The Madisonian Scheme to Control the National Government[1]

Jenna Bednar

Assistant Professor
Department of Political Science
University of Michigan
jbednar@umich.edu

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Abstract: Madison set out to cure state mischief by strengthening the national government, a solution that begs the question: how do we control this new power? Madison had a two-pronged approach: interinstitutional conflict and electoral control. This essay discusses the weaknesses of both approaches. First, the federal structure creates a national power that at times has incentives to put aside its internal disagreements and compete with the state governments. Second, electoral control can fail because of the federal paradox: in a federation, voters have no way to articulate their general vision of the federation. The consequence of oversubscription to Madison's political science is that we undervalue

[1] For thoughtful comments I am indebted to Andreas Kalyvas, Sam Kernell, and two anonymous referees.

judicial review's stabilizing potential.

1 Madison's Testament on the Vices of the United States and Advice for its Salvation

The title of this essay might be surprising. Certainly, Madison set out to control the *state* governments by *expanding* the powers of the national government. But no theory of federalism is complete without a provision to draw and maintain the boundaries on all governments, including the national government. Most likely, the proposed government would have failed ratification had the Constitution's opponents continued to believe that the state governments would be diminished to administrative subunits, as the political Madison well understood. Therefore, he devoted much thought to controlling the national government, and the resulting theory, especially the separation of powers component, has been his greatest contribution to the study of political institutions. This essay will examine the efficacy of Madison's plan.

Madison's scheme for controlling the national government is inseparable from his understanding of what was wrong with the state governments. After an extensive study of classical confederacies, (Hutchinson 3-24) Madison observed that in all unions where the states retained their sovereignty, the union eventually collapsed from interstate rivalry. He then recorded his thoughts on the problems with the American government under the Articles of Confederation. Famously labeling the problems "vices," his notes are a laundry list of the intransigence of the state governments, in their trespasses on one another, in their wildly divergent laws, and in their encroachments on the national government. (Madison 69-80) It was imperative that any new government reduce the ability of the states to harm to the union.

Madison's concerns extended beyond making federalism work: he was worried that state governmental opportunism would forever tarnish republican democracy.[2] Several state legislatures had

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[2] Hobson (1979) describes this crisis as more important to Madison than the problems of controlling the state legislatures. He writes: "Madison regarded the crisis of the Confederation in the 1780s as foremost a crisis of republican government. The question at stake for him was whether a government that derived its authority from the people and was administered by persons who were directly or

shown tendencies to ignore the rights of their citizens and otherwise lean toward tyrannical behavior unbridled by their constitution or bills of rights to such an extent that some called for an end to the experiment with republican governance. While for Hamilton (and others) the solution was to establish a monarchical system similar to Britain's, Madison was reluctant to give up hope for representative democracy. If the institutions of aggregation could be perfected, he reasoned, then republican government would succeed.

To Madison, the solution to both problems, federal and democratic, was clear: a strengthened national government would overcome the vices of the present system, thereby serving as double-cure, both by stabilizing the union and relegitimizing republican government. A strong national government, with direct powers over the people, would be necessary to patrol conflict between the states. It would also field better politicians and reduce the problems of faction. Republics can be too small, Madison reasoned in Fed. 10 & 51;[3] the larger union would have two advantages: it could draw its candidates from a larger pool, increasing the chance of getting an excellent public servant, and the larger union would dilute the potency of factions.

Madison's primary point seems vindicated: the subordination of state governments to a strong national government does appear to reduce interstate conflict. And the experiment in republican

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indirectly appointed by the people would prove to be more than a vain hope or merely theoretical ideal." (pp. 218-219) This essay agrees with Hobson that Madison most wanted to create a government of manageable popular sovereignty.

[3] Madison first developed the size of states argument in his notes on the Vices. Note 11 blames the poor quality of the laws on two factors: the representatives and the people themselves. Politicians seek office for three motives, Madison reasoned: ambition, personal interest, and public good, and he feared that the first two reasons outweigh the third, often causing the "honest but unenlightened representative [to] be the dupe of a favorite leader, veiling his selfish views under the professions of public good...." *Federalist* 10 famously elaborates his position on faction, but Note 11 contains his early thoughts: the wider the sphere, the more difficult it is for factions to influence outcomes.

government has long proven successful. But the two prongs of Madison's solution---a decentralized, layered system with a strong center---each create problems of their own. At the same time that it created a new interest---the national government---for the citizens to control, Madison's federal solution erected obstacles for effective republican government. Institutional mechanisms stitched onto electoral control as "auxiliary precautions" (Fed. 51) do not make a seamless federal fabric; flaws remain that can doom the union. At its conclusion, this essay will suggest how judicial review is consistent with Madison's objectives and can repair some of these weaknesses of interbranch conflict and electoral control.

Section 2 examines Madison's political science to control the national government, beginning with his arguments that the national government would not need to be controlled. Sections 3 and 4 follow by addressing the weaknesses of institutional mechanisms and electoral control, respectively. Section 5 concludes by advocating the usefulness of judicial review to perfect federalism's operation.

2 The Control Mechanisms

Despite his focus on the states' propensity for shirking on their obligations to the federal union and burden-shifting on one another, Madison had to answer to critics of the Constitution who were worried about the strength of the new national government. As a political pragmatist, his first responses were strategic: he tried to calm fears about the center's power with assurances that the national government would have little motivation to encroach upon the states or upon citizen rights. But as political theorist, he carefully constructed an institutional framework to guarantee through structure that the federal government would not behave opportunistically. His institutional mechanism combined institutional checks and balances at the federal level and---less importantly---incorporation of states into the decision-making process. Finally, and most fundamentally, through the institutional mechanisms the electorate could be the ultimate watchdogs of federalism.

2.1 Self-Regulating Federalism

In most of his rhetoric, Madison forcefully rejected the possibility that the national government would encroach on the state governments by constructing a theory of self-regulating federalism. Madison and his colleagues often tried to deflect concerns that the national government would trespass on the rights of states and citizens by suggesting that the national government would have little opportunity or motivation to do so. Writing long before the welfare state was imagined, Madison and Hamilton both argued that the national government was needed primarily to promote the defense of the union,[4] while normal police powers and day-to-day government functions would be performed by the states. Madison wrote in Fed. 45: "The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy [an] advantage over the federal government." To this defense he appends an equilibrium-based argument nudging citizens to arm the federal government as completely as possible: "The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States." He cleverly inverts fears of the national government's power into a call for supporting it all the more: the stronger the national government's defense capacity, the less need we have for defense; therefore, the less need we will have for the federal government generally, and the less it will come to dominate the state

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[4] By no means did the founders think that defense was a minor function. Riker (1964: 20-21) neatly summarizes the urgency of stabilizing the union: external threats from Great Britain and Spain meant that the American hold on the continent was tenuous. If the union could not be strengthened, its internal divisions would ease foreign encroachment. Citing the first papers of the Federalist (written by John Jay, the diplomat), Washington's preoccupation with war preparedness in letters, and Madison's own notes on the Vices, where 5 of the 11 deal with military weakness, Riker argues that the primary motivation for reconstruing the union was external military threat.

governments.

