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INTRODUCTION

*Perspectives on Madison's Legacy for
Contemporary American Politics*

BENJAMIN WITTES AND PIETRO S. NIVOLA

*I*n 1785, while serving as a member of the Virginia legislature, James Madison wrote a letter to a friend who was contemplating the possible parameters of a constitution for Kentucky, which was soon to become independent of Virginia. His friend, Caleb Wallace, had asked him a number of questions, including one on a lot of people's minds today: "Should there be a periodical review of the Constitution?"

Madison responded noncommittally. He noted that the idea was good in theory but had not been tried much, and he mentioned a couple of schemes by which review of a constitution could be built into its fabric. He concluded that perhaps a temporary constitution made sense for Kentucky. "In your situation," he wrote, "I should think it both imprudent & indecent not to leave a door open for at least one revision of your first Establishment, imprudent because you have neither the same resources for supporting nor the same lights for framing a good establishment now as you will have 15 or 20 Years hence, indecent because a handful of early settlers ought not to

preclude a populous Country from a choice of the Government under which they & their posterity are to live.”¹

By the end of his long life, Madison was firmly committed to the young nation’s constitutional arrangement, especially its stronger union, which he had done more than anyone else to design. His 1834 “Advice to My Country,” one of the last things he ever wrote, is brief: “The advice nearest to my heart and deepest in my convictions is that the Union of the States be cherished and perpetuated. Let the open enemy to it be regarded as a Pandora with her box opened; and the disguised one, as the Serpent creeping with his deadly wiles into Paradise.”²

There is no shortage of academic tracts pondering whether the American constitutional order, so influenced by Madison’s thinking, has grown outmoded in important respects. Periodically, the discontents express concern that the old Madisonian framework may not be up to the challenge of addressing modern society’s most pressing problems. Isn’t the framework, at least in part, an anachronism that perpetuates governmental inefficiencies and inequities, the critics ask? Their qualms are somewhat reminiscent of Madison’s own in 1785. What right, they ask, does the “handful of early settlers” who established the U.S. Constitution now have to “preclude a populous Country” of 300 million people from modernizing it?

Defenders of the American political system today rejoin that while much of it continues to reflect the exigencies of its original framers, the Constitution also has proven resilient and innovative, and they warn that those who call for fundamental reform should be careful what they wish for. This view is closer to Madison’s advice to his country in 1834—to his insistence that the Constitution was not to be trifled with and to his warnings about renegotiating a hard-won compact.

This book joins the debate: How well—or at least how consequentially—*does* the Madisonian system perform? But the book also asks an additional question: If Madison could peer at the present, how would he regard the current condition of the key political institutions that he helped originate and the government policies that they make? The book, in short, explores what Madison might think of contemporary U.S. politics and how reverential we should remain toward the system that he bequeathed to the nation.

To contemplate these matters, a group of scholars convened at Montpelier, James Madison’s home, in Orange, Virginia, during the fall of 2013,

under the joint auspices of Montpelier's Robert H. Smith Center for the Constitution and the Brookings Institution. This volume contains the papers presented at that conclave. The book, in accordance with the questions posed, has two parts. The first comprises five chapters concerned primarily with systemic performance: Does the intricate edifice that Madison and his colleagues engineered still measure up? The second comprises five chapters that illustrate the extent to which the Father of the Constitution, were he with us today, might be discomfited by contemporary developments in American politics and public policy.

In chapter 2, John DiIulio Jr., of the University of Pennsylvania, examines a contemporary political shortcoming that Madison and the Founders arguably had a hand in bequeathing: the failure of policymakers these days to address fully the nation's long-range financial liabilities. "American citizens yet to be born," DiIulio writes, "are being stuck with an entitlement benefits bill that is about five times the country's current annual GDP." He suggests more than one reason that America has not broken the habit of "legally robbing future citizens in order to enjoy present benefits without having to pay for them itself." Not least among his explanations is the power of organized groups with a vested interest in feeding and fattening the public sector. Another, however, is simply public opinion: substantial majorities oppose genuine retrenchment of the welfare state and will not hesitate to punish elected officials who attempt more than token tweaks to either entitlements or the tax revenues necessary to support them.

