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Madisonian Equal Protection

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ARTICLES

MADISONIAN EQUAL PROTECTION

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James Madison is considered the "Father of the Constitution," but his progeny disappointed him. It had no effective defense against self-government's "mortal disease"—the oppression of minorities by local majorities. This Article explores Madison's writings in an effort to reclaim the deep conception of equal protection at the core of his constitutional aspirations. At the Convention, Madison passionately advocated a radical structural approach to equal protection under which the "extended republic's" broadly focused legislature would have monitored local laws and vetoed those that were parochial and "unjust." Rejecting this proposal to structure equal protection into the "interior" operation of government, the Framers instead adopted "exterior" admonitions against state ex post facto laws, impairment of contracts, and the like. Expanding this strategy, the Fourteenth Amendment admonished states against all denials of "the equal protection of the laws." Exactly as Madison predicted, however, protection of local minorities cannot be entrusted to "dim and doubtful" words enforced after the fact by courts that are inaccessible to minorities and too distant from the people at large to have the knowledge and confidence to resist powerful local majorities. This is particularly so of late, as the courts have placed vast spheres of activity off limits to the extended republic and denied it the power to enlist state officials in implementing national policy. By rediscovering Madison's neglected thinking on equal protection, and his elaborate design for a constitution that was never enacted, this Article sheds new light on seemingly intractable problems of federalism and equal protection and paves the way for a modern revival of Madisonian Equal Protection.

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INTRODUCTION

The framing of the original Constitution reveals far more about equal protection than the doctrine's absence from the document would seem to imply. Indeed, a vision of equal protection deeply motivated the actions of James Madison, the "Father of the Constitution,"[1] at the time of the framing. As Madison wrote to George Washington before the Constitutional Convention, one of the main innovations he sought in the newly constituted government was a national negative or veto of state law

1. Charles F. Hobson, The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government, 36 Wm. & Mary Q. (3d ser.) 215, 215 (1979) (stating that Madison "has been justly acclaimed 'Father of the Constitution'"); see also Edward McNall Burns, James Madison: Philosopher of the Constitution 10–11 (1938) (noting Madison's disproportionately large contribution to the framing); Jack N. Rakove, James Madison and the Creation of the American Republic, at 53 (1990) [hereinafter Rakove, James Madison] ("None of the fifty-five members of the Federal Convention contributed more to the framing of the Constitution than James Madison.").

by Congress to curtail state-level "aggressions of interested majorities on the rights of minorities."[2]

The constitution Madison envisioned, however, is not the one the Framers wrote. To his great disappointment, the nation's first constitution omitted any explicit equal protection constraint on the states, and it excluded the national negative he had fervently promoted. Nor, as we will see, did Madison's constitution emerge eighty years later with the Equal Protection Clause and the other postbellum amendments.

This Article recalls the constitution Madison wanted in order to enrich our understanding of Madison's thinking and to credit his prescient belief that the constitution the nation originally framed was—and the one that replaced it in 1868 remains—gravely defective for lack of an effective equal protection constraint. In so doing, the Article does not contend that Madison's support for a national negative exhausted his views on federal-state relations,[3] nor that his ideas on equal protection

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2. Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 The Papers of James Madison 382, 383–84 (Robert A. Rutland et al. eds., 1975) [hereinafter Papers of Madison].

3. We focus on Madison the Framer in the period from 1783 to 1788. Whether his views changed during his years as an opposition politician with a states' rights bent, Secretary of State, President, or elder statesman is a question we do not systematically address. A few observations on the issue are in order, however. To begin with, Madison never disavowed any of the views he held at the time of the framing. On the contrary, he continued to believe in the importance of his and other's ideas discussed at the Convention, and he took careful steps to preserve his notes recording those ideas. See Rakove, James Madison, supra note 1, at 173–74 (discussing Madison's efforts to preserve his notes even though he "did not believe that the 'intentions' of the framers should fix [the Constitution's] 'legitimate meaning'").

In addition, our analysis here suggests considerable consistency between Madison's earlier and later views, with the missing link supplied by his belief in the need for the carefully structured daily interaction and competition among the organs of government to provide ongoing protection of minorities against majority oppression. Although we focus here on the need to protect minority interests from neglect by *state* governments, the Madison of 1788 was quite clear that structural steps were also needed to protect minorities from the *national* government. See infra Parts IV–V. He simply believed that the Constitution achieved the latter protection—including through the action of the states in advocating and mobilizing support for the rights of local majorities that were in the minority nationally—while neglecting the former protection. See infra notes 256–286 and accompanying text. We are not aware of anything the "states' rights" James Madison of the Virginia Resolutions said or did a decade later that departs from this view. In point of fact, Madison wrote the Resolutions in service not of states' rights but of the rights of aliens and putative seditionists—unpopular minorities on whose behalf he sought to enlist Virginia and other states to rally public opinion against federal oppression. See, e.g., Rakove, James Madison, supra note 1, at 127–29. Not surprisingly, Madison was displeased by Jefferson's implication in earlier drafts of the Resolutions that states might be able to nullify federal law, and he toned down Jefferson's language raising the implication. Id. at 129 (stating that "disunion was the absolute evil Madison could never imagine").

Although Madison continued later in life to invoke the power of the states, acting in their daily constitutional role within the union, to protect unpopular groups against national majorities, he also energetically struggled against the notion of separate state sovereignty. And he was "pained by [the] repeated appeals to the Virginia and Kentucky

eclipse all the other (not always consistent) filaments of political thought with which he is more usually associated.[4] On the contrary, this account of Madison's deep reservations about what so many consider to be *his* constitution is intended to debunk monochromatic views about what Madison stood for. In particular, we show how badly the one-dimensional portrayal of Madison by the current Supreme Court[5] and much recent scholarship[6] has misunderstood him—ignoring his passionate conviction that routine national monitoring of the actions of state majorities had to be structured into our federal system if the nation was to fulfill its constitutional potential.[7]

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resolutions" by Southern protosecessionists such as John C. Calhoun. Id. at 177–78. The consistency between Madison's earlier and later views is obscured by an assumption that Madison's framing-era nationalism was the same as Hamilton's. Although the two were allies at the Convention and immediately afterwards, Hamilton cared far more for protecting national prerogatives and the public good against state incursions and less about protecting individual and minority rights and justice than did Madison. See infra Part IV.C.1. In neither period did Madison show an affinity for Hamilton's effort to eke out every nationalist inch in the text of the Constitution so it could be used (including by Hamilton himself as Secretary of Treasury) to steal a nationalist mile when the government began.

4. For a helpful discussion of the different, contradictory strains of constitutional thought that are often associated with Madison, see Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 38–45 (1985).

5. See, e.g., infra Part VI for a discussion of the current Supreme Court's ongoing misappropriation of Madison's thinking in its recent decisions undercutting Congress's ability to legislate pursuant to Section 5 of the Fourteenth Amendment.

6. See, e.g., Saikrishna Bangalore Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 2004, 2033–36 (1993) (characterizing Madisonian constitutional thought as rejecting need for federal government to supervise state legislative decisionmaking); J. Harvie Wilkinson III, Federalism for the Future, 74 S. Cal. L. Rev. 523, 535 (2001) (citing Madison's fear of tyranny of the majority as reason for the Court to police Congress's use of its Section 5 powers); see also Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 Mich. L. Rev. 752, 815, 817–22 (1995) (conceding that Madison's views provide justification for federal court review of state laws under federal antidiscrimination statutes but nonetheless arguing that because of normative reasons, federalism does not support a national judicial role in overseeing state laws regulating criminal procedure and "social and cultural issues," including issues of speech, reproductive rights, and prison conditions); cf. John C. Yoo, The Judicial Safeguards of Federalism, 70 S. Cal. L. Rev. 1311, 1361–62, 1366–80 & n.242 (1997) (stating that "the views of Madison, Hamilton, and the other Framers are important, not just because they reflect the original understanding, but also because they represent penetrating lines of thought whose force has endured to this day," but elsewhere arguing that Madison's atypical concern with minority rights and his unsuccessful efforts, via the national veto, to limit state power make him an unreliable source for views about how the Constitution was expected to operate and should be interpreted).

7. We are not alone in trying to set the record straight on Madison's sympathy for governmental arrangements that are often assumed to be at odds with his notions of federalism and states' rights. See Samuel H. Beer, To Make a Nation: The Rediscovery of American Federalism 2–8, 23–25, 261–64 (1993) (responding to Ronald Reagan's "New Federalism" attack on large national government by locating foundations of New Deal activism and the welfare state in the "extended" and "energetic" republic "for increase" that Madison and Hamilton desired); David Lawsky, Would Federalists Like Their Fans?,

This Article begins in Part I with an overview of Madison's proposed national negative, its reception at the Constitutional Convention, and how the scholarship, both legal and historical, has ignored the bearing of Madison's constitutional theorizing on contemporary thinking about equal protection. Part II attempts to synthesize that contemporary thinking by presenting a vision of harmonized liberty, equality, and fraternity that our existing constitutional structure aims to realize through the equal protection principle. It then returns to the eighteenth century and links that vision to Madison's. Part III discusses the structural equal protection constraint that the extended republic was designed to build into the first Constitution, a constraint based on Madison's recognition that "interior" or structural constraints on parochial exercises of majority power were a constitutional necessity. Part IV reveals both the incompleteness of the extended republic, the first Constitution's only equal protection constraint, and Madison's prescient recognition of the defect. In doing so, Part IV compares the great Federalists' actual proposal for structural equal protection to the flawed—because *more* federalist—product that emerged from the Convention in 1787.

Part V applies a Madisonian critique to the Equal Protection Clause of 1868, finding it an ineffectual, "exterior," or merely admonitory, step in the right direction. Part VI assays the additional damage the modern Supreme Court has done to Madisonian equal protection by dismantling the extended republic and, along with it, the incomplete structural protections against oppressive state action that Madison did manage to build into the Constitution. The Article ends by reflecting on possible applications of Madison's theory to our modern constitutional system, noting some grounds for optimism.[8]

I. Reclaiming Madison's Constitutional Motivation

Nearly all of Madison's greatest works of constitutional theory—his writings leading up to the Convention, his speeches there, and *Nos. 10* and *51* of *The Federalist*, following the Convention—focus on the problem

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N.Y. Times, Feb. 12, 1995, at E3 (citing *The Federalist* in support of balanced budget amendment; contrasting modern "federalist" opposition); see also Printz v. United States, 521 U.S. 898, 945–46 & n.4 (1997) (Stevens, J., dissenting) (citing Beer, supra, and describing how, contrary to the Court's modern insistence on separation between federal and state functions, Madison expected that the federal government would govern in cooperation with, and through decentralized use of, state officials); Henry Paul Monaghan, We the People[s], Original Understanding, and Constitutional Amendment, 96 Colum. L. Rev. 121, 122–24 (1998) (documenting continuous controversy since the beginning of the republic over the nature of the Founding and the nature of the relationship between state and federal government); infra Part IV.C.4.

8. A companion piece more fully explores modern application of Madison's theory, by way of the thought of John Dewey. See Brandon L. Garrett & James S. Liebman, Experimentalist Equal Protection, 22 Yale L. & Pol'y Rev. (forthcoming June 2004, expected at 22 Yale L. & Pol'y Rev. 235) [hereinafter Garrett & Liebman, Experimentalist Equal Protection].

of equal protection. His overarching concern—what he called the most "dreadful class of evils" besetting the new nation under the Articles of Confederation, more dreadful even than the weak national government—was the "factious spirit" in the states which chronically drove stable and interested majorities to enact "unjust" measures benefiting themselves while systematically neglecting or harming weaker groups and the public good.[9] In a more modern tongue, the most serious problem the new constitution had to solve was discrimination against persistently disfavored groups through state action lacking a sufficient relationship to legitimate state ends.

Particularly in his role as a constitutional architect, Madison was equally convinced that admonitory rights—such as those he later wrote into the Bill of Rights (despairing of their effect) and those John Bingham and his colleagues eventually wrote into the Fourteenth Amendment—provided at best a "precarious security" for "the rights of the minority."[10] Even when committed to energetic enforcement by the judiciary—the least transient and most "independent" "member of . . . government"[11]— such "exterior" constraints on government would inevitably be "inadequate"[12] and ineffectual[13] responses to the virulent temptations toward factionalism, discrimination, and defiance of the common good that plague republican government.

On the eve of the Convention, Madison believed he had discovered an "interior," or deeply structural, solution to the problem of equal protection, and he worked tirelessly to draft and promote a constitution that embodied his solution. The idea was twofold. First was to create an "ex-

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9. Proceedings of the Committee of the Whole House, The New Jersey Plan, Tuesday, June 19, 1787 (James Madison) [hereinafter Madison, June 19, 1787], *in* 1 The Records of the Federal Convention of 1787, at 312, 318–19 (Max Farrand ed., rev. ed. 1937), available at http://memory.loc.gov/ammem/amlaw/lwfr.html [hereinafter Farrand]; see also Lance Banning, The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic 76–107 (1995) (noting Madison's "alarm about abuses in the states . . . traced to the debilities of the Confederation"); Rakove, James Madison, supra note 1, at 45 ("At the heart of Madison's thinking lay a deep concern with the process by which laws were enacted, enforced, and obeyed, and an overriding conviction that the legislatures created by the state constitutions of 1776 had failed to discharge their duties fairly or responsibly."); Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 467 (1969) ("[T]he move for a stronger national government thus became something more than a response to the obvious weaknesses of the Articles of Confederation. It became as well an answer to the problems of the state governments.").

10. The Federalist No. 51, at 323–24 (James Madison) (Clinton Rossiter ed., 1961).

11. Id. at 324 (rejecting as "precarious" a "power independent of the society").

12. Id. at 320.

13. Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), *in* 10 Papers of Madison, supra note 2, at 163, 163–64 [hereinafter Madison, Sept. 6 Letter to Jefferson] ("[T]he plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs wbich every where excite disgusts agst the state governments." (empbasis omitted)); see also infra Parts III.B, IV.C; infra notes 241–243 and accompanying text.

tended Republic"[14] and place at its helm a broadly focused and empowered Congress over which local majorities could never expect to hold sway.[15] Second and more crucial was a "Power of the [National] Legislature to Negative State Laws" in "all cases" even if the state law impinged on no matter of national concern.[16] Only a plenary power to veto unjust state law, Madison believed, could force state lawmakers, however grudgingly in the short term, to heed minority interests and the public good. And only such a national negative, as Madison called it, could actually transform parochial local oligarchs over the long term, instilling a habitual concern for locally subordinated interests as well as the public-spirited perspective that, by Madisonian design, would motivate the extended republic's legislators in applying the negative. During the Convention, as described in Part IV, Madison labored to convince his colleagues to adopt his national negative. Although his radical proposal enjoyed some early success, the negative foundered as a coalition of delegates balked at giving Congress such broad power over state legislatures. After two contentious debates, the Convention shelved Madison's negative and unanimously adopted the Supremacy Clause as an acknowledged substitute. Even then Madison did not give up, but his repeated efforts to revive his proposal were all defeated.

A. *Setting Straight the Scholarly Record*

The negative thus was not, as many historians and legal commentators have dismissively assumed,[17] "some theoretical will-o'-the-wisp that Madison the practical politician quickly abandoned" or a "curious aberration" that he rejected along with the other Framers as "unrealistic."[18] To

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14. Beer, supra note 7, at 279.

15. The Federalist No. 10, supra note 10, at 83 (James Madison).

16. James Madison, Power of the Legislature to Negative State Laws, Speech at the Convention (June 8, 1787), *in* 10 Papers of Madison, supra note 2, at 41, 41 [hereinafter Madison, June 8 Convention Speech]. The "all cases" language was Madison's frequent description of the power required. See, e.g., Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 Papers of Madison, supra note 2, at 382, 383 [hereinafter Madison, Letter to Washington] (endorsing negative in "*all cases whatsoever*"). Charles Pinckney's June 8, 1787 motion at the Convention on Madison's behalf stated "that the National Legislature shd. have authority to negative all Laws which they shd. judge to be improper." Madison, June 8 Convention Speech, supra, at 41 (citation omitted).

17. See, e.g., Burns, supra note 1, at 10–11, 98–102 (dismissing as unimportant Madison's advocacy of the negative); Hobson, supra note 1, at 215–17 (finding as of 1979 that the history and importance of the national negative was "veiled in relative obscurity" and noting the absence of attention to it in important works on Madison and the framing of the Constitution by Douglass Adair, Clinton Rossiter, and Max Farrand). But cf. Irving Brant, James Madison: Father of the Constitution, 1787–1800, at 12–13, 36–38, 104–05, 127–29 (1950) (recognizing national veto as an important component of Madison's plan for a new constitution, while making no effort to ground the veto in Madison's thinking about the nature or needs of republican government).

18. Hobson, supra note 1, at 216. Hobson's article was the first to emphasize the centrality of Madison's national veto proposal.

the contrary, the negative "occupied a central place"[19] in Madison's constitution and can be seen as the "central innovation"[20] on which everything else was to "hinge."[21] Notwithstanding his success in creating the extended republic and its broadly focused Congress, Madison believed at the time that the negative's defeat had ruined the new Constitution. As he wrote Thomas Jefferson at the close of the Constitutional Convention, "the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts agst the state governments."[22] And even as he defended the new Constitution publicly in *The Federalist*, he worked behind the scenes to have something like the negative restored. When the states ratified the Constitution without including the negative among the changes they demanded, he used his seat in the First Congress and stewardship of the very Bill of Rights demanded by the ratifying conventions to constrain the *federal* government to propose his own amendment— prophetically numbered "fourteenth"—to create important rights as against the *states*.[23] This last ditch effort also failed.[24]

A handful of commentators have recognized the negative's central importance to Madison.[25] None, however, has emphasized its significance to equal protection.[26] And none has recognized the sophistication

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19. Id.

20. Jack N. Rakove, The Madisonian Theory of Rights, 31 Wm. & Mary L. Rev. 245, 253 (1990) [hereinafter Rakove, Madisonian Theory].

21. Banning, supra note 9, at 118.

22. Madison, Sept. 6 Letter to Jefferson, supra note 13, at 163–64 (emphasis omitted); see also Letter from James Madison to Thomas Jefferson (Aug. 24, 1787), *in* 10 Papers of Madison, supra note 2, at 205, 212–14; infra notes 238–239, 286 and accompanying text. Given the uninviting alternative of continuing to operate under the Articles of Confederation, the fact that the Constitution failed to address the most important "vice" of the existing arrangements and was likely doomed to failure was not enough to set Madison, "the practical statesman," against it. See Hobson, supra note 1, at 233 (concluding that Madison "preferred the risk of the Constitution, defective as it was, to the anarchy he was certain would result from continuing under the Articles of Confederation").

23. See infra Part V.A.1.

24. Last ditch it was, because it relied on "exterior" constraints of the sort Madison believed to be ineffective. See infra Parts III.A, V.A.1 (discussing Madison's fourteenth amendment); infra notes 249, 386–388, 398 and accompanying text (detailing Madison's doubts about "exterior" or admonitory constraints).

25. E.g., Banning, supra note 9, at 117–19; Brant, supra note 17, at 12–13, 36–38, 104–05, 127–29; Rakove, James Madison, supra note 1, at 51–52; Hobson, supra note 1, at 217–19; Larry D. Kramer, Madison's Audience, 112 Harv. L. Rev. 611, 627–28, 634–36, 649–53 (1999) [hereinafter Kramer, Madison's Audience]; Jack N. Rakove, The Madisonian Moment, 55 U. Chi. L. Rev. 473, 497–98 (1988) [hereinafter Rakove, Madisonian Moment].

26. In an early article, Professor Rakove included protection of the rights of minorities, along with deterring the states from subverting the national government, as Madison's goals in proposing the veto. Rakove, Madisonian Moment, supra note 25, at 497–98. In later articles, however—in an analysis carried forward by Professor Kramer, see infra notes 30–31, 33–34 and accompanying text—Rakove linked Madison's concern with "populist legislation" adopted by "factious majorities" to fears about the sanctity of

and wisdom of Madison's view that it was only through a structural device like the negative—and not, for example, through the extended republic by itself, or through the judiciary's enforcement of an "exterior" admonition to treat minorities equally—that effective protection could be secured.[27]

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property rights and other republican liberties. See Rakove, James Madison, supra note 1, at 51–52; Rakove, Madisonian Theory, supra note 20, at 247 (arguing that "the most Madisonian element of the Constitution is arguably the fourteenth amendment" insofar as it protects individual rights against the states).

27. One scholar who has described Madisonian theory as sounding in equal protection is Vincent Blasi, in an essay on Madison's very earliest writings, on religious tolerance. Vincent Blasi, School Vouchers and Religious Liberty: Seven Questions from Madison's *Memorial and Remonstrance*, 87 Cornell L. Rev. 783, 806 (2002). Professor Blasi's effort to give Madison's *Memorial and Remonstrance* its rightful place in current legal debates about religious freedom provides a precedent for our own effort to restore the national veto to its proper place in modern equal protection scholarship.

Other observers have noted the link between Madison's conception of the extended republic in *The Federalist No. 10* and equal protection principles. But contrary to Madison's own conclusions, see supra note 22 and accompanying text; infra notes 232–233, 277 and accompanying text, these writers have tended to see that republic's establishment through the new Constitution as having largely succeeded in accomplishing all of Madison's equal protection goals. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 523–24 (1989) (Scalia, J., concurring); Terrance Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1190 (1977) (arguing that Madison was prescient to point out importance of diversity in guarding against "tyranny of the Majority" and in concluding that judicial review was weaker protection for minorities than safeguards built into political process through creation of a stronger national government); Note, A Madisonian Interpretation of the Equal Protection Doctrine, 91 Yale L.J. 1403, 1429 (1982) (linking Madison's conception of the extended republic to equal protection goals but concluding that the new Constitution's rearrangement of powers between state and national government largely achieved those goals); Alexandra Natapoff, Note, Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict, 47 Stan. L. Rev. 1059, 1087 (1995) (relying on Madison's theory of faction and the extended republic as basis for criticizing Supreme Court's "colorblindness" limitations on benign racial categories and arguing that factions may "be controlled through strnctural means and constant competition" among various entities of government that may produce appropriately benign race-conscious legislation).

Still other commentators have recognized that the attempt to afford sufficient equal protection through the extended republic has failed, but have assumed that the republic exhausted Madison's mechanisms for affording such protection—thus ignoring Madison's national veto and his anticipatory criticism of these commentators' favored solution: "exterior" constraints of the sort adopted by the Fourteenth Amendment's Equal Protection Clause. See John Hart Ely, Democracy and Distrust 79–81 (1980) [hereinafter Ely, Democracy] (linking Madison's discussion of faction in *The Federalist* to equal protection, but assuming that Madison expected the extended republic by itself to solve the problem and implying Madison's lack of foresight with the comment that "it didn't take long to learn that from the standpoint of protecting minorities [the Constitution's safeguards were] not enough"); William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 536–37, 539–40 (1986) (noting link between equal protection and Madison's extended republic but concluding that it took the Fourteenth Amendment to achieve the needed protection); infra notes 408–409, 559 and accompanying text; see also Robert A. Goldwin, From Parchment to Power: How James Madison Used the Bill of Rights to Save the

Most analysts who have taken the national negative seriously have classified it under the heading of "federalism"—the allocation of power between the national and state governments—and assumed that Madison intended the negative to enable the national government to bring the states to heel,[28] or to abolish state sovereignty altogether by putting states at the bottom of a national hierarchy.[29] Like Madison of the Virginia Resolutions, however, Madison the Federalist was no hypercentralizer bent on making states toe the national line. The main "vice" he wanted the new constitution to correct was not the states' insufficiently subordinate relationship to the national government, but their chronically dismissive treatment of their own minority citizens and failure to govern themselves in the general interest.[30] Madison's solution was not to cow the states—which he hoped would play a crucial role in cabining federal power—but instead to structure lawmaking incentives so that state officials would take a broader view of their publics and the public good.[31] Although Congress would have sweeping power to veto unright-

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Constitution 59 (1997) (assuming that the Fourteenth Amendment was the kind of negative Madison had in mind).