In the blustery beginning of Fed. 45, Madison argues that in light of the bloodshed of the Revolution, it is "preposterous" to think that the federal government would derogate state powers, so dearly bought. He diverts attention from the concern at hand---central government encroachment---by saying that the states are much more likely to threaten the center than the center do harm to the states. This was not a sentiment he reserved for the newspapers. In debate, too, he argued that the national government would have little incentive to overwhelm the states. While allowing that the central government would have augmented powers, he introduced and rejected the hypothetical that "indefinite power" be vested in the national government, and the states reduced to "corporations dependent on the Genl. Legislature":

> Why should it follow that the Genl. Govt. wd. take from the States any branch of their power as far as its operation was beneficial, and its continuance desireable to the people? In some of the States, particularly Connecticut, all the Townships are incorporated, and have a certain limited jurisdiction. Have the Representatives of the Townships in the Legislature of the State ever endeavored to despoil the Townships of any part of their local authority? ... The relation of a Genl. Govt. to the States is parallel. (Madison 108-9)

The states had little to fear from the federal government: no precedent exists for a higher level of government to usurp power from a lower. The federal government would have no motivation to encroach.

While the remainder of this section will detail Madison's scheme for controlling the center, it is helpful to keep in mind Madison's denial of a federal encroachment problem. While Madison, as a nationalist, was not opposed to a greater centralization of the government, he consistently expressed confidence that a combination of interinstitutional oversight, state government involvement, and electoral control were sufficient devices to check whatever stray motivations for usurpation might possess the federal government.

2.2 Interinstitutional Oversight

In Madison's scheme of harnessing conflict to invoke obedience, separation of powers is without question the crown jewel, Madison's most enduring contribution to the theory of political institutions. Breaking with the parliamentary model, Madison advocated the fragmentation of executive, legislative, and judicial power at the national level. In so doing, Madison implicitly acknowledged that federalism, in its rawest form as decentralized government, is not self-regulating but needs institutional support.

Institutions create incentive environments; rules and organizational structures affect individual behavior by changing the means to achieve desired ends. One theory of human motivation posits that we are all essentially selfish. We would be unlikely to deny ourselves opportunities and therefore are incapable of self-restraint, but our jealousy prompts us to monitor one another's actions closely. Madison applies this theory of human nature to government; governments are groups of selfish men and therefore also likely to act selfishly. Brilliantly, he transforms vice into virtue by manipulating the institutions of government to mimic the forces of selfishness in society: "ambition must be able to counteract ambition." Madison's theoretical trick is to fragment government, while leaving them partially dependent on one another through checks and balances. The antagonism within governmental parts induces a self-regulating whole.

To Madison, separation of powers was necessary for "preservation of liberty" and the prevention of tyrannical laws.[5] Madison fused protection of the people with maintenance of federalism, and separation of powers could help achieve both ends, by providing a "double security" (Fed. 51): "so it is to be hoped ... the two governments possess each the means of preventing or correcting unconstitutional encroachments of the other." (Madison 508) While separation of powers might

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[5] See, for example, "Remarks in the Federal Convention on Electing the Executive," July 17, 1787), in Madison 125-7 and Fed. 51. Note, however, the contributions of Kernell and McLain in this volume, arguing that Madison was much less committed to separation of powers than we assume today.

contribute to governmental efficiency due to task specialization, it seems far more likely to stall government action as the distinct interests bargain. For this reason, stagnation is evidence that separation of powers is working according to theory, because gridlock means that no one interest is able to overwhelm another. By frustrating attempts to dominate, separation of powers preserves federalism and protects people from tyranny.

In Madison's theory, separation of powers has two necessary ingredients: distinct but partially overlapping power, and independence. Overlapping power allows one branch to oversee the actions of another. In a 1785 reply to questions asked by his friend Caleb Wallace, in the course of agreeing with Wallace that amendment was necessary, he slipped in a comment about the importance of having some remedy available to one branch who believes that another has superceded its powers (Madison 41): interbranch conflict was on his mind, and rather than promote a unified government, he sought an institutional outlet for internal disagreement. The cousin to separate powers, bicameralism, further unravels the monolith of parliamentary government by fragmenting power within the legislature. In the same letter to Wallace, Madison denigrated the design of the existing senate, but "bad as it is, it is often a usefull bitt in the mouth of the house of Delegates." (Madison 40) In the constitutional convention, speaking on the proposed Senate, Madison argued: "all business liable to abuses is made to pass thro' separate hands, the one being a check on the other." (Madison 110)

Separation of powers can only work if the institutions have a motivation to cry foul. Task specialization is not enough to break the team mentality of the government. Their objectives and incentives must be independent as well. "Each department should have a will of its own," writes Madison in Fed. 51. His appreciation for the difficulties in achieving independence grew. The Virginia Plan called for the lower legislative house to appoint upper, and the two chambers appointing the other branches. Staggered terms would "ensure" independence. Following the convention, he is much more supportive of fragmenting the elections and the constituencies of the separate branches and the two legislative houses. Electoral separation prevents the coagulation of interests, thereby exploiting institutional self-interest by inducing the branches to be watchful of one another's actions. In a unified government, whistle-blowers lose their jobs when their party is punished at the polls. With separation of

powers, constituents are not restricted to such a blunt instrument; they may retain their district's representative while rejecting their President.

Even when the prudence of independence and overlapping powers is seen, it is still difficult to work out in practice a combination of institutions that can carry it off. Certainly Madison's vision of the government evolved with experience: he seems to have grown more convinced of the necessity to disentangle the branches and put them on much more equal footing. If the mechanisms to provide independence are functioning correctly, a consequence is conflicting interests that need to be aired and reconciled. One feature the remainder of this section will highlight is different mechanisms proposed to mediate intergovernmental disputes.