DiIulio's diagnosis of what ails the U.S. polity is important because, at the end of his chapter, he countenances potentially far-reaching constitutional reforms. He boldly stipulates that the Constitution is now an ill-fitting suit for a government that has outgrown it. Yet, if, as DiIulio's analysis implies, the weight of the people's preferences is a big part of the underlying problem, the reform agenda would have to include not only greater restraints on the excesses of participatory democracy (a challenge discussed in the subsequent chapter) but also, let's face it, on the norm of majoritarian rule, which Madison basically favored and which lies at the core of any democratic regime. That is a very tall order.

In chapter 3, Brookings Institution senior fellow William Galston reviews a number of respects in which the country's politics have deviated from the Framers' intentions. His observations, at least implicitly, have a

bearing on whether certain constitutional corrections might be in order. Some of what Galston cites—the expansion of executive power, federal authority poaching on the traditional purview of the states—also comes up elsewhere in the volume. But two other big changes do not: the rise of political parties (forces that, for better or worse, the Founders sought to discourage), and, related to it, what Galston terms the ascent of “direct versus representative democracy.”

This latter populist element may be, as Galston suggests, the single most nettlesome deviation to have occurred in the American political arena. A committed republican, Madison decidedly championed governance with the consent of the people, perhaps even to the point of permitting “them” the final say in determining the constitutionality of statutes. But—and this is a crucial distinction—he eschewed any form of direct rule by the populace. Rather, he envisioned, as Galston describes, a modified democracy, one in which popular participation is suitably subject to “filtration through representation.”

No major democracy is more sensitive to popular moods and grassroots pressures than the United States. Some of that sensitivity is baked into the constitutional design: consider the implications of the system’s unique biennial elections for the House of Representatives—an instrument of democratic expression that Madison himself considered excessive. (He had preferred at least a three-year term for House members.) Much of it, however, is of more recent vintage: the dominance of party primaries and caucuses, which has challenged, as Galston calls it, “the culture of deference” to seasoned political leaders—that is, the “filter” that Madison deemed so necessary to represent the people responsibly and attain for them what he called the “real” public good.

In chapter 4, Pietro Nivola, a senior fellow emeritus at Brookings, takes another tack. Although he, like DiIulio, recognizes the democratic predicament presented by the need to face up to long-term fiscal challenges, his first concern is how American democracy performed in an immediate crisis of epic proportions: the global economic collapse that began in 2008. Commentators who ritually chastise “Washington” for its deficient policies ought to ask themselves: Deficient compared with what? The Great Recession was a very big test—and, as a matter of fact, the U.S. government arguably handled it better than governments in many

other advanced economies did, most notably several in Europe. The comparative U.S. success has been evident: U.S. GDP has grown, mostly at a respectable pace, and unemployment has dropped below the pre-recession level. The recovery in much of Europe was slower. Although growth there has finally regained momentum recently, unemployment in the Eurozone has remained disturbingly high.

How did America's supposedly "gridlocked" political system manage this feat, in contrast to regimes overseas? The answer, Nivola posits, is that first of all, the gridlock itself was actually helpful. The political parties were at odds. There was reluctance to cut public spending (chiefly on the part of Democrats) and to raise taxes (most intensely on the part of Republicans). Felicitously, the combination of those positions prevented premature adoption of austerity measures. Second, where activism was imperative—to secure various countercyclical initiatives—the government was anything but gridlocked; in large part, it responded promptly, creatively, and energetically. What does this story imply about America's Madisonian mix of institutional constraints and capabilities? It still works, Nivola argues—indeed, at times impressively—at least if the comparison is with other societies in the real world, not with some utopia.