28. "Madison was convinced that the fundamental defect of the Confederation was that Congress lacked the sanctioning power necessary to make the states carry out its decisions." Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 Stan. L. Rev. 1031, 1044 (1997) [hereinafter Rakove, Origins]; see also Rakove, Madisonian Moment, supra note 25, at 497–98 (noting that Madison believed that rejection of national negative undermined Constitution's power over the states).

29. See, e.g., Hobson, supra note 1, at 218–19 (claiming that "Madison proposed nothing less than an organic union of the general and state governments" and sought "consolidation" of state and national governments); Yoo, supra note 6, at 1365 n.242, 1366–67 (claiming, by way of arguing that Madison's views are not a reliable indication of how the Constitution ought to be interpreted, that his concern for local minorities and defeated national veto proposal was the motivation and "centerpiece of an effort [by Madison] to transform the states from their status as independent sovereigns under the Articles of Confederation to something more akin to the 'lesser jurisdictions,' of a 'large Government'" and concluding that "[t]he opposition of Madison and others to the power of the states . . . highlights their manifest failure to convince the Philadelphia Convention to undermine, eliminate, or significantly reduce the scope of sovereignty" (citations omitted)); cf. infra Part IV.C.4 (describing complex interaction between state and federal governments that Madison envisioned).

30. See infra Part IV.A; see also Kramer, Madison's Audience, supra note 25, at 634 n.98, 649 ("Madison apparently never contemplated [consolidation of the states into the national government] and sought only a negative power to guard against abuses—a point too-often overlooked . . . .").

31. See infra Part IV.B–C. Madison has been misunderstood on this point from the beginning. With the exception of Alexander Hamilton and James Wilson, the other conveners inaccurately assumed—sometimes sympathetically; mostly not—that Madison's real goal (like Hamilton's and Wilson's) in proposing the veto was to strengthen the national government. As Professor Kramer has shown, Madison's contemporaries often failed to understand his arguments, even those by which they claimed to be convinced. See Kramer, Madison's Audience, supra note 25, at 647–71. Hamilton's notes from the Convention show that he understood Madison's arguments about the dangers of faction in a republican state and the capacity of a national veto to avoid the problem, but that he disagreed with Madison on the point and supported the veto for the reason the other

eous measures enacted by state lawmakers, the goal was not to shove national priorities down the throats of the states. Rather, the "happy effect" of local legislators operating under the watchful eye of a "disinterested & dispassionate [congressional] umpire" was to be the end of factional discrimination by stable and interested local majorities against chronically disempowered minorities.[32]

More recently, Professor Kramer has recognized Madison's fixation on the national negative, while challenging the view that it was meant to weaken the states.[33] In Kramer's view, Madison intended the negative to do work we now assign to the Fourteenth Amendment's Due Process Clause: "preventing abuses of republican liberty in the states."[34] This interpretation moves the negative into the proper hemisphere of constitutional analysis—relations between the governed and the government, not those among the government's parts. However, it still leaves the device on the wrong continent.

To be sure, Madison was a great partisan of republican liberty—individuals' freedom to pursue their own interests.[35] He agreed with the other conveners that enabling individuals to govern themselves in their daily affairs (what he called "civil" liberty)[36] required citizens first and foremost to be able to govern themselves in their political affairs.[37] A new constitution accordingly had to empower individuals to vote in frequent elections, and to play the state and national governments (and the branches of the latter) off against eacb other so government power would never be concentrated enough to threaten individual liberty.[38]

But, anticipating Bingham and the other Fourteenth Amendment framers, Madison also realized that too much self-government is a bad thing. Even when mobilized to keep elected representatives from tyrannizing their electors, an excess of self-government can allow stable and interested majorities to tyrannize minorities. That power, in turn, can dangerously destabilize the polity, as lawmakers defect from a commit-

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delegates wrongly assumed Madison had proposed it: to give the national government a broad power to coerce the states. See id. at 641–42, 645 & n.141, 657–58 nn.201–202; infra note 203. For Wilson's understanding of Madison's thinking and alternative view, see infra Part IV.C.2; infra notes 338, 388 and accompanying text.

32. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 Papers of Madison, supra note 2, at 317, 318 [hereinafter Madison, Mar. 19 Letter to Jefferson]; Madison, Letter to Washington, supra note 16, at 382–84.

33. See Kramer, Madison's Audience, supra note 25, at 649–53; supra notes 31–32.

34. Kramer, Madison's Audience, supra note 25, at 642.

35. See infra Part II.B.1.

36. By "civil rights," Madison meant all of the rights and liberties exercised by self-governing individuals in their personal lives, in their social activities, and in their interactions outside the realm of government and politics. See The Federalist No. 51, supra note 10, at 324 (James Madison); id. No. 10, at 79 (James Madison).

37. See infra notes 100–102 and accompanying text.

38. See infra Part II.B.

ment to a common good transcending all groups, and members of disfavored groups defect from the polity.[39]

Recognizing these dangers, Madison did not design the national negative primarily to shield individual liberties from state abuse. He saw that the "tyrann[ization]," [40] or "oppression," that needed curbing was an *exercise* of individual liberty and self-government, albeit one he considered the embodiment of "injustice." [41] For Madison, therefore, "injustice" was not principally the deprivation of individual rights by the government, but instead the majority's use of its liberty via the vote and the mobilization of its representatives to threaten the interests of groups chronically in the minority through legislation with no justification in the common good.[42] "Injustice" was what we today call discrimination[43]—"the majority trampling on the rights of the minority." [44] Every example of "vicious legislation" Madison gave involved laws disadvantaging people based on their personal status, religious beliefs, economic interests, and geographic location—laws whose degrees of "injustice" Madison categorized in a manner strikingly akin to modern equal protection "tiers." [45] For Madison, therefore, the negative's objective was not due process but equal protection—and through it the binding together of a nation of individuals and factions into a cohesive whole with a common good.[46] The goal was not liberty, but equality and fraternity.

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39. See infra Part II.B; infra notes 174–178 and accompanying text.

40. The Federalist No. 47, supra note 10, at 301 (James Madison).

41. See James Madison, Debates at the Virginia Convention (June 6, 1788), *in* 9 The Documentary History of the Ratification of the Constitution 989, 990 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter Madison, Debate].

42. See infra Part II.B.2.

43. See infra Part II.B.2.

44. Madison, Debate, supra note 41, at 989–90.

45. See infra Part II.B.2.

46. In drawing a bright line between the equal protection considerations at the core of our own analysis and the due process considerations at the beart of Professor Kramer's, we risk overstating our case and understating Professor Kramer's insight. Madison certainly recognized that discrimination can manifest itself in the denial of individual liberties to members of minority groups, that deprivations of personal liberty by the states are a bad thing no matter whom tbey affect, and that a national veto would discourage the adoption of laws impinging upon individual liberties generally and not just the liberties of minorities. At the core of Madison's thinking, however, was the insight that in a republic, popularly enacted laws are unlikely to impinge equally on everyone's individual liberties, and that if they do, the truly common sacrifice that results is not as troubling as harm selectively targeted on members of particular minority groups. See infra Part II.B.2. This view convinces us of the importance of the distinction we are drawing between equal protection of what today are called "civil rights"—whicb we take to be Madison's principal concern—and the due process protections of "civil liberties" tbat Professor Kramer emphasizes. See infra Part V.A.1 (noting that even when Madison proposed to include a provision very like the modern Fourteenth Amendment's Due Process Clause in the Bill of Rights, he justified the provision in equal protection, not individual rights, terms).

B. *Appreciating Madison's Skepticism About "His" Constitution*

It is time, therefore, to disassociate Madison from the Constitution he is esteemed for having fathered but in fact disowned as it went out into the world.[47] True, the blueprint for the Constitution was Madison's "Virginia Plan," based on his theory of sound government and study of the vices of ancient republics and the confederation of former colonies.[48] And true, it was he who "mastermind[ed]" the Constitutional Convention and was its "dominant personality";[49] who, along with Hamilton and Jay, sold the resulting Constitution to the public;[50] who shepherded it through the all-important Virginia ratifying convention; and who implemented the bargain that assured its ratification by drafting the Bill of Rights and securing its acceptance by Congress.

But all that said, "Madison's" constitution departed decisively from his design and his theory of sound republican government. And he said so, not only privately near the end of the Convention but also publicly in his post-Convention masterpieces of political theory and public propaganda in "support" of the Constitution—*Nos. 10* and *51* of *The Federalist.* As we demonstrate below, these documents, particularly *No. 51*, beg the conclusion—indeed, they seem *intended* to beg the conclusion—that the Constitution was tragically flawed for lack of an effective protection against abuse and oppression of minorities by the states.[51]

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47. See supra note 17; infra notes 238–239, 286.

48. Cf. Burns, supra note 1, at 10–11, 98–102 (describing Madison's nationalist position at the Constitutional Convention, which resulted from his concerns about the "evils" created by the Articles of Confederation).

49. Hobson, supra note 1, at 215.

50. [T]he central problem [in studying Madison the Framer] is to reconcile divergences between his public and private positions—or to put the point another way, to set the public defense of the Constitution in The Federalist in the context of Madison's prior and private analyses of what he called the "vices of the political system of the United States" and the specific remedies he sought, and often failed, to convince the Federal Convention to adopt.

Rakove, The Madisonian Moment, supra note 25, at 478; see also *Editorial Note* to Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 Papers of Madison, supra note 2, at 205 (noting that "because 'Publius' did not need to discuss the negative, JM's essays in *The Federalist* are an incomplete statement of his political thought").

51. See infra Part III.B. This is not to suggest that Madison the propagandist risked much by baring his doubts as a political theorist. Readers of *The Federalist* who were disposed to think the Constitution already took too much power from the states hardly would have been moved to exploit Madison's implication that the Constitution ought to have constrained the states even more. See William H. Riker, The Strategy of Rhetoric: Campaigning for the American Constitution 39–42 (1996). And nationalist readers like Hamilton, who very well may have recognized what was implicit in Madison's contributions to *The Federalist*, were too intent on sealing the nationalizing deal the conveners had struck to worry about what more they might have gotten. See also supra note 3; infra notes 373, 389 and accompanying text (noting that Hamilton and other nationalists tended to subordinate Madison's equal protection worries to desire for more favorable balance of power between federal and state governments). See generally infra Part IV.C.1–2.

It thus takes only a little imagination to hear Madison the prophet foretelling the Civil War, Jim Crow, Massive Resistance, and the other instances of virulent American factionalism, xenophobia, and discrimination. And it takes only an honest reading of his masterpieces to find him explicitly predicting both the "inadequa[cy]"[52] and ineffectualness[53] of the constitutions of 1868, 1937, 1954, and 1964, given their reliance on inherently weak "exterior" or admonitory, as opposed to "internal" or structural, constraints against discrimination.[54] For Madison, that is, the Fourteenth Amendment's stillbirth in the *Slaughter-House Cases*,[55] and the recent stifling of equal protection enforcement by the courts[56] through doctrines of subjective intent,[57] "incremental" causation,[58] remedial limits,[59] qualified immunity,[60] local control,[61] separation of powers,[62] and

52. The Federalist No. 51, supra note 10, at 320 (James Madison).

53. Madison, Sept. 6 Letter to Jefferson, supra note 13, at 163–64 ("[T]he plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which everywhere excite disgusts agst the state governments." (emphasis omitted)).

54. Id.

55. 83 U.S. (16 Wall.) 36 (1872).

56. See Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 12–15 (1972).

57. E.g., Washington v. Davis, 426 U.S. 229, 240–43 (1976) (discussing requirement in school desegregation cases of racially discriminatory purpose and noting insufficiency of racial impact for invalidation of a law); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) (emphasizing "*purpose* or *intent* to segregate" as distinguishing factor between de jure segregation and de facto segregation and holding that de facto segregation does not alone violate equal protection clause).

58. E.g., Missouri v. Jenkins, 515 U.S. 70, 101 (1995); Freeman v. Pitts, 503 U.S. 467, 496 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976).

59. E.g., Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585 (1983) (describing limits of, and public resistance to, modern civil rights injunctions, such as foot dragging of officials, boycotts, "white flight," and other hostility, and criticizing federal courts for failing to be candid when limiting remedies in reaction to such resistance).

60. E.g., Saucier v. Katz, 533 U.S. 194, 201, 205 (2001) (holding that threshold inquiry as to whether defendant public officials are entitled to qualified immunity is distinct from subsequent inquiry into merits of constitutional claim; in order to satisfy former doctrine, plaintiff must demonstrate that defendant public officials violated constitutional rights so clearly established that defendants' conduct could not have been result of a "reasonable mistake[ ]" about what the law required).

61. E.g., Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (holding, based in part on local-control considerations, that interdistrict school desegregation orders exceed limits of federal equitable authority, even when adopted to remedy intentional, state-sponsored racial segregation, unless every school district encompassed in the plan was itself responsible for segregation in another district).

62. E.g., City of Boerne v. Flores, 521 U.S. 507, 523–24, 536 (1997) (holding Religious Freedom Restoration Act unconstitutional on grounds that it violated separation of powers between Congress and federal judiciary, and holding that judiciary alone, not Congress, defines constitutional rights and thus the remedial reach of Section 5 of the Fourteenth

states' rights,[63] are the inevitable results of defective constitutional design.

Raising up Madison the equal protection theorist and constitutional prognosticator means knocking down Madison the idol of the New Federalism. It is of course true that history may "suppl[y] an original Constitution, from which much 20th century political innovation," including the protection of minorities against abusive state power, may be "seen as an unacceptable departure."[64] But it is inaccurate for the current Court and sympathetic commentators to associate James Madison with this complaint.[65] Although Madison would almost certainly question the equal protection currently afforded to minorities against factional oppression by the states, his "insufficiency" worries would be the opposite of New Federalist complaints about "excessive" national intervention on behalf of local minorities.

II. HARMONIZING LIBERTY, EQUALITY, AND FRATERNITY

Much of this Article is about Madison the prophet of doom, a Cassandra who pointed a different way toward equal protection than the rocky and dangerous path to that goal that the nation has instead taken. But in conceptualizing that goal, Madison's thinking at the time of the founding was prophetic in a different way, anticipating what is now becoming the accepted wisdom about equal protection's crucial role in a democratic polity. We begin with this second feat of successful prophecy to make clear why it remains important to heed Madison's first, doomsaying warning about the dangers of the wrong path to equal protection. By describing the role of equality (really, equal protection) in preventing the freedom of a liberty-loving polity from destroying society's capacity for fraternity—and by then noting how thoroughly Madison anticipated this crucial move in republican theory and how convincingly he justified it—we can begin to suggest how attentive we ought to be to Madison's perhaps equally prescient and convincing views about how to achieve equal protection.

A. *The Emerging Synthesis of Liberty, Equality, and Fraternity*

On one view, liberty, equality, and fraternity are inconsistent goals.[66] Liberty promotes accumulation or aggrandizement, and individualism;

Amendment); see also infra notes 574–578, 613 and accompanying text (discussing *Boerne* in relation to Madison's views).

63. E.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40–43 (1973) (finding no fundamental right to equal financing of public education, in part on the basis that education and state taxation are subjects as to which federal courts have traditionally deferred to state legislatures).

64. Robert W. Gordon, The Struggle over the Past, 44 Clev. St. L. Rev. 123, 124 (1996).

65. See supra note 5; infra Part VI.

66. James S. Liebman, Desegregating Politics: "All-Out" School Desegregation

equality and fraternity require the opposite—redistribution and communal control. A contrary view, now becoming dominant, is that the three objectives are consistent, indeed mutually necessary, in a particular kind of liberal polity—including, arguably, the polity toward which our own government aspires through the medium of the judicially enforced Equal Protection Clause.[67] This alternative account accepts the conventional liberal view that liberty is the preeminent goal or, in Madison's words, "essential to political life."[68] By "liberty," what is meant is the individual's ability to choose values and plans and, equally important, the progressive extension of that ability to ever more individuals and ever more public and social spheres of human endeavor. This conception recognizes, however, that liberty is its own worst enemy. Liberty invites, and even promotes, accumulation and aggrandizement. In the process of accumulating and aggrandizing, individuals or groups of them are permitted and tempted to advance their own values and interest to the exclusion, and eventually the destruction, of the values and interests of other individuals and groups. Insecurity and alienation result.

In this emerging view, economized conceptions of equality and fraternity provide a cure for these self-defeating excesses of liberty. These economized conceptions inform and help explain the Equal Protection Clause as interpreted by courts during the last several decades. The conception of equality is economized in the way that the preeminence of liberty dictates—the aspect in which all individuals are equal is their qualitative capacity to choose values and plans.[69] Or in a more postmodernist vein, individuals are equal because they have the same capacity to be different.[70]

The conception of fraternity or community is likewise economized in the way that liberty and equality dictate. Consistent with the demands of liberty, individuals are not required to fraternize at all—unless they choose to have public as well as private lives, in which case they are re-

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Explained, 90 Colum. L. Rev. 1463, 1552–56 (1990) [hereinafter Liebman, Desegregating Politics].

67. Id. at 1541–65.

68. The Federalist No. 10, supra note 10, at 78 (James Madison); see infra Part III.A; infra note 102; see also David F. Epstein, The Political Theory of *The Federalist* 113–14, 148 (1994); John Locke, Second Treatise of Government, ch. 9, §§ 123–124, at 65–66 (C.B. Macpherson ed., 1980); Charles de Secondat, Baron de Montesquieu, The Spirit of the Laws, bk. XI, ch. 6, at 156–66 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748); id. bk. XII, ch. 2, at 188 (claiming that civil, not political, liberty is the preeminent goal of government).

69. This conception of equality is economized, inter alia, because its goal is not redistributive, although redistribution may sometimes be a means to its achievement. See Liebman, Desegregating Politics, supra note 66, at 1544–45 & n.374 (noting that Ronald Dworkin, John Rawls, and others define the basic principle underlying the Equal Protection Clause in this way).

70. See, e.g., Richard Rorty, Solidarity or Objectivity?, *in* Post-Analytic Philosophy 3, 5–6, 18 n.12 (John Rajchman & Cornel West eds., 1985).

quired to practice only a weak sort of other-considering "virtue."[71] Consistent with the demands of (liberally economized) equality, the virtue individuals must practice in their public lives is "equal concern" virtue. Public actors must refrain from public acts characterized by[72] a belief that the individuals or groups disadvantaged by the acts are less worthy of respect and concern either because the disadvantaged individuals or group members are not worthy choosers or because the values or interests they have chosen are unworthy.[73] Put differently, and drawing upon a proto-equal protection provision that, courtesy of James Madison, *did* creep into the first Constitution in its first amendment: Individuals acting in the public sphere must refrain from "establishing" a particular type of chooser, chosen value, or interest as the one the polity prefers.[74]

In one important sense, this conception of fraternity, community, and virtue is *not* economized. Its notion of public actors and public acts is broader than the standard conceptions of "state action" and "politics." Citizens,[75] as well as public officials—even, sometimes, citizens acting in a

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71. For discussion of "virtue" in connection with communitarian legal theory, see, e.g., T. Alexander Aleinikoff, Theories of Loss of Citizenship, 84 Mich. L. Rev. 1471, 1494 (1986) (claiming that "the bywords of communitarian theory are solidarity, responsibility, and civic virtue"); Frank I. Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 18 (1986) ("Republicanism's 'animating principle' is said to be civic virtue."); Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543, 543–50 (1986) ("A feminine jurisprudence, instead of rejecting the communitarian and virtue-based framework of Jeffersonian republicanism, might embrace and adapt it for modern society.").

72. "Characterized by" is meant in the sense of "intentionally acting on the basis of," as in the purpose requirement of equal protection law. See supra note 57 and accompanying text; infra notes 521–522 and accompanying text. Alternatively, it is meant in the sense of "projecting the view that," as in the Court's "message-conveyance" test for violations of the Establishment Clause. See, e.g, Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) (adjudicating an Establishment Clause challenge based on whether a "reasonable observer is likely to draw from the [state action] . . . an inference that the State . . . is endorsing a religious practice or belief" or is otherwise not "neutral" as between different religious beliefs (citation omitted)). For uses of a "message conveyance" test in the equal protection context, see, e.g., Bush v. Vera, 517 U.S. 952, 984 (1996) (acknowledging "expressive harms" that race-based drawing of electoral districts can cause, even apart from any concrete effect on voting); Shaw v. Reno, 509 U.S. 630, 647–48 (1993) (similar); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." (citation omitted)); see also Blasi, supra note 27, at 806 (linking equal protection and Establishment Clause theory and doctrine); Liebman, Desegregating Politics, supra note 66, at 1574–75 (same); infra Part II.B.2.b (same).

73. For an explanation of how the law aims to eliminate such public acts through vehicles like the doctrine of suspect classifications, which facilitates analysis of actors' motivations, see Ely, Democracy, supra note 27, at 145–48.

74. On the link between establishment and equal protection, see supra notes 27, 72; infra Part II.B.2.b; infra note 134 and accompanying text.

75. By citizens we mean individuals engaged in public actions, such as voting and even speaking if doing so "incites" political action. See Liebman, Desegregating Politics, supra note 66, at 1552–53; infra notes 98–102 and accompanying text.

civil or social,[76] but not the political, sphere—must practice equal concern virtue.[77]

That, in any event, is a *theory* of why liberty needs equality and fraternity to save liberty from itself. In *practice*, however, liberty abhors its cure. Individuals invited to choose values and plans do not readily respect and concern themselves with others whose values and plans conflict with their own and about whose capacity to choose wisely they may have serious doubts. When left to their own devices, liberated individuals are likely to consider even economized equality only a theory and even economized fraternity an inconvenient or obnoxious recipe for subordinating their freedom to someone else's or to the collective. By all evidence, moreover, liberated individuals strongly resist equality and fraternity even when they are *not*, strictly speaking, left to their own devices and instead are *legally admonished* by the Equal Protection Clause to adhere to the economized notions of equality and fraternity that are described above. This helps explain why judges are so often called upon—yet so often fail—to condemn inequitable, nonfraternal exercises of political freedom and are called upon and fail to adopt remedies that effectively replace the resulting misdistributions of public services and skewed institutional practices with constitutional ones.[78]

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76. Civil or social activity includes buying, selling, working, employing, and publicly associating.

77. The Constitution applies to political action, so "virtue" in that field of endeavor is always required. See Liebman, Desegregating Politics, supra note 66, at 1581. Legislation properly governs civil or social action and may (although it need not) impose an equal concern requirement in that sphere via civil rights legislation. See infra note 447. Although courts sometimes adjudicate "intent" issues (as we advocate) by scrutinizing not only what public officials did and wanted but what their constituents did and wanted, doing so is more controversial than other methods of adjudicating equal protection violations. See Liebman, Desegregating Politics, supra note 66, at 1605. Given that mutual "participation," other-considering "virtue," and "deliberation" are important procedural indicia of community, see, e.g., Hannah Arendt, On Revolution 115 (1963); Michelman, supra note 71, at 27–36, this conception's broad notion of who constitutes a participant obliged to act virtuously, and (thus) to deliberate, achieves a fair amount of the communitarian agenda. It does so, however, in service of liberalism and without the communitarian tendency towards parochialism and oppression.