While separation of powers promotes contest and compromise, if it is at all imbalanced, it alone does not provide a means to halt interbranch encroachment, nor does it guarantee the Constitution. A complete institutional recipe must include some method of binding government action through constitutional review. Instinctively, the judiciary seems a likely candidate, but Madison and his colleagues were wary of vesting so much power in an unelected body,[6] and Madison doubted that the judiciary alone would be strong enough to counter the other two branches. (Rakove 2002) Instead, Madison was intrigued by an institution in the 1777 Constitution of New York, a Council of Revision. (Madison 41) The Council of Revision joined the judiciary to the executive in a body that would have power to veto national legislation, as well as reject the legislature's vetoes of state legislation.

The Council of Revision has its roots in the British model. New York altered the British institution in two ways, and Madison seems to have supported both revisions. First, under the British model, the executive had the exclusive power to veto legislation. Madison favored including the judiciary, where the benefit of its "wisdom and weight" would be "incontestable." (Madison 95) At the same time, he did not propose transferring the whole power to the judiciary. Even apart from Madison's doubts about the judiciary's capacity, including the executive was critical to the political success of the proposal. Some convention delegates opposed the measure, believing that to give the

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[6] For the modern edition of this concern, see Ely 1980 and Friedman 1993.

judiciary review powers was to give it the power to legislate.

A second change that New York made to the British model was in the potential to override the veto. The British model had an absolute veto: the New York legislature could override the veto if 2/3s of its members repassed the legislation.[7] While the Council of Revision failed to get enough support in

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[7] Madison reports that the British model was an abolute veto. (Madison 95) The Avalon Project at the Yale Law School has made the New York Constitution of 1777, as well as many other important founding documents, available to anyone with access to the web at: http://www.yale.edu/lawweb/avalon/avalon.htm.

In the Virginia Plan, widely attributed to Madison, the size of the majority needed to override the veto is unspecified. The clause reads: "and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [blank] of the members of each branch." (Madison 90) It is reasonable to assume that the condition "by [blank] of the members," indicated some supermajority, the exact proportion to be determined later. If not, the statement "again passed" would suffice. The controversy is over the application of the condition "by [blank] of the members." If it is intended to qualify overrides on the negatives on state legislation alone, then the supermajority limits the use of the negative, but does not affect regular legislative action, which would then seem to require mere majority repassage. Circumstantial evidence indicates a preference for a supermajority override requirement.

In the August 23, 1785 letter to Caleb Wallace, he praises the New York version of the Council in the midst of discussing the importance of legislative review to protect against "fluctuating & indegested laws". (Madison 41) In his Oct 24, 1787 letter to Thomas Jefferson, he recounts the debate about the revisionary power. The debate seemed to have been between the absolute veto and a supermajority requirement: simple majority repassage is not mentioned, and in fact he immediately supported a supermajority requirement when it was proposed in the convention. (Madison 145) Finally, in his notes on "Draught of a Constitution for Virginia", c. Oct 15 1788, Madison offers two specific supermajority figures for the Council of Revision: 2/3 and 3/4 (depending on if either or both of

the convention, it demonstrates further Madison's dual scheme of interinstitutional checks and electoral control: the mechanism is purely institutional, but is careful to include the popularly-controlled executive, rather than the judiciary alone.

With the demise of the Council of Revision, attention returned to the judiciary for legislative review. Madison never was a strong proponent of judicial review. He fails to mention it in the Virginia Plan.[8] When he did write about it, he was wary of granting power to a branch so removed from the people, but at the same time, worried that it was too weak to intermediate government disputes. Later in life, he also expressed frustration that the court tended to develop broad constitutional theories from specific cases.

Madison and his contemporaries viewed the court as the natural arbiter in interstate disputes and also thought the court could monitor state transgressions on federal jurisdictions, although in this latter capacity Madison was dubious about the judiciary's ability to enforce its rulings, without force to back up its words. If Madison had had his way, of course, the national legislature would have had the

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the executive and judiciary vetoed). As compelling as the specific figures I find his reasons, both here: "a revisionary power is meant as a check to precipitate, to unjust, and to unconstitutional laws" (Madison 417), and in 1785: it is a "valuable safeguard" (Madison 41). It is not meant to be pro forma, or merely a cry of alarm to the public.

Nevertheless, I must emphasize that this evidence is circumstantial. Certainly, Madison's Virginia Plan did not advocate as strict a separation of powers as the New York model: the New York executive, for example, was directly elected, while the Virginia Plan specified that the executive be chosen by the Legislature. For an alternative interpretation that the Virginia Plan proposes a more unfettered national legislature, see the Kernell contribution in this volume.

[8] In its point 9 he details his conception of the judiciary's role, which includes no powers of review, unless you creatively interpret "questions which may involve the national peace and harmony." (Madison 91)

bite of the negative on state legislation, so judiciary weakness wouldn't matter.[9] Despite his expression of confidence in Fed. 39,[10] Madison worried that the judiciary still would not have enough influence to control the state governments.[11]

Madison's concerns about the judiciary were more complex: he also worried that it might have too *much* power relative to the other branches. He attributes to it a last-mover advantage:

> ... as the Courts are generally the last in making their decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended, and can never be proper. (Madison 417)

Statutory interpretation extends to the judiciary legislative power reserved for the popularly-controlled legislative branch, a threat that touched a particularly sore nerve with Madison, who wanted to ensure that republican democracy would work, by making the people's voice as effective as possible. Were the judiciary to grow too accustomed to intervening in intragovernmental disputes, it "might subvert forever, and beyond the possible reach of any rightful remedy, the very constitution, which all were instituted to preserve."(Madison 614)

Madison's confidence in the judiciary did seem to grow over time, as did his sense of the urgency of having effective checks on the legislature. The Alien and Sedition Acts of the Adams

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[9] The supremacy clause was added to the Constitution as a weak compromise once the negative was lost.

[10] Here I refer especially to the third-to-last paragraph of Fed. 39, regarding the necessity of a federal-level tribunal to resolve disputes between the levels of government. Although much later, in an 1830 letter to Edward Everett, Madison refers to this essay as early support for judicial intervention (discussed below), I think that when writing Fed. 39 he had in mind only state encroachment on federal power, and not the inverse; I do not consider it to be a recommendation of judicial involvement in federal encroachment claims.

