -- accounts for their shifting political positions after ratification.

After 1790, domestic and foreign policy issues put pressure on Congress to adopt massive new legislative projects and on the executive to act with dispatch. The powers conferred on the executive by Congress and inferred by the executive from the Constitution itself turned out to be much more formidable than had been anticipated in Publius’ *Federalist* essays. Publius was forced to adjust the original assumptions of the *Federalist* in light of this new evidence. Even as Hamilton and Madison drew opposite normative conclusions about this expansion of executive power, it was precisely their (largely shared) evolving empirically based beliefs about politics that drove them to different political conclusions.
As “experimentalists” neither Hamilton nor Madison could take all of their beliefs as equally open to revision in light of new evidence. Like any experimental scientist, each would retain certain beliefs as fixed or “maintained hypotheses” while revising others. We doubt, for example, that either Madison or Hamilton would have been prepared to conclude that his foundational theory of human nature was wrong even if the proposed institutions did not work as expected. Instead, each held constant their shared fundamental principles about the problems of collective action that constitutions were supposed to solve. Madison and Hamilton parted ways instead on their normative assessments about how well state officials, Congress, and voters could control executive power, with Madison systematically revising Publius’ assessment in light of the post-1790 operation of the Presidency, while Hamilton – a primary author of such presidential behavior – retained his confidence in the benefit of relatively broad implied presidential powers.

Our argument proceeds in four parts. In part 1, we lay out some of Publius’s design principles for a constitution rooted in his beliefs about human nature and predictions about institutional behavior rooted partly in those beliefs, but partly in their studies of other republics, classical and contemporary. Parts 2 through 4 focus on Madison rather than Hamilton because, as we see it, the emerging evidence as to how the constitution worked largely in ways that Hamilton believed and hoped. Part 2 will examine Federalist 10 and show Madison revised his theory of representation in large republics in light of the perceived failure of Congress to curb adequately Hamilton’s financial program. Madison’s response to this failure was constitutional: He tried to devise interpretive canons which would ameliorate the newly revealed weaknesses in the text. In Part 3 we show how Madison’s understanding of the Presidency – which he had termed a simple office easily controlled – also turned out to be wrong and how he tried, in line
with his response to the predictive failure of Federalist 10, to devise interpretive canons to try to cabin newly claimed executive authority. In Part 4, we show how Madison tried other constitutional moves to attempt to counter the Alien and Sedition Acts, seeking to enlist other states to block or interpose enforcement of these laws. Following the disappointing response of the states (and the nonresponse of the Court) to these unconstitutional statutes, he and Jefferson launched a political campaign to appeal to “The People Themselves” in a ‘constitutional’ campaign that culminated in what was called the Revolution of 1800. The key aspect of that campaign was the appeal to the “People” as the “guardian of the Constitution” (to invoke the controversy of Hans Kelsen and Carl Schmitt).

In each case the key event was the failure of an empirical prediction as to how constitutionally designed institutions would work, causing Madison to revise Publius’ assumptions about executive power and adopt a new reading of the document that would curb the power that as Publius, he had defended. Hamilton would not have seen, in any of these events, any reason to change his views about executive powers and certainly no reason to attempt to curb it.

1. Publius’s Political Theory

We start by sketching Publius’s normative views about successful republican government and then take up “his” views about human nature and institutional predictions. Publius’s normative recommendations depend on, first, the context (domestically and internationally) in which the new government would operate, and, second, to the broad goal of designing a government capable of dealing effectively with anticipated challenges while honoring the commitment to popular or republican government.
Publius’s Normative Commitments

We assume that Hamilton’s and Madison’s normative views, about which *the Federalist* is somewhat informative, bracket those of others at Philadelphia in the summer of 1787. Roughly speaking, Hamilton wanted the new republic to be powerful enough both militarily and financially, to match up to European powers on land and sea, and to secure internal social order. Such a government needed to be able to raise revenues and troops independently of the state governments, to able to borrow on favorable terms, and to be led by a decisive (energetic) president in order to exercise its power effectively. It also needed a productive legislature able to sustain economic and foreign policies in a treacherous world. Hamilton thought that a powerful republic had to be economically dynamic with a flourishing industry and commerce and that the national government had to be committed to supporting these interests.

We argue that, however different their normative commitments, Publius “agreed” on certain principles of constitutional design. We consider six short articles -- four numbers from

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3 Banning has argued that “In 1787 as in 1798 Madison desired a well-constructed federal republic – not as Hamilton did, because nothing better could be secured – but because no other form of government seemed consistent with the American Revolution….. [Madison’s] starting point for constitutional reform and his conception of the finished Constitution were never anything but incompatible with Hamilton’s.” Lance Banning, “The Hamiltonian Madison: A Reconsideration,” *The Virginia Magazine of History and Biography*, Vol. 92, No. 1 (Jan., 1984), p. 9. As a statement of the normative aspirations we can agree with this. But we think that they may well have shared certain empirical beliefs in 1787-8 that they no longer did in 1791.

4 Hamilton’s early views on some of these issues can be found in his Continentalist essays which were published in 1781, where he emphasizes the need for the new nation to develop strong financial institutions, a sound currency, to pay its debts, and to avoid expropriating royalist properties.
the Federalist 10, 49, 51 and 63, written by Madison and two of Hamilton’s most important pieces (Federalist 70 and 78) that amount to a summary statement as to what a stable republican constitution should look like. Each of these papers articulates a practical norm of republican constitutional design and rests on some underlying proposition of political science, drawn from classical and early modern examples of popular governments, which are then used to justify some aspect of the Constitution or some critique of the Articles or state constitutions. Here is a short list.

1. The republic ought to be large and diverse; this will make it difficult for factions to form and capture governmental institutions (Federalist 10)

2. Stability and rule of law requires that the powers of the departments ought to be separated to some extent, and that the weaker departments be given the means to defend themselves against encroachments by the legislature which is the strongest and most dangerous department in a republic (Federalist 51, 78)

3. Government should be conducted by elected representatives and their appointees because a well-structured election process will assure high quality representatives; the people themselves should have no direct role either in the operation of the government or the revision of the Constitution; because “the people” acting together (as a mob) will vulnerable to appeals of interest and passions rather than public purposes (Federalist 49, 51, and 63).

4. The executive authority ought to be exercised by a single person for fixed and lengthy periods: because otherwise the laws will be badly executed and have little effect on the conduct of public or private affairs (Federalist 70).
5. Constitutional norms ought to be enforced by independent judges: otherwise the constitution would be no constraint on the conduct of government (Federalist 78).

We think, as we will note in passing, that these practical “design” norms pervade other numbers as well though in different ways. Generally speaking they justify the creation of a representative government with stably separated powers, on a large scale, with large election districts, and regular but not very frequent elections.

Publius’s political psychology

The Federalist abounds with generalizations about human nature which are deployed to expound on and justify features of the proposed constitution. In his overview of checks and balances in Federalist 51, Madison starts from an Augustinian description of humans after the Fall: People are, he thought, powerfully motivated to pursue their material interests despite their (usually weaker) attraction to larger public purposes. This frailty explains why we accept government with coercive powers over us: “what is government itself but the greatest of all reflections on human nature,” Madison opined, noting that, “i]f men were angels there would be no need for government.”