78. On the ineffectiveness of judicial relief for equal protection violations, see Gerald N. Rosenberg, The Hollow Hope (1991) (debunking the view that the Supreme Court and federal courts were instrumental in securing civil rights, and questioning whether courts are an effective means of securing change); Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice 3 (1987) (arguing that "the salvation of racial equality has eluded us again"); Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1376–81 (1988) (claiming that civil rights law has failed to remedy discrimination, permits subordination of people of color, and has been rendered indeterminate by neoconservative notions of colorblindness); Linda S. Greene, Race in the 21st Century: Equality Through Law?, 64 Tul. L. Rev. 1515, 1517 (1990) (posing "a question presented time and time again, before and after *Dred Scott*: whether meaningful equality can be obtained for African-Americans through law"); Richard Primus, *Bolling* Alone, 104 Colum. L. Rev. 976, 979–81 (2004) (discussing surprising paucity of federal decisions finding

Elsewhere, we and others have been groping towards a solution to this difficulty.[79] The solution builds on the idea that, although individu-

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federal government liable for equal protection violations); Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 475–78 (2001) (expressing doubts about ability of courts, lawyers, and rule-based approaches generally to remedy employment discrimination). For the Madisonian explanation of the failure of courts in this regard, see infra Part V.B.

79. See, e.g., Archon Fung et al., Realizing Labor Standards, *in* Can We Put an End to Sweatshops? 3, 4–12 (Joshua Cohen & Joel Rogers eds., 2001) (advocating a system of self- and third-party-monitoring of overseas working conditions by corporations operating global supply chains); Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 314–23 (1998) [hereinafter Dorf & Sabel, Democratic Experimentalism] (describing potential role of democratic experimentalism in resolving difficult questions of constitutional interpretation); Michael C. Dorf & Charles F. Sahel, Drug Treatment Courts and Experimentalist Government, 53 Vand. L. Rev. 831, 832–38 (2000) (discussing recent innovations in use of court-monitored treatment plans for drug addicted offenders); Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 4 (1997) (advocating collaborative innovation in the administrative context); Brandon Garrett, Remedying Racial Profiling, 33 Colum. Hum. Rts. L. Rev. 41, 48 (2001) (advocating a system in which police departments use community partnership, monitored information collection, and problem solving as a means of combating racial profiling); Garrett & Liebman, Experimentalist Equal Protection, supra note 8 (manuscript at 54) (describing how a "Madisonian light on experimentalism reveals how modern experimentalist regimes help solve the problem of equal protection"); Bradley C. Karkkainen, Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?, 89 Geo. L.J. 257, 260 (2001) (championing systematic use of performance monitoring and benchmarking as regulatory tools in the environment and other areas); Bradley C. Karkkainen, Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance, 102 Colum. L. Rev. 903, 908 (2002) (proposing that NEPA be retooled as a means of progressively redefining government projects to moderate their environmental effects to the extent currently possible); James S. Liebman & Charles F. Sabel, The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda, 81 N.C. L. Rev. 1703, 1704–07 (2003) (claiming that the No Child Left Behind Act is part of a national "New Accountability" movement for school reform that potentially could supplant *Brown v. Board of Education* as the model for institutional reform and achievement of effective education); James S. Liebman & Charles F. Sabel, A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform, 28 N.Y.U. Rev. L. & Soc. Change 183, 184–85, 191–92, 303–04 (2003) [hereinafter Liebman & Sabel, Public Laboratory] (describing how a combination of movements towards standards, changing goals of desegregation and school finance litigation, and state and federal legislation, have converged to create a promising experimentalist framework for school reform); Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 558–62 (1997) (exploring the uses of community-based planning and monitoring as a method of managing police discretion); Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1015, 1019 (2004) (describing an evolution in public law remedies from injunctive command-and-control regulation towards experimentalist remedies that permit collaboration, flexibility, and ongoing learning); Sturm, supra note 78, at 462–63 (advocating a multi-tiered and interactive "regulatory" framework that makes use of employee participation, problem solving, and ongoing monitoring to remedy often informal patterns of employment discrimination); William H. Simon, Solving Problems v. Claiming Rights: The Pragmatist Challenge to Legal Liberalism (2003), available at http://www.wisc.edu/wage/simon.html (unpublished

als and their representatives are unlikely to be admonished out of a disposition to exercise their liberty in inequitable, nonfraternal ways, they sometimes abandon such behavior in situations in which the need to solve common problems creates an interest in acting equitably and fraternally as those concepts are defined, economically, above.[80] The question then arises whether such salutary situations may be constitutionally constructed: Relying on what might be called Madisonian psychology and governance mechanics (concepts we more fully describe below), can (1) a cautious belief in humankind's capacity to practice virtue, coupled with (2) a healthy skepticism about its innate disposition to do so, prompt and guide (3) the construction of "ethical situations"[81] that give ambitious and self-seeking individuals (4) incentives to behave virtuously in their public lives and eventually (5) a disposition or habitual tendency to do so?

The next portions of this Article show that James Madison fully anticipated each important aspect of this asserted method of harmonizing liberty, equality, and fraternity, including: (1) the underlying political theory, which identifies equality and fraternity as two necessary, liberty-preserving constraints on liberty; (2) the need, in bringing theory into practice, for a vigorous equal protection constraint on state action; (3) the insufficiency of our admonitory, judicially enforced Equal Protection Clause to achieve the necessary equal protection; and (4) the need instead for structural mechanisms to accomplish that goal.

B. *Madisonian Liberty, Equality, and Fraternity*

By no means a strong democrat,[82] and only a skeptical republi-

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manuscript, on file with the *Columbia Law Review*) (describing a new school of pragmatist thought that advocates carefully monitored problem solving, in lieu of the announcement and enforcement of fixed entitlements, as the most effective means of reforming social institutions and responding to the needs of disadvantaged communities).

80. See Liebman, Desegregating Politics, supra note 66, at 1614–15.

81. Id. at 1609–14; see Garrett & Liebman, Experimentalist Equal Protection, supra note 8 (manuscript at 6–8) (describing Madison's constitutional objective as an "ethical situation" where "through the exercise of competing, overlapping powers . . . individuals constrain others in adjacent institutions to behave in [an] 'impartial' manner"); see also infra Part III.A. A well-known philosophical example of an ethical situation is Rawls's Original Position. See John Rawls, A Theory of Justice 118–22 (1971) ("[F]or each traditional conception of justice there exists an interpretation of the initial situation in which its principles are the preferred solution.").

82. Madison attacked pure democracy and rejected Jefferson's proposal for frequent constitutional conventions because, in his view, the people could not be trusted with the responsibility. At various points in *The Federalist*, he "points with some satisfaction to the fact that this 'wholly popular' government is distinguished by its '*total exclusion of the people in their collective capacity.*'" Epstein, supra note 68, at 195 (quoting The Federalist No. 14, supra note 10, at 100 (James Madison); id. No. 63, at 387 (James Madison)).

can,[83] James Madison was an ardent liberal. Indeed, he seems to have come by his republicanism—what he described as his "honorable" but unproven "assumption" that "the people" are capable of effectively choosing their own governments, representatives, and laws[84]—as a byproduct of his liberal belief in the capacity to choose beliefs, values, and plans. Madison's liberalism also defined his economized conception of equality and prompted his recognition of the need for a governmental structure aimed at achieving fraternity or at least at avoiding its opposite: violent internecine conflict.

1. *Liberty.* — Madison the political theorist is perhaps most famous for his identification of "faction" as the "mortal disease[ ]" of republican government, unless it is carefully controlled.[85] For Madison, however, the problem of faction can only be controlled, and can never be cured, because it is an inevitable byproduct of something that cannot and should not be eradicated, namely, "liberty."[86] Madison reasoned that the two sources of faction—passionately but not universally held "opinions" and differing "interests"[87]—are the unavoidable result of "diver-

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83. See infra notes 93–102 and accompanying text. Like Madison, we define "republican" as any "government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." The Federalist No. 39, supra note 10, at 241 (James Madison).

84. The Federalist Nos. 37, 39, supra note 10 (James Madison); see Epstein, supra note 68, at 118–20. As Alexander Hamilton wrote:

> It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

The Federalist No. I, supra note 10, at 33 (Alexander Hamilton).

85. The Federalist No. 10, supra note 10, at 77 (James Madison).

86. Cf. Kramer, Madison's Audience, supra note 25, at 632 (noting that, for Madison, "[f]action is the fundamental social force that needs to be controlled, the very stuff of which society is made").

87. The Federalist No. 10, supra note 10, at 78 (James Madison) ("By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."). Madison carefully distinguished opinions from interests as causes of faction, noting subtle differences between the allegiances, organizing methods, and actions of factions arranged according to each of those two motivations, and noting less subtle differences in the propriety of governmental regulation that preferred and subordinated along lines of opinion and interest. On passionate opinions, Madison says:

> As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.

Id. On interest, Madison says:

> The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of

sity."[88] They arise precisely because people are "at liberty to exercise" a "diversity . . . [of] faculties,"[89] including (1) the faculty of inherently "fallible" "reason" (the source of "different opinions"); (2) the "different and unequal faculties of acquiring property" (the source of "the possession of different degrees and kinds of property," which in turn is the source of "a division of the society into different interests and parties");[90] (3) the faculty of political action (which leads individuals to coalesce and publicly promote their respective opinions and interests);[91] and most fundamentally, (4) the faculty of "free choice in exercising [other] faculties."[92]

Revealing Madison's liberal bent, he recoiled at the possibility of saving Republican government from "the mortal disease[ ]" of faction by "destroying the liberty whicb is essential to [faction's] existence."[93] Quite to the contrary, he believed that "[t]he protection of these faculties [for self-service, self-expression, and self-rule] is the first object of govern-

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these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties.

Id.; see infra notes 92, 134, 148–151, 158, 165–168 and accompanying text.

88. The Federalist No. 10, supra note 10, at 78 (James Madison).

89. See Epstein, supra note 68, at 72 & n.27 (noting that Madison included reason as a faculty).

90. The Federalist No. 10, supra note 10, at 78 (James Madison); see Beer, supra note 7, at 272–73 (noting that for Madison "each person also enjoyed as 'a gift of nature' the right so to employ his faculties as to acquire, use, and dispose of property"); James Madison, Property, Nat'l Gazette, Mar. 27, 1792, reprinted in 14 Papers of Madison, supra note 2, at 266, 266–68 (developing Madison's views on property).

91. Madison defined faculties (1) and (2) as the exercise of "public . . . liberty" and faculty (3) as the exercise of "personal" liberty. The Federalist No. 10, supra note 10, at 77 (James Madison).

92. Epstein, supra note 68, at 84. Madison's catholic views as to the wide array of value-laden and interested choices that individuals are at liberty to make is revealed by his description of the various factions into which individuals group themselves by their choices:

> All civilized Societies would be divided into different Sects, Factions, & interests, as they happened to consist of rich & poor, debtors & creditors, the landed[,] the manufacturing[,] the commercial interests, the inhabitants of this district or that district, the followers of this political leader or that political leader, the disciples of this religious Sect or that religious Sect.

James Madison, Popular Election of the First Branch, Speech at the Constitutional Convention (June 6, 1787), *in* 10 Papers of Madison, supra note 2, at 32, 33 [hereinafter Madison, June 6 Convention Speech].

93. The Federalist No. 10, supra note 10, at 77–78 (James Madison). Madison added:

> It could never be more truly said than of th[is] . . . remedy that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

Id. at 78.

ment,"[94] the very reason humans seek the protections but also risk the dangers (to liberty) of civil society and government.[95] Insofar as the faculties involved are the "personal liberties," i.e., the capacity to choose the values and life plans that constitute private life, protecting these "faculties" is the object that animates *all*—even nonrepublican—"free" governments, meaning polities that allow citizens to choose their own livelihoods and beliefs, whether or not they allow citizens (as in a republic) to choose their government.[96] This same object especially animates *republican* governments, however, precisely because it applies as well to "political liberty," i.e., the right to choose governments, governors, and laws.[97] Because men characteristically "choose to live a 'political life,'" only in a republic does government enable individuals to exercise faculties fully.[98]

Madison's liberalism, his devotion to the human capacity for freedom, seems to have driven him inexorably—if perhaps ambivalantly—to his republican commitment to popular sovereignty. His chief explanation in *The Federalist* for the Constitution's republican character was that only republican government was "reconcilable . . . with the honorable determination which animates every votary of freedom to rest all our po-

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94. Id. at 78.

95. Id. No. 51, at 324 (James Madison); see Epstein, supra note 68, at 144, 163.

96. See James Madison, Republican Distribution of Citizens, Nat'l Gazette, Mar. 3, 1792, reprinted in 14 Papers of Madison, supra note 2, at 244, 244–46 [hereinafter Madison, Republican Distribution]. Free governments include England's, although it is not a republic because only one branch is popular. The Federalist No. 8, supra note 10, at 70 (Alexander Hamilton). On religious freedom as an attribute of a "free" government, see infra note 115.

97. See Madison, Republican Distribution, supra note 96, at 244–46; see also The Federalist No. 10, supra note 10, at 77 (James Madison).

98. Epstein, supra note 68, at 68. Under this conception, the attribute of individuals to which the most fundamental governmental and legal protection attaches is not some particular *fruit* of the exercise of the human faculties (such as Lockean property), and instead is the possession of the various self-actualizing *faculties* themselves—most fundamentally, the *faculty of choice* among the various faculties and their fruits. As Professor Epstein writes:

> Madison does not say that government is instituted to protect the rights of property, but rather that the "first object of government" is the "protection" of the "faculties of men." . . . As in Locke's account, men enter society for the purpose of protecting something which they enjoy precariously prior to society. But Madison's specification of that something is an apparently original formulation. Men do not seek to protect any particular property but rather their faculties of acquiring property altogether.

Id. at 74. As Epstein himself shows, Madison seems to have included among the "faculties" that of reason leading to diverse opinions and values. Id. at 72 & n.27. The better reading, therefore, is to expand Madison's insight beyond the protection of the property-acquiring faculties to *all* faculties of choice. See supra notes 91–92 and accompanying text. There is something of this same notion in the Declaration of Independence's statement that "all men are created equal" given their "unalienable Rights" to "Life, Liberty, *and pursuit of Happiness.*" The Declaration of Independence para. 2 (U.S. 1776).

litical experiments on the capacity of mankind for self-government."[99] Given his contemporaneous concession that "instability, injustice, and confusion introduced into the public councils have, in truth, been the mortal diseases under which popular governments have *everywhere* perished,"[100] Madison offered little besides hypothesis to justify either his faith in humankind's capacity for self-government or the massive new republican "experiment" he, Hamilton, and Jay were advocating.[101] As he said, however, he had no choice, as a "votary" of human liberty, but to conclude that because individuals have "political" as well as "personal" faculties, they must remain at liberty to exercise those faculties as a key element of their underlying faculty of choice; they thus must remain at liberty to govern themselves; and must be presumed to have a "*capacity* . . . for self government."[102]

2. *Equality.* — As we just noted, in *The Federalist No. 10*, Madison defined "[t]he protection of these faculties" of choice in good liberal fashion as "the first object of government."[103] When he later elaborated the point, however, Madison changed it in an important way. In *The Federalist No. 51*, Madison writes, "[*j*]*ustice* is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."[104] By "justice," moreover, Madison did not—as Professor Kramer has recently argued—principally mean the kinds of libertarian immunities we today use the word to describe.[105] He did not, that is, mean protection against the government's

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99. The Federalist No. 39, supra note 10, at 240 (James Madison). Madison also claimed that only republican government conformed to popular wishes and coincided with the principle of popular choice embodied in the act of revolution. Id.

100. Id. No. 10, at 77 (James Madison) (emphasis added).

101. See Epstein, supra note 68, at 119–20 (concluding that, for Madison, "Men's capacity for self-government is . . . not an undeniable truth but a hypothesis . . . of . . . votaries of freedom"); id. at 122 ("*The Federalist* . . . presents a paradox: popular government 'has so long labored' under 'opprobrium'; yet 'republic' is an 'honorable title.'" (quoting The Federalist No. 10, supra note 10, at 81 (James Madison); id. No. 39, at 241 (James Madison)).

102. The Federalist No. 39, supra note 10, at 240 (James Madison); see Epstein, supra note 68, at 121 ("It would appear that the minimum requirement for a republic is that it honor the great body of the people by respecting their capacity to choose."). Epstein argues that it was a "point of honor" with Madison and Hamilton to assume that humans could choose; otherwise, they would be like animals. See, e.g., id. at 15–16, 119–25. Madison seems to be saying something more: that the only way to properly honor the human capacity to choose in the private sphere—the purpose of government in the first place—is to assume that the capacity extends to the political sphere. See The Federalist No. 11, supra note 10, at 91 (Alexander Hamilton); id. No. 14, at 103–04 (James Madison); id. No. 36, at 224 (Alexander Hamilton); id. No. 39, at 240 (James Madison). This understanding explains Madison's otherwise curious extension of the word "liberty"—which Hobbes, Locke, and Montesquieu reserved for exercises of freedom in the private sphere—to exercises of political freedom. See Epstein, supra note 68, at 148 (discussing Madison's deviation from prior uses of the word "liberty").

103. The Federalist No. 10, supra note 10, at 78 (James Madison).

104. Id. No. 51, at 324 (James Madison).

105. Kramer, Madison's Audience, supra note 25, at 642.

or another individual's interference with one's exercise of faculties of choice or with the fruits of that exercise, for example, by taking[106] or theft.[107] Madison described those protections as "rights" which he *distinguished* from "justice."[108]

What Madison meant by "*justice*" was the protection of "minority" groups against systematic "oppression"[109] or "tyrann[ization]"[110] by more powerful groups acting through the political process and the government.[111] By justice, he meant the duty of "government . . . [to] protect all parties, the weaker as well as the more powerful," lest "the stronger faction [could] readily unite and oppress the weaker."[112] The "injustice with which a factious spirit . . . taint[s] our public administration"[113] thus occurs when one group destroys the liberty of the members of another group—*not*, at base, by withdrawing the latter's individual rights (although that may also occur), but instead by systematically doubting or disrupting the ability of minority group members, *as* group members, to exercise their faculties of choice.

In other words, the "injustice" Madison attributed to "factions" and famously diagnosed as "the mortal disease[ ] under which popular governments have everywhere perished"[114] is what we today call the problem of equal protection.[115] This in turn explains how Madison could believe *both* that protecting the libertarian faculties is the first object of govern-

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106. See James Madison, Parties, Nat'l Gazette, Jan. 23, 1792, reprinted in 14 Papers of Madison, supra note 2, at 197, 197 [hereinafter Madison, Parties] (arguing that government should use the "silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort").

107. See The Federalist No. 62, supra note 10, at 381 (James Madison) (discussing "unmerited" gain that one "harvest[s]" from "toils and cares" of another).

108. See, e.g., id. No. 10, at 79 (James Madison) (distinguishing government actions "concerning the rights of single persons" and "concerning the rights of large bodies of citizens").

109. E.g., id. No. 51, at 323 (James Madison).

110. Id. No. 47, at 301 (James Madison).

111. Madison's distinction bears emphasis. Generally speaking, violations of "rights" run against an individual; they are episodic; and they are committed out of a desire to benefit the perpetrator rather than out of some belief about the unworthiness of the victim. By contrast, deviations from "justice"—"injustices"—run against groups and their members *as* members; they are ongoing (hence Madison's terms "oppression" and "tyranny"); and they are committed, at least in part, based on a belief in the relative unworthiness of the victims.

112. The Federalist No. 51, supra note 10, at 325 (James Madison).

113. Id. No. 10, at 78 (James Madison).

114. Id. at 77.

115. In Madison's earliest writings on religious liberty, he tended to use the language of "equality" to refer to what he later would discuss under the heading of "justice." See infra notes 122, 126–137 and accompanying text. Madison's reliance on the language of equality to express his views on religious freedom was in line with substantial eighteenth century thought linking the two concepts. See Noah Feldman, The Intellectual Origins of the Establishment Clause, 77 N.Y.U. L. Rev. 346, 383–85 (2002). See generally Philip A. Hamburger, Equality and Diversity: The Eighteenth-Century Debate About Equal

ments generally *and* that "justice," or equal protection—shielding minorities from factional oppression—is the first object of *republican* governments. For under republican governments, the worst threat to the free exercise of one's faculties is faction—the tendency of powerful groups to use majority rule as a vehicle for oppressing the members of weaker groups.

In seeking to protect minorities, Madison was no utopian. He recognized that government action inevitably requires choices among competing interests that temporarily subordinate one to the other,[116] and he identified government choices as "unjust" only if they either (1) subordinated one group to another because of a belief that members of the subordinated group or their opinions were less worthy than those of the majority group, or (2) were made with the assumption that a particular interest or occupation was unworthy of any consideration.[117] Once again, it is Madison's liberalism that explains his tempered egalitarianism.

Although, like other Republican theorists,[118] Madison believed that a modest amount of redistribution of wealth (short of takings) was appropriate,[119] he opposed a legislatively enforced "equal division of property."[120] Because government must "protect[ ] . . . different and unequal faculties of acquiring property," it also must protect "the possession of different degrees and kinds of property [that] immediately results."[121] For Madison, therefore, equality was not quantitative but qualitative; it was not the extent of the fruits of individuals' labor that made them equal, or even the extent of their faculties for acquiring particular kinds or amounts of those fruits, but rather the possession of faculties in the first place and the ability and the right to choose among them and their fruits.[122]

Protection and Equal Civil Rights, 1992 Sup. Ct. Rev. 295, 366 (describing eighteenth century movement towards conception of equality of religious rights).

116. The Federalist No. 10, supra note 10, at 79 (James Madison) ("The regulation of these various and interfering interests forms the principal task of modern legislation . . . .").

117. See infra Part II.B.2.b.

118. See, e.g., James Harrington, The Commonwealth of Oceana 181, 197–98 (Henry Morley ed., George Routledge & Sons 1883) (1656) (advocating "a perpetual law establishing and preserving the balance of dominion, by such distribution that no one man or number of men within the compass of the Few or Aristocracy can overpower the whole people by their possession of lands"); see also Beer, supra note 7, at 103 (discussing Harrington's Oceana, where "the distribution of property was determined by law").

119. Madison, Parties, supra note 106, at 197 (arguing that government should use the "silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort").

120. The Federalist No. 10, supra note 10, at 79–80 (James Madison).

121. Id. at 78.

122. See Epstein, supra note 68, at 83 (suggesting that for Madison, "[j]ustice means, or at least includes, the protection of each man's right to exercise his faculties").