[11] See the discussion in Rakove, 1996, pp. 171-177 and Rakove 2002.

administration taught him that other structural safeguards could not be relied upon. In an 1830 letter to Edward Everett he cites the turnover in the next election as vindication that political safeguards work anyway, through the electoral process. At the same time, he allows more room for the judiciary to review the constitutionality of federal legislative and executive action, although he cannot help but in the same breath write "the power has not always been rightly exercised." (Madison 847) Of this, he was perhaps referring to the Court's decision in McCullough v. Maryland, which he criticized in a series of letters to Spencer Roane in 1821. (Madison 733-7, 772-779) While Madison did not fashion himself to be an expert on the intricacies of law, he believed that constitutional interpretation ought to arise from a series of decisions, rather than the court expounding its own theory, abstractly, in the midst of reconciling a specific dispute. The court is particularly at fault when it embellishes its own power in this manner. The means to alter the power structure is available in the constitution, and Madison believed that the court should not circumvent the established procedure of amendment.

In sum, interinstitutional oversight works through a combination of independence and dependence. Institutions should have distinct wills but need one another to act. When this balance is achieved, the federal government is less likely to behave opportunistically, whether by encroaching on the state governments, or by tyrannizing its citizens.

State Supervision

Madison's skepticism of the abilities of state governments is well known and so we must unravel his theory here with care. Without a doubt, much of his writing is rhetoric to gain support for the Constitution. However, the theory is consistent with interinstitutional oversight because it works through a combination of independence and dependence, and while it is the least elaborated component of Madison's system of constraints on the federal government, it is one of the most cited today.

Although we remember Fed. 51 as a defense of separation of powers, in it Madison describes a parallel system for maintaining the power balance between state and federal governments: "the different governments will control each other, at the same time that each will be controlled by itself." (Fed. 51)

States supervise federal action both from within and without the federal apparatus because the constitution has made the national government dependent upon them to act. In correspondence with Thomas Jefferson, Madison wrote: "This dependence of the General, on the local authorities, seems effectually to guard the latter against any dangerous encroachments of the former...." (Madison 147-8) The entanglement of state and federal interests in the national legislature makes it unlikely that a federal interest will evolve. Reminiscent of his earlier assurances that the national government will have no desire to encroach on the states, he submitted in later correspondence that: "encroachments of [state sovereignty] are more to be apprehended from impulses given to it by a majority of the States seduced by expected advantages, than from the love of Power in the Body itself, controuled [*sic*] as it *now* is by its responsibility to the Constituent Body." (Madison 774) Federal encroachment, if it occurs, is likely to be from state capture of the federal government. The federal government itself has no desire to increase its power.

Within the government, states have many avenues to express their interests. In Fed. 39, Madison describes how the Constitution is both federal and national: by federal he means that the states are involved in the central level decision-making, and he cites the Senate, the electoral college, and state ratification of the Constitution, as well as the "natural attachment" (Fed. 46) that citizens have to their own state, as evidence. The American formulation of bicameralism protected state interests in two ways: it provided for equal representation of the states, and until the 17th Amendment, state legislatures appointed the Senators.

Madison blamed the state legislatures for the anemic performance of the union under the Articles; if he had had his druthers, the last thing he would have advocated was perpetuating their power in the new federal union.[12] Yet we remember him (disguised as Publius) as one of equal

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[12] As a large state delegate, and moreover due to his suspicions of the state governments, Madison fought against equal representation in the Senate. He searched in vain for some principle other than state representation to guide Senate membership once his Virginia Plan proposal, in which the second chamber would be elected by members of the first chamber (who were themselves directly

representation's more eloquent advocates, and state representation in the federal decision-making structure is considered by many to be an integral part of the Madisonian vision for governmental reform.

The resolution of this inconsistency is to be found in Madison's practicality and political skills: he

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elected by the people), was rejected by the convention. In the weeks preceding the "Great Compromise" (the July 16 vote for equal representation in the Senate) Madison's arguments against equal representation accelerate in bitterness and desperation. On June 7 Madison complained in debates that rather than serve as a useful check on inexpedient governmental practices in the national legislature, state appointment of Senators might *promote* it, as the states had proven themselves to be prone to incompetent government (Madison 98-9) and on June 21, he wrote that State governments are maintained, not to serve as checks on the national government, but instead because they are needed to attend to all the minutiae of local government that they can do more efficiently than a purely national one. (Madison 108-9) His desperation showed on June 30, when in attempt to frighten his compatriots into agreement, he spoke the unspeakable (and implicitly burst a hole in his theory of faction). He said that while equal representation might do no harm, it wouldn't help either, as "the Majority of the States might still injure the majority of the people," (Madison 117-9) and he introduced the possibility of sectional conflict, as a more important cleavage than the large state small state division.[12] As late as July 5th he was still protesting the proposed compromise calling it "unjust" and saying further that he did not think it necessary to achieve ratification:

> Harmony in the Convention was no doubt much to be desired. Satisfaction to all the States, in the first instance still more so. But if the principal States comprehending a majority of the people of the U.S. should concur in a just & judicious Plan, he had the firmest hopes, that all the other States would by degrees accede to it. (Madison 120-1)

On July 14th, he made his final attempt to persuade his colleagues. He hotly delineated the fault with equal representation. With remarkable prescience, his closing argument reiterated his June 30 concern regarding the north south division over slavery: "the perpetuity it would give to the preponderance of the Northn. agst. the Southn. Scale was a serious consideration." (Madison 125)

believed that the institutional structure would minimize the danger posed by state intervention in the federal government, and he knew that equal representation was very popular and would increase the Constitution's chance for ratification. So we find him writing persuasive passages in the *Federalist* in support of the institutionalization of state input in the federal government. In Fed. 62 he alludes to the compromise that brought about equal representation and praises it for maintaining state autonomy and especially that it is a useful mechanism for incorporating state input in national decision-making:

> In this spirit it may be remarked, that the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty.

Ever the statesman, he continues the thought by criticizing the position he held prior to the vote on July 16:

> So far the equality ought to be no less acceptable to the large than to the small states; since they are not less solicitous to guard by every possible expedient against an improper consolidation of the states into one simple republic.
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> ... No law or resolution can now be passed without the concurrence ... of a majority of the states. (Fed. 62)

Equal representation in the Senate will help to stabilize the union by ensuring the balance of power between state and federal governments.