In Federalist 70, Hamilton paints a similarly pessimistic picture of human nature, though with more emphasis on men’s vanity and passion than on their material self-interest. “Whenever two or persons are engaged in any common enterprise…there is always the danger of difference opinion… of personal emulation or and even animosity. From….all these causes, the most bitter dissensions are apt to spring….Men often oppose a thing merely because they had no agency in planning it…it they have been consulted and happen to disapprove, opposition becomes… an

5 Nowadays, scholars doubt that the Constitution’s design actually accomplished what Madison claimed. We agree. But that only means that the framers fell short as constitutional designers; not that the task itself is impossible or unattractive.
indispensable duty of self love.” The “inconveniencies” of these tendencies “…must necessarily be submitted to in the formation of the legislature; but it is necessary and therefore unwise to introduce them into the constitution of the executive.” But, like Madison, he thought that a smart constitutional engineer could make use of these tendencies: a single executive, knowing he would be held responsible in any case, would be amply motivated to take responsibility for giving effect to the laws and protecting the nation from internal and external threats.⁶

Collective Action: Problem and Opportunity

Starting from these pessimistic generalities about human nature, Publius offered three more specific generalizations about organizational and institutional behavior. First, partly because people are self-seeking, collective action is difficult to achieve; second, the tendency of the popular and powerful legislative branch to encroach on other departments (or on personal liberties) needs to be curbed; and, third, the main difficulty in establishing stable republican rule is the psychology of the people themselves, requiring that the mass of citizens be prevented from playing an active role in both day-to-day and constitutional politics.

Let’s start with the obstacles to collective action. According to Publius, it is hard for people to coordinate their actions to pursue public goods and so such goods will tend to be undersupplied.

There was a time when we were told that breaches, by the States, of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union. This language, at the present day, would appear as wild as a great part of what

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⁶ Ironically, modern political science has tended to give better marks to Hamilton’s design ideas that to Madison’s. As we shall see, the constitutional scheme gives the president ample incentive to act responsibly – at least it did until the adoption of the 22nd Amendment which incentivized a second term president only though his care for his legacy and for his party’s fortunes.
we now hear from the same quarter will be thought, when we shall have received further lessons from that best oracle of wisdom, experience. (Federalist 15).7

This principle – stated in its familiar or positive form -- is presented as a justification for giving Congress the authority to make laws binding directly on the people. Hamilton presents the case:

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist.… the United States has an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option. (Federalist 15)

We can find the same principle invoked in other papers as well – for instance, those papers that explain why federal taxation would be more efficient than that of the states and why the federal government is more likely than the states to build a Navy to protect American commerce.

The collective action problems confronted by citizens, however, is not just a bug but is also a feature of national government, because it causes otherwise dangerous factions to lie dormant. This idea that obstacles to collective action can suppress private-regarding factions is the key to Madison’s argument in Federalist 10. By forming the new government on a national scale, factions will face hard problems in coordinating their activities to pursue private regarding

7 Hamilton helpfully connected the problem to his view of human nature:
It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power. Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses, for which they would blush in a private capacity.
legislation. In that respect, the principle of collective action plays two roles in justifying the constitutional design: it supports the expansion of congressional powers to create public goods; and it justifies the formation of a large and heterogeneous republic.

Publius’ second institutional assumption is that the legislature would be the most powerful and dangerous branch. For this reason its powers needed to be carefully regulated in order for the executive and judiciary departments to do their jobs. This regulation required that the legislative power be divided and checked and subjected to review. By contrast, few such checks were needed on the powers of the weaker but no less essential executive and judicial branches. The point of having a distinct executive was to create an official who could detect dangers to the republic and act expeditiously without going to Congress or the people, and subjected only to ex post accountability. The point of having judges was to apply the laws evenhandedly, no matter what members of Congress thought, according to their expert judgment and to maintain the superiority of the constitution over ordinary statutes.

Publius’ final institutional assumption was that excessive responsiveness of republican governments to public opinion would make the republic tumultuous and unstable. Both men believed that republican principle required that the legislature be open to the people’s control through popular elections and the operation of public opinion, and the new constitution recognized this necessary dependence in various ways. But this dependence was appropriately modulated by bicameralism, by relatively long terms of office for the House and especially the Senate, by making the election of Senators indirect, and in other ways as well. Even with these checks on public opinion, however, Madison believed that the legislature would remain excessively powerful and dangerous. He had hopes that the electorate would, because of the size of electoral districts in a continental-scale democracy, elect representatives who would be older,
better educated and generally more likely to be guided by public purposes than ordinary voters. In addition, the constitution imposed checks on Congress in Article I, §§8-9 that were far more detailed than those imposed on other departments in order to resist its tendency to draw other matters into the “legislative vortex.”

2. The Constitution in Action

Evidently, by the end of the Convention, both Madison and Hamilton thought that the institutions agreed to in the proposed constitution were reasonably well adapted to the ends each of them sought (however different these ends may have been). The Constitution provided ample new legislative powers to the national government, a single executive, and independent courts, while preserving much control over local affairs to the states. It also provided protections against congressional intrusions on the other powers and, to an extent, against the states too. If they could get states to agree, they would have an opportunity to learn from experience about how their proposed institutions would work and to change them if they did not. To the extent that institutions did not work as expected, they could learn about which of their beliefs were false. This would be a matter of testing, in the laboratory of experience, the design adopted in Philadelphia and agreed to in the state conventions, and seeing how it worked.

Failures of Federalist 10

The first test came early, with Hamilton’s proposal that the Congress confer a charter on a private bank with which the United States would deposit all of its revenues but receive only 20% of its shares. Hamilton believed that the United States’ use of such a fiscal agent would

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8 Though Madison was skeptical about the effects of the loss of the Congressional negative on state legislation.
provide a ready source of funds for large-scale capital projects, insuring the industrial
development of the new nation. Private subscribers to the Bank’s stock would also have an
incentive to support the new nation’s taxing powers, thereby becoming a constituency in favor of
import duties, excise taxes, higher prices for the public domain, and any other sources of federal
revenue. Because the proposed Bank would enjoy the exclusive privilege of holding deposits of
federal revenue without paying interest, it would have ample reserves from which to make loans
to private entrepreneurs and thereby create a de facto federal currency of circulating banknotes.

The proposal, however, immediately mobilized gentry opponents of finance capital. In
particular, it provoked a rupture between Hamilton and James Madison that transformed a
cordial friendship and close political alliance into bitter political and personal enmity. The
proposed Bank seemed to confer special privileges on financiers and industrialists who owned
stock or received loans from the federally favored corporation. Virginians like Madison and
Jefferson had a visceral revulsion towards bankers and merchants to which southern planters
were perennially in debt.9 Beyond this sectional worry, however, was the larger Country Party
ideology that financiers corrupted republics by their stealthy insider influence over legislators
and disproportionate power in metropolitan centers.

The success of Hamilton’s proposal, which was enacted by Congress over the opposition
of three of the most prominent Virginians in the federal government (Madison in the House,
Jefferson and Edmund Randolph in the executive), suggested to Madison that the Anti-
Federalists had been nearer to the truth about the effects of scale on a republic than Federalist
#10. In the eyes of the Anti-Federalist opponents of the Constitution, the larger geographic and

demographic constituencies of the new national government would increase the power of 
merchants and bankers. As the size and diversity of the electorate increased, farmers’ and small 
producers’ networks rooted in land and local markets would fade in importance, while 
financiers’ and merchants’ networks rooted in liquid, mobile assets unmoored to any particular 
physical space would increase. Being generally further from centers of, and less deeply 
involved in, trans-Atlantic commerce and finance than the Constitution’s supporters, Anti-
Federalists viewed with alarm the domination of the new national government by commercial 
wheelers-dealers in the coastal cities.10

Prior to congressional authorization of the First Bank of the United States, Publius 
placated these Country Party worries by arguing that the electoral connection between voter and 
representative sufficed to prevent domination of Congress by a self-interested minority. “If a 
faction consists of less than a majority,” Federalist #10 reassured its readers, then “relief is 
supplied by the republican principle, which enables the majority to defeat its sinister views by 
regular vote.” Madison did not dispute the Anti-Federalists’ argument that the Constitution 
strengthened the influence of a cosmopolitan trans-Atlantic elite – in his phrase, “men who 
possess the most attractive merit and the most diffusive and established characters,” where 
“diffusive … characters” meant something like reputations (paradigmatically, General George 
Washington’s) that were diffused broadly through national networks of literary fame, military 
service, law, or commerce. But, as Publius noted elsewhere, the election of such “diffusive” 