An examination of the examples of "injustice" that Madison identified confirms that, like mainstream equal protection thinkers of today,[123] he was primarily concerned with a group's denial of the ability of the members of another group to exercise their liberty when the denial was likely to be ongoing, group-wide, and systematic, and when it was premised on disabilities associated with membership in that group. Indeed, Madison's examples closely approximate the modern taxonomy of equal protection violations—down to a distinction between unequal treatment deserving scrutiny that is so "strict" in theory that it is "fatal" in fact[124] (the first two subcategories of injustice discussed below), and unequal treatment that almost always *survives* scrutiny, save in the rare instance in which its relation to the "public good" is entirely obscure (the last subcategory of injustice discussed below).

a. *Distinctions Based on Beliefs or Opinions.* — The first opinion Madison expressed on a public matter was that Virginia's colonial government had no business providing preferential treatment to its Anglican majority by enacting laws requiring preachers to be licensed and by arresting Baptist ministers who were not licensed.[125] His first act as a public man—indeed his only significant act as a delegate to Virginia's constitutional convention of 1776—was to secure the replacement of a provision in the proposed Virginia Declaration of Rights stating that "all men shou'd enjoy the fullest Toleration in the *Exercise* of Religion, according to the Dictates of Conscience" with a stronger provision declaring that "all men are *equally* entitled to the free exercise of religion."[126] By shifting the focus from toleration of the exercise of different religions to an assurance of all religions' equal status, this second provision discouraged laws giving members of one religion preferences not available to others. That assurance in turn "laid the intellectual basis for disestablishment,"[127] which Madison subsequently convinced Virginia to accomplish by legislation in 1785.[128]

Madison consistently resisted opinion- or conscience-based governmental establishments, among which he included all preferential government treatment of any sort for groups of citizens identified by their opinions or beliefs.[129] In a pamphlet circulated anonymously in 1785 at the

123. See Ely, Democracy, supra note 27, at 145–48.

124. See Gunther, supra note 56, at 8 (describing Warren Court's "two-tier" approach: "Some situations evoked the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact; in other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and virtually none in fact").

125. See Rakove, James Madison, supra note 1, at 6.

126. Id. at 13 (emphasis added) (noting that religious liberty and opposition to religious establishment were the first issues that moved Madison in public affairs).

127. Id.

128. Id. at 35 (discussing Madison's shepherding of Jefferson's Act for Establishing Religious Freedom through the Virginia legislature in late 1785).

129. Madison opposed the bill to subsidize "Christian" teachers not only because it taxed members of nearly all sects to support the teachers of only some of them but also

beginning of his successful campaign to disestablish religion in Virginia, he argued that even mild governmental preferences for religion are intolerable because they "degrade[ ] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[130] Government, he believed, should not create preferences of any sort based upon or implying judgments about the relative worth of the different opinions to which individuals' exercise of their reasoning faculties has led them.

For Madison, therefore, freedom of conscience was simply an example—perhaps the classic example—of the "justice," or immunity from factional oppression, or (in modern parlance) the equal protection that republican government is duty-bound to afford.[131] In terms Madison

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because its exemptions for Quakers and Mennonites were preferential on the basis of conscience. See James Madison, Memorial and Remonstrance (June 20, 1785), *in* 8 Papers of Madison, supra note 2, at 295, 300 [hereinafter Madison, Memorial]. Quakers and Mennonites were exempted from the general restriction that funds from the assessment be used only for buildings and salaries for the clergy; the exception was quite logical in that neither group built edifices or hired clergy. But Quakers and Mennonites were then permitted to spend the funds on proselytizing, which other groups could not do. This particularly offended Madison: "Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others?" Id. Whether in its subsidy or in its exemptions, the fault of the Bill, he said, was that it operated "by subjecting some to peculiar burdens" while "granting to others peculiar exemptions." Id.

As is true of Madison's writing leading up to and immediately after the Convention, which focused far more on equal protection ("justice") than individual "rights," see supra notes 109–115 and accompanying text, his writings on religious freedom emphasized governmental neutrality (opposing religious establishments and restrictions on or preferences among organs of the press) more than government noninterference (e.g., with free speech and free religious exercise). Of course, he included both protections in the First Amendment.

130. Madison, Memorial, supra note 129, at 302. In the pamphlet, Madison wrote:

> If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of Conscience."

Id. at 300. Madison was responding to A Bill Establishing a Provision for Teachers of the Christian Religion (1784), reprinted in Everson v. Bd. of Educ., 330 U.S. 1, 72–74 (1947) (Rutledge, J., dissenting). Madison clearly perceived this bill (proposed, interestingly, by Madison's Anti-Federalist opponent at the Virginia ratifying convention, Patrick Henry) as an example of the kind of factional oppression to which representative legislatures were susceptible—an instance in which "the majority may trespass on the rights of the minority." Madison, Memorial, supra note 129, at 299; see Rakove, James Madison, supra note 1, at 34 (describing Madison's successful efforts to defeat proposal to tax citizens to support Christian teachers, including securing thousands of signatures on petitions, an amazing organizational accomplishment); Hobson, supra note 1, at 223 ("[T]he [General Assessment Bill] experience was a sobering reminder of the precariousness of so-called unalienable rights in a society and government operating under the rule of a majority.").

131. Madison himself drew this connection in *The Federalist*: "In a free government the security for civil rights must be the same as that for religious rights." The Federalist No. 51, supra note 10, at 324 (James Madison).

developed a few years later, all individuals are equally endowed with a "faculty" to choose a religion to practice, a faculty that, once exercised, associates the individual with other individuals defined by the same choice.[132] Even more so than other exercises of liberty, this one automatically poses a serious threat to itself in a republic, given the tendency decried by Madison of self-governing individuals to coalesce in factions as a result of passionately held opinions and, when in the majority, to oppress those with whom they disagree.[133] It thus is the first object of government to guard the equality of conscience against the factional oppression it invites.[134]

Uncompromising equal protection of differing "opinions" is not only easier for republican governments to achieve than an analogous protection of competing interests, but also is more important to the survival of the political community. By involving themselves in religious matters, governments needlessly increase strife between religious groups—politicizing them, drawing them into the public sphere, and inviting them to rely on religious imprimatur as a basis for using government action to abuse others.[135] Religious belief is an inflaming passion that often

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132. See Banning, supra note 9, at 76–107 (connecting Madison's views at the time he mobilized opposition to a general assessment on behalf of Anglican teachers to views he developed more fully at the Convention and in *The Federalist*).

133. According to Madison, writing in *The Federalist No. 10*:

> A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.

The Federalist No. 10, supra note 10, at 79 (James Madison). Professor Epstein speculates that by "persons of other descriptions whose fortunes have been interesting to the human passions," Madison here meant to refer to slaves. Epstein, supra note 68, at 214 n.117. For additional evidence that Madison contemplated race-based factions, considering them to be especially virulent and productive of strife, see infra notes 139–144 and accompanying text.

134. Madison evidently believed, as well, that republican governments should be particularly forceful and uncompromising in equally protecting adherents of all religions and in protecting the holders of all the "various and interfering" "opinions." The Federalist No. 10, supra note 10, at 78–79 (James Madison). For governments can accomplish all their other intended functions without "regulat[ing]" opinions. Id. at 79. Tbis is in contrast to the problem facing republican governments when their citizens have "various and interfering" interests. Id. In that situation, governments cannot so forcefully implement their duty of neutrality, because accomplishing their other objectives inevitably requires them to choose among competing interests. See Blasi, supra note 27, at 806 ("Today we tend to look upon 'equal protection' and 'free exercise' as wholly separate notions, both fundamental to our constitutional structure but not conceptually integrated. That is not how Madison viewed the matter.").

135. Madison feared that "[r]ulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries." Madison, Memorial, supra note 129, at 302.

leads to coercion and oppression, and led to "[t]orrents of blood . . . spilt" in Europe.[136] Madison feared that when authority becomes accustomed to favoring certain groups at the expense of others, the tendency to aggrandize power and exclude others can continue unchecked.[137] Thus, not only liberty and equality but also fraternity—the polity's stability itself—is endangered by measures tending to establish religion: "[T]he majority may trespass on the rights of the minority" and, once accustomed, will do so with abandon and without any check.[138]

b. *Distinctions Based on Personal Status.* — Madison's writings in the constitutional period contain three references to "injustices" or "oppression" based on the victims' personal status. The first two—crucially, given the nation's subsequent history—are to factions defined by race. The third is to government preferences among practitioners of different occupations.

Madison's most startling reference to justice-impairing factions came in a crucial speech at the Convention in which he summarized views that later became the core of his famous *Nos. 10* and *51* of *The Federalist.* There, in discussing injustices to which republics tend to succumb, he identified race as perhaps the most virulent source of faction and the oppression it invites: "We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man."[139]

Madison's reference to race as a motivator of faction in this speech at the Convention helps us interpret an even more tantalizing passage in a precursor to the speech and to *Nos. 10* and *51.* As we discuss in greater detail below, Madison prepared a memorandum on the eve of the Convention listing the "vices" of republican governments—in general and in the thirteen states and the Confederation—that he hoped a new constitution would cure.[140] In describing ways in which republics governed by majority rule fail to live up to their promise of self-government, he commented, as he did again at the Convention, that "[w]here slavery exists

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136. Id.

137. In his *Memorial,* Madison warns:

> Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? [T]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Id. at 300.

138. Id. at 299.

139. Madison, June 6 Convention Speech, supra note 92, at 33; see supra note 133 and accompanying text; infra notes 139–144 and accompanying text (discussing other evidence Madison recognized race as important source of faction).

140. James Madison, Vices of the Political System of the United States (Apr. 1787), *in* 9 Papers of Madison, supra note 2, at 345, 348–57 [hereinafter Madison, Vices].

the republican Theory becomes still more fallacious."[141] Madison suggests that there are two sources of this particular republican fallacy. The first lies in the fact that slaveholders, even if they make up a majority, cannot claim their exercises of authority are in the "Right."[142] The second source of the fallacy inheres in the danger of a slave revolt, in which the previously enslaved group takes power and the prior enslavers can no longer count on the protection of the law, even, again, if they are in the majority.[143]

Particularly, in light of Madison's specific reference to racial factions in his speech summarizing this memorandum at the Convention—and given also its group-versus-group, as opposed to individual-versus-individual, connotations—this passage is highly informative about the kinds of factional injustice and strife Madison most feared. The first source of the republican fallacy posed by slavery is the "injustice" and resulting illegitimacy that accompanies a racial or other factional use of laws to systematically oppress another group. The second source is the danger of violent revolt by members of the oppressed faction, which, as we will see, was a strong libertarian (and modestly fraternal) motivation for Madison's identification of equal protection as the first task of republican government.[144]

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141. Id. at 351; James Madison, Reply to the New Jersey Plan (June 19, 1787), *in* 10 Papers of Madison, supra note 2, at 55, 58 [hereinafter Madison, June 19 Convention Speech] (summarizing discussion in Madison, Vices, supra note 140, and stating again that "[w]here slavery exists, the Republican Theory becomes still more fallacious").

142. Madison, Vices, supra note 140, at 350.

143. See id.

144. See infra Part II.B.3. For an even earlier reference to the dangerous power republics give "the majority in every community to despoil & enslave the minority of individuals," see Letter from James Madison to James Monroe (Oct. 5, 1786), *in* 9 Papers of Madison, supra note 2, at 140, 140 [hereinafter Madison, Letter to Monroe]. For what it is worth in the case of a lifelong slaveholder who never emancipated any of his own slaves, Madison was not oblivious to the depredations of African slavery. While a member of the Virginia legislature, he expressed offense at motions during the 1786 legislative session to "throw under the table" the Methodists' petitions for a bill gradually emancipating the slaves and the concurrent motions to forbid manumission. Letter from James Madison to George Washington (Nov. 11, 1785), *in* 8 Papers of Madison, supra note 2, at 403, 404. Later, at the Convention, he opposed any sanctioning of the slave trade in the Constitution because he "thought it wrong to admit in the Constitution the idea that there could be property in men." Speech of James Madison at the Constitutional Convention (Aug. 25, 1787), *in* 10 Papers of Madison, supra note 2, at 157, 157. Madison noted the discord that slavery caused among the states, finding it so divisive that it overshadowed the differences between large and small states and invited a "line of discrimination" between the North and South. James Madison, Speech at the Constitutional Convention (July 17, 1787), *in* 10 Papers of Madison, supra note 2, at 102, 102 [hereinafter Madison, July 17 Convention Speech]; see also infra note 378. In *The Federalist*, Madison pulled his punches. See The Federalist No. 54, supra note 10, at 336–41 (James Madison) (discussing three-fifths compromise and institution of slavery and, instead of taking sides, presenting the argument for the Southern position in the voice of a Southerner, and the objections of a Northerner, and concluding after much pragmatic, legalistic, and nuanced discourse that the compromise reached was sound). Later in life, Madison called slavery "the dreadful

Madison's third reference to injustices based on personal status came in an essay he wrote a few years after the Convention. There he expressed his view that certain occupations (e.g., farming) are more worthy and conducive to the public good than others (e.g., manufacturing of "frivolous" goods).[145] But despite his own prejudices, he adhered to the view that government should never take a position in favor of one and against another occupation, because doing so would interfere with "the free choice of occupations by the people."[146]

This passage is significant because it forced Madison to distinguish normal legislation, which almost inevitably favors one interest or occupation over another, from legislation that is unjust because it is premised on a deep-seated or systematic preference for one occupation over another. Madison recognized, of course, that "necessary and ordinary" government "regulation" (the lowering of tariffs, for example) will very often favor one occupation (e.g., farmers) over others (e.g., manufacturers). Given this recognition, the distinction for Madison between the "necessar[il]y" disproportionate consequences of "ordinary" government "regulation," on the one hand, and the government's unjust interference in "the free choice of occupations by the people," came down to a question of whether the regulation was, on the one hand, designed to serve the "public good" or, on the other hand, invidious in the sense that it was motivated entirely by the belief that a particular occupation was unworthy.[147] Thus, the distinction Madison drew is very like the modern one permitting economic classifications that, at the least, roughly serve a legitimate state interest, while barring those that serve no purpose other than to disadvantage a particular occupation or interest.

The occupational preference that most troubled Madison, based on his own experience as a legislator in Virginia and his broader observations in the years prior to the Convention, was populist legislation authorizing the printing of paper money, requiring its acceptance in commerce, and providing other forms of debtor relief.[148] Madison viewed such legislation as unjust (and as drawing distinctions among occupations) because

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calamity which has so long afflicted our country and filled so many with despair," and supported proposals to free slaves, provide for their settlement in Liberia (because they would remain "dissatisfied with their condition" in the United States), and to compensate their former owners from the sale of western land. Epstein, supra note 68, at 104–05; Rakove, James Madison, supra note 1, at 177.

145. See Madison, Republican Distribution, supra note 96, at 246.

146. Id. at 245; see Epstein, supra note 68, at 85 ("Madison's view of justice subordinates a concern for the effect of various ways of life on the faculties of men to a respect for men's faculty of free choice.").

147. See Epstein, supra note 68, at 82–85.

148. Madison described the problem in a more evenhanded, general way at the Convention: "Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The Holders of one species of property have thrown a disproportion of taxes on the holders of another species." Madison, June 6 Convention Speech, supra note 92, at 33.

he viewed it as a preference for a class of speculators.[149] Madison's archetypal example of factious oppression of this sort was Rhode Island, where speculators and debtors took control of the state legislature and passed legislation forbidding use of promissory notes or hard currency, devaluing the currency and relieving their debts while deflating the value of real property.[150] According to Madison, such measures fit the mold of unjust preferences for a particular occupation by benefiting speculator-capitalists at great and unjustified expense to real property holders such as farmers.[151]

Of course Madison's classification of debtor relief legislation as unjust, and not simply inconvenient or misguided, is hard to swallow for the modern observer, who can hardly imagine life without paper money (unless perhaps the substitute is even softer electronic currency).[152] As we

149. The Federalist No. 10, supra note 10, at 79 (James Madison); see id. at 84 (arguing that "[a] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it"). During his time in the Virginia Assembly, Madison decried land speculators who bought property on credit, then sought legislative protection from creditors. Hobson, supra note 1, at 224; see infra note 151 (discussing views of Charles Beard, Forrest MacDonald, and Jennifer Nedelsky).

150. The "wickedness of the measures they are pursuing" in Rhode Island were symptomatic of the "embarrassments and *mortal* diseases of the Confederacy." Letter from James Madison to James Madison, Sr. (Apr. 1, 1787), *in* 9 Papers of Madison, supra note 2, at 358, 359 [hereinafter Madison, Apr. 1 Letter to Madison Sr.]. The Rhode Island-type "majority faction" that Madison most feared grew out of the unrest leading to Shays' Rebellion. Id. at 360 n.2 (editor's endnotes). In Rhode Island in April 1786, the "country" party in support of issuing paper money took power of the legislature and governor's office and immediately issued substantial paper money, devaluing the currency. The legislature passed laws forbidding the use of promissory notes in business so that the devalued currency would be used instead, and it redeemed state debt with the same bills. Conflict with the federal government ensued when the federal postmaster insisted on receiving hard currency, and not the paper bills. Rhode Island also barred out-of-state debtors from discharging their debts using Rhode Island paper money. Finally, Rhode Island, rumored to be sheltering rebels from Shays' Rebellion, refused to assist Massachusetts in arresting the rebels. Id.

151. For the view that the legislation Madison decried in fact benefited all debtors at the expense of the mercantile and wealthy landowning minority to which Madison belonged, see Forrest McDonald, E Pluribus Unum 199–207 (1965). The classic criticism of the self-interested motives of the largely wealthy and property-owning Founders is Charles A. Beard, An Economic Interpretation of the Constitution of the United States (The Free Press 1986) (1913). More recently, Jennifer Nedelsky has argued that Madison principally feared an aroused majority's confiscation of property or, via paper money, devaluation of his assets as a major creditor. Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy 22–25, 73–75 (1990).

152. Madison most fully laid out his objections to paper money in notes for a 1786 speech in the Virginia Legislature opposing a measure to issue paper money. James Madison, Outline for Speech Opposing Paper Money (ca. Nov. 1, 1786), *in* 9 Papers of Madison, supra note 2, at 156, 156–57 (arguing that paper money is unjust to creditors and debtors, would result in "scarcity of specie," "destroy confidence public & private," become a "source of dissention between States," "enrich collectors, speculators" and "vitiate morals," "reverse the end of Govt. by punishing good Citizens & rewarding bad,"

next discuss, however, Madison's struggle to define the "public good" as a basis for distinguishing unjust from appropriate legislation that favors one set of interests over another is not so different from more recent efforts to give "teeth" to "minimum rationality" analysis.[153]

c. *Distinctions Among Divergent Interests.* — Madison identified and carefully distinguished two important ends of government—"justice," or equal protection, and pursuit of "the public good."[154] Madison considered faction to be the bane of *both* crucial ends of government, because faction begets governmental action "adverse" not only "to the rights of other citizens" (i.e., injustice) but also "to the permanent and aggregate interests of the community."[155] Madison's overriding project of establishing a system of government that was sufficiently "well-constructed . . . to break and control the violence of faction"[156] thus was designed to prevent not only unjust actions but also actions *adverse to the public interest.* Here, too, Madison's project tracks modern equal protection theorizing.

"discourage foreign commerce," and even "dishonor our Repub[lic] [in] the eyes of mankind"); Notes for Speech Opposing Paper Money (ca. Nov. 1, 1786), *in* 9 Papers of Madison, supra note 2, at 158, 158–59 (adding historical examples of paper money leading to depreciation and scarcity of specie). Paper money was responsible for the disappearance of specie in the seven states that had adopted it. Letter from James Madison to James Monroe (June 4, 1786), *in* 9 Papers of Madison, supra note 2, at 73, 74 n.6 (editor's endnotes) (internal citation omitted). As Madison wrote to Monroe, "Our situation is truly embarrassing. It can not perhaps be affirmed that there is gold & silver eno' in the Country to pay the next tax." Id. at 74. Gordon Wood's explanation of Madison's concern with paper money suggests that more may have been at stake in the dispute than a run-of-the-mill clash of economic interests or an effort by Madison and his colleagues to maintain the dominance of the rich over the poor:

> Madison and many of the other Federalists still conceived of property in premodern, almost classical terms—as rentier property, proprietary property, property as a source of authority and independence . . . . These kinds of fixed property were very vulnerable to inflation, which is why Madison and other Federalists were so frightened by the state assemblies' issuing of so much paper money in the 1780s. Inflation threatened not simply their livelihood but their authority and independence as citizens. . . . Th[e] majorities [favoring paper money], however, were neither the propertyless masses nor radicals opposed to the private ownership of property. Such debtors believed in the sacredness of property as much as Madison and the other Federalists. But it was a different kind of property they were promoting—modern, risk-taking property; not static proprietary wealth, but dynamic venture capital; not money out on loan, but money borrowed. . . .

Gordon S. Wood, "Motives at Philadelphia": A Comment on Slonim, 16 Law & Hist. Rev. 553, 560–61 (1998).

153. See, e.g., Gunther, supra note 56, at 20–24.

154. The Federalist No. 51, supra note 10, at 324 (James Madison) ("Justice is the end of government. It is the end of civil society."); id. No. 45, at 289 (James Madison) ("[T]he public good, the real welfare of the great body of the people, is the supreme object to be pursued; and . . . no form of government whatever has any other value than as it may be fitted for the attainment of this object.").

155. Id. No. 10, at 78 (James Madison).

156. Id. at 77.

First, consider Madison's definition of the "public good." Implicit in his criticism of faction as inviting action "adverse . . . to the permanent and *aggregate* interests of the community"[157] is the view that, in ascertaining the public good, all the interests pursued by various self-serving faculties either singly or in groups ought to count for something.[158] Madison in fact seemed to believe that all such interests should count *equally*. As is noted above in discussing government distinctions based on the relative worth of occupations, Madison believed that the job of government was not so much to *define* the public good, in the sense of adjudicating among society's various interests, as it was to *achieve* the good that the aggregate of those interests themselves defined. Government's goal, that is, was to maximize the interests' aggregate satisfaction—in effect weighting all interests equally.

Next, consider Madison's definition of "wise" or "fit" representatives—representatives who pursue the public good—as ones who are intellectually capable of considering and who are morally disposed to consider all interests and not just their own or their constituents'.[159] What Madison called fitness parallels John Hart Ely's conception of public action undertaken according to the principle of "equal concern and respect" in the sense that all interests count.[160] For Ely, the central danger in representative government is the danger of a "refusal to represent."[161] Such a breakdown occurs not where the losing group's interests are subordinated on one or another occasion to the general interest, but where the legislature repeatedly and harmfully ignores a group's interests, and does so not just for the selfish good of the majority, but "largely for the sake of simply disadvantaging [the losing group's] members."[162] Victims of such invidious discrimination hold interests that do not receive equal concern and respect, because the interests do not count. "Such groups might just as well be disenfranchised."[163]

That Madison was troubled by this same sort of breakdown is clear from his views on the national dispute that was most on the minds of the delegates as they gathered for the Constitutional Convention: Jay's pro-

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157. Id. at 78 (emphasis added).

158. Epstein, supra note 68, at 66 ("The interests of the community are an 'aggregate' because the community is a nonhierarchical whole; none of the parts has a higher dignity than the others."); see also Beer, supra note 7, at 272 (noting that one of Madison's great contributions was rejecting hierarchies based on "different types of property").

159. Although Madison believed that people might come by this wisdom or fitness naturally, his conception of human psychology convinced him that other dispositions were likely to be stronger in most people and, accordingly, that governmental structures had to winnow out the more from the less fit and give those who were elected incentives to behave wisely. See infra Part III.A.

160. Ely, Democracy, supra note 27, at 82 (quoting Ronald Dworkin, Taking Rights Seriously 180 (1977)); see Beer, supra note 7, at 276 (discussing the interest-broadening or -generalizing disposition that Madison associated with action in the public good).