Several other institutions incorporate state input in federal decision-making, as Madison delineates in Fed. 45. Not only will states be represented in the Senate, but the President cannot be elected without the states, and that the House members, although directly elected by the people, will likely have State legislative experience.[13]

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[13] Whether or not we should take seriously Madison's proclamation that because of the institutional incorporation of state interests that the federal government would be politically dependent upon the state governments is unclear. We know how opposed he was to equal representation in the Senate and how disdainful he was of the competence of state representation. The connection between the Electoral

Structural political safeguards were just the first stage in the system of state protection as envisaged by the founders. The states could also work outside of the formal structure by protesting when the federal government overstepped its bounds. James Wilson, delegate of Pennsylvania, describes the following chain reaction:

> The States having in general a similar interest, in case of any proposition in the National Legislature to encroach on the State Legislatures, he conceived a general alarm wd. take place in the National Legislature itself, that it would communicate itself to the State Legislatures, and wd. finally spread among the people at large. The Genl. Govt. will be as ready to preserve the rights of the States as the latter are to preserve the rights of individuals; all the members of the former, having a common interest, as representatives of all the people of the latter, to leave the State Govts. in possession of what the people wish them to retain. (Farrand 1:356)

Wilson refers to the state legislatures responding to the cry of alarm from the U.S. Senators. Madison echoes this argument in Fed. 45: "But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of the single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause." Ignoring any collective action problem,[14] much less the possibility that the federal government's encroachment may be welcomed by some of the states, Madison argued that the states would watch federal action closely and jointly protest any violation.

College and state interests is weak, and his argument about the House contradicts his theory of enlarged republics.

[14] Madison's logical slip here is worth noting because he well understood the collective action problem in state financing of war debt. We must assume that he believed protest was costless---that it was in each individual state's interest to protest---thereby skirting the collective action problem, or that he still did not believe that the federal government would encroach, so given the irrelevance of counter strategies, he did not devote much thought to the protest mechanism.

When the Adams administration's passage of the Alien and Sedition Acts infuriated Madison for its encroachments on civil liberties, he federalized a political issue by enlisting the Virginia assembly (along with his colleague Thomas Jefferson, in Kentucky) to challenge the administration's moves. (Madison 589-90, 608-62) States not only had the right to protest unconstitutional federal activity; it was their duty as an obedient member of the union to protect the union and maintain the constitutional covenant with the people.

Later in life he continued to support his position and the decision to write the Virginia Resolutions, although he regretted South Carolina's reference to the Resolutions while it attempted to nullify congressional legislation. (Madison 842-52) While it seems that Madison believed in the protective force of political safeguards, particularly state involvement, on balance it is a poorly worked out component of his theory. Its greatest impact was no doubt as the rhetoric expressed to win over the states rights constituency.

2.3 Electoral Control

If in his writing Madison had mentioned popular sovereignty only occasionally, or only in the propagandist *Federalist*, we might surmise that he praised the Constitution's protection of the electorate for strategic reasons, to quell the fears of dissenters distrustful of the power of the new national government. Instead, he was concerned about the future of republican government. He planned to rescue popular sovereignty by perfecting the means by which people control their government. Inarguably, his was a federalism pulled by a joint team of national and state governments, but the people held the whip and reins. "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes." (Fed. 46) Even interinstitutional competition had its limits: in his proposed Council of Revision, if the popularly-controlled legislature could muster a supermajority, then it could overrule the executive and judiciary and proceed with its proposed legislation.

The people were not to blame for the poor performance of the union under the Articles of Confederation. He was confident that if the people had the right instruments for governance---those that captured their reason while controlling their passion---then no government could better guarantee individual rights than a representative democracy. (Madison 532-4) His faith in the people extended beyond appropriate use of the tools available to an ability to correct outcomes in the infrequent moments when the institutions fail. He relished the electorate's rejection of the Adams administration after its transgressions. (Madison 846)

Madison favored elections by ballot (to preserve the election's integrity) with suffrage granted to as many citizens as practicable, although he was concerned that the poorer citizens might be tempted to sell their votes. (Madison 43) While Madison stopped short of advocating that public officials be beholden to the instructions of their constituents, (Madison 468-9) the design of the federal institutions and his rhetoric in support of it reflect his commitment to popular sovereignty. Indeed, as stated above, Madison's federal project was motivated by the desire to preserve electoral control.

Directly or indirectly, the people controlled all national institutions. Congress' bicameral structure tempered the House's passionate impulse with the Senate's longer view, and the executive might recruit seasoned leadership, but all were subject to electoral review (the Senate and President indirectly). And rather than construct a Bickel-ian criticism of the undemocratic judiciary, he optimistically pointed out that the people had indirect control over appointments, and underscored (twice repeating it in Fed. 39) that the judges would retain office only in cases of good behavior. The Constitution itself could be amended by the people, although only indirectly (through Article V). He did not support direct popular constitutional amendment. In Fed. 49 he criticized Jefferson's proposal for frequent or periodic review of the constitution by the people, as it implied some flaw in the government and reduced the legitimacy of the constitution. Here, his fear is not so much with the people's involvement, but the method of their involvement. He feared that passion had the potential to produce imperfect results that the people might later regret. Fully consistent with the rest of his proposals, a rejection of popular amendment is a means of perfecting republican democracy.

With so much control over the various engines of government, the people could become the

ultimate protectors of the Constitution and of their own rights. If they did not approve of the activity of one of their governors, they had the power to remove him. State sovereignty was guaranteed through the watchful eyes of the general population, who would not tolerate federal encroachment unless they decided that it was in their own interest.

In sum, this brief review of Madison's proposals reveals a two-pronged system to control the national government, through interinstitutional competition (including state oversight) and electoral control. The next two sections consider the weaknesses in these approaches.

3 Credit Assignment and Federal Encroachment: the Weakness of Interinstitutional Competition

Interinstitutional competition works through Madison's thesis of intertwining independence and dependence. Antagonism, spurred by independence, is necessary for the government to be self-regulating. But the branches of government might not always have an incentive to arrest one another's efforts to encroach; they are not automatic adversaries.

Consider the following argument about why states would serve as watchdogs. Madison records the following speech from James Wilson, delegate from Pennsylvania (and generally a supporter of Madison's plans):

> He insisted that a jealousy would exist between the State Legislatures & the General Legislature **Y**. A private Citizen of a State is indifferent whether power be exercised by the Genl. or State Legislatures, provided it be exercised most for his happiness. His representative has an interest in its being exercised by the body to which he belongs. He will therefore view the National Legisl: with the eye of a jealous rival. (Farrand 1:343-4)

Because the states are jealous of the attention that the federal government might receive from additional power, the states rebuke any federal attempt to encroach. Wilson, echoing Madison's sentiments,

argues that the state legislators have incentives to be the providers of policy pleasing to its constituents, suggesting motivations for state encroachment.[15] The same drive for constituency service exists at the national level, and so Wilson's argument can be reversed, applied to the federal government to identify a motivation to encroach.