10 James H. Hutson, Country, Court, and Constitution: Antifederalism and the Historians, 38 Wm. & Mary Q. 337, 
340 (1981); Jackson Turner Main, Political Parties Before the Constitution 358, 388 (1973) (noting that Anti-
Federalists tended to be “agrarian-localist” rather than “commercial cosmopolitan” leaders). Donald Lutz notes that 
Main’s anti-cosmopolitan explanation for Anti-Federalist opposition to the Constitution cannot explain the 
Constitution’s support from the inhabitants in some frontier areas of the states. See Donald S. Lutz, Federalist 
versus Antifederalist in Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions 
171, 175-86 (1980).
men would not mean the subordination of the landed to the monied interest, because the latter simply lacked the numbers to carry elections: “In a country consisting chiefly of the cultivators of land, where the rules of an equal representation obtain, the landed interest must, upon the whole, preponderate in the government.”\textsuperscript{11} To the extent that high-flying, cosmopolitan lawyers and financiers were disproportionately represented in Congress, this would simply be the result of the voters’ freely choosing as their representatives the most competent people to represent them, it being “altogether visionary” that “each occupation should send one or more members.”\textsuperscript{12}

The creation of the First Bank, however, shook Madison’s faith in these sanguine predictions that majority voting would produce genuine majority rule. The ratification of Hamilton’s Bank in Congress, with the imprimatur of President George Washington himself, seemed to cast doubt on this confidence in the electoral connection as a sufficient antidote to domination by “natural aristocrats.” Madison apparently concluded that Federalist #10 had overestimated the electorates’ power to overcome the costs of organizing on a continental scale. Soon after he vote lost the vote on the First Bank, Madison seemed to endorse the Anti-Federalist idea that popular opinion could not be rallied on a continental scale: “neither the voice or the sense of twenty millions of people, spread through so many latitudes as are comprehended within the United States, could ever be combined or called into effect” by national elections alone, Madison asserted in “Consolidation,” a short essay published for Freneau’s \textit{National Gazette}, a newly founded organ for the newly founded Democratic-Republican Party\textsuperscript{13}. Unable to act together at a national scale, citizens would soon cease to make the futile effort: “[T]he

\begin{quote}
\textsuperscript{11} Federalist 60
\textsuperscript{12} Federalist #35
\textsuperscript{13} Consolidation, Nat’l Gazette, December 5th, 1791.
\end{quote}
impossibility of acting together, might be succeeded … at length by a universal silence and insensibility,” Madison warned, “leaving that whole government to that self-directed course, which, it must be owned, is the natural propensity of every government.”

Scale thus threatened to eliminate the expression of public opinion altogether: “The larger a country, the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited,” Madison wrote in a second essay in the *Gazette*. Large scale also demoralized potential opposition to the national government, because “the more extensive the country, the more insignificant is each individual in his own eyes,” a psychological state of impotence “unfavorable to liberty.”

In short, Madison flipped his argument in *Federalist #10* on its head: He continued to maintain that demographic heterogeneity and large population impeded the mobilization of majorities, but now he regarded this impediment as a fault to be remedied, not “a republican remedy for the diseases most incident to republican government.” Publius had mocked the idea that Congress could be corrupted into betraying the interests of the majority by noting the implausibility of a majority of congresspersons’ being bribed by either “foreign gold” or executive places: The “people of America” would not stand for it, and the state legislatures would sound the alarm.

Madison’s *Gazette* essays, however, suggested that the people may not hear the alarm or, if they did, be able to act on it. The suggestion borne out by the bitter experience of having seen Congress approve the plainly unconstitutional Bank, provoked these essays. The problem was that federal resources could be used to counterfeit public opinion: Jefferson had complained that the permanent funded debt “enabled Hamilton so to strengthen himself by corrupt services to many that he could afterwards carry his bank scheme and every

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14 Id.
15 “Public Opinion, National Gazette, December 19th, 1791.
16 *Federalist #55*
measure he opposed in defiance of all opposition,” deploying “that speculating Phalanx” of bondholders “in and out of Congress.” Jefferson was simply echoing familiar Country Party rhetoric that Hamilton’s opponents had been using as early as 1790, even before Madison’s break with Hamilton. Commercial ties and financial loyalties could create a “multitude” that overcome continental scale’s obstacles to political organization, while the opponents of such financial networks would be silent and cowed by the costs of rallying public opinion across a continent.

Interpretative Strategy

Experience had, in sum, overturned Publius’ confidence that “the republican principle” of regular elections sufficed to safeguard majority control of the federal government. Based on this experience, Madison offered a new constitutional principle by which to supplement electoral control – the idea of what we would now call “strict scrutiny” of especially suspicious exercises of Congress’ implied powers. Madison incorporated this principle into his speech on the floor of the House of Representatives against the First Bank, one of three leading Virginian politicians’ constitutional expositions (the other two being memos by Edmund Randolph, President Washington’s Attorney General, and Thomas Jefferson, Washington’s Secretary of State. All three opinions started from the textual premise that the enumeration of congressional powers in

17 Thomas Jefferson, Memorandum on the Compromise of 1790, in Liberty and Order 64, 65 (Lance Banning ed. 1999).
18 Walter Jones, a Virginia Democratic Republican, complained to Madison that Hamilton had the backing of “strong auxiliaries” – “system-mongers and fund jobbers,” in Jones’ phrase – that the “landed interest” could not easily match. Letter from Walter Jones to James Madison, 25 March 1790.
19 See also George Lee Turberville to Madison, April 7th, 1790, in Liberty and Order at 67 (The “multitude who will be interested in the funds,” an effective machine controlled by Hamilton).
Article I, §8 implicitly barred additional implied powers that strayed too far from the express powers, because such powers by implication would lead to “consolidation” – meaning, aggrandizement of all power by the federal government. Madison supplemented this simple textual position with a canon of constitutional construction requiring the interpreter to resolve textual ambiguities by the effects of an interpretation.

In particular, Madison urged that the “importance” of an implied power should weigh against its being accepted as “necessary and proper” for the execution of enumerated powers, because “the degree of [a power’s] importance” determines “the probability or improbability of its being left to construction.” The power to charter a corporation like the First Bank, was “a great and important power” requiring a close link to expressly enumerated powers, because private banks were dangerously corrupting institutions. Madison invoked all of the Country faction fears of financial corporations, “dilat[ing] on the great and extensive influence that incorporated societies had on public affairs in Europe.” The language could have been straight from Cato, Defoe, Swift, Bolingbroke, or any other Country writer inveighing against the Bank of England. “They are powerful machines,” Madison declared, “that have always been found competent to effect objects on principle in a great measure independent of the people.” In particular, Madison saw special danger in the Congress’ proposed grant of land-purchasing authority and exclusive banking privileges to the First Bank. “Congress themselves could not purchase lands within a state without the consent of its legislature,” Madison noted: “How could they delegate a power to others which they did not possess themselves?”

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21 James Madison, at ___. In Jefferson’s words, “to take a single step beyond the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of definition.”

22 “Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences.”
United States’ exclusive fiscal agent for twenty years “takes from our successors, who have equal rights with ourselves, and with the aid of experience will be more capable of deciding on the subject, an opportunity of exercising that right for an immoderate term.” Moreover, the proposal “involves a monopoly, which affects the equal rights of every citizen.”

Madison’s attempt to constitutionalize a canon of strict construction of “important” powers failed in the Bank debate, and this failure suggested the need for what Madison (writing as Publius) had called “auxillary precautions” – the checks and balances embedded in the Constitution that were supposed to defend the separation of powers if the need arose -- which looked by 1792, to be the main impediment to an encroaching national government.