161. Ely, Democracy, supra note 27, at 82.

162. Id. at 152–53.

163. Id. at 84.

posal to allow Spain (then in possession of New Orleans) to close off the Mississippi River to commerce for five years in return for trade concessions.[164] In Madison's view, the burden that this proposal placed on the citizens of the "ultramontane" districts was so obviously great, and the benefits to the eastern districts so obviously modest, that its supporters could have reached their position only illegitimately or "unjustly"—by utterly ignoring the interests of the western districts.[165]

Next, consider Madison's term for action "adverse to the . . . aggregate interests of the community," the term he typically paired with "injustice": "partiality."[166] Madison deplored the "partiality" of states toward their own interests and rights because its effect was to "exaggerate the inequality [among states] where it exists," and to lead others to "even suspect it where it has no existence."[167] Thus, partiality exaggerates inequality, breeding mistrust and instability.

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164. For a detailed discussion of Madison's letters to Washington, Jefferson, and Randolph on the eve of the Convention, see infra Part IV.A; infra note 226 and accompanying text.

165. Madison, Letter to Monroe, supra note 144, at 140–41. Madison's October 1786 letter to Monroe is important. It evidently is the first time Madison discussed his fear of majority tyranny and forcefully rejected the argument that the majority view is necessarily consistent with the public good. Exemplifying the problem was the measure to close the Mississippi, which Madison considered to be:

> an alarming proof of the predominance of temporary and partial interests over those just & extended maxims of policy which have been so much boasted of among us and which alone can effectuate the durable prosperity of the Union. Should the measure triumph under the patronage of 9 States or even of the whole thirteen, I shall never be convinced that it is expedient [i.e., in public interest], because I cannot conceive it to be just [meaning equally protective of all interests]. There is no maxim in my opinion which is more liable to be misapplied, and which therefore more needs elucidation than the current one that the interest of the majority is the political standard of right and wrong. Taking the word "interest" as synonymous with "Ultimate happiness," in which sense it is qualified with every necessary moral ingredient, the proposition is no doubt true. But taking it in the popular sense, as referring to immediate augmentation of property and wealth, nothing can be more false. In the latter sense it would be the interest of the majority in every community to despoil & enslave the minority of individuals; and in a federal community to make a similar sacrifice of the minority of the component States. In fact it is only reestablishing under another name and a more spe[c]ious form, force as the measure of right; and in this light the Western settlements will infallibly view it.

Id. (editor's footnote omitted). This letter anticipates the linkage in *The Federalist No. 51* of, on the one hand, the might-makes-right quality of the state of nature and, on the other hand, popular democracy unconstrained by the equal protection principle. Madison links injustice to "partiality" and to a failure to consider the full range of views, i.e., to add "every necessary moral ingredient." Id. at 141. The passage also shows Madison vehemently concerned with minority rights other than those of the propertied opponents of paper money and debtor relief.

166. The Federalist No. 51, supra note 10, at 78 (James Madison).

167. Madison, Vices, supra note 140, at 352; see also Madison, Letter to Monroe, supra note 144, at 140–41.

Madison thus did not consider Rhode Island-style debtor relief or the Jay proposal "unjust" because he believed the government could or should avoid actions beneficial to some interests and adverse to others.[168] As he repeatedly acknowledged, actions of that sort are the "principal task of modern legislation" which inevitably "involves the spirit of party and faction in the necessary and ordinary operations of government."[169] What Madison believed "a well-constructed Union" should be capable of avoiding is "partial" action: action undertaken by legislators who simply ignored certain interests, or (what may signal the same thing) action that, in the aggregate, accomplishes so much more harm to some than good to others that the interests of the former group had assuredly been ignored.[170]

3. *Fraternity.* — Madison was more of a liberal than an egalitarian. His liberalism drove him to his economized conception of "justice," or equality—which valued and sought to protect individuals' "unequal faculties of acquiring property" and, thus, their unequal "degrees . . . of property."[171] Not surprisingly, therefore, the first of the two rationales he expressed for giving government an obligation of equal protection—constraining "the superior force of an interested and overbearing majority" and proceeding "according to the rules of justice and the rights of the minor party"[172]—was the liberal's explanation: Absent this obligation, the majority faction in any government organized along republican lines could interfere with the minority party's "free choice of occupations," opinions, and other exercises of their faculties.

Madison's second rationale for equal protection from factional oppression was similarly functional, identifying equality as a means to another end. That end was fraternity, which Madison's liberalism again drove him to conceptualize in a highly economized fashion. Unless regulated, Madison believed, factions would foment instability, violence, and rebellion.[173] His principal explanation for keeping government neutral

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168. For criticism of Madison's view that legislation not in the public interest must be overturned, see Frank H. Easterbrook, The State of Madison's Vision of the State: A Public Choice Perspective, 107 Harv. L. Rev. 1328, 1339 (1994) (arguing that a "common ground around which to rally" does not exist and that "[w]e are doomed by the logic of majority voting to aggregate private preferences rather than to find a common public good").

169. The Federalist No. 10, supra note 10, at 79 (James Madison).

170. Id. at 77–79.

171. Id. at 78.

172. Id. at 77.

173. In regard to the fear of an aroused citizenry, see id. No. 6, at 56, 59 (Alexander Hamilton); id. No. 21, at 140 (Alexander Hamilton); id. No. 22, at 151 (Alexander Hamilton); id. No. 27, at 175 (Alexander Hamilton); id. No. 28, at 178 (Alexander Hamilton). Among Madison's expressions of the same fear, often in regard to Shays' Rebellion and its spillover from Massachusetts into the Rhode Island legislature, see Madison, June 19 Convention Speech, supra note 141, at 58 (discussing necessity of securing "the internal tranquility of the States"—"[t]he insurrections in Massts. admonished all the States of the danger to which they were exposed"); Letter from James Madison to Ambrose Madison (Aug. 7, 1786), *in* 9 Papers of Madison, supra note 2, at 89,

among different opinions, notwithstanding that such opinions are "fallible" and probably unequally so, was that allowing passionately opinionated factions to establish their views as those of the government would "inflame[ ] . . . mutual animosity" and "excite the[ ] most violent conflicts."[174]

Far from being a friend of all "minorities," therefore, Madison mainly lived in fear of them.[175] Repeatedly noting the tendency of minority factions—slaves included[176]—to resort to violence when persistently tyrannized and oppressed by the majority, Madison feared that "a minority may in an appeal to force, be an overmatch for the majority."[177] For that reason, the notion of fraternity these passages imply is entirely negative: freedom from instability and conflict. Madison thus did not focus on fraternity[178] any more than he advocated thick notions of equal-

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89 (describing "general distress and tumultuous meetings" in Rhode Island due to the paper money measures); Letter from James Madison to James Madison, Sr. (Nov. 1, 1786), *in* 9 Papers of Madison, supra note 2, at 153, 154 (fearing result should the "discontented" behind Shays' rebellion "get [the] uppermost" at the Convention because they desired abolishment of debts and a "new division of property"); Letter from John Madison to George Muter (Jan. 7, 1787), *in* 9 Papers of Madison, supra note 2, at 230, 231 (fearing that "civil blood may be shed," that the government might not prevail, and that those events "furnish new proofs of the necessity of such a vigour in the Genl. Govt. as will be able to restore health to any diseased part of the federal body"); Madison, Apr. 1 Letter to Madison Sr., supra note 150, at 360 n.2 (editor's endnotes) (providing historical background on events in Rhode Island following Shays' Rebellion); Madison, Vices, supra note 140, at 355.

174. The Federalist No. 10, supra note 10, at 79 (James Madison); see supra notes 125–138 and accompanying text (linking these same views to Madison's resistance to government preferences among adherents of different religious opinions).

175. This point is perhaps the strongest answer to the claim that the only minority Madison was interested in was the one to which he belonged: the propertied class. See supra notes 151–153. Madison was well aware that he was simultaneously a member of majorities and minorities, and both statuses provided him with reasons for concern in the absence of vibrant equal protection.

176. See supra notes 141–144 and accompanying text.

177. Madison, Vices, supra note 140, at 350–51. The three examples Madison gives in the cited passage: (1) a rich and militaristic "one third" of the populace "may conquer the remaining two thirds"; (2) "those whose poverty excludes them from a right of suffrage . . . for obvious reasons [may] . . . join the standard of sedition"; and (3) slave revolts, discussed supra notes 139–144 and accompanying text—reveal not only the breadth of his conception of the types of "minority" and "majority" factions but also the insecurity he felt in the face of the possible violence of the former against the latter. Madison, Vices, supra note 140, at 350–51. In a speech at the Convention criticizing the New Jersey plan because of its insufficient check on factional oppression in the states, Madison again raised the specter that a consistently ignored "minority may in an appeal to force be an overmatch for the majority." Madison, June 19 Convention Speech, supra note 141, at 58–59. For other references to the danger of minority factions, see The Federalist No. 10, supra note 10, at 80 (James Madison) (noting minority factions may "convulse the society"); supra note 173 (discussing Madison's fears regarding Shays' rebellion).

178. But cf. The Federalist No. 14, supra note 10, at 104 (James Madison) (discussing common bonds created not only by blood, but also by common exercise of choice to dissolve ties with England); id. No. 39, at 243 (James Madison) (advocating popular

ity. Rather, he thought a lot about and strove to find ways to avoid the opposite of equality and fraternity—majority oppression of minorities leading to violent insurrection.

4. *Liberty, Equality, Fraternity.* — In two critical passages, one in *The Federalist No. 51* and another in his germinal memorandum written on the eve of the Constitutional Convention,[179] Madison wove together his committed liberalism, functional egalitarianism, and economized fraternity into a coherent description of the development of a stable republican government. In doing so, he identified the critical importance of an equal protection principle in assuring the mutual security of a republic's liberally enfranchised citizens:

> Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.[180]
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> *****
>
> The great desideratum in Government is such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions, to controul one part of the Society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole Society. In absolute Monarchies, the prince is sufficiently[ ] neutral towards his subjects, but frequently sacrifices their happiness to his ambition or his avarice. In small Republics, the sovereign will is sufficiently controuled from such

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ratification of the Constitution because it serves to replicate the common exercise of choice of government).

179. Madison, Vices, supra note 140, at 348. Rakove calls *Vices* "one of those rare documents in the history of political theory in which one can literally observe an original thinker forge his major discovery." Rakove, James Madison, supra note 1, at 46. Arguably, however, Madison's most important document is not the *Vices* monograph, but the subsequent letter to Jefferson that actually contains versions of *both* critical passages quoted in the text. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 Papers of Madison, supra note 2, at 205, 214 [hereinafter Madison, Oct. 24 Letter to Jefferson]. Moreover, Madison had already forged most of "his major discovery" in a letter to Monroe written six months before the *Vices* memorandum. See Madison, Letter to Monroe, supra note 144, at 140.

180. The Federalist No. 51, supra note 10, at 324–25 (James Madison).

> a Sacrifice of the entire Society, but is not sufficiently neutral towards the parts composing it.[181]

In these two passages and the accompanying monographs, Madison provided a path-breaking narrative account of the formation and evolution of a just regime.[182] In keeping with the liberal tradition, he begins with the state of nature, in which, left to their own devices, privately liberated people freely pursue their own ends. Doing so under conditions of scarcity, however, especially given individuals' unequal faculties and abilities to secure goods for themselves, leads some to threaten others, with the strong victimizing the weak. Eventually, this dangerous and unstable situation leads even the stronger individuals, in their more far-thinking moments (i.e., their more "virtuous" moments), to recognize that all individuals, the currently strong as well as the currently weak, are equally threatened by this state of affairs. This situation inspires recognition of the "liberal" respect in which the strong and the weak are fundamentally equal (i.e., in their capacity and desire to exercise their faculties of choice without oppressive interference). This recognition in turn leads people to submit to a government for their equal protection.[183]

Thus far, Madison follows the traditional liberal account. At this point, however, he takes a sharp turn away from earlier accounts of the advantages of republics. By itself, the establishment of a republic does not, he pointed out, sufficiently ensure justice. Precisely because of the self-government a republic permits, the diversity of opinion and unequal capacity to acquire property that in a state of nature enables the powerful to tyrannize the weak will lead in a republic to the tyranny of stronger factions over weaker ones. Even the most virtuous may be tempted to

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181. Madison, Vices, supra note 140, at 357.

182. As classical tradition had it, in the natural cycle of regimes, oligarchy would lead to democracy or republican government, which would degenerate into tyranny. 1 The Discourses of Niccolo Machiavelli 218–30 (W. Stark ed., Yale Univ. Press 1950) (1532); Plato, The Republic 554a–557 (Francis Macdonald Cornford trans. & ed., Oxford Univ. Press 1941). The liberal tradition did not have any picture of a cycle, but instead adopted a linear view of progress from a state of nature, to despotism, to a "free" but non-republican government (one that allowed individuals to pursue their own plans in their personal lives but not to govern themselves in their public lives, see supra Part II.B.1), and finally to a contract through which a sovereignty such as a republic is erected. Thomas Hobbes, Leviathan 228–39 (C.B. Macpherson ed., Penguin Books 1968) (1651); Locke, supra note 68, ch. 8, §§ 95–122, at 52–65. Madison's thinking had elements of both traditions, as is clear from what follows.

183. Initially, people mainly submitted themselves to non-republican governments to solve the equal protection problem, by giving power to a single person who was assumed to be neutral among the rest. Doing so, however, dangerously empowered that single sovereign to aggrandize himself vis-à-vis the rest or to side with one faction or another, harming a minority or even the majority. This in turn threatened freedom or "self-government," the protection of which drove people to form civil society in the first place. For this reason, non-republican governments are unstable over the long run, and republican governments are preferred. Frank Michelman identifies this same link between liberal self-government in the private sphere and republican self-government in the public sphere. Michelman, supra note 71, at 18–19.

pursue their own interests and those of their group, be those interests class-based, commercial, political, or religious. So, although the republican solution nicely empowers people to govern themselves, it dangerously replicates the state of nature by allowing strong factions to victimize weak ones through the representative process. This, Madison believed, was the chief vice of the Confederation that the thirteen American states had created after the Revolution.

This dangerous and unstable situation eventually leads even majority factions, in a second "virtuous" moment of constitutional reflection, to recognize that they, together with the minority, are equally threatened by this state of affairs. This reminds individuals of the "liberal" respect in which they—members of majority as well as minority factions—are fundamentally equal, i.e., in their capacity and desire to exercise their faculties of choice. And that recognition in turn leads even the majority "to wish for a government which will protect all parties, the weaker as well as the more powerful," i.e., to wish for a republican government constrained by an equal protection principle.

Providing equal protection based on a mutual recognition of the ways in which all individuals and group members are equal to all others, and of the equal protection the government owes to all, not only protects the liberty of minorities against majority tyranny but also keeps the peace between the two. Equal protection thus enables liberalism to save itself from itself. For Madison, therefore, the purpose of the Constitutional Convention was to provide this equal protection against chronic "injustice" in the states.

Providing that equal protection is not easy, however. Liberalism can be saved from itself only as long as individuals in their public lives—no less than in their imagined moments of constitutional reflection—actually practice this (economized) "equal concern virtue."[184] And republics can survive only if citizens recognize, every day, their mutual interest in protecting, and their common humanity in possessing, the faculties of choice. How, then, is it possible to provide equal protection—to make individuals practice this kind of virtue in their everyday public actions? This is the question that Madison devised the extended republic and the national negative to answer.

III. THE FIRST CONSTITUTION'S STRUCTURAL EQUAL PROTECTION CONSTRAINT

A. *Madisonian Psychology and Mechanics*

In *The Federalist*, Madison claims that a "double security" protects "the rights of the people" under the new Constitution.[185] The first form of security, the separation of powers between departments of government

184. See supra notes 71–77 and accompanying text (introducing concept of "equal concern virtue").

185. The Federalist No. 51, supra note 10, at 323 (James Madison).

and between the states and the federal government, chiefly protects the people against an overreaching federal government. The other significant source of security, the operation of the Constitution's structural equal protection constraint through the extended republic, protects the people against factional capture of state government. The Madisonian psychology and governance mechanics that explain the need for this latter constraint and its workings are familiar and are only lightly sketched here.

In Madison's view, individuals have a capacity to be "fit" self-governors; to forbear using the government and political power to entrench their own opinions; to take "remote" and public-spirited as well as "partial" and selfish interests into consideration; in short, to exercise what may be called "equal concern virtue."[186] But humans also have the opposite, often stronger, disposition to instill their own opinions (an ambitious faculty) and to promote their own interests (a self-serving faculty) or those of their constituents (another ambitious faculty).[187] Madison emphasizes that neither "religious" nor "moral" controls can adequately prevent these dispositions from leading individuals to resort to "injustice" and "violence."[188] Something stronger is required.

In considering ways to control the disposition of republics and republicans to injustice and violence, Madison rejected "exterior"[189] controls of the "thou shalt" variety, not only when enforced by religious and moral values but also when enforced by law and the courts. Madison had little faith in "legal imperatives requiring conformity,"[190] which he repeatedly disparaged as "parchment barriers."[191] Instead, as Beer writes, he

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186. These all may be human "faculties," related to ambition. See id. at 322; id. No. 15, at 111 (Alexander Hamilton); id. No. 48, at 309 (James Madison); Madison, Vices, supra note 140, at 354 (identifying as a cause of injustice that representatives seek power due to "ambition"); see also Epstein, supra note 68, at 138–40.

187. The Federalist No. 10, supra note 10, at 79 (James Madison); Epstein, supra note 68, at 78–88; Rakove, James Madison, supra note 1, at 48.

188. Madison made this point most succinctly at the Convention:

> In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger. What motives are to restrain them? A prudent regard to the maxim that honesty is the best policy is found by experience to be as little regarded by bodies of men as by individuals. Respect for character is always diminished in proportion to the number among whom the blame or praise is to be divided. Conscience, the only remaining tie, is known to be inadequate in individuals . . . . Besides, Religion itself may become a motive to persecution & oppression.

Madison, June 6 Convention Speech, supra note 92, at 33; accord Madison, Vices, supra note 140, at 355; Madison, Oct. 24 Letter to Jefferson, supra note 179, at 213–14; The Federalist No. 10, supra note 10, at 81 (James Madison) ("If the impulse and the opportunity [to create powerful factions] be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control.").

189. The Federalist No. 51, supra note 10, at 320 (James Madison).

190. Beer, supra note 7, at 284–85.

191. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 Papers of Madison, supra note 2, at 295, 297 [hereinafter Madison, Oct. 17 Letter to Jefferson]

preferred to "use law to create situations which would incite office-holders incidentally, but voluntarily, to conform to the norms of their office."[192] It is true that Madison and especially Hamilton were willing to rely on enforcement via "judicial review" as a back stop.[193] But as we discuss later, Madison was loath to rely upon judicial review, which he considered ineffectual.[194]

The controls Madison preferred were "interior"—not to individuals, but to the structure of government. In other words, the controls he preferred were "structural"—they were intended to constrain the actual everyday practice of just government, rather than to inculcate virtue before the fact or to punish injustice after the fact. Through the design and empowerment of the various branches and levels of government, "[a]mbition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[195] The idea was not so much separation as interdependence, and thus Madison expected the states and national government to "control each other, at the same time that each will be controlled by itself."[196]

("Repeated violations of these parchment barriers have been committed by overbearing majorities in every State."). The original letter can be viewed online at http://www.loc.gov/exhibits/madison/objects.html.

192. Beer, supra note 7, at 284–85; The Federalist No. 48, supra note 10, at 313 (James Madison) (stating that, to be effective, the separation of powers must be guaranteed by more than "a mere demarcation" of responsibilities on "parchment"); see also The Federalist Nos. 25, 50 (Alexander Hamilton), No. 45 (James Madison); Epstein, supra note 68, at 43–46, 50; Rakove, James Madison, supra note 1, at 73, 77; Liebman, Desegregating Politics, supra note 66, at 1604–14.

193. See James S. Liebman & William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696, 762–73 (1998). And Madison himself dutifully followed the instructions of the state ratifying conventions to write exactly such limitations on the federal government into the Bill of Rights. See infra Part V.A.1–3 (noting Madison's assiduous work to secure adoption of the various "parchment barriers" in first ten Amendments to the Constitution, his earlier contributions to the drafting of Virginia's Declaration of Rights, and his reliance on the Declaration as a barrier to religious establishment in his *Memorial and Remonstrance* and in a contemporaneous letter to Monroe).

194. See infra Part V.B.1 (discussing Madison's argument in favor of a national veto based on inadequacy of judicial review).

195. The Federalist No. 51, supra note 10, at 322 (James Madison). Madison's distinction between weak "exterior" or admonitory constraints and potentially stronger "interior" or structural constraints foreshadowed Robert Dahl's famous combination of both legal and moral-religious restrictions into a single category of relatively less effective controls on misbehavior by citizens and officials, which Dahl juxtaposed with relatively more effective, structural controls. Only Madison's and Dahl's terminology is different—maddeningly so, given Dahl's use of the word "internal" to describe the controls operating through laws and "motives" that Madison referred to as mere "exterior" controls. Robert A. Dahl, A Preface to Democratic Theory 6, 18, 36, 82–83 (1956).

196. The Federalist No. 51, supra note 10, at 323 (James Madison).

B. *The Extended Republic as Structural Equal Protection Constraint*[197]

Madison's first step in developing his concept of interior or structural controls was to reject classic "small republic" theory. This theory held that democracy could be maintained only in a small, cohesive, homogenous society like Geneva or a Greek city-state.[198] Madison argued that no matter how small a republic is, there will still be factions. Diversity is inevitable, based on a republic's (or any "free" polity's) protection of the human faculties and thus of the resulting differences of class, occupation, and opinion.[199] In fact, the greater danger lies in a smaller republic.[200] The smaller the republic the greater the "impulse" to coalesce into a faction, because of a faction's higher probability of achieving a majority in a small republic.[201]

Madison's extended republic addressed the danger of faction in three ways. In a larger nation (1) there is a lower probability that any faction will amount to a majority and less "impulse" to coalesce into what

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197. In our discussion here of the link hetween the extended republic and equal protection, we are indebted to Dean Sandalow. See Sandalow, supra note 27, at 1190.

198. See, e.g., Montesquieu, supra note 68, hk. VII, chs. 16–17, at 124–25 (contrasting distinctive properties of repuhlic and monarchy); Beer, supra note 7, at 91, 277 ("[G]reater homogeneity in turn is thought to enhance the chances for agreement and so for orderly government in the republic."); Epstein, supra note 68, at 101 (locating Madison's rejection of small republic theory in David Hume's writings).

199. See supra notes 87–92 and accompanying text.

200. As Madison wrote:

> The smaller the society, the fewer probahly will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

The Federalist No. 10, supra note 10, at 83 (James Madison). Madison continued:

> [A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

Id. at 81. For Madison, the worst tendencies of small republics were illustrated by America's own Rhode Island. See supra notes 150, 173 and accompanying text; infra notes 206, 281 and accompanying text.

201. Given close proximity and ties of blood in a small society, a few individuals may dominate, "and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression." The Federalist No. 10, supra note 10, at 83 (James Madison).

will be only minority factions; (2) there is less "opportunity" to coalesce, given the large distances separating allied individuals; and (3) elected officials' wider constituencies make it more likely that they will take a broader, more general and impartial view of their responsibilities and that this enlarged view will eventually become habitual.

Hamilton's notes at the Convention, in which he (presciently[202]) dissented from Madison's faith in extended republics, highlight the reliance Madison placed on the development of broadening dispositions based on the extended republicans' breadth of activity and interaction. In Hamilton's view, local factions would have no trouble finding common cause at the national level or in forming larger, regional alliances that could be just as oppressive.[203]

Madison, on the other hand, hoped that a broad-minded disposition would arise from the constant, repeated need to find commonalities in great collections of interests, even if (as Hamilton predicted) those interests find sufficient impulse and opportunity to coalesce into larger alliances of factions. The only way "a coalition of a majority" can form across such a wide variety of interests, would be based on "principles . . . of justice and the general good."[204] Because the extended republic will "take in a greater variety of parties and interests[,] . . . [this structure] makes it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."[205] Diversity thus brings security by requiring consensus and cooperation.