Political and institutional safeguards can depress or eliminate this motivation. These safeguards work in two ways: 1. by state interest penetration in the Senate and 2. by ambition counteracting ambition; that is, the branches checking one another's activity, presumably prepared to denounce one another. When these two conditions hold, states participate in the formation of federal interests or at the least can redraw any plan contrary to state interests. If state penetration fails to affect all of the federal branches, interbranch conflict will stifle any federal encroachment. This section will show how the federal structure and electoral connection work against these two conditions.

Political safeguards depend upon the infiltration of state interests in federal decision-making. Senators must remain true not just to their own state, but to *all* states, preserving state power against a greedy central government. Equal representation in the Senate was pitched (and still is) as a vertical federalism issue, as a way to maintain the balance of power between federal and state governments, an interpretation promulgated by some legal theorists and even the Supreme Court. In truth, equal representation in the Senate was always a small-state large state concern: the small states wanted protection from the large. While this is a federalism issue, it is a horizontal one about interstate rivalry, connected to the central government only through fears that the large states would, by their weight, capture the national government and discriminate against small state interests. It may be the case---perhaps, even, it often is---that one collection of states is able to capture just one branch of government at a time, thereby creating heterogeneous interests at the federal level, but this diversity is not automatic.

Madison's solution of state protest, exercised against the Alien & Sedition Acts, is an ineffective control on the center. It ignores the collective action problem inherent in expecting all states to band together in a costly exercise; it ignores that some federal encroachment may be welcomed by some

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[15] He also reminds us of the limits of the public's scrutiny, which I take up in the next section.

states. It introduces the danger of misapplication (as the Virginia & Kentucky resolutions were), and worst, it has no teeth. Even when it works (and we must bear in mind that the most famous example, the protest against the Alien & Sedition Acts, was really about party politics and not about federalism) it does so only by enlisting some other institution for support, primarily by alerting the voters to the federal government's intransigence. It is symbolic, unsustainable, and therefore an ineffective deterrent.

The demands political safeguards place upon the electoral system contradict the system's design. Electoral competition causes each politician to act as Wilson suggested he would: to do what he can to please his own constituents. Each representative wants to be the one to provide demanded services. Naturally, when services are demanded in jurisdictions his level of government holds no responsibility over, he will do what he can to get his government involved. At times his objective will cause him to envy the successes of his compatriots in other levels of government; wherever possible, he will try to claim credit for those accomplishments. At some point, it is likely that the politician will be tempted to encroach upon the jurisdiction of another level of government, despite rules to the contrary.

Madison might counter that the second component of interinstitutional competition, separation of powers, would ensure that the House or executive would block Senate moves to encroach. But counteracting ambitions work only if interests are disparate, and these elected representatives have the identical urge to provide policy pleasing to their voters. Absent any ideological divisions over centralization the branches of government are perfect partners to encroach upon state jurisdictions, and separation of powers (ironically) helps smooth any potential turf rivalries that might block (or highlight) the encroachment. At times, therefore, it is appropriate to treat the branches as agents differently abled but identically motivated. Federalism creates an *alignment* of interests in the electorally-responsible federal branches; House, Senate, and President are motivated to work as a team to please their constituents, and sometimes they will be collectively motivated to pursue policy that encroaches on state jurisdiction.

Using decision-theoretic analysis,[16] we can define conditions favorable for encroachment.[17]

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[16] Decision theory reduces the number of strategic agents to one: here, only the federal government's

Most intuitively, we think that a struggling central government would encroach upon a dimension where the states have been successful, to claim credit. Logically, the argument works as follows: assume retrospective voting and an optimal distribution of powers where the central government is more efficient at policy in its own jurisdiction than it is when it encroaches on state jurisdictions.[18] Voters have some threshold that defines their expectation for government performance; if performance falls below that threshold, they fail to re-elect. We might be tempted to think that any government whose expected evaluation lies below that re-election threshold would be a candidate for credit-claiming encroachment, but we can pursue a slightly more sophisticated analysis, where we consider not just the expected value---the mean---but also the variance associated with the government's current policy. Because policies are plans adopted in a noisy---uncertain---environment, policies have distributions over the likelihood that they are successful. A tried-and-true policy might have a tight band of potential outcomes, where little can disrupt the outcome, while a new policy in an emerging problem area may have a broad range of possible effects, some feasible outcomes being beneficial, but others dismal failures.

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behavior is analyzed. Therefore, we exclude from consideration retaliatory encroachment by the states, strategic underperformance to reduce the attractiveness of encroachment and credit claiming, and advertisement of the center=s encroachment activity. The first two state behaviors are far-fetched anyway: it is inappropriate to try to link decisions to encroach in a tit-for-tat sort of way, as encroachment is generally independent from dimension to dimension, and the second, intentional underperformance, is electoral suicide. The last behavior, public protest of federal encroachment, is the most likely reaction. Its efficacy depends on the electoral response, which I consider (and reject) in Section 4.

[17] I make this argument formally in a manuscript titled "The Credit Assignment Problem," which first appeared as a chapter of my dissertation: *The Federal Problem: The Political Economy of Federal Stability* (Stanford University, 1998).

[18] This second assumption rigs the problem against finding any encroachment and also allows us to think about federal behavior absent any specific assumptions about state competence or behavior.

When we consider both mean and variance, we see two conditions that make encroachment attractive to the central government. First, if its mean is already below the voter's re-election threshold, and its variance is low, then even random good shocks are unlikely to lift its performance to a level required for reelection. If the state is successful, or pursuing a high-variance policy that makes it more likely that it will please the voters, the central government might encroach to introduce some policy in a higher variance jurisdiction that allows it to share credit should the state succeed.

Even when the federal government's expected evaluation is above the threshold it may have an incentive to encroach. If it is pursuing a policy that has high mean, but also high variance, it may decide to encroach on state activity with a lower mean (but still above the threshold) and lower variance, as an insurance policy. The potential win-big payoff is lower, but it might reduce the probability of failure dramatically.

Notice that in this analysis the central government behaved as a single unit. All elected divisions of the government have the same set of interests: please the voters. If the central government has a chance to give money for extra police on the streets and thereby have a chance to claim credit for reducing crime, President, Senate, and House will all support the program. Madison's scheme of interinstitutional competition only works if interbranch interests are diverse; here, as is often the case with federalism issues, they are identical.