Granted, the remarkable response to a near-term crisis may say little about the prospects for prudent policies that anticipate dangers in the more distant future. DiIulio harbors that reservation about fiscal policymaking in this country—and Nivola shares some of his unease. Where these two old friends might part company, however, is on the question of how many examples there are of other democracies that unquestionably excel at taking the long view. Glancing abroad, Nivola suspects that distinctive profiles in courage are scarce.

A healthy debate has been joined. DiIulio's case for considering some judicious constitutional adjustments in the United States cannot be dismissed out of hand. In a famous letter to Madison in 1789, Thomas Jefferson had insisted that no constitution should be immutable—indeed, that all should have an expiration date.³ And Madison did not wholly disagree. Replying the following year, he concurred that from time to time improvements might well be called for, especially to provide "a salutary curb on the living generation from imposing unjust or unnecessary burdens on their successors."⁴ That is precisely the broad rationale that DiIulio advances.

In chapter 5, R. Shep Melnick of Boston College contributes his keen insights on whether the nation's Madisonian regime now is plainly malfunctioning. Melnick's essay is a wide-ranging *tour d'horizon*, probing most comprehensively the *real*, not merely the rhetorical, record of policy outcomes in the past couple of decades. He begins by observing that critics of the nation's Madisonian order have long bemoaned its biases. The main flaw, the dissenters allege, is a systemic propensity for evasion and inaction. In the 1950s, they complained of "stalemate." In more current parlance, the label is "gridlock." But are such characterizations warranted? Whatever the catchphrase of the day, Melnick shows that no serious analysis of what has actually transpired in the United States during this century and much of the last can conclude that U.S. politics has been paralytic. His list of major new policies is robust and extensive. While the political process can erect roadblocks, it also can (and does) clear new paths to get around them.

Furthermore, Melnick's chronicle does a special service: he notices how a great deal of innovation emanates from venues that too often remain under-recognized. While the media may fixate on this or that "do nothing" Congress, elsewhere—in the courts, the regulatory bureaucracy, the Federal Reserve, the states—a lot of significant undertakings fill the space. Suffice it to look at this astonishing train of events, for example: the revolutionary change that has occurred in marital law. Almost overnight, the legalization of same-sex marriage has hopscotched from state to state, and in June 2015, the Supreme Court itself ruled on the question.

In chapter 6, the last in this half of the book, Jonathan Rauch, another senior fellow at Brookings, also runs against the grain of prevailing commentary, which tends to depict the U.S. political scene as a sorry spectacle, hopelessly deadlocked and "dysfunctional." To the contrary, writes Rauch, the system continues to do what the Framers, particularly Madison, intended: It duly applies a "brake" on precipitous change, but it also has a vigorous capacity for "adaptation." Why is that possible? Because, even amid today's partisan polarization and obstructionism, the Madisonian design still encourages pragmatism: "It forces politicians to compromise, by creating competing power centers and depriving any of them of the power to impose its will on the others." The arrangement can be "an engine of innovation"—albeit one that typically innovates in measured, incremental ways. Rauch presents a compelling example. Not long ago, the divided gov-

ernment accomplished the seemingly impossible: it initiated (albeit on the margins) the painful process of cutting federal spending and hiking taxes. However tentatively, in other words, it took steps to begin putting the nation's fiscal house in order.

In the second half of his essay, Rauch takes aim at the “anti-compromise movement” in recent party politics, arguing respectfully that it is not in keeping with the political tradition credited to Madison. For now we live in an era when bands of uncompromising partisans, empowered directly by impassioned voters, sometimes appear to exert outsized influence on the national agenda—and have kicked aside some overdue business that parties controlled by practical politicians probably would have resolved by now.

Part 2 of the book turns from what we should think of Madison's legacy to what Madison might think of the United States today. It begins with chapter 7, by Jack Rakove, a historian at Stanford University. Rakove focuses on the contemporary conduct of the U.S. Senate. Nowadays, far from being a consistent source of “wisdom and stability” in legislative deliberations, as Madison had hoped, Congress's upper body has inordinately expanded its methods of obstruction. Its bag of tricks includes the secret holds that individual senators frequently slap on confirmation proceedings for prospective executive or judicial appointments, leaving the courts and essential administrative agencies with critical vacancies. Perhaps worse, by regularly threatening to resort to filibusters, the modern Senate has all but imposed a new procedural norm for lawmaking: the requirement for a supermajority to pass even ordinary legislation. Rakove makes a case that Madison, a firm believer in the “republican principle” of majority rule, would have disapproved of such parliamentary practices.