Two auxiliary benefits arise because of an extended republic's tendency toward large electoral districts. First, large districts distance representatives from many petty, local factions. In order to get elected from large districts, representatives must engage in something like the same disposition- and habit-forming practice of finding commonalities among different factions as are discussed above.[206] Second, there is a larger

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202. See, e.g., Easterbrook, supra note 168, at 1334–47 (arguing that private interest legislation abounds, even in Congress, because of public choice failings of Madison's extended republic, and also because of social and technological changes making communication easier and making interested national legislation more accessible and attractive); infra notes 663–668, 679–681 and accompanying text.

203. Madison, June 6 Convention Speech, supra note 92, at 34 n.2 (Hamilton's notes). Hamilton confided in his notes that Madison's arguments for an expanded republic "do not conclude so strongly as he supposes" because the legislators "will meet in one room if they are drawn from half the globe—& will be liable to all the passions of popular assemblies." Id.; see also Proceedings of Committee of the Whole House, Wednesday, June 6, 1787 (Alexander Hamilton), *in* 1 Farrand, supra note 9, at 145, 146.

204. The Federalist No. 51, supra note 10, at 325 (James Madison); see also Beer, supra note 7, at 276 ("The judgments of the extended republic will be more just because they are more general, and they will be more general because, perforce, they must include a greater variety of interests.").

205. The Federalist No. 10, supra note 10, at 83 (James Madison).

206. See id. No. 58, at 360 (James Madison). Madison gave a particularly detailed account of how the structuring of government activity can over time form virtuous habits in *The Federalist No. 57*, which discusses the selection of members of the House:

number of "fit" or "wise" (i.e., relatively virtuous, commonality-seeking) "characters" in larger districts. Consequently, there is a greater likelihood that each faction will coalesce around such a "character."[207]

Additionally, in an extended republic, the separation and interdependence of power that provides the first structural "security" against injustice[208] includes not only the separation of the executive, legislative, and judicial functions but also a division of power between the national and state governments. The function of the states within this federal organization creates two additional potential sources of equal protection. First, vis-à-vis each other, states are separated horizontally, so that "[t]he influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States."[209]

Second, given the national government's practically and constitutionally limited set of functions, Madison expected the states to siphon off many localized issues of the sort that are especially interesting to factions.[210] As Professor Beer points out, Madison also expected that connecting large numbers of small, localized governmental units to a

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> [T]he House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

Id. No. 57, at 352 (James Madison). Madison juxtaposed the House of Representatives to state assemblies with large numbers of members representing small constituencies—as few as ten voters per representative in Georgia, and typically only several hundred electors per representative. See id. No. 55, at 341–42 (James Madison). With particular reference to the "iniquitous" measures passed in Rhode Island, Madison argued that a "sense of national character . . . can never be sufficiently possessed by a numerous and changeable body," and that big assemblies with representatives of small constituencies are especially susceptible to passion and unqualified members. Id. No. 63, at 383 (James Madison); see also id. No. 58 (James Madison).

207. Thus, whichever candidate is elected will have a greater innate disposition to virtue than is likely to be true of representatives elected from smaller districts. See id. No. 10, at 82 (James Madison); id. No. 58, at 360 (James Madison); id. No. 68, at 414 (Alexander Hamilton).

208. See supra note 185 and accompanying text.

209. The Federalist No. 10, supra note 10, at 84 (James Madison).

210. See id. at 83 ("The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures."); id. No. 46, at 294–95 (James Madison) ("[A]ll the more domestic and personal interests of the people will be regulated and provided for [by the states]."). As a result, an even higher proportion of especially "fit" (i.e., virtuous) "characters" would be enticed to seek election to national office because of the more challenging issues confronted there, and because they could leave behind them at the state level the many petty issues of government that might otherwise repel them from public service. A national government made up of "fit" "characters" thus could devote itself to generalizing the interests implicated by the smaller category of more momentous issues. See id. No. 10, at 83 (James Madison).

broader, national legislature would encourage the development and wide diffusion of innovative responses to public needs. States that rose above self-interest could become "well-springs for reform."[211] Especially in the House (where Madison served in the first constitutional Congress), given its members' closer connection to their smaller districts and familiarity with local laws and institutions, Madison "foresaw legislators from across the country pooling their knowledge of their home state laws when drafting federal laws."[212] Just as states nourished the revolutionary spirit and participated in ratifying the Constitution while making suggestions for its immediate modification, they might set examples for each other and for the national government.

Madison hoped this same interaction would work to dissuade public officials from "partial" and "unjust" legislation, while encouraging them to innovate and learn from each other. Congress would not only be restrained by the people who elected members of the House of Representatives; it also would "be . . . watched and controlled by the several collateral legislatures"[213] through their power to appoint senators and to agitate among their representatives in the House.[214] Madison hoped that this power would operate "symmetrically," matching state controls on the national government with a reciprocal power of Congress to veto unjust state legislation.[215]

In sum, Madison believed that in an extended republic *opinionated* factions would be unlikely to comprise a majority on their own and too passionately opinionated to coalesce effectively with other opinionated groups. The only likely coalition, therefore, would be a coalition of "sects" sharing a desire that government give *no* sect a leg up. The result would be a disposition toward "equal concern virtue" of the "justice" variety. Second, no single *self-interested* faction would be a majority. Even if many lesser factions coalesced into a greater one (e.g., various types of landowners into an owners' coalition, which then forms an alliance with a commercial coalition), the organizing principle would likely be closer than before to the principle of the public good. The result, in short, would be a tendency—albeit perhaps weaker in this instance—toward equal concern virtue of the "impartiality" variety.[216]

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211. Beer, supra note 7, at 388 (citation omitted).

212. Id. at 306.

213. The Federalist No. 52, supra note 10, at 330 (James Madison).

214. See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 559 (1954) [hereinafter Wechsler, Political Safeguards]; authorities cited infra notes 255–256, 289.

215. Beer, supra note 7, at 302; see infra Part IV.C.4.

216. See The Federalist No. 51, supra note 10, at 325 (James Madison) ("In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good . . . ."). Like

IV. MADISON VERSUS THE FIRST CONSTITUTION'S FLAWED FEDERALISM

There was one big problem with the Constitution's equal protection constraint, and Madison knew it. The problem was that the Constitution would do almost nothing to "cure" the "mortal diseases" of faction-driven "injustice" and "partiality" that, to Madison's mind, justified the effort to frame a new charter in the first place.[217] Indeed, one of the steps the Constitution took to enhance the cure—its retention of a strongly federalist organization—actually preserved and exacerbated the disease. To see why this is true, it is first necessary to consider the "vice[s]" in the Confederation that drove Madison's ardent efforts to frame a new, more "well-constructed Union."[218] After doing so, this Part demonstrates how the new Constitution institutionalized factional injustice and partiality in vast geographically defined and issue-defined reaches of the new republic, how Madison knew it and despaired of it, and how his far more radical (because less federalist) equal protection constraint (the "national veto") would have avoided it.

Scholars have puzzled over the question of how Madison came to the idea of the extended republic, especially given its violation of the Machiavellian and Montesquieuian orthodoxy that republics can survive only if they encompass small territories and populations.[219] Although traces of extended republican theory have been found in the writings of two Scottish thinkers, James Harrington[220] and David Hume,[221] the question remains why Madison chose to build upon Harrington and Hume rather

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Hamilton, Madison had doubts about the capacity of the extended republic's legislature to resist factional influences. See supra notes 202–203 and accompanying text.

217. The Federalist No. 10, supra note 10, at 77 (James Madison). For further discussion of the point that the extended republic fails to bind state legislators, see infra Part IV.B.

218. The Federalist No. 10, supra note 10, at 77 (James Madison).

219. See sources cited supra note 198.

220. See Beer, supra note 7, at 91–122.

221. See id. at 266–70; Epstein, supra note 68, at 101–02; Rakove, James Madison, supra note 1, at 50. One of David Hume's essays advances a version of extended republican theory. Hume proposed a government with a hundred counties, each administered by eleven elected magistrates and each with a hundred parishes. David Hume, Idea of Perfect Commonwealth, *in* Essays, Moral, Political and Literary 512, 516 (Eugene F. Miller ed., 1987). Each parish would elect a representative to a county legislature, and the county's legislature would elect a senator to a national senate. Id. There thus would be 100 senators, 1,100 county magistrates, and 10,000 county representatives. Id. Hume believed this "separation of places and interest" would permit stable representative government and "have all the advantages": "If the people debate, all is confusion: If they do not debate, they can only resolve; and then the senate carves for them. Divide the people into many separate bodies; and then they may debate with safety, and every inconvenience seems to be prevented." Id. at 523, 525. Hume's scheme had checks and balances not unlike those Madison later advocated, including the national veto. The Senate would have "[l]arger powers, though of the safest kind." Id. at 526. Although each county would be "a kind of republic within itself," minority rights within each county would be protected by the national senate, which could annul the bylaws of another county—as could any of the other ninety-nine counties! Id. at 520. Counties would try

than following Machiavelli and Montesquieu.[222] Madison's papers actually leave little doubt about the answer to this question. The reason the answer remains obscure is that Madison largely left it out of *The Federalist*. He did so not only because it would have lent support to some of the criticisms of the Constitution that *The Federalist* was designed to answer but also, as we shall see, because a critical omission from the Constitution's equal protection constraint left Madison with no occasion to discuss the problems that the omitted provision would have addressed.[223]

A. *The "Vices" of the Existing Arrangement That Required a New Constitution*

The standard (indeed, the official) explanation for convening the meeting in Philadelphia that eventuated in the Constitution was that the weak central government under the Articles of Confederation had failed.[224] In letters to George Washington, Thomas Jefferson, and Edmund Randolph, however, as well as in a private memorandum and in a speech at the Convention, Madison gave a very different explanation. In Madison's view it was the stronger governments of the thirteen small republics in the Confederation that had failed. Their "vices" were manifest, moreover, not only in actions that, at every turn, had thwarted the central government's erstwhile efforts at just and impartial legislation and administration. More importantly, the thirteen republics had succumbed to even more abject failings in managing their *own* affairs. The critical defect in the constitution of the Confederation was not in the Articles themselves, therefore, but in the constitutions of the thirteen member republics. It was those constitutions, Madison believed, that most needed to be

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criminal defendants, "[b]ut the senate can stop any trial, and bring it before themselves." Id. at 521. In regard to Hume's influence on Madison, see Beer, supra note 7, at 269–70.

222. Although classical "small republics" theory generally derives from Aristotle, even he recognized that a relatively large state—large by the standards of the day, though very small by modern standards—may be more stable than the small, divided regime because of its greater immunity to "faction":

> The mean condition of states is clearly best, for no other is free from faction; and where the middle class is large, there are least likely to be factions and dissensions. For a similar reason large states are less liable to faction than small ones, because in them the middle class is large; whereas in small states it is easy to divide all the citizens into two classes who are either rich or poor, and to leave nothing in the middle.

Aristotle, Politics, reprinted in The Basic Works of Aristotle 1113, 1221 (Richard McKeon ed., 1941).

223. See *Editorial Note* to Madison, Oct. 24 Letter to Jefferson, supra note 179, at 205 (remarking that "JM's essays in *The Federalist* are an incomplete statement of his political thought" given Madison's omission from *The Federalist* of his most cherished proposal after the conveners omitted it from the Constitution).

224. See The Federalist No. 40, supra note 10, at 247–48 (James Madison) ("[T]he object of the convention was to establish in these States *a firm national government*; 2nd, that this government was to be such as would be *adequate to the exigencies of government* and *the preservation of the Union* . . . ."). Madison largely derived this definition of the Convention's object from the Act of Congress of February 21, 1787, which authorized the Convention.

changed, and he saw the development of a new national constitution as the way to accomplish that goal.[225]

In his writings, Madison attributed four "vices" or "mortal diseases" to "the Legislative sovereignties of the States"—the "multiplicity," "mutability," "injustice," and "impotence" of their laws.[226] In successive iterations, the discussion of the third vice ("injustice") grew while discussions of the other vices shrank. The third vice then became the one that Madison—after almost totally stripping it of any explicit linkage to the governments of the thirteen states—placed at the core of his most famous *Nos. 10* and *51* in *The Federalist*, namely, the mortal diseases bred of faction.[227]

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225. See Rakove, James Madison, supra note 1, at 44 (explaining that Madison "came to believe that only the creation of an effective national government would rescue the states from their own failings").

226. See Madison, Vices, supra note 140, at 353–57; Letter from James Madison to Edmund Randolph (Apr. 8, 1787), *in* 9 Papers of Madison, supra note 2, at 368, 370 [hereinafter Madison, Letter to Randolph]; Madison, Letter to Washington, supra note 16, at 384; Madison, June 8 Convention Speech, supra note 16, at 41; James Madison, Relationship Between Federal and State Governments, Address Before Constitutional Convention (June 21, 1787), *in* 10 Papers of Madison, supra note 2, at 67, 68–69 [hereinafter Madison, June 21 Convention Speech]; Madison, July 17 Convention Speech, supra note 144, at 102–03; Madison, Oct. 24 Letter to Jefferson, supra note 179, at 212. The "mortal diseases" language appears for the first time in a letter Madison wrote to Jefferson just before the Convention, which linked the "mortal diseases of the existing constitution" to "the Legislative sovereignties of the States," and described the maladies as the states' "invasion" of "national rights and interests," "thwarting and molesting each other," and their "oppressing the minority within themselves" by "unrighteous measures which favor the interest of the majority." Madison, Mar. 19 Letter to Jefferson, supra note 32, at 318.

227. See Rakove, James Madison, supra note 1, at 51 (stating that it was Madison's "overriding conviction that factious majorities *within the states* posed the greatest danger to liberty" under the Articles). Illustrating Madison's effort to obscure his concerns about the states in his contributions to *The Federalist*, the "mortal disease" phrase reappears in *The Federalist No. 10* but is used to describe the diseases of constitutions of *past* republics—on which, Madison claims, the constitutions of the states have "admir[ably]" and "valu[ably]" "improve[d]." The Federalist No. 10, supra note 10, at 77 (James Madison); cf. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 205, 213–14 (presenting similar analysis but omitting any of encomia to state constitutions). And although Madison smuggled some of his honest views about the states into his classic, he did so in the midst of inaccurately saying he believed the Constitution cured the problem. Starting out in a critical, if uncharacteristically wishy-washy, mode, Madison stated:

> Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. . . . The instability, injustice, and confusion introduced into the public councils have, in truth, been the mortal diseases under which popular governments have everywhere perished . . . . The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments

"In developing the evils which viciate the political system of the U.S., it is proper," Madison wrote, "to include those which are found within the States individually, as well as those which directly affect the States collectively, since the former class have an indirect influence on the general malady and must not be overlooked in forming a compleat remedy."[228] Among those "evils," the most "alarming" was the "[i]njustice of the laws of the States."[229] Madison considered this "defect" to be "alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments are the safest Guardians both of public Good and of private rights."[230] In assaying the "causes" to which "this evil [is] to be ascribed," Madison concluded that the "more fatal . . . cause lies among the people themselves," given their natural tendency to "divide[ ] into different interests and factions."[231] Madison warned that individuals will always "naturally" pursue self-interest at the expense of a minority, when given the opportunity:

> In republican Government the majority however composed, ultimately give the law. Whenever therefore an apparent interest of common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals? . . . Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give

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> are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true.

The Federalist No. 10, supra note 10, at 77 (James Madison). Madison then offered his extended republic solution and misrepresented his belief that, by extending the republic and its *national* government according to that theory, the proposed Constitution thereby cured the republican "dangers" that "our governments"—referring to the *state* governments—previously had "not . . . effectually obviated." Id. at 77, 84 ("In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government."). Later, however, in *Nos. 47* and *48*, Madison again criticized the state constitutions, noting that many were hastily drafted and lacked proper mixing and separation of powers, and that uncorrected violations of state constitutions by state legislators had occurred in all of the states. See id. No. 47, at 307 (James Madison); id. No. 48, at 310, 312 (James Madison).

228. Madison, Vices, supra note 140, at 353.

229. Id. at 354.

230. Id. In a letter to James Monroe eight months before the Convention, Madison harshly criticized the "maxim . . . that the interest of the majority is the political standard of right and wrong." Madison, Letter to Monroe, supra note 144, at 141. "[N]othing can be more false," he argued, noting "the interest of the majority in every community to despoil & enslave the minority of individuals; and in a federal community to make a similar sacrifice of the minority of the component States." Id. Without some kind of equal protection constraint, majority rule "only reestablish[es] under another name and a more spe[c]ious form, force as the measure of right." Id. (second alteration in original).

231. Madison, Vices, supra note 140, at 355.

> to two of them an interest opposed to the rights of the third? Will the latter be secure? The prudence of every man would shun the danger. . . . Will two thousand in a like situation be less likely to encroach on the rights of one thousand? The contrary is witnessed by notorious factions & oppressions which take place in corporate towns limited as the opportunities are, and in little republics when uncontrouled by apprehensions of external danger.[232]

In "lobbying" letters before the Convention to Governor Randolph and General Washington (the two acknowledged leaders of the Virginia delegation),[233] in speeches at the Convention, and in a lengthy letter to Jefferson (then the ambassador to France) immediately after the Convention's embargo on descriptions of its proceedings was lifted, Madison pressed the same theme. It was "absolutely necessary,"[234] he said, that the new "system" of government curb the "constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights & interests of each other"; and, most especially, "to oppress the weaker party within their respective jurisdictions."[235] Cataloging the states' "[i]nterferences" with "the security of private rights, and [with] the

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232. Id. at 355–56; see also James B. Staab, The Tenth Amendment and Justice Scalia's "Split Personality," 16 J.L. & Pol. 231, 251 n.83 (2000) (describing tbis passage as "[a]n illustration of Madison's ratber dark view of human nature," "influenced at least in part by his Calvinistic training, a primary tenet of which is the doctrine of original sin").

233. Madison, Letter to Wasbington, supra note 16, at 382; Madison, Letter to Randolph, supra note 226, at 368. Madison's lobbying letters did not fully develop—or report—his views. In several, he justified the veto more in terms of coercing the states or creating a "defensive power" against state encroachment on federal prerogatives than in terms of protecting state minorities, although he always mentioned the latter point. See, e.g., Madison, Mar. 19 Letter to Jefferson, supra note 32, at 318. Professor Kramer notes this change in Madison's defense of the veto—from giving the veto's "supervisory function" a "plainly subordinate role" in his early Convention-eve lobbying letters, to emphasizing that function in his later private *Vices* memorandum and in his April 16, 1787, letter to Washington. Kramer, Madison's Audience, supra note 25, at 635. Kramer chalks up the change to evolution in Madison's thinking. See id. at 636. In fact, Madison's letter to James Monroe six months earlier had already fully and emphatically stated Madison's belief in the need to curb state injustices. See supra note 230. It thus appears that the inconsistencies between Madison's lobbying letters and his more private views were a result of his tailoring his attacks on the states and defense of the veto to make them most convincing to the letter's particular recipient. As we discuss below, some of the Virginia delegates who received lobbying letters from Madison, such as Edmund Randolph, were far more sympathetic at the Convention to the veto's power to strengthen the national government's hand vis-à-vis the states than to its uses to curb state oppression of minority groups. See infra Part IV.C.5. Madison's tactics may have come back to haunt him when early veto supporters like Gouverneur Morris of Pennsylvania withdrew their support from the veto in favor of a judicially enforced Supremacy Clause that, although a reasonable method of curbing state encroachments on federal prerogatives, had no power (especially given the Constitution's lack of anything resembling an equal protection clause) to curb states' injustices against their own minority factions. See infra notes 382, 389 and accompanying text.

234. Madison, June 8 Convention Speech, supra note 16, at 41.

235. Id.

steady dispensation of Justice," Madison asked the Convention whether it "[w]as . . . to be supposed that republican liberty could long exist under the abuses of it practiced in some of the States."[236] He put the point most directly in his post-Convention letter to Jefferson:

> The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects. A reform therefore which does not make provision for private rights must be materially defective.[237]

B. *The Vice of the Constitution as Revealed by* The Federalist No. 51

Through *The Federalist* and his head-to-head debates with Patrick Henry at Virginia's ratifying convention, Madison (along with Hamilton and to lesser extents Jay and Wilson) was the great and successful champion of the Constitution. But what were Madison's candid thoughts about the prospects for the new Constitution—what many consider to be *his* constitution?[238] He expressed those thoughts in a letter to Jefferson toward the end of the Convention, when the embargo on discussions of its deliberations still prevented him from giving his reasons: "I hazard an opinion," he wrote, "that the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts agst the state governments."[239]

The reasons for Madison's doubts about the Constitution are apparent in his single greatest essay in political science, *The Federalist No. 51*.[240] The doubts are apparent, however, not from what Madison said, but from what he left unsaid. To mangle the cliché, *No. 51* is like a grand old clock that reaches high noon and tolls eleven times.

No. 51 begins by restating a familiar constitutional problem and some unavailing solutions to it that were addressed in the immediately preceding papers, and then proposes classically Madisonian mechanics as the solution. The familiar problem was to identify some "expedient . . .

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236. Madison, June 6 Convention Speech, supra note 92, at 32.

237. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 212.

238. See supra note 1 and accompanying text.

239. Madison, Sept. 6 Letter to Jefferson, supra note 13, at 163–64 (emphasis omitted).

240. The Federalist No. 51, supra note 10, at 320 (James Madison). Unlike the more theoretical *No. 10*, *No. 51* is an exercise in real constitutional architecture. *No. 51* is also more complete than *No. 10*, because it juxtaposes Madison's extended republican theory to previously established (especially Montesquieuian) separation of powers theory and describes many of the structural aspects of the Constitution beyond the extended republican aspects.

for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution."[241] The key phrase here is "in practice," which was prompted by Madison's immediately preceding conclusion that "exterior provisions"—i.e., legal "thou shalts" and "shalt nots" that purport to define the powers and limitations of "the several departments"—are "inadequate" to assure conformity with the principles they state.[242] "The only answer," Madison concluded, introducing his famous mechanics, is to "so contriv[e] the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[243]

Thus far, Madison's essay sounds in Montesquieu's "separation of powers" theory.[244] And, indeed, the first part of Madison's essay is devoted to the political science underlying that theory—i.e., "to lay[ing] a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty . . . ."[245] Reprising Montesquieu's core principle (absolute separation of each branch from the others in their functions and appointment[246]) and the principle's implication for a republic (that, because the departments cannot appoint each other, the people acting independently of each other should appoint all of them), Madison proceeds to note and explain the Constitution's substantial "deviations" from the orthodox position.[247]

In fact, the glory of the separated powers under the Constitution is that they are not very separated. Judges are appointed by the President, confirmed by the Senate, and compensated by both Houses. The President's veto and the Vice President's vote in the Senate enables the executive to share legislative power with Congress; the Senate's power of approving appointments and treaties lets the legislative branch share executive power with the President; and neither the Senate nor the House can act without the concurrence of the other.[248] In essence, each

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241. Id.