3. The underrated executive power

Publius’s views on the value of the separation of powers were essentially identical to the orthodox eighteenth century viewpoint most famously expressed by Montesquieu23 in the Book XI of The Spirit of the Laws. On this view, the exercise of adjudicative, executive, and legislative powers by the same decision-maker was (in Madison’s words) “the very definition of tyranny.”24 Unfortunately, such assertions, without more, are also the very definition of

23 We are not claiming that Montesquieu could be ideologically identified as a republican; only that he offered a “positive theory” of republican government that was largely accepted by Madison among others. This theory stressed the importance of maintaining a separation of legislative and executive from judicial powers, if republican liberties are to be preserved. He also anticipated later writers in defending something like checks and balances in order to preserve adequate separation of powers. See M. J. C. Vile, Constitutionalism and the Separation of Powers, Indianapolis: Liberty Fund, 1998, 83-106.

24 Montesquieu’s plainest statement of the idea is found near the beginning of Book VI, chapter 2. “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary
tautology. Although Montesquieu’s and Publius’s principle was plain enough, their reasons for this insistence on functional specialization by different bodies of officials was lost in the brevity of their Augustan style.\textsuperscript{25}

Behind Montesquieu’s elegantly oracular aphorisms, however, it is possible to disentangle three distinct ideas, all related to the virtues of functional specialization. First, a multi-member body designed to reach consensus among different social classes (the “licentious” multitude and the aristocracy) was not capable of the “dispatch” needed for executive business.\textsuperscript{26} Second, a body that simultaneously enacted and interpreted laws would twist the interpretation to defeat the notice provided by the enactment. Montesquieu was admittedly not as plain as Locke in laying out this idea that lawmakers had too much incentive to favor allies and punish enemies when acting as judges. But the idea is sufficiently conveyed by Montesquieu’s condemnation of “Italian republics” for vesting “[t]he same body of magistrates with power to act as both “executors of the laws” and “legislators,” because the former becomes, in effect, “the whole power” of legislation, such that “every private citizen may be ruined by their particular decisions.”\textsuperscript{27} Finally, in defending the tedious legalisms of the French Parlement, Montesquieu hinted at the idea that the adjudicative process of determining whether a law has been violated should be slower and more deliberate than the executive process of dealing out justice writ large. Again, the idea was conveyed elliptically through a sarcastic compliment for the expeditiously

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\textsuperscript{26} Id. at 205 (“The executive power ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many: on the other hand, whatever depends on the legislative power, is oftentimes better regulated by many than by a single person”).

\textsuperscript{27} Id. at 198-99.
unified executive and adjudicative functions of Turkish magistrates “where little regard is shewn to the honour, life, or estate, of the subject” but “all causes are speedily decided,” because “[t]he method of determining [disputes] is a matter of indifference, provided they be determined” such that “[t]he bashaw, after a quick hearing, orders which party he pleases to be bastinadoed, and then sends them about their business.”

Separating functions among different types of officials, in short, protects what Jeremy Waldron calls “articulated governance” – that is, the distinct skills and virtues needed for the different stages of law-making. Initial general policy-making should reflect broad community consensus, while adjudication should focus on accuracy in applying that general policy and execution should focus on efficiency and dispatch in carrying out those adjudications.

Montesquieu may have been cavalier about laying out systematically the idea that distinct virtues were necessary for distinctive stages of government, because he assumed that his readers would be familiar with the idea of a Ciceronian “balance” of rival and complementary virtues of the one, few, and many in a Classical republic.

The constitutional problem of achieving such a “balance” turned on assuring that each set of officials had incentives and powers to “check” rivals who refused to stay in their lane. “Checks,” in this sense, were distinct from, and perhaps unnecessary to maintain, this “balance” of functions. It was possible, for instance, that even authoritarian monarchs had incentives to protect power of an independent Parliament as a useful device to deflect blame from himself of unpopular decisions favoring one or another social class.

28 Id. at 95:  
29 Waldron at 459-66.

30 For an argument to this effect, see Niccolo Machiavelli, The Prince 75 (Tim Parks trans. 2009).
Both Montesquieu and Publius, however, started from the presumption that the legislature, in particular, would have both the incentive and ability to trespass on the powers of judges and executive magistrates. Montesquieu makes this point (as usual) rather obliquely, asserting that executive officials were more in need of checks against the legislature than vice versa. Publius, however, made the defense of checks on the legislature a central pillar of his defense of the proposed U.S. Constitution.

For Publius, the problem of legislative dominance derived from the House of Representatives’ character as a multi-member body elected from districts no larger than a single state, a character that would make it more directly accountable to the people than either the President or federal judiciary. This direct accountability would make the House of Representatives “closer” to the people in the sense of being elected by constituencies that would closely monitor its performance and reward its members for closely following the popular will. Because it was obliged to win the affection of the people in frequent elections from relatively small districts (compared to the nation—wide constituency of the President), the House would have a built-in advantage over its rivals – and an electoral incentive to use this advantage to undermine its rivals’ functions. Therefore, the people “ought to indulge all their jealousy and exhaust all their precautions” against the House of Representatives, because “a representative republic ... inspired by its supposed influence over the people” would have “an intrepid confidence in its own strength” and be “sufficiently numerous to feel all the passions which activate a multitude; but not so numerous as to be incapable of pursuing the objects of its

31 “If the executive does not have the right to check the enterprises of the legislative body, the latter will be despotic.” But “... the legislative power must not have the reciprocal faculty of checking the executive .. As execution has limits of its own nature, it is useless to restrict it.” (Op cit. 162).
passions.” The advantage of the House of Representatives over Senate, President, and Supreme Court was suggested by analogy to the advantage allegedly enjoyed by the state legislatures over Congress. Because both the House of Representatives and state legislatures were elected more frequently from smaller constituencies than their rivals, both would be able, and indeed, impelled by electoral incentives to usurp their rivals’ powers.

To counteract these electoral incentives, Publius called for a constitution that defined legislative powers more meticulously than executive powers and saddled the Congress with a bicameral process subject to presidential veto. “As the weight of the legislative authority requires that it should be thus divided,” Publius argued. “the weakness of the executive may require that it should be fortified.” The interests of the Congress would be sufficiently vindicated by what could be called the principle of institutional self-interest according to which the occupants of any office, whether legislative or executive, would identify their own self-interest with the powers of the position they currently held and, therefore defend those prerogatives. Driven by such institutional self-interest, members of Congress and Presidents would compete on a constitutionally leveled playing field, with no need for any judicial review to redress the balance of power between them. In this sense, the distribution of powers given in the Constitution appeared to be self-enforcing, almost mechanical, with no need to rely either on the internal self-restraint of officials or on an external enforcement mechanism (such as judicial review).

32 Federalist #48.

34 Federalist 51 (Rakove, Writings, 295)
The assumption of legislative dominance influenced not only the design of the written constitution but also the post-enactment strategies for its interpretation. To the extent that this original plan was ambiguous, both Madison and Hamilton were originally united in resolving such ambiguities with anti-legislative canons of construction drawn from Montesquieu’s and Publius’ idea of inherent legislative advantage. The first such ambiguity surfaced around the question of whether the President enjoyed the inherent power to remove high officials. Did the power to appoint ministers with the advice and consent of the Senate imply that the president must also consult the Senate before such officials can be fired? The natural implication of Article II’s language was that hiring and firing should be symmetrical, with the Senate’s participation in both processes. Madison, however, rejected that natural implication on the practical ground that the president, as the most responsible officer in government, could be stuck with ministers with whom he could not work and for whom he could not be responsible. Moreover, he thought that placing this authority in Senate would require it to be in continuous session which he believed was impractical and dangerous. Behind this practical worry the institutional assumption that the Congress would always enjoy an inherent advantage over the President that should be counter-balanced with a canon of construction favoring presidential power. When in doubt, construe the prerogatives of the president broadly, because “if the Federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the Encroachments of the Legislative department.”