In chapter 8, the late Martha Derthick of the University of Virginia traces the profound transformation that has taken place in another cornerstone of the Constitution: federalism. In *Federalist* No. 45, Madison had expected the state governments, to which the people would be closely attached, to form a firm bulwark against overweening encroachments by the central government. That expectation proved wrong. In sphere after sphere, the balance of power has shifted to the central authorities in the course of the country's history. Derthick delves into the trends in certain health care programs (notably the steady expansion of Medicaid) and in education policy, describing in granular detail the stealthy policy entrepreneurship of

administrators as well as legislators. Her larger point is that Madison might be startled by how extensively the government in Washington has come to micromanage the strictly “local and particular” concerns that used to be the province of the states and municipalities (*Federalist* No. 10). And, Derthick infers, Madison would be no less disturbed by how much of this vast body of national law “is being made outside of legislatures.”

Had Martha Derthick lived to revisit her essay, she almost certainly would have enhanced it by further stressing yet another characteristic of the euphemistically termed “cooperative federalism” of modern times: its stupefying legal complexity. Observers since de Tocqueville have recognized that, as he noted, “complication” is one of the “vices in every federal system.” But the sheer amount of complication associated with American state-*cum*-federal law today would surely dismay Madison, much as it does many ordinary citizens. Too much law is “a nuisance of the most pestilent kind,” wrote Madison in 1787.⁵

In chapter 9, Eugene Hickok, a former deputy secretary of education and fellow at the Heritage Foundation, also examines what has happened in the field of education. He discusses in depth Madison’s grasp of the essential role of educational institutions in society. Like Jefferson, Madison viewed an educated citizenry as vital to a vibrant republic. In some ways, the United States has duly heeded his aspiration. This country spends more per pupil than any other advanced democracy. Like Derthick, Hickok shows that investment in education is no longer just a state and local priority; it has become a national one, with the federal government increasingly engaged at all levels.

But it must also be said that Madison would likely be troubled by the often mediocre return on this expensive investment. Despite the massive spending, Hickok observes, the upshot according to most indicators has been that “student achievement in reading, math, and science has been flat for more than twenty years. Moreover, the performance of U.S. students is lower than that of students in many other countries.” Not only that, but assessments of civic literacy—even among graduates of the nation’s vaunted system of higher education—can look decidedly discouraging. The finding of one multiyear study cited by Hickok was that “a college education had almost no influence on students’ understanding and awareness of civics and government.” Madison would be troubled by that outcome. As Hickok em-

phasizes, no founder was more mindful than Madison of the importance to Americans of obtaining “a good education in order to fulfill the responsibilities of self-government.”

Chapter 10 opens with the Affordable Care Act (ACA), which is in some ways a poster child for the reach—and, more important, the extraordinarily complex form—of federal domestic policy in the twenty-first century. A law of this sort would have been so unimaginable in Madison’s day that it seems strained to wonder what Madison would think of it. An indisputably relevant query, however, is whether he would have been comfortable with how the law’s constitutional legitimacy was ultimately decided: through the judiciary. Lynn Uzzell, a scholar in residence at Montpelier, directs her attention to this inquiry. She concludes that, at bottom, Madison would have preferred the court of public opinion—not the litigants and judges at federal tribunals—to have the last word on so ambitious and controversial a national policy initiative and one so hobbled by lukewarm popular support. Madison had indeed asserted at times that the people should be the final arbiters of laws that arguably strain, or “usurp,” constitutional boundaries: “in the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers.”⁶ As author of the Virginia Resolution in 1798, he more or less practiced what he preached.