242. Id.; see supra Part III.A.

243. The Federalist No. 51, supra note 10, at 320 (James Madison).

244. Montesquieu, supra note 68, bk. XI, ch. 6, at 156–66; id. bk. XX, ch. 12, at 345; see Beer, supra note 7, at 225–31; see also Locke, supra note 68, ch. 9, § 131, at 68.

245. The Federalist No. 51, supra note 10, at 321 (James Madison).

246. Id. ("[E]ach department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.").

247. Id. ("[R]igorously adhered to, [the separation of powers] would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another.").

248. According to Madison, the Constitution separates the legislative branch into two parts precisely in order to subject the otherwise over-powerful legislative power to additional separation of powers constraints:

> In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into two different

branch (particularly the political branches) shares a significant portion of the power of the others but *exercises* its power separately—the President only after Congress has acted, the Vice President only after the Senate has deliberated to a standstill, and the like.

Madisonian mechanics provide the explanation for thus qualifying the classical separation of the three branches' powers by requiring some of the separated powers to be shared, but then separating the branches' acts of shared authority into successive steps. Just as "exterior provisions" forbidding rulers to usurp each other's powers and those of the ruled are unavailing, so too is innate human virtue, given "the defect [i.e., insufficiency] of better motives" that characterizes "human nature."[249] Based on the "experience . . . [of] mankind," Madison thought that the purest form of republican mechanics—periodic elections—was also inadequate to the task of enforcing the needed division of powers, thus creating a "necessity of auxiliary precautions."[250] Under these circumstances, the so-called separation of powers could succeed in limiting government oppression only by giving each department enough of the power of another[251] (1) to interest the "ambitions" of the first department in the business and product of the second department, and then (2) to allow the first department, when ambition dictates, to thwart the plans of the second department—or to refrain from doing so if but only if the second department refrains from encroaching on the prerogatives of the first department.[252]

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branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

Id. at 322.

249. Id. In Madison's famous words:

It may be a reflection on human nature that such [mechanistic or structural] devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. . . . This policy of supplying . . . the defect of better motives, might be traced through[out] the whole system of human affairs, private as well as public.

Id.; see supra notes 262–265 and accompanying text (discussing Madison's use of the word "motives" to refer to what classic republican theory describes as "virtue" and rejecting virtue as an adequate protection against the dangers of faction).

250. The Federalist No. 51, supra note 10, at 322 (James Madison).

251. The system avoids giving any one branch too much of the other branch's power. See, e.g., id. at 323 (giving Madison's explanation for withholding from the President an "absolute negative on the legislature" and allowing the legislature to override the President's veto).

252. See id. at 321–22. Madison writes:

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Amhition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.

Id.

Madison then noted that under the new Constitution "usurpations" of power "are guarded against" by a second "division of the government into distinct and separate" parts, namely, through the retention of a partly federal structure:[253]

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[254]

In *Nos. 44* and *46*, Madison had described how this checking function would work through the states' mobilization of the people: States "will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives."[255] Indeed, Madison was concerned about the ability of the national government to protect its power from the states as successfully as the states could protect their power from the federal government through a mobilized electorate.[256]

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253. See infra Part IV.C.4 (explaining why constitutional structure Madison envisioned, both with and without national veto, gave the states less sovereignty and independence than in a classically federalist polity).

254. The Federalist No. 51, supra note 10, at 323 (James Madison).

255. Id. No. 44, at 268 (James Madison); see also id. No. 46 (James Madison). Madison used this very technique in the Virginia and Kentucky Resolutions of 1798 to mobilize public opposition to the federal Alien and Sedition Acts—indicating more continuity between his views at the time of the founding and later than is sometimes assumed. See supra note 3 and accompanying text; infra notes 353, 494–495 and accompanying text.

256. The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

The Federalist No. 46, supra note 10, at 297–98 (James Madison). We do not conclude that Madison's fears were answered in part by the national political party system, though it provided mutual dependence of states and federal government, and a conduit connecting local and national politics. See Beer, supra note 7, at 306; Larry D. Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 269–71 (2000) [hereinafter Kramer, Putting the Politics]. Professor Kramer argues that the two national political parties have admirably served the role Madison assumed Congress would play in the extended republic. Id. On this view, the parties mimic the role of the legislature in the Madisonian extended republic by bringing enough small factions under a single "tent" to amass or approach a national majority, in the process denying decisive influence to any single faction, no matter how powerful it may be locally. Cf. Nicholas Lemann, The Controller: Karl Rove Is Working to Get George Bush Reelected, but He Has Bigger Plans, The New Yorker, May 12, 2003, at 68, 82–83 (attributing this understanding of role of political parties to Bush Administration political strategist Karl Rove—a fan of James Madison, after whom he named his only child). But from the

At this point, it helps to recall *The Federalist No. 51*'s underlying objective: to show how to constrain government, particularly republican government, so it never becomes powerful enough to threaten the capacity of individuals to exercise their faculties.[257] In terms Madison used elsewhere,[258] separation of powers and federalism pit the "few" against the "few" (executive officers against legislators; state officials against national ones) so that the few (government as a whole) never become powerful enough to threaten the many (the people).

In this way, separation of powers and federalism protect the "rights" or individual liberties of the people vis-à-vis the government. But at least as discussed up to this point in Madison's essay, these political mechanics do not assure "justice" among the people: They do not address the problem of faction by keeping groups of people from oppressing each other.[259] On the contrary, federalism may have the opposite effect. First, it leaves the states subject to control by small enough groups of voters that a single faction could hold sway over a state and use its power "unjustly," not only locally but in mobilizing the state's power against the national government.[260] Second, by leaving entire spheres of activity outside the interest or control of the national government,[261] federalism permits this oppression to operate without interference or constraint from the national level. So, although federalism may be "a double security" for liberty, it provides a double invitation for state-level factional abuse of minorities.

Having dealt with the problem of protecting the many from the few, Madison turned to the problem of protecting the few (members of minority factions) from the many. In his statement of the problem, he again rejected virtue as a constraint on the abuse of power and again identified the need to embed alternative protections in the constitutional framework:

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable

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standpoint of the equal protection concerns motivating Madison at the Convention, any "generalizing" effect the two political parties have achieved at the national level has been more than offset by their fortification and perpetuation of factional control at the state level. Cf. id. at 75–77 (describing Rove's and others' success in replacing Democratic Party's century-long stranglehold on Texas politics with similarly monolithic control by Republican Party). In other words, the two-party system only underscores our conclusion that the extended republic is not enough by itself to achieve the local-level equal protection that Madison believed was essential to successful republican government. We discuss this point further in infra Part VII.

257. See The Federalist No. 51, supra note 10, at 320–21 (James Madison).

258. See, e.g., id. No. 57, at 350 (James Madison) (discussing measures the Constitution takes to avoid "an ambitious sacrifice of the many to the aggrandizement of the few").

259. See supra notes 109–115 and accompanying text (distinguishing "individual rights" from "justice" in Madisonian political theory).

260. See supra notes 254–256 and accompanying text; infra note 495.

261. See infra note 276.

> the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on government; but experience has taught mankind the necessity of auxiliary precautions.[262]

As Madison well knew, this passage is fraught with paradoxes. In a republic, "the people" are not only "the governed" but also, when in the majority, "the government." Yet, although the people, like other governors, are no "angels,"[263] and are the locus and source for faction, a "dependence on the people is . . . the primary [republican] control."[264] Madison described the same problem on the eve of the Convention, again rejecting virtue, or "character," as its solution:

> In republican Government the majority however composed, ultimately give the law. Whenever therefore an apparent interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals? Three motives only I. a prudent regard to their own good as involved in the general and permanent good of the Community . . . 2dly. respect for character . . . [and] 3dly. . . . Religion . . . , [none of which is a sufficient restraint].[265]

Madison devoted the remainder of *The Federalist No. 51* to a search for the "auxiliary precautions" that could compensate for the people's "defect of . . . motives" and "oblige [the government]"—ultimately, a majority of the people—"to control itself."[266]

"It is of great importance in a republic," Madison began, "not only to guard the society against the oppression of its rulers, but to guard one part of society against the injustice of the other part."[267] Encapsulating *The Federalist No. 10,* he explained how such "injustice" might arise: "If a majority be united by a common interest, the rights of the minority will be insecure."[268] Madison identified "but two methods of providing against this evil"—in our terms, of providing a workable equal protection constraint. The constitution either (1) must "creat[e] a will in the community independent of the majority—that is, of the society itself"; or (2) must "comprehend[ ] in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable."[269] Madison damned the first method

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262. The Federalist No. 51, supra note 10, at 322 (James Madison).

263. See Madison, Oct. 24 Letter to Jefferson, supra note 179, at 213 ("However erroneous or ridiculous these grounds of dissention and faction, may appear to the enlightened Statesman, or the benevolent philosopher, the bulk of mankind who are neither Statesmen nor Philosophers, will continue to view them in a different light.").

264. The Federalist No. 51, supra note 10, at 322 (James Madison).

265. Madison, Vices, supra note 140, at 355–56. For further discussion of the three motives, see supra note 188.

266. The Federalist No. 51, supra note 10, at 322 (James Madison).

267. Id. at 323.

268. Id.

269. Id. at 323–24.

both by association and by analysis. That method "prevails in all governments possessing an hereditary or self-appointed authority" and is "but a precarious security; because a power independent of the society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties."[270]

As a result, Madison wrote:

> The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.[271]

Reiterating *The Federalist No. 10*'s theory of the extended republic, Madison noted that "the security for civil rights must . . . consist[ ] . . . in the multiplicity of interests" which "may be presumed to depend on the extent of country and number of people comprehended under the same government."[272] He continued, "In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good . . . ."[273] And it is on this note that *No. 51* concludes: "[T]he larger the society, provided it lie within a practicable sphere, the more duly ca-

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270. Id. at 324.

271. Id.

272. Id.

273. Id. at 325. As Madison said at the Convention, in a speech in favor of the national negative as a necessary adjunct to the extended republic:

> The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the wbole or of the minority; and in the 2d place, that in case they shd have such an interest, they may not be apt to unite in the pursuit of it.

Madison, June 6 Convention Speech, supra note 92, at 33. It is just here in *The Federalist No. 51* that Madison inserts the passage on wbich so much emphasis is laid above—that "[j]ustice is the end of government" because it enables the weak to preserve their liberties against incursions occurring when the strong exercise their liberties; that a version of equal concern virtue convinces the stronger individuals in the state of nature to agree to submit to government along with the weak to protect what even the strong (eventually, virtuously) recognize as their shared equal liberties; that a belief in liberty and its implication, self-government, eventually compels a switch to republican governments that respect "political" as well as "personal" liberty; that, however, the creation of a republic and the empowering of the people replicates (and worsens) the state of nature by placing weak minorities at the mercy of strong majorities (indeed, this is worse than the state of nature, because the strong now can wield the entire power of the state, not just their own power); that a new type of justice (the equal protection requirement) thus becomes a necessity of republican government, to protect weak factions from strong ones; that strong factions accept this constraint out of a version of equal concern virtue (Madison's "like motive") that arises once they recognize their own insecurity absent "protection" for what they recognize are their own and minority group members' equal liberties. See supra Part II.B.4.

pable it will be of self-government. And happily for the *republican cause*, the practicable sphere may be carried to a very great extent by a judicious modification and mixture of the *federal principle*."[274]

Earlier in *No. 51* and in the immediately preceding papers of *The Federalist*, Madison had explained how the federal principle enabled a wide enough extension of the republic to bring the new constitution's equal protection mechanics into play with regard to the central government. First, the breadth of the central government could be widened in the interest of protecting minorities from majorities (protecting "the few" from "the many") without unduly empowering the governors to oppress the governed (without enabling "the many" to oppress "the few") because the expanded central government's "usurpations are guarded against" or checked by the states.[275] Moreover, by limiting the tasks assigned to the central government to an enumerated few,[276] with the rest being reserved to the states, the federal principle not only (1) made the range of tasks assigned to the central government manageable, but also enabled the central government (2) to operate with a manageably small number of representatives (because the principle reserved for the states the localized issues that require localized knowledge and, thus, numerous locally knowledgeable representatives), and (3) to attract "fit" "characters" (who would have been repelled by the tedium and minutiae of those localized issues).[277]

Dividing power not only among the three branches but also between the federal and state governments would enable each of the three branches of the federal government and also the states, together with periodic elections, to protect the people as a whole against the national government's exercise of its enumerated powers. Such a division of power, together with periodic local elections, would also permit the national government and the state governments to protect the people as a whole against state governments in exercise of their reserved powers. And to cure "the evils" that most "contributed . . . to that uneasiness which produced the Convention"[278]—"the internal vicisitudes of State policy" in the course of the states' exercise of their reserved functions and

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274. The Federalist No. 51, supra note 10, at 325 (James Madison). Madison developed this idea further in an "immoderate digression" in his post-Convention letter to Jefferson. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 214.

275. The Federalist No. 51, supra note 10, at 323 (James Madison); see supra notes 253–256 and accompanying text.

276. In one sense, the so-called enumerated "powers" are not really powers, but substantive areas of concern—problems to be solved, or as Madison called them, "objects." The Federalist No. 46, supra note 10, at 296 (James Madison); id. No. 10, at 83 (James Madison) (distinguishing "great and national objects" of the national government from "local circumstances and lesser interests" that prevail in state legislatures); see Beer, supra note 7, at 292–93.

277. See supra note 210 and accompanying text.

278. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 212; see also Madison, June 6 Convention Speech, supra note 92, at 33.

"the aggressions of interested majorities" in the states against "the rights of minorities and . . . individuals"[279]—*The Federalist No. 51* and the new Constitution offered . . . well, *nothing*.

And Madison knew it. Indeed, he said so in *No. 51* itself, albeit covertly. In the guise of responding to critics of the extended republic who parroted the Machiavellian/Montesquieuian orthodoxy that only *small* republics or confederacies of them could survive,[280] Madison wrote:

> [I]n exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, [namely, the extended republic] for the rights of every class of citizen, will be diminished; and consequently the stability and independence of some member of government, the only other security, must be proportionally increased.[281]

But, as *The Federalist No. 51* admits, in order to take advantage of "the federal principle" to permit the "practicable" extension of the republic, the Constitution *itself* had formed "the territory of the Union . . . into more circumscribed . . . States," facilitating "oppressive combinations of a majority" and diminishing "the rights of every class of citizen" in those states.[282]

The quoted passage does, to be sure, offer an alternative form of "security" for those rights, namely, "proportionally increas[ing]" "the stability and independence of some member of the government."[283] But this is an alternative characterized only a few sentences earlier as "a precarious security," because it "introduc[ed] into the government . . . a will independent of the society itself."[284] And most important of all, it is an alternative solution that *the Constitution nowhere provided for*. On the contrary, as Madison noted in *The Federalist No. 44*, "[t]here being *no . . . intermediate body between the State legislatures and the people* interested in

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279. Madison, Letter to Washington, supra note 16, at 384.

280. See supra notes 198, 222 and accompanying text.

281. The Federalist No. 51, supra note 10, at 324 (James Madison). As usual, Rhode Island was Madison's archetype of the danger of factional tyranny in a small state:

> It can be little douhted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it.

Id. at 325; accord Madison, July 17 Convention Speech, supra note 144, at 103 (noting, as a reason why a negative on state laws was needed, the "wicked & arbitrary plans" of Rhode Island legislature); see also supra notes 150, 173 (describing events in Rhode Island that triggered Madison's concerns).

282. The Federalist No. 51, supra note 10, at 324–25 (James Madison).

283. Id. at 324.

284. Id. at 324–25.

watching the conduct of the former, violations of the State constitutions are . . . likely to remain unnoticed and unredressed."[285]

The first Constitution, in sum, was fundamentally flawed because it lacked an equal protection constraint on oppressive action by majorities *in the states.* And it was precisely this defect—the Constitution's omission of either the first *or* the second method of controlling "many versus few" oppression in the states—that prompted Madison to tell Jefferson that "the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts agst the state governments."[286]

C. *Madison's (and Hamilton's and Wilson's) More Perfect Constitution*

Madison had a solution to this problem that he passionately pressed on the Convention: the national legislative veto, or national negative. But the Convention rejected it, and as we later note, perhaps for good reason. Before discussing Madison's solution, we first consider his reasons for rejecting two alternative proposals.

1. *Alexander Hamilton's Solution.* — Hamilton's solution in theory, and in practice as Secretary of Treasury, was to have the national government absorb as many functions as possible, leaving few of any moment at the mercy of "many versus few" oppression at the state level. Madison had some sympathy for this approach, hence his proposal at the Convention for an open-ended, not enumerated, description of the national government's powers. But he lost. Partly because he lost, significant jurisdiction would always remain with the states, in spheres offering many opportunities for majority oppression of minorities.[287]

Moreover, as recent events reveal, even a national government that has gradually accreted broad powers over issues may choose not to exercise them.[288] Aggregating too many powers at the national level may lead to inefficiency and failed policies, popular resistance, and an effective demand by the states of just the sort that *The Federalist No. 44* had predicted, that power be returned to them. There is thus no reason to expect that the national government will choose to absorb the kinds of issues that are most susceptible to majority tyranny in the states and many reasons to

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285. Id. No. 44, at 286 (James Madison) (emphasis added).

286. Madison, Sept. 6 Letter to Jefferson, supra note 13, at 163–64 (emphasis omitted). Madison further explained his doubts about the new constitution in Madison, Oct. 24 Letter to Jefferson, supra note 179, at 209–14.

287. See The Federalist No. 17, supra note 10, at 120 (Alexander Hamilton) ("There is one transcendent advantage belonging to the province of the State governments . . . I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment."). For additional discussion of the significant powers and advantages remaining with the states, see The Federalist No. 46, supra note 10, at 296–98 (James Madison); supra notes 254–256 and accompanying text; infra Part V.B.

288. See infra Part V.C.

think it will instead choose to concern itself with less factious issues that more obviously affect the public good, such as national security.

Madison made exactly this prediction in *No. 44* in the process, as we have noted, of stating explicitly what the lacuna in *No. 51* had implied, that the Constitution as written would not sufficiently protect minorities from state-level tyranny:

> The truth is that this ultimate redress [i.e., federalism] may be more confided in against unconstitutional acts of the federal than of the State legislatures, for this plain reason that as every such act of the former will be an invasion of the rights of the latter, these [states] will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives. There being no such intermediate body between the State legislatures and the people interested in watching the conduct of the former, violations of the State constitutions are more likely to remain unnoticed and unredressed.[289]

Regardless of the precise allocation of responsibility between the states and the national government, therefore, the retention of a federal system in which the states had substantial sovereignty and political clout (which was itself a prerequisite for the extended republic's protection against national tyranny) left ample room for state-level factional oppression to operate and yet "remain unnoticed and unredressed."

Ultimately, even Hamilton himself recognized this problem. In the only reference in *The Federalist* to the national negative, Hamilton in *No. 80* described the veto, or some substitute for it that goes beyond the extended republic itself, as crucial if the states were to be prevented from committing injustices against their people:

> No man of sense will believe that such prohibitions [on state injustices] would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union.[290]

As we develop later in this Part, the Convention did very explicitly understand and adopt the "judicial review" solution to which Hamilton refers as a substitute for the veto.[291] But as we develop in Part V below, Madison rightly rejected this solution, not only because the first Constitution had no equal protection provision for the federal courts to enforce against

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289. The Federalist No. 44, supra note 10, at 286 (James Madison); see also id. No. 80, at 475 (Alexander Hamilton) ("What . . . would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them?").

290. Id. No. 80, at 475–76 (Alexander Hamilton).

291. See infra Part IV.C.5.

the states but also because judicial review was *not* an "effectual power in the [central] government to restrain or correct" state injustices.[292]

2. *James Wilson's Solution.* — Hamilton's nationalist fellow traveler James Wilson—who along with Hamilton was the rare delegate who actually seems to have understood Madison's concerns about faction[293]—disagreed with Madison's assessment of the seriousness of the problem. For Wilson, faction was simply an excess of political enthusiasm—an "esprit du corps" that was "frequently nothing else than a warm but inconsiderate ebullition of our social propensities."[294] Wilson was loath to dampen such social passions, believing they would draw the people to the newly empowered national government.[295] He also thought the maladministration of state governments would diminish as the national government's better administration (a product of its consideration of a wider, more optimal range of interests) led states to emulate it.[296] As we have seen, however, Madison found no solace in such predictions.[297]

Worse, Wilson's prediction depended in part on a psychological assumption: that the "social virtue" citizens possess would lead them, in exercising their power of self-government, to develop affection for a national government that better embodied those virtues than local governments.[298] Although similar to the virtue-inculcating process that Madison hoped would accompany his national veto—under which the extended republic would create generalizing habits of political practice that would feed back to the state governmental level[299]—the psychological process Wilson imagined worked directly on citizens, not just on state legislators.[300] And it worked purely by emulable example, without the structural incentives at the heart of Madison's proposal.

From a Madisonian perspective, the psychology Wilson imagined was both unlikely, given the highly economized version of citizen participa-

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292. The Federalist No. 80, supra note 10, at 476 (Alexander Hamilton).

293. See supra note 203 and accompanying text; infra notes 338, 388 and accompanying text.

294. Beer, supra note 7, at 375–76 (quoting James Wilson, Of Man, As a Member of a Confederation, *in* 1 The Works of James Wilson 247, 266 (Robert Green McCloskey ed., 1967)).

295. See id. at 367–73.

296. See id.; James Wilson, Of the Law of Nations, *in* Wilson, supra note 294, at 148, 162–64; James Wilson, Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department, *in* Wilson, supra note 294, at 399, 402–03.

297. This was due to his respect for the states' capacities to maintain the allegiance of the people in any fight with the national government, and his worry that oppressive state majorities would think they had more to lose by giving up their state-level monopolies on power than they had to gain by adopting more far-seeing administrations. See The Federalist No. 44, supra note 10, at 286 (James Madison).

298. Beer, supra note 7, at 367–73.

299. See infra Part IV.C.4.

300. See Beer, supra note 7, at 370–71 (discussing Wilson's belief in the inculcating power of discussing and explaining that for Wilson "[t]he perfecting of the Union went along with the perfecting of its citizens").

tion that the Constitution adopted, and unwelcome, given Madison's reservations about strong participatory democracy.[301] Madison harbored those reservations precisely because he expected "partial," not "generalizing," considerations to dominate local elections, where the kind of national-to-state-level feedback Wilson imagined would have to take place.[302] Madison's belief in individuals' "defect of better motives" under most circumstances,[303] and his respect for the ability of states and their governing factions to command popular support,[304] also left him with little faith in the virtue-inculcating power of the national government's example by itself. For Madison, as we will soon see, virtue can be inculcated only after long, habitual, incentive-driven practice. It will not arise merely as a result of the public's occasional attention to salutary examples.

3. *Madison's National Negative.* — Madison's own solution was to add a separate structural or "interior" equal protection constraint that operated not on the government of the extended republic but on those of the "more circumscribed . . . States."[305] As radical then as now, Madison's proposal was a national legislative veto. Congress would be empowered to veto state legislative measures in "*all cases whatsoever.*"[306] The national negative was the centerpiece of Madison's proposed constitutional structure, and by his lights the most important contemplated reform of the Articles. He tirelessly advocated it at the Convention. Indeed, for the other delegates his advocacy of the negative must have been *tiresome*, given how often he tried to resurrect the proposal after it was first defeated.