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35 See Federalist #77 (“It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint”).
36 Letter to Edward Pendleton, June 17, 1789, Writings, 467.
As with Publius’ idea that state powers would sufficiently be safeguarded by federal electoral accountability, Publius’ idea of inherent congressional advantage over the President was soon cast into doubt by the Washington Administration’s conduct of foreign policy. The outbreak of a general war between Revolutionary France and monarchical Europe in 1792 placed the United States in the position of having to decide whether to honor its trade and mutual defense treaty with France, dating to 1778, that assured France of most favored nation treatment and entitled France to America’s aid if France were attacked. Madison and Jefferson were particularly sympathetic to a pro-French American policy and were bitterly disappointed by President Washington’s proclamation of strict neutrality that seemed favorable to British control of Atlantic trade and implicitly to undercut the 1778 treaty. To the Democratic-Republicans, the Proclamation was not merely unwise but unconstitutional: Jefferson had argued in cabinet that the President could not constitutionally declare neutrality without involving Congress, because the proclamation of neutrality was essentially a “legislative” act.

The ensuing pamphlet debate between Hamilton (writing under the pseudonym “Pacificus”) and Madison (writing under the name “Helvidius”) over Jefferson’s constitutional position marked Madison’s full retreat from his call for robust executive power in the Federalist. Hamilton answered Jefferson with a canon of construction requiring the narrow construction of the Senate’s power to approve treaties and Congress’ power to declare war, because both “are exceptions out of the general executive power, vested in the President [by Article II], they are to be construed strictly...”37 In effect, Hamilton took a page from Madison’s own 1789 playbook, when Madison defended the exclusivity of the President’s implied power to remove executive

officers on the ground that the Senate’s express power to advise and consent to the appointment of executive officers should be narrowly construed. Like Hamilton, Madison (in 1789) had treated the Senate’s express powers of advice and consent as an exception to Article II’s default rule that “executive” powers otherwise be vested in the President. Madison likewise offered (again in 1789) the gloss that all such exceptions should be read narrowly to maximize the President’s “executive” powers. Hamilton, as Pacificus, offered precisely the same argument, simply substituting the Senate and Congress’ express diplomatic powers for the Senate’s removal powers.

Despite Madison’s protests to the contrary, it is difficult not to view Madison’s “Helvidius” essays as adopting reasoning almost exactly opposite his 1789 argument for an implied presidential removal power. According to “Helvidius,” the Proclamation of Neutrality trespassed on Congress’ powers over foreign affairs, because the Senate’s and Congress’s express powers to ratify treaties and declare war carried along with them implied and exclusive powers to construe treaties and therefore the power to proclaim (or not) neutrality. Against Hamilton’s argument that the President’s power to “take care that the laws be faithfully executed” implied a concurrent power to announce and enforce a particular interpretation of treaty law, Madison insisted that the express grant to Congress to declare war necessarily carried with it an equally exclusive power to declare peace.

Madison’s insistence on the legislative character of this treaty-construing power sat oddly with Madison’s concession that the “federative power” -- the power to enter into treaties -- was

38 Removal Power of the President, June 17, 1789, 12 Madison Papers 233.

39 Helvidious No. 1, at 62-63.
neither unambiguously “executive” nor “legislative.” Why did not this ambiguity invite a canon of construction drawn from the logic of Federalist #51? “As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.” When in doubt about the “executive” character of an ambiguous power, why should not the principled interpreter favor the reading that “fortified” the President?

The answer lies in Madison’s re-assessment of Publius’s view of the relative power of the President and Congress. That view was based on the idea that legislators, have been elected more frequently from smaller constituencies, would be “closer” to the people and, therefore, more capable of rallying them to the support of legislative prerogatives. But such a theory of institutional power did not reckon on the agenda-setting power of a highly visible single executive with powers to take quick and detailed actions in the absence of specific legislation. Such agenda-setting powers, it turned out, gave the President powers to redefine the status quo in ways hard for a sluggish bicameral legislature to reverse. Those powers to redefine the status quo, in turn, allowed the President to build a political machine from anyone benefiting from the President’s exercise of political discretion. To Madison and his fellow Democratic-Republicans, this discretion was the very essence of corruption.

The driving engine for Madison’s argument against the Neutrality proclamation was therefore not technical hair-slitting about whether the “federative power” was “executive” or “legislative” in character, for, as Madison conceded, it was both. Instead, suspicion of presidential discretion in foreign affairs – even discretion to proclaim neutrality and peace – was

41 “Helvidious” No. 1, August 24, 1793, in The Pacificus-Helvidius Debates of 1793-1794 at 64.
rooted in the vintage Country Party rhetoric of *Helvidius No. 4*. “War is in fact the true nurse of executive aggrandizement,” Madison declared: “In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them. In war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed.”

These worries about the President’s mobilizing veterans like the Society of the Cincinnatus to champion presidential positions echoed Madison’s fear of the First Bank and its “phalanx” of subscribers and paper holders. The military-industrial complex of officers, veterans, government contractors, and bond underwriters was simply the diplomatic and military version of the alliance of stockjobbers and creditors held together by the First Bank’s commercial paper. *Federalist 51*’s idea of relative departmental power had been flipped on its head by the political reality that the executive discretion to deal specific benefits to particular persons was a more effective way to create a political machine that the enactment of general rules. Thus, by 1793, Madison believed that it was Congress’ power, not the President’s power, that needed to be “fortified” with implied powers.

The President’s institutional advantage was not merely that he could direct specific benefits to particular supporters but also that his power to set the agenda quickly made it difficult for Congress to overturn any presidential choice of policy. The advantage of presidential agenda-setting was powerfully illustrated by the Washington Administration’s negotiation of the Jay Treaty and its suppression of the Whisky Rebellion. In both cases, the Administration placed before Congress a take-it-or-leave-it package that Jefferson, Madison, and their Democratic-

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42 Helvidious N. 4, July 10, 1793, at 87.
Republican followers intensely disliked but could not overturn, precisely because, as unpopular as the packages were, they was better than the status quo ante.

The Jay Treaty was negotiated in secret by John Jay, sent by Washington to London to settle longstanding disputes having to do with British interference with American shipping and control of northwestern frontier forts that had festered since the 1783 Paris Treaty. Although the treaty was ratified by the Senate in November 1794, Madison and other members of the House of Representatives did not learn of its terms until the following summer, long after it was a fait accompli. Dismayed by its concessions to the British, Madison requested that the Washington Administration turn over the papers relating to the negotiations so that House could decide whether to appropriate money for the various fact-finding commissions required by the treaty.

When President Washington refused to disclose the documents, the House was placed in a dilemma. Refusal to approve any funds containing an appropriation for the challenged commissions would place the entire budget in jeopardy. But acquiescence gave the Senate and President alone the power to use the treaty power to determine spending priorities that had been formally delegated to the House of Representatives. As Madison noted, treaties creating obligations to spend money effectively obviated the House’s constitutionally guaranteed powers over revenue, because failure to appropriate money for agreements to engage in military operations already approved by the Senate and President would amount to a species of treason.

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43 A dispute of this kind had arisen earlier in treaty negotiations with the Barbary powers. Those treaties were agreements to pay ransom for American hostages or to purchase free passage for American ships. As such, these treaties were concerned with money and nothing else. The American had, at that point, no way of actually threatening to retaliate against the Barbary states.
The President’s agenda-setting power would reduce the House to a “mere heralds proclaiming [war].”