That said, some of Madison’s other reflections might seem at odds with Uzzell’s take. In *Federalist* No. 37, for example, he ruminated on the inevitable need for interpretive jurisprudence: “All new laws,” he argues, “are considered as more or less obscure and equivocal until their meaning be liquidated and ascertained by a series of particular discussions *and adjudications*” (italics added). For, he implied, in legislation as in the human expression of practically any sophisticated idea, there tends to be “unavoidable inaccuracy,” all the more so when the “objects” in question inherently involve “complexity and novelty.”⁷ The ACA could certainly be considered a case in point.

In the book’s final chapter, Benjamin Wittes and Ritika Singh tackle the momentous issue of how, if at all, James Madison’s inclinations might be said to square with America’s modern national security regime. For politicians, then as now, where one stands frequently depends on where one sits. Wittes and Singh remind us, in essence, that the old adage also applies to

Madison, who was a pragmatic practitioner of politics, not merely a theorist. As a coauthor of the *Federalist Papers*, he had joined Hamilton in calling for a stronger national government. Afterward, as a member of the Anti-Federalist opposition, he was less inclined to do so (note the Virginia Resolution). Later, as secretary of state and then president, he tilted again toward various nationalist stances—sanctioning expansion into the territories of the Louisiana Purchase and part of Florida, appealing to Congress for resources to prosecute the War of 1812 (“Mr. Madison’s War”), and, in his final message to Congress in December of 1815, at last largely embracing a Hamiltonian case for maintaining adequate military strength in peacetime.

The nub of the thesis that Wittes and Singh exposit is this: If Madison appeared to fluctuate between assertions of national power on one hand and grave misgivings on the other, a similar pattern persists to this day in the pursuit of the nation’s security. At times, the government asserts the national security interest aggressively; at other times, amid mounting public skepticism, it retreats. In the age-old contest between the competing values of security and civil liberties, in some ways America still wrestles with its constitutional scruples, as did Madison. And in no small part, we have him to thank for that.

Fair enough. One has to be careful not to overstate the parallels, however—and sensibly, Wittes and Singh don’t. Madison’s moves in the name of national security pale in comparison with those of subsequent presidents. His wartime measures were small-bore, almost quaint, even by the standards of his time. As Martha Derthick notes, whereas Madison had believed that wars would be rare, now they seem perpetual, summoning up a military establishment and security apparatus so formidable that nothing like it exists anywhere else. What would a president who declined to prosecute even flagrant traitors during the War of 1812 say about the likes of the USA Patriot Act or the scope of NSA surveillance? How would he react to modern America’s permanent state of being under threat and on a war footing?

This much is clear: the foundation that Madison helped lay has proven neither static nor unproductive in the modern age. How radically the modern American state has stretched the original constitutional limits that he held dear remains a contested question.

Notes

1. James Madison, "Letter to Caleb Wallace, August 23, 1785," in *Selected Writings of James Madison*, edited by James Ketcham (Indianapolis/Cambridge: Hackett Publishing Company, 2006), pp. 29–34.
2. James Madison, "Advice to My Country," in *Selected Writings of James Madison*, edited by Ketcham, pp. 362–63.
3. Letter from Thomas Jefferson to James Madison, September 6, 1789, in *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison, 1776–1826*, edited by James Morton Smith (New York: Norton, 1995), pp. 631–36.
4. Letter from James Madison to Thomas Jefferson, February 4, 1790, in *Life of Thomas Jefferson, Third President of the United States*, vol. 1, edited by James Parton (Boston: J.R. Osgood, 1874), pp. 326–30.
5. James Madison, *Vices of the Political System of the U. States*, vol. 2, in *The Writings of James Madison: 1783–1787*, edited by Gaillard Hunt (New York: G.P. Putnam's Sons, 1901), pp. 361–69.
6. James Madison, "Federalist No. 44," in *The Federalist*, edited by Robert A. Ferguson (New York: Barnes and Noble, 2006), pp. 248–55.
7. James Madison, "Federalist No. 37," in *The Federalist*, edited by Ferguson, pp. 194–201.