In short, federalism is different from other concerns, especially from protection of individual liberty. The institutional structure designed to protect liberty cannot be relied upon to protect federalism, as the electoral mechanisms create a competition of sorts between the state and federal governments with the potential to destroy interinstitutional competition by aligning federal interests.

4 The Federal Paradox: the Weakness of Electoral Control

The structural weakness of the institutional safeguards, as laid out in Section 3, is minimized in Madison's theory because the institutions are backed up by the people. In Fed. 46, he writes:

> The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. ...[T]he ultimate authority, ... resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. ...[T]he event in every case should ... depend on the sentiments and sanction of their common constituents. (Fed. 46)

In Madison's federalism, the people are sovereign. The secret to the efficacy of the political safeguards is that they express the people's will; the safeguards are backed by a public watchful that the union operates according to plan. Federalism creates a dual expression of their will: the people's needs are broken into tasks allocated to state and federal levels of government, and their will is determined through electoral mechanisms and administered through political institutions at both levels. If the federal government initiates legislation or executive action that violates the federal bargain, disrupting the balance of power between state and federal governments, the people will punish the federal government. Only if the people believe that the federal government would be better able to handle the jurisdiction than the states will the people fail to punish. Otherwise, as he writes in Fed. 45-46, (and see Kramer 2001: 42), their "natural attachment" to the states causes them to prefer state empowerment and be suspicious of federal encroachment.

Madison's defense of the Constitution depicts the people holding the reins on their team, knowing the joint product they expect from their federal and state governments. They can balance each government's talents and ambitions to produce the best joint effort for union good; the allocation of powers between state and federal governments is efficient, or at least meets with public approval. Any federal encroachment is disarmed by an electorate loyal to the states. There are two problems with this argument: the impermanence of allegiance to the states, and the difficulty of managing a federation.

Madison argued that the citizens are most naturally attached to their states, because they think of themselves as citizens of Virginia or New York first, and of the United States second. As the

importance of the union grew, identities shifted; now, indisputably, we are Americans first: state identification, for some, is reduced to "resident of Michigan". Riker fingered the upward shifting loyalties of citizens as the glue that binds a federal union together and makes centralization inevitable (1964: 108-116). At any rate, citizen attachment to the state is transient and cannot be relied upon to maintain the balance between federal and state powers. It is perhaps best understood as a product of the distribution of powers. It is not a reliable barrier to federal encroachment.

A second problem for the electorate is the complexity of managing a federation. While no one would argue that the federal system is straightforward and uncomplicated, many, including Madison, praise it for the increased opportunity for democratic control. By delineating jurisdictional responsibilities, the system takes advantage of specialization; requisites for national office are different than for state because the jobs are very different, and the people can elect those most suited for the specific job at hand. When coupled with staggered elections at one or both levels, as in the United States, it offers a compromise between consistency and reform. The frequency of elections and the number of offices on each ballot increases the importance of parties, and some have argued that parties contribute to stability in a federal system (Kramer 2000, Ordeshook & Shvetsova 1995, Ordeshook 1996). Parties are most likely to prevent federal encroachment are integrated party systems, with a commonality of interests between organizational levels created by upward mobility and mutual dependence. When parties are decentralized, as in Canada, or weak, they are less successful at sustaining federalism.

Layering the political system introduces a problem for republican government under-examined to date: voters have no direct means to control the overall performance of their union. Instead, federalism's two-level republican system forces voters into a piecemeal articulation of the public interest. Contrary to most expectations, the central government cannot be relied upon to promote the most effective or efficient union. Central government representatives are rewarded when they provide policy pleasing to the voters; at times they will be motivated by electoral gain to encroach upon state powers in order to create ambiguity over policy responsibility, even in cases when such encroachment harms the overall efficiency of the union. While this is a moral hazard problem, it is one not handled by separation

of powers, which depends upon "opposite and rival" interests: elected representatives in the central government have a common interest to claim responsibility for outcomes pleasing to the voters. This federal paradox diminishes the potential for electoral control.

Unfortunately, the Madisonian model of electoral control exceeds the capacity of boundedly-rational voters; the federal system is complex, with a prism of responsibilities doled out between federal and state government, some shared, some separate. The allocation in some dimensions may be justified by a principle, for example, provision of public goods at the level required to absorb all externalities; but more often the assignment is somewhat haphazard, based upon historical precedent or, frankly, political convenience. Without defending optimality of the allocation of powers between state and federal governments, or even wanting to pretend that any frozen allocation can be considered perfect, there is much to be said for consistency and stability in the allocations in maintaining federal stability. But voters are not up to the task.[19] While they do seem able to spot major transgressions and respond, most federal opportunism pushes the boundaries of fuzzy parameters, often justifiable in the short-run (matching the voter's vision) or simply invisible until too late.

Even in the moments when the voters have a clear notion of what they want from the union, translating those orders into a division of tasks allotted to each level of government is more difficult than simple task specialization might indicate, as the governments are designed to compete with one another ever so subtly but quite importantly, as argued in section 3. Voters simply have no means of derailing the intergovernmental competition detrimental to the union, as this competition was designed into the system.

Federalism offers the appearance of republican government---it provides the instruments of democratic representation and popular sovereignty---but has it satisfied our requirements for a successful republic? Ought it not also be necessary that the government provide the ability for the people to form a general intention and articulate it to their government? Federalism poorly satisfies

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[19] Parties certainly provide helpful heuristics, so the extent that they are free from interlevel competition, they may help voters to secure the federal balance.

these two conditions, and therefore poses a serious challenge to republicanism. As a control mechanism on federal encroachment, elections are not efficient, and definitely not reliable.

5 Consequence: the Neglected Potential of Judicial Review

We know of the weaknesses of Madison's theory of factions: Madison himself supplied evidence of it, in pointing out to his convention colleagues that the North-South division would be perpetuated by equal representation in the Senate. (Rakove 1996:68-9, 74-5) The last two sections probed this weakness more deeply, concluding that Madison's institutional and electoral theory of federal stability incompletely transform self-interest into public good. Either mechanism works well under some conditions, perhaps even the majority of the time. But the coverage is incomplete, the constraint on the federal government is imperfect, and so the possibility of encroachment persists. Federalism's division of powers creates a national governmental interest distinct from the state government interests. It also erases any potential for the people to formulate, let alone express in a coherent fashion, their notion of the public interest. These two problems are closely related: at the same time that federalism establishes a new government in need of control, it makes it impossible for the people to say for themselves what they expect from the union. Federalism is a special topic; it is different from protection of individual rights, and the solutions that work for the latter we cannot assume will work for the former.