The President’s “first mover” advantage was even more pronounced in the Washington Administration’s suppression of the Whiskey Rebellion. When Secretary of Treasury Hamilton’s excise tax on liquor inspired a rebellion of whiskey-distilling farmers in western Pennsylvania, Hamilton persuaded Washington to suppress the insurrection with an overwhelming force of over 12,000 militiamen provided by the governors of Virginia, Maryland, New Jersey, and Pennsylvania, led personally by President Washington himself. The rebellion quickly melted away in the face of this overwhelming force, but the military victory was overshadowed by another and more important triumph in public relations – the Federalists’ successful tarring of the Democratic-Republican Societies as instigators of the insurrection. Formed mostly by small farmers on the western frontier and urban artisans in coastal cities, those societies supported the French Revolution, opposed Hamilton’s financial program (perceived as pro-English), and generally attacked the Federalists’ corrupting the nation through the blandishments of stock in federally chartered companies and the emoluments of federal office. Because the societies in Western Pennsylvania had been particularly vocal in attacking the whiskey excise tax, President Washington excoriated them in his November 1794 Address to Congress as “certain self-created societies” who incited “a few counties” in western Pennsylvania.

46 See generally Eugene Perry Link, Democratic Republican Societies, 1790-1800 (1942);
47 The members of one of these societies (the Mingo Creek Society of United Freemen) had participated in a armed march through Pittsburgh to protest the death of a farmer in the efforts to collect the excise. Marco Sioli, The Democratic Republican Societies at the End of the Eighteenth Century: The Western Pennsylvania Experience, 60 Pa. Hist. 288, 295-96 (1993).
Pennsylvania “to frustrate” tax collection. All of Madison’s efforts in the House of Representatives could not wash out the stain of supporting an insurrection with which the President had thereby marked the societies, and they quickly disbanded or became inactive as a result of the reputational blow. As Madison explained to James Monroe, “the game was to connect the Democratic Societies with the odium of insurrection,” and, in this game, the Federalists controlled the trump card of the President’s bully pulpit.48

Madison’s experience of fighting off a House resolution joining the President and the Senate in condemning “self-created societies” exploded the assumptions of Federalist # 49 and #51 that the House would enjoy an advantage over the President in the battle for public opinion. That assumption was rooted in the alleged “closeness” of the tie between politicians elected from small electoral districts and their constituents, closeness that a president, with a nation-wide constituency, could never enjoy. Such “closeness” between multiple, relatively small electoral districts and their individual representatives indeed reduced the costs of constituents’ communicating with their representatives. But these same factors increased the costs of the House of Representatives’ communicating collectively with their constituents: the House faced collective action problems that the President, as a single individual, did not confront. Presenting his version of events immediately and saliently in a national address that was immediately visible even to inattentive voters, President Washington easily outflanked the House of Representatives, which, divided among multiple members proposing multiple resolutions and amendments, could not so quickly and unequivocally provide a rival version of events to “rouse the people

completely from their lethargy.”49 “If the people of America are so far degenerated already as not to see ... that the citadel of their liberties is menaced by the precedent before their eyes,” Madison complained, then there was little that Democratic Republicans could do to sound the alarm.50 The “degenerate[ion]” denounced by Madison was simply the public’s inattentiveness to politics that automatically gave the most visible and quick-acting politician an advantage in the battle for public opinion.

Interpretive Strategy Redux

As with the battle over the First Bank, Madison invoked a constitutional canon of construction to redress these imbalances of power. The President’s and Senate’s powers to enter into treaties must be construed narrowly because such powers were “substantially of a legislative, not an executive nature” requiring the participation of both Houses of Congress.51 Following this rule of construction, Madison argued that the treaties could not be self-executing: Where treaties ratified by the Senate cover topics within the legislative power of Congress as a whole (such as treaties requiring expenditures of revenue), Congress must retain its authority to legislate with respect to those latter topics, regardless of the treaty’s terms. Madison dismissed the notion that this view of the President’s and Senate’s treaty-making power would emasculate the nation’s capacity to enter into treaties with other nations, asserting that “the several powers vested in the several Departments form but one Government; and the will of the nation may be expressed thro’ one Government, operating under certain checks....”52

49 Id. at 25.
50 Letter to Thomas Jefferson, November 30, 1794, in id. at 22.
51 Helvidius No. 1, in 6 Letters & Other Papers at 146.
52 Speech on Jay Treaty, March 10th, 1796, in
The perfunctory character of Madison’s statement conceals the distance that he had traveled since Publius in Federalist #65 argued that the treaty power could not be committed “to a popular assembly, composed of members constantly coming and going in quick succession...” Such a body would not sit long enough to “attain[] those great objects, which require to be steadily contemplated in all their relations and circumstances” that are the topics of international diplomacy. Although Federalist #65 was written by Hamilton, not Madison, the idea that frequency of elections reduces legislators’ expertise was a common theme of both Madison’s and Hamilton’s joint “Publius” persona. 53 That Madison would simply ignore the institutional differences between the Senate and the House in defending the prerogatives of the latter against the President suggests how radically Madison had revised his assessment of the dangers of presidential power since 1788.

4. A new Role for the people

Facing unified Federalist opposition and a President who increasingly cast his lot with Hamilton, Madison’s constitutional canon failed with foreign policy and the analogous canon failed with the Bank. By 1798, the president had successfully claimed all of the powers that Madison characterized as “legislative.” Things were about to get much worse as hostilities between the British and French escalated, leading both sides to attempt to drag Americans into their conflict. Faced with a hostile republican press, the president’s congressional allies thought his neutrality policy could not succeed without restricting certain domestic liberties. The

53 See, e.g., Federalist #53.
Federalist-dominated Congress pushed through the Alien and Sedition Acts which criminalized criticism of the government and exposed noncitizens to deportation.

The Alien and Sedition Acts posed a problem for Madison different from the Neutrality Proclamation or Jay Treaty, because the legislative and judicial branches seemed aligned with President Adams against Madison’s understanding of the Constitution. During the ratification debates Madison had, famously, rejected the idea that the “people” (in the form of regular constitutional conventions) should be called upon to settle constitutional disputes (Federalist 49), arguing that frequent appeals to constitutional conventions would deprive the Constitution of popular veneration and empower conniving politicians purporting to act in the name of We the People. After a frustrating decade of political defeats had convinced Madison that powerful financial interests were using war and debt to enlarge their powers, Madison was prepared to re-think his earlier skepticism of popular constitutional interpretation.

In the Virginia Resolutions, Madison used state legislatures rather than constitutional conventions as the device for rallying popular sentiment against what he regarded as unconstitutional legislation to which all three federal branches had acquiesced. The Virginia Assembly declared that the “states,” as “parties” to the constitutional “compact,” “have the right, and are in duty bound, to interpose... for maintaining within their respective limits, the authorities, rights and limits appertaining to them.” In speaking on behalf of “the good people of this commonwealth” and their “feelings of the most scrupulous fidelity to that constitution,” the Virginia Assembly was not engaged in ordinary politics. As Madison later explained, by
referring to the “the states” as “parties” to the “compact,” the Virginia Assembly referred to “the people … in their highest sovereign capacity.” 54

By what right did the Virginia Assembly assume this role as the mouthpiece for the “sovereign” people of Virginia? The claim seemed in tension with Federalist #49’s list of “insuperable objections against the proposed recurrence to the people” in resolving disputes about constitutional meaning. Among those objections was the worry that members of any regular constitutional convention would simply be politicians with a stake in the dispute about the federal branches’ powers and, hence, “parties to the very question to be decided by them.” 55 Such deliberations “could never be expected to turn on the true merits of the question” but instead “would inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself” such that “[t]he PASSIONS, therefore, not the REASON, of the public would sit in judgment.”

Although Federalist #49 imagined that members of Congress would dominate the constitutional convention proposed by Jefferson, Federalist #49’s attack on that convention applied with even greater force to the Virginia Assembly’s claim to speak on behalf of the people of Virginia in their sovereign capacity as parties to the constitutional bargain. After all, these state legislators were opining about the balance of power between Congress and the state legislatures, such that they were “parties to the very question to be decided by them” – indeed, “parties springing out of the question itself” to the extent that the Democratic-Republicans defined themselves in large part by opposition to an expansive interpretation of the federal

54 Report of 1800.

55 Federalist #49.
governments’ powers. *Federalist #49* had attributed the success of the post-Revolutionary state constitutional conventions of the 1770s and 1780s to the “enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions” and insured that “no spirit of party … could mingle its leaven in the operation.” The Virginia Resolution, by contrast, was suffused with the “spirit of party.” Although it was written as an appeal to all of the states of the Union to rise as one against the Alien and Sedition Acts, Madison was no fool and surely foresaw the response of the New England state legislatures, dominated as they were by Federalists who heartily endorsed the statutes that the Virginia Resolution denounced. There was no “enthusiastic confidence of the people in their patriotic leaders” here to “stifle[] the ordinary diversity of opinions on great national questions.” Instead, there was a largely sectional division about the Adams Administration in which one section (the South) inveighed against a New England president’s legislative agenda, while another (New England and some mid-Atlantic states) told them to mind their own business. When the Massachusetts state legislature responded to Virginia by noting that “the people … have not constituted the state legislatures the judges of the acts or measures of the federal government,” it was apparently humming Publius’ own tune as set forth in *Federalist #49*.

Why had Madison changed his mind about the people’s participating in the process of resolving constitutional disputes? His changing views on popular constitutionalism were closely connected to another change of heart – Madison’s view, developed during the 1790s, on the necessity of partisan organization and discipline to counteract the influence of financiers and other “aristocrats” on the federal government. The problem was that the heterogeneity of interests celebrated by *Federalist #10* as a brake on majority faction seemed to empower a minority faction of bondholders, military veterans, and others who profited from federal power.
Madison, therefore, embraced the idea of a political party that could unite otherwise disorganized constituents across the United States, transcending geographic and occupational divides. The idea of party organization lay underneath the Democratic-Republican Societies championed by Jefferson and Madison from 1792 through 1796. Madison’s endorsement of the idea of party, however, transcended these short-lived societies. The more basic idea was that the enemies of Hamilton’s pro-finance and pro-British program should place their common opposition above any other geographic or occupational interests that might divide them. “The anti republican party” will try to multiply the dimensions of politics, Madison warned, “by reviving exploded parties, and taking advantage of all prejudices, local, political, and occupational, that may prevent or disturb a general coalition of sentiments.”

To counteract this effort to divide the majority by multiplying the issue environment, the Bank’s opponents needed to “bury[] all antecedent questions” and “banish[] every other distinction than that between enemies and friends to republican government, and in promoting a general harmony among the [latter].”

The call for party loyalty was essentially an effort to work around what Federalist #10 described as the “greater variety of parties and interests” in continental-scaled democracy that made it “more difficult for all who feel [a common motive] to discover their own strength, and to act in unison with each other.”

Described by Federalist #10 as “a republican remedy for the diseases most incident to republican government,” such coalition-defeating diversity was now a threat to republican government. Partisan unity, by contrast, would prevent Hamilton from prying apart an anti-Bank majority coalition with distributional goods – say, more Bank branches in the South or

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57 Id.
mortgages on easy terms for western farmers. By framing the case against the First Bank as a matter of constitutional principle to galvanize a unified majority, Madison was seeking to foster precisely what *Federalist #10* had hoped the national scale of American democracy would thwart – a unified, programmatic political party.

By endorsing partisan organization as an antidote to federal corruption, Madison was also endorsing a much more direct role for the popular policing of constitutional boundaries. The whole point of parties in the electorate was to focus public opinion with laser-like intensity on a few critical questions to prevent the enemies of republican government from counterfeiting public opinion by distracting it from what really mattered. If the anti-republicans managed to capture all three branches of the federal government through such counterfeit popularity, then mobilizing the people against the federal government through partisan advocacy was not merely legitimate but essential. The Virginia Resolution’s invoking the “sovereign” power of the people to overturn an unconstitutional regime was completely consistent with this new vision of how large-scale partisan organization was necessary to redress the failings of continental-scale democracy.

It is tempting to paper over the differences between Publius with Madison’s stance on popular constitutionalism in the 1790s by noting how Madison consistently endorsed a role for active “public opinion” in monitoring elected officials. Larry Kramer offers such a harmonizing account of *Federalist #49* and Madison’s *National Gazette* essays, arguing that *Federalist #49* did not reject role for the people in construing and enforcing the Constitution but merely cautioned against popular control that was too “unmediated and direct.”

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Madison consistently envisioned a constitutional politics in which rival federal representatives educated public opinion by contesting parochial or factional views, thereby insuring a role for the public in enforcing the constitution more sophisticated than a simple up-or-down vote in a constitutional convention. Likewise, Colleen Sheehan argues that Madison consistently defended the sovereignty of public opinion throughout the 1780s and 1790s.59

All of these efforts to harmonize Madison’s attitudes, however, founder on Madison’s defense of partisan democracy in the 1790s. Such an idea is wholly missing from the Federalist, which is replete with denunciations of “party spirit.” It is one thing to embrace the general idea that the educated public ought to guide the actions of elected representatives, guided by literati and channeled through the elite jockeying between federal branches. It is another thing altogether to call on the public to stand behind a party platform that contradicts the views of all three federal departments, form local organizations to reenforce that platform (the Democratic-Republican Societies), and, when those societies collapse as a result of a successful Federalist smear campaign, whip up public sentiment through the alternative mechanism of state legislative pronouncements in the teeth of obvious hostility from sister states. Madison’s adoption of the latter program was not a continuation of the gentlemanly populism of Publius. It was instead a radical departure from Federalist #49’s and Federalist #10’s suspicion of mass populism.

In addition to supporting a more active and pugnacious role for public opinion, Madison supported a more robust role for state legislatures in enforcing the Constitution. The Virginia Resolution’s reference to the states’ “interposing” their authority was ambiguous, and Madison’s

later report defending that power of “interposition” did little to clarify exactly the type of constitutional authority that he was claiming on behalf of the states. Again, it is tempting to smooth over the radical character of the Virginia Resolution’s claim of a power of “interposition” by citing Publius’s earlier defense of a state role in sounding the “general alarm” against federal usurpations in *Federalist* #45 and #46. Publius’ arguments for a state role in the *Federalist*, however, did not envision a formal constitutional role for state legislatures in curbing the federal government’s unwarranted assertions of powers. Instead, Publius predicted merely that, because of “the predilection and probably support of the people,” state politicians would successfully rally the public to oppose federal overreaching: a correspondence would be opened, “plans of resistance would be concerted,” and, unless the federal government backed off, an “… appeal to a trial of force” would be made (*Federalist* #46).

The claim by the Virginia Resolution that the state legislature had a power of “interposition” as a consequence of their being parties to the constitutional compact seems more legal and less pre-political than such a right of revolution. Madison was coy about explaining precisely how the state legislature could “arrest the progress of the evil.” Perhaps, by sounding the “clarion” call that he had anticipated in *Federalists* ##45-46, the Virginia and Kentucky legislatures were merely asking their sister legislatures to amend the Constitution pursuant to Article V. On this view, the Kentucky Resolution’s reference to “a nullification, by those [state] sovereignties, of all unauthorized acts” should be construed as a *collective* nullification through an amendment properly ratified by three-quarters of those state “sovereignties.” Virginia’s and Kentucky’s opponents apparently construed “interposition” and “nullification” to mean a more robust
remedy to be exercised by individual states.\textsuperscript{60} Neither Jefferson nor Madison, however, cleared up this ambiguity, and it lingered on throughout the nineteenth century as the “spirit of ’98,” invoked to justify South Carolina’s attempted “nullification” of the “tariff of abominations” in 1832 as well as anti-slavery advocates’ calls for the “interposition” of state authorities between federal power and the kidnapping of black residents under the 1850 Fugitive Slave Act.