The gap in the protection of federalism might not be sufficient to endanger the polity's stability. Often the electorate and other political safeguards catch deviations that slip through cracks in the institutional structure. And often the institutional structure helps guide the electorate into formulating a vision for their federation. The overlap in failures may be rare, but a complete theory of federal stability needs insurance for infrequent threats as well as the mundane.

In Fed. 49, Madison describes a characteristic he would like to see in any body that would regulate intergovernmental dispute: "it is the reason, alone, of the public that ought to control and

regulate the government. The passions ought to be controlled and regulated by the government."[20] The judiciary alone stands removed from public passion. Madison says so himself not two paragraphs earlier: "the [judiciary], by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions."

The judiciary is a viable solution for both of the problems created by Madison's federalism. It is not subject to electoral approval, so is freed from the motivation shared by the legislature and executive to encroach. While it cannot---and should not---decide the people's will for them, it is the guardian of the Constitution, which is the only expression we have of what we as a people want our federalism to look like. It can recover the second form of failure by promising a coherent practice of federalism according to our Constitution, offering the possibility that time and perspective might do what an instant's decision cannot: we can tinker (but not frivolously!) with our Constitution as we gain experience with its effects. Therefore, the judiciary has much to offer to federal stability.

But Madison's way of viewing federalism, as a self-enforcing system constrained by competition and electoral control, meant that the judiciary was neglected as an important stabilizing force. The U.S. Supreme Court is now reining in the federal government, with mixed reviews from legal and lay observers alike. Apart from the criticism of the doctrine the Supreme Court is developing, criticisms of its involvement at all ring loudly and point most often to Madison, championing his institutional and political safeguards.

Political safeguards are most explicitly laid out in The *Federalist*, especially numbers 45, 46, 51, and 62, and modern analysts strengthen the theory. Neatly turning the tables, Wechsler (1954) argues that Congress does not threaten state power but instead helps to protect it. In his theory, not

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[20] Madison supplies a curious bit of food-for-thought regarding the legitimacy of unanimous decisions: he implies that they are an indication that the decision was governed by passion, not reason. "When men exercise their reason coolly and freely on a variety of distinct questions, they inevitably fall into different opinions on some of them. When they are governed by a common passion, their opinions, if they are so to be called, will be the same." (Fed. 50)

only is the Senate a forum for states to express and protect their interests, but the House, through state control of elections, also can be twisted to represent state interests. Choper (1977, 1980) urges us to consider the court's finite institutional capital: as a non-elected body, the court has limited leverage; it is best to reserve what power it has, and not test its legitimacy, by allowing it to focus on the protection of individual rights. In agreement with Wechsler, he argues that the court need not concern itself with federalism disputes because the states are protected through political institutions; he adds to Wechsler's list lobbying organizations such as the National Governors' Association. Kramer's (2000) political safeguards argument is not so much an addition to Wechsler as a transformation of it. In his argument it is the informal political institutions, particularly the political parties, that ensure state institutional input in the national decision-making process.[21] These Madisonian arguments have been used extensively to criticize judicial interference with federalism disputes, especially in curtailing federal encroachment; they have even been employed by Supreme Court justices to support their decision not to intervene.

Political safeguards is the meat of the dissent in *National League of Cities* [1976] (426 U.S. 833), which cites Madison in Fed. 45 & 46 and Wechsler. It also becomes the basis of the majority decision in *Garcia*, where, citing as evidence Fed. 45, 46, and 62, it is argued that:

> the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[22]

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[21] Kramer transforms the political safeguards arguments of Wechsler and Choper by arguing that the real source of political control is in the political parties, which of course is an informal organization of electoral control. In so doing, he is much truer to Madison than most modern Madisonians. See also Ordeshook's contributions.

[22] 469 U.S. 528 at 43, 44 [1985].

The same argument continues to be employed in recent arguments, mostly in dissent, in *Seminole Tribe*,[23] in *Kimel*,[24] and in *Morrison*,[25] to protest judicial intervention when the justices believed that political institutions were designed expressly to incorporate state interests and form an adequate protection against national encroachment. The heart of the political safeguards argument can be summed up in Madison's words in Fed. 62: "No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the states." On independent patrols, the electorate and the state governments stop federal encroachment. It ignores altogether the federal problem of credit assignment, it ignores the paradox of republican government in a federation, and above all it uses Madison's words out of context and written before the benefit of experience.

Are these Supreme Court references to the *Federalist* a near-criminal misreading of Madison, an over-reliance on his propagandist writings? No, not really. He did not think much of judicial review and he did believe that the states were effectively protected, although perhaps not for the reasons we think he did today. But by failing to understand the weakness of Madison's argument, the court long accepted the role of executive handmaiden Riker (1964) assigned it. Instead, the court could bolster political safeguards, not replace them, by filling in where they have the potential to fail.

Madison knew that the federal government would have an incentive to embellish its power, but at the time of founding he believed that the destructive motivation was sufficiently constrained by institutional design. He quickly learned otherwise, and when his back-up plan of state protest backfired with the nullification crisis, he began to have more faith in judicial review, but it remained underappreciated by him and definitely by Madisonian scholars.

What he left unprotected was the Constitution, ultimately. The Constitution established the rules of play, established the incentive scheme that set in motion the web of competition and check that would create a self-enforcing federation. But federalism is not self-enforcing; it is because of electoral and

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[23] 517 U.S. 44 at 183 [1996].

[24] 528 U.S. 62 at 93 [2000].

[25] 529 U.S. 598 at 639, 648 and 650 [2000]

interinstitutional competition that the governments will try to tweak the rules to their own advantage. The Constitution needs an advocate who is independent from the electorate. The judiciary is prone to errors, like all other institutions, but its errors are not correlated with counter-federalist motives. John Marshall did not meddle with the institutional balance and federalism; instead, he might have saved it. As the court works out a federalism doctrine, rather than be impatient with its mistakes and criticize it for its countermajoritarian tendencies we should remember Madison in his later wisdom, and accept that it might be useful to put our federation back on track (or keep it from derailing). The judiciary's infrequent, important interventions are what make the rest of Madison's theory work.

Madison was a nationalist and a populist, albeit perhaps not according to today's standards. He wanted a stronger national government and qualified democratic control significantly, but all with the aim of making republican democracy work. He pragmatically accepted the faults of men and designed a government to transform those flaws into virtues. When impossible, his mechanisms suppressed them. Madison believed that a vigorous federalism was necessary for a healthy democracy.

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