The debate over the precise content of “nullification” or “interposition,” however, obscures a less dramatic and yet more lasting idea of subnational governments’ forming an institutional home for party organization. Virginia’s and Kentucky’s calls for united state opposition to the incumbent national administration went nowhere, because state officials, divided among Federalists and Republicans, did not form any sort of united interest. Such calls formed a rhetorically and organizationally effective way to rally voters against the Adams Administration by demonstrating that that Administration’s opponents had officially recognized electoral support. Virginia and Kentucky were constitutionally recognized representatives of their constituents and, therefore, were not vulnerable to the accusation leveled against the Democratic-Republican Societies that they were merely “self-created societies” with no legitimate right to speak for the “people” against duly elected constitutional officers.\textsuperscript{61} Federalist \#51 had envisioned officials’ aligning their ambitions with the defense of the prerogatives of their office. This idea of institutional balances, however, had collapsed under the weight of partisan and

\textsuperscript{60} The Massachusetts Legislature conceded that “the people … have confided to [state legislatures] the power of proposing … amendments of the [U.S.] Constitution” but denied that the state legislatures could authoritatively identify current constitutional violations. See

\textsuperscript{61} Elkins & McKitrick, The Age of Federalism 452-55.
sectional differences dividing state officials. Instead, state officials played the role of party leaders, rallying their rank and file on behalf of a partisan agenda only loosely tied to any particular institutional arrangement.

5. Conclusion

The point of this essay was to separate Publius’ s contributions to government and political science from his normative political commitments. We have argued that Publius was committed to a political science based on historical and contemporary experience which evolved as new lessons were learned. Madison and Hamilton would have agreed on the propositions of the new political science at each historical moment – in 1787-8, writing as Publius and later on as they learned how the Constitution worked in practice. The substantial difference between the two men concerned two issues: the nature of the (domestic and international) challenges that would be faced by the new government; and how the powers of the constitutional departments actually worked. Hamilton envisioned a hostile international environment for the new nation and thought it imperative to build its industrial and military capacities to deal with dangerous foreign powers. Building those capacities required an active executive and a Congress able to initiate big legislative projects. Hamilton also thought that the executive had to retain a firm hold on power at all times. The way to deal with internal commotions was to mobilize force to crush it: to appear as a “Hercules” and intimidate any who would challenge governmental authority. He articulated this view repeatedly from the early 1780s to the end of his life.62 Madison seemed to envision a more benign environment both internationally (where he believed the Americans

would trade peacefully with European powers and avoid clashes) and domestically. He thought the protections built into the Constitution would resist the passage of bad laws and limit popular discontent of the kind that might require a coercive response.

Publius’s lasting contribution, one that both Hamilton and Madison could embrace, was a vision of institutional design that was based on a realistic, if pessimistic, view of human nature -- one that regarded a competent and well structured government as a means to pursue genuinely common interests. From this viewpoint, it is a virtue of a set of institutions that they are stable or self enforcing and, given his view of human nature, it seemed natural to seek to obtain this stability by enlisting man’s lower capacities -- ambition, jealousy, inflated self regard, self dealing -- to accomplish these necessary tasks. Institutions, so designed, seem well suited to work among individuals who must be taken largely as they are found. This vision of institutional design still inspires us as political scientists.

After 1789, we must abandon Publius himself and consider the political science of Madison and Hamilton. We doubt that, as rational men they would have differed very much on matters of fact. They both learned almost immediately that republican rule on a large scale did not prevent well financed and highly motivated (minority) factions from capturing governmental powers, but they drew very different lessons from this. While Madison was alarmed at this prospect – seeing in it the failure of what he had called the “republican principle” -- Hamilton was probably pleased that, despite the difficulty of forming majorities, it was not impossible for public spirited men to form congressional majorities to pursue big public projects. He was probably neither surprised nor disappointed by the success of urban banking and commercial interests in getting favorable policies enacted.
Madison learned soon afterwards, in the fights over the Bank and Neutrality, that the Presidency was far more powerful than he had imagined. There were few constitutional checks capable of limiting the authority of an imaginative and energetic executive. Hamilton learned that too but, no doubt, concluded that presidential powers had evolved largely in ways he had hoped and anticipated. Finally, Madison learned, in the reaction to the Alien and Seditions Acts, that the carefully designed federal institution could not be counted on to resist the temptation to impose what he thought were plain violations of the First Amendment.

Thus, there was no real difference in the positive political beliefs of the two men. They disagreed, of course, with Publius who had not had the benefit of the experience of the 1790s. Publius was wrong in Federalist 10 in thinking that the republican principle would limit the influence of minorities. He was wrong in 51 in thinking that the checks he described there would be adequate to maintain the departments within their “proper sphere.” Or maybe he was half right. He was correct in arguing (in Fed 10) that it would be hard for majorities to form; but this meant that majorities had a hard time resisting capture by interested minorities. And he was right that the checks in 51 would be effective against Congress; but that meant that Congress could not effectively limit executive adventures. By 1800, both Hamilton and Madison could have appreciated these failures of Publius’s political science.

Despite his decade of frustration Madison ended up with the last and lasting word. As it became clear that the ordinary constitutional mechanisms had failed to prevent tyrannical laws, it was left to these two leaders to craft a role for the people to interpose against those laws in ways that could be situated within the Constitution. This they accomplished by running an electoral campaign aimed at asserting, through ordinary electoral processes, that the people refused to accept the conduct of the national government. Historians, writing of the 1800 campaign
generally fixate on the peculiar mechanism by which the vice president was chosen – he was to be the candidate with the second highest vote total in the electoral. Moreover presidential electors could, constitutionally, be chosen either by direct election or selected by the legislature, the choice being left to the states. Moreover that choice was shaped by short run political considerations – the Federalists controlled most of the existing legislatures and tended to pick the system that they expected to do best in. Only two states chose direct election. What this meant was that the Republican campaign needed to tailor itself to these political realities and develop a ticket and state level organizations that would accomplish their desired task.

Famously the republicans chose Aaron Burr, Hamilton’s New York nemesis (they needed to win support there) as vice president. Meanwhile the Federalists, seeing that Adams had no hope of reelection, campaigned for support for the Republican vice presidential candidate while the Republicans campaigned successfully for republican electors to vote a solid ticket. The result was a tie between Jefferson and Burr, leaving it up to the Federalist controlled House of Representatives to choose which of the two Republicans would be president. This is all fascinating in its way but we think it misses a deeper point about the 1800 election, which is that the People themselves had been asked to interpose against the enactment of unconstitutional laws and that they had responded positively. This the People did by removing the Federalists from executive and legislative power, leaving them in control (for the time being) only of the judiciary.63 This assertion of a popular role as “guardian of the Constitution” was rejected by Publius (in Federalist 49). It was never articulated in the high constitutional discourse of the Virginia Resolution nor, indeed, in interpretations of various clauses of the Constitution. Such

63 Even this concession was insecure. Congress repealed the 1801 Judiciary Act and fired the sixteen federal judges who had been appointed by its authority.
matters were carried out in the old ways: arguments about the “meanings” of texts or by appeal to “first principles” of social contracting.

In the end however, everything was accomplished on the ground, through an electoral appeal. The most ordinary kind of electoral politics was summoned and proved sufficient to reconfigure the constitutional balance. In the event, the appeals either to a republican morality of self restraint, or to pre-constitutional principles or power configurations were unavailing. The people themselves played the needed role. Ironically, the result: Republican control of the elected branches and Federalist control of the judiciary was to lead to the gradual development of a judicial role in the enforcement of separation of powers. This evolution was timid at first but after a long time, blossomed into the system of we have today, for better or worse. Madison as a constitutional theorist had a lot of problems with this development. But Madison as a political scientist ought to have been able to appreciate how far it was driven by the actual experience of the new republic.