Although in the sections that follow we highlight Madison's enthusiasm for his proposal, we do not, in the end, share his fervent belief in the particular structural equal protection mechanism he proposed. On the contrary, in Part VII below and in a companion article,[307] we argue that that the national veto would not have served its intended purpose, especially under modern conditions. What we instead take from Madison is his reasoning and his structural approach to the problem he so presciently diagnosed. Before we can explain what we do and do not take from Madison, however, we must first describe his proposal and recall in detail his reasoning and approach to structural equal protection.

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301. See Epstein, supra note 68, at 195–97; supra note 200 (noting Madison's reservations about strong democracy).

302. See The Federalist No. 57, supra note 10, at 352 (James Madison); see also id. No. 55, at 341–42 (James Madison) (noting that state elections were rife with possibilities for factional control, given that as few as ten electors sometimes were responsible for electing a single state representative).

303. See supra note 249 and accompanying text.

304. See supra notes 254–256 and accompanying text; infra Part V.B.

305. The Federalist No. 51, supra note 10, at 324 (James Madison).

306. Madison, Letter to Washington, supra note 16, at 383.

307. Garrett & Liebman, Experimentalist Equal Protection, supra note 8 (manuscript at 82–83).

a. *The Need for the Negative.* — In understanding the importance of the negative to Madison, it helps to begin with Madison's strong metaphor—the "mortal diseases of the existing constitution."[308] "These diseases," he said in a letter to Jefferson:

> are at present marked by symptoms which are truly alarming, which have tainted the faith of the most orthodox republicans, and which challenge from the votaries of liberty every concession in favor of stable Government not infringing fundamental principles, as the only security against an opposite extreme of our present situation.[309]

Having thus tried to prepare Jefferson for a radical "concession in favor of stable Government,"[310] Madison offered his solution, privileging it "over" what we call Hamilton's solution above:

> Over & above the positive power of regulating trade and sundry other matters in which uniformity is proper, . . . [the new constitution should] arm the federal head with a negative in all cases whatsoever on the local Legislatures. . . . The effects of this provision would be not only to guard the national rights and interests against invasion, but also to restrain the States from thwarting and molesting each other, and even from oppressing the minority within themselves by paper money and other unrighteous measures which favor the interest of the majority.[311]

In this letter and letters to Washington and Randolph, Madison argued that the severity of the states' injustices compelled the breadth and radical nature of his proposal. Acknowledging that the language, "in all cases whatsoever," came from the British Crown's despised royal prerogative over the legislation of the former colonies,[312] he argued that extending the veto to entirely "local questions of policy" was "absolutely

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308. Madison, Mar. 19 Letter to Jefferson, supra note 32, at 318.

309. Id.; see also Madison, June 6 Convention Speech, supra note 92, at 33 (noting tendency of "all civilized Societies" to divide "into different Sects, Factions, & interests" who pursue their goals in the political process).

310. Madison, Mar. 19 Letter to Jefferson, supra note 32, at 318. In fact, Madison's veto idea offended Jefferson's federalist sensibilities. See Letter from Thomas Jefferson to James Madison (June 20, 1787), *in* 10 Papers of Madison, supra note 2, at 63, 64 [hereinafter Jefferson, June 20 Letter to Madison] ("Primâ facie I do not like it."); infra Part VII.B (discussing Jefferson's objections).

311. Madison, Mar. 19 Letter to Jefferson, supra note 32, at 318.

312. Madison, Letter to Washington, supra note 16, at 383 (stating that "a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions"). At risk to his ability to win over the other delegates, Madison more than once stated that the veto was inspired by the prerogative of the King of England over the laws of parts of the empire. As he said in a speech to the Convention, he admired the "harmony & subordination of the various parts of the empire," which he attributed to the Crown's ability to "stifle[ ] in the birth every Act of every part tending to discord or encroachment." Madison, July 17 Convention Speech, supra note 144, at 102–03. Madison's negative proposal also evidently was influenced by David Hume's writings about the ideal republic—although Hume, too, may have been influenced by the royal prerogative. See supra note 221.

necessary" and, given the need, "the least possible encroachment on the State jurisdictions."[313] Rejecting the Hamiltonian solution by itself, Madison argued that "[w]ithout this defensive power" of the national government to veto unjust legislation by the states, "experience and reflection have satisfied me that however ample the federal powers may be made, or however Clearly their boundaries may be delineated, on paper, they will be easily and continually baffled by the Legislative sovereignties of the States."[314]

Madison turned up the heat even higher at the Convention, arguing he "could not but regard an indefinite power to negative legislative acts of the States"—one "extend[ing] to all cases"—"as absolutely necessary to a perfect system."[315] In ominous tones, he forecast the Civil War, warning that the inevitable alternative to this "least possible" structural encroachment was the national government's resort to coercive force against the states:

> Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischeifs [sic]. The existence of such a check would prevent attempts to commit them. Should no such precaution be engrafted, the only remedy wd. lie in an appeal to coercion.[316]

b. *The Ameliorative Operation of the Veto.* — In pre-Convention letters to Randolph and Washington, Madison provided the first of three descriptions of the ameliorative or arbitral operation of the negative against the depredations of majority oppression of minorities:

> The great desideratum which has not yet been found for Republican Governments, seems to be some disinterested & dispassionate umpire in disputes between different passions & interests in the State. The majority who alone have the right of decision, have frequently an interest real or supposed in abusing it. In Monarchies the sovereign is more neutral to the interests and views of different parties; but unfortunately he too often forms interests of his own repugnant to those of the whole. Might not the national prerogative here suggested be found suf-

313. Madison, Letter to Washington, supra note 16, at 383–84.

314. Madison, Mar. 19 Letter to Jefferson, supra note 32, at 318. For similar statements in contemporaneous letters and at the Convention, see Madison, Letter to Washington, supra note 16, at 382; Madison, Letter to Randolph, supra note 226, at 368; Madison, June 8 Convention Speech, supra note 16, at 41; Madison, July 17 Convention Speech, supra note 144, at 102–03.

315. Madison, June 8 Convention Speech, supra note 16, at 41. For similar statements, see Madison, Oct. 24 Letter to Jefferson, supra note 179, at 213–14; sources cited supra note 314; see also infra note 378 (discussing speech by Madison at the Convention predicting increasing conflict between Northern and Southern states over slavery, particularly as new Western states joined the Union).

316. Madison, June 8 Convention Speech, supra note 16, at 41.

> ficiently disinterested for the decision of local questions of policy, whilst it would itself be sufficiently restrained from the pursuit of interests adverse to those of the whole Society?[317]

When the King served as arbiter, he was not sufficiently neutral. Congress would do better, however, given the workings of the extended republic, because it would have a wide mix of diverse interests, with no single faction being large enough to hold sway over the rest.[318] In the aggregate, Congress would be entirely disengaged from any particular local question of policy, and perfectly situated to focus on the national good. It would be the umpire, the neutral arbiter.

Madison's speech at the Convention on behalf of a combined presidential and judicial veto of *federal* legislation, delivered a few days before he championed a national legislative veto of state legislation, provides additional support for his "neutral arbiter" point:

> We must introduce the Checks, which will destroy the measures of an interested majority[.] [I]n this view a negative in the Ex[ecutive] is not only necessary for its own safety, but for the safety of a minority in Danger of oppression from an unjust and interested majority—The independent condition of the Ex[ecutive] who has the Eyes of all Nations on him will render him a just Judge—add the Judiciary and you increase the respectability.[319]

In defending the legislative veto itself at the Convention, Madison shifted ground somewhat. A reason for the shift may lie in concerns about the correctness of Madison's claim that the veto would "not infring[e] fundamental [i.e., republican] principles."[320] That assurance may be compared with Madison's subsequent, more generalized description in *The Federalist No. 51* of the neutral-arbiter "method" of avoiding majority tyranny. That method, he said, "prevails in all governments possessing *an hereditary or self-appointed authority*" and proceeds by "introducing into the government . . . a will *independent of the society itself*."[321] In *The Federalist No. 51*, Madison equivocates on whether this method is consistent with "republican forms," and in his parallel speech at the Convention, he strongly suggested that it was *not* consistent with such forms of government.[322] Perhaps to distance the proposal from the anti-republican odor

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317. Madison, Letter to Washington, supra note 16, at 384; see also Madison, Letter to Randolph, supra note 226, at 370. In his June 8 speech to the Convention, Madison floated the possibility of limiting the power to veto to the *most* neutral legislative branch, the Senate. Madison, June 8 Convention Speech, supra note 16, at 42.

318. See supra Part III.B.

319. James Madison, Revisionary Power of the Executive and the Judiciary, Speech at the Constitutional Convention (June 4, 1787), *in* 10 Papers of Madison, supra note 2, at 25, 25 [hereinafter Madison, June 4 Convention Speech].

320. Madison, Mar. 19 Letter to Jefferson, supra note 32, at 318.

321. The Federalist No. 51, supra note 10, at 324, 325 (James Madison) (emphasis added).

322. In Madison's speech at the Convention that foreshadowed *The Federalist No. 51*, he claimed that the extended republic was "the *only* defense agst. the inconveniences of

of the "neutral arbiter" method of assuring equal protection, which Madison at the very least considered a "precarious security,"[323] he switched at the Convention to a "separation of powers" explanation: "The States cd. of themselves then pass no operative act, any more than one branch of a Legislature where there are two branches, can proceed without the other."[324] Thus, as in a bicameral legislature, "[t]he existence of such a check" created by the requirement of the second body's concurrence "would prevent attempts to commit" such "mischiefs" in the first body, as it would legislate with an eye towards what would be acceptable to the second.[325] Although this explanation addressed the states' legislative tendencies to usurp national prerogatives, it did not as neatly explain the national negative's value in avoiding *internally* oppressive legislation.

Madison's most coherent explanation of the negative's republican bona fides is in his post-Convention letter to Jefferson. "It may be asked," Madison wrote, "how private rights will be more secure under the Guardianship of the General Government than under the State Governments . . . ."[326] Both governments, he noted, are "founded on the republican principle which refers the ultimate decision to the will of the majority, and [the two] are distinguished rather by the extent within which they will operate, than by any material difference in their structure."[327] The answer, wrote Madison, is exactly that distinguishing trait—the "extent within which [the national and state governments] will operate."[328] "In a large Society, the people are broken into so many interests and parties, that a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority"; consequently, "no common interest or passion will be likely to unite a majority of the whole . . . ."[329] By contrast, in a "small . . . sphere oppressive combinations may be too easily formed agst. the weaker party . . . ."[330]

In Madison's view, therefore, the national legislature—itself a republican body formed in part by the votes of the citizens of each state—was the appropriate body to exercise a negative, not because it reflected no interest or only one, but because it reflected a "pretty even balance" of all

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democracy consistent with the democratic form of Govt." Madison, June 6 Convention Speech, supra note 92, at 33 (emphasis added). This statement made clear what the discussion in *The Federalist No. 51* leaves ambiguous—that the "stability and independence of some member of the government, the only other security [against majority tyranny]," is not consistent with "republican forms" or able to constrain majority tyranny. The Federalist No. 51, supra note 10, at 324 (James Madison).

323. The Federalist No. 51, supra note 10, at 324 (James Madison).

324. Madison, June 8 Convention Speech, supra note 16, at 41.

325. Id.; see also The Federalist No. 78, supra note 10, at 470 (Alexander Hamilton).

326. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 212.

327. Id.

328. Id.

329. Id. at 214.

330. Id.

interests.[331] A national legislature empowered to veto state legislation could thus provide "[t]he great desideratum in Government." It could "modify the sovereignty [so] that it may be sufficiently neutral between different parts of the Society to controul one part from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the entire Society."[332]

Thus understood, the national negative was not anathema to republicanism but a prerequisite to it. The negative would have simultaneously afforded minorities equal protection against unjust and partial state laws— giving them access to an impartial political process through which to exercise their self-governing faculties—while being sufficiently constrained (unlike England's king and hereditary lords) "by its dependence on the community" via elections and on the states via federalism.[333]

Moreover, by operating both through the national legislature's after-the-fact nullification of unjust legislation,[334] and by "preventing" attempts to commit "mischiefs" before the fact[335]—as state legislators contemplated the reaction their proposals would engender in the national legislature—the process of inculcating state legislators with the national legislators' interest-generalizing dispositions, habits, and virtues would proceed far more successfully than if the inculcating process occurred (a la James Wilson) entirely by distant example.

The habit-forming process by which the negative would have served over time to inculcate habits of just and generalizing lawmaking may be inferred from *The Federalist*'s discussion of second-best substitutes for the veto, such as judicial review and the extended republic. A crucial psycho-

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331. Id.; see also The Federalist No. 10, supra note 10, at 79–80 (James Madison) (analogizing operation of the legislature in extended republic to deliberations of a judge free of "bias" and "corrupt[ion]").

332. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 214.

333. Id. As Madison wrote, "The General Government would hold a pretty even balance between the parties of particular States, and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interests." Id.

334. What Madison said about the ameliorative effect of the small number and indirect election of United States Senators on injustices momentarily contemplated by members of the public precisely describes the beneficial effect he also expected Congress's veto to have on injustices actually committed by state legislatures under the influence of oppressive majority factions:

> As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?

The Federalist No. 63, supra note 10, at 384 (James Madison).

335. See Madison, June 8 Convention Speech, supra note 16, at 41.

logical effect of Congress's oversight would be to cause each state legislator to stop and think, before adopting unjust legislation, about how Congress would react. Just as Hamilton said about judicial review by federal judges, this oversight process could have been "of vast importance" in deterring unjust laws by "operat[ing] as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected" upon subsequent review by national officials "are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts."[336]

Although, as we will see, Madison lacked Hamilton's faith in courts, his reasons distinguish the congressional veto. Unlike occasional judicial review subject to the vagaries of litigant interests, resources, and access to distant courts, veto consideration would be automatic in each case.[337] As James Wilson contended at the Convention, the proposed negative would serve as "the key-stone wanted to compleat the wide arch of Government we are raising. . . . The firmness of Judges is not of itself sufficient. Something further is requisite—It will be better to prevent the passage of an improper law, than to declare it void when passed."[338] Nor did the negative face the difficult task of getting state legislators to think habitually like judges governed by "parchment provisions."[339] Instead, the negative sought to make state legislators think habitually like representatives and senators governed by the inherently legislative need to build "coalition[s] of [the] majority,"[340] albeit at the scale of the extended republic, where coalitions are "more just because . . . more general, and . . . more general because . . . they must include a greater variety of interests."[341]

Madison valued frequent elections of members of the House of Representatives because elections would infuse members with "an habitual recollection of their dependence on the people."[342] He likewise expected the national negative to provide state legislators with a constant reminder of their "habitual" dependence on the national legislature—some of whose members, in turn, were likely to be habitually dependent on individuals very much like those constituents state legislators might otherwise be disposed to neglect or oppress because of their minority status locally. This explains why the extended republic was not sufficient by itself.[343] Although the large republic did create a governing body with the kinds of generalizing dispositions that Madison valued, it was only

336. The Federalist No. 78, supra note 10, at 470 (Alexander Hamilton).

337. See supra notes 316, 324–325 and accompanying text.

338. Proceedings of the Convention, Draft Constitution Required by the Committee of Detail, Aug. 23, 1787 (James Madison), *in* 2 Farrand, supra note 9, at 391 (remarks of James Wilson).

339. The Federalist No. 25, supra note 10, at 167 (Alexander Hamilton); see infra Part V.B.3.

340. The Federalist No. 51, supra note 10, at 325 (James Madison).

341. Beer, supra note 7, at 276; see supra Part III.B.

342. The Federalist No. 57, supra note 10, at 352 (James Madison).

343. See supra Part III.B.

through the national negative that *state* legislators could be made habitually dependent on the support of national legislators with that broader perspective.

4. *Cooperative Federalism.* — Even apart from the national negative, but especially when it is considered, Madison can be seen to have envisioned a unique brand of federalism. Contrary to one prominent view,[344] Madison did not wish to see the states wither away. He valued the states as a "double security" for the individual "rights of the people" and against inter-factional injustice.[345] Along with the even more nationalistic Hamilton, he described the states as essential administrative "auxiliaries" of the national government,[346] and as crucial mechanisms for siphoning off tasks the national government could not administer itself without undermining its efficiency and discouraging "fit characters" from joining it.[347]

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344. See, e.g., Hobson, supra note 1, at 219 ("In effect, Madison proposed nothing less than an organic union of the general and state governments."). But see supra notes 30–31 (criticizing Hobson); Part I.A (same).

345. See The Federalist No. 51, supra note 10, at 323 (James Madison); supra notes 254–256 and accompanying text; infra note 495.

346. The Federalist No. 27, supra note 10, at 177 (Alexander Hamilton) ("Thus the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws."); see also id. No. 33, at 201–02 (Alexander Hamilton). Illustrating the imagined relationship of state and national governments is Hamilton's description of state courts as "natural auxiliaries" of an integrated national judiciary operating pursuant to the Supremacy Clause and required by oath to uphold the national Constitution:

> [T]he national and State [judicial] systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.

Id. No. 82, at 494 (Alexander Hamilton). Hamilton explicitly expected even *lower* federal courts to hear appeals from state courts, further integrating the state and federal judicial hierarchies. See id. at 494–95; see also Liebman & Ryan, supra note 193, at 722. Hamilton later emphasized that not just judges, but officers of all branches of state government are rendered "auxiliaries" to the federal government:

> It merits particular attention . . . that the laws of the Confederacy as to the enumerated and legitimate objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective [states] will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws.

The Federalist No. 27, supra note 10, at 177 (Alexander Hamilton).

347. Madison expected that "the eventual collection [of taxes] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States" and that "it is extremely probable that in other instances . . . the officers of the States will be clothed with the correspondent authority of the Union," including but not limited to state judges. The Federalist No. 45, supra note 10, at 292 (James Madison); accord id. No. 44, at 287 (James Madison) (stating that although "[t]he members of the federal government will have no agency in carrying the State constitutions into effect," "[t]he members and officers of the State governments, on

As these latter descriptions make clear, Madison did not hold the current Supreme Court's view of the states as sovereign entities free of all control by the national government save that to which they expressly consented.[348] States could, of course, check and influence the national government by urging their senators to vote and by mobilizing popular sentiment against national legislation or through the ameliorative exercise of their power—emphasized by Madison—to oversee their officials' implementation of national administrative tasks, such as collecting taxes.[349] But notwithstanding the states' checking and implementing roles, "the national and State systems [were] to be regarded as ONE WHOLE."[350] Precisely because much of the state (as well as national) administrative apparatus would be comprised of state officials "clothed with the correspondent authority of the Union,"[351] state actors would be strongly disposed to make the interests of the Union "the objects of their affections

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the contrary, will have an essential agency in giving effect to the federal Constitution"). As Madison asked in *The Federalist No. 45*:

> Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty?

The Federalist No. 45, supra note 10, at 289; cf. Prakash, supra note 6, at 2004, 2033–36 (agreeing that Madison and other Federalists anticipated federal commandeering of executive and judicial officials but contending that a larger number of the Framers would have withheld their support from national legislation directing state legislatures to comply with federal programs).

348. See, e.g., Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) ("Dual sovereignty is a defining feature of our Nation's constitutional blueprint."); New York v. United States, 505 U.S. 144, 187 (1992) ("[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."). For criticism of the Court's reasoning and invocation of Madison, see infra Part VI.

349. See The Federalist No. 45, supra note 10, at 292 (James Madison); see also id. No. 36, at 220 (Alexander Hamilton) ("The national legislature can make use of the [tax collection] *system of each State within that State.* The method of laying and collecting this species of taxes in each State can, in all its parts, be adopted and employed by the federal government."). Against the complaint that direct taxation would inflict on the citizenry "double sets of revenue officers," Hamilton offers the simple expedient of "employ[ing] the State [revenue] officers as much as possible, and to attach them to the Union by an accumulation of their emoluments. This would serve to turn the tide of State influence into the channels of the national government . . . ." Id. at 221–22.

350. Id. No. 82, at 494 (Alexander Hamilton).

351. Id. No. 45, at 292 (James Madison); see also Beer, supra note 7, at 306. As Beer points out, Madison here follows the description of Scottish republican theorist James Harrington, whose ideal republic, Oceana, would have almost no bureaucracy at the level of the central government and instead would use local units to execute the laws. Id. at 252–53.

and consultations."[352] Like the state judges, these state officials would be "co-opted" to the national cause.[353]

Madison imagined similar influences running in the opposite direction—from the states to the national government. Given senators' and representatives' access to "local knowledge of their respective districts," "considerable knowledge of [state] laws," and experience as members of state legislatures in the past or "even at the very time" they were serving in Congress, Madison expected Congress to rely upon "local information" and the "assistance of the State codes" in designing its own laws.[354] As Samuel Beer has shown, Madison "foresaw legislators from across the country pooling their knowledge of their home state laws when drafting federal laws"[355] and was the progenitor of the Brandeisian idea of states as "laboratories for experimentation."[356]

Neither national hierarchy nor dual sovereignty describes Madison's conception of the federal structure. Consistent with his recasting of the "separation" of powers as the powers' creative interdependence, and with his treatment of federalism as merely an example of those interdependent powers, Madison envisioned a *mixture* of dependence and independence for the national and state governments. In his words, he envisioned a system "neither wholly *national* nor wholly *federal*"[357]—one that

352. Cf. The Federalist No. 46, supra note 10, at 296 (James Madison) (discussing conflicting loyalties of state between goals of state and federal government); id. No. 36, at 222 (Alexander Hamilton) (recommending, in regard to tax collection, "employ[ing] the State [revenue] officers as much as possible," thus "attach[ing] them to the Union by an accumulation of their emoluments" and helping "to turn the tide of State influence into the channels of the national government").

353. Liebman & Ryan, supra note 193, at 764. Even the so-called "states rights" James Madison, who argued in the Virginia Resolutions a decade after the framing period that states could interpose their views in opposition to unjust federal laws (in that case, the Alien and Sedition Acts), insisted while debating the amendments to the Constitution that sovereignty was held by the people, not "detached bodies" of them. 1 Annals of Cong. 767 (Joseph Gales, Jr. & William W. Seaton eds., 1789); see James Madison, The Report of 1800 (Jan. 7, 1800), *in* 17 Papers of Madison, supra note 2, at 303, 309 [hereinafter Madison, Report of 1800] (defining "States" as used in the Virginia Resolutions, drafted by Madison, as "the people composing those political societies," and emphasizing that it is only "in that sense [that] the Constitution was submitted to the 'States:' In that sense [that] the 'States' ratified it; and in that sense of the term 'States,' [that] they are consequently parties to the compact from which the powers of the Federal Government result").

354. The Federalist No. 56, supra note 10, at 347–48 (James Madison); see supra text accompanying notes 211–212.

355. Beer, supra note 7, at 306.

356. Id.; cf. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

357. The Federalist No. 39, supra note 10, at 246 (James Madison) ("The proposed Constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal Constitution, but a composition of both."); id. No. 62, at 378 (James Madison) (remarking that only a "portion of sovereignty remain[s] in the individual States," "a residuary sovereignty").

might best be characterized as "cooperative decentralization," or in Cover and Aleinikoff's phrase, "Dialectical Federalism."[358]

Thus far, this description of Madisonian federalism is based on the original Constitution as explained in *The Federalist*. From this description, it is clear, however, that the national negative would have fit comfortably within the Madisonian conception, while highlighting its novelty and the ways it deviates from both a national hierarchy and dual sovereignty. In service of Madison's objective of protecting minorities against oppression and dissuading them from violence against local majorities, the national negative would have strengthened three attributes of cooperative decentralization. First, the central government would have had the power to constrain the states by vetoing unjust legislation, but it could not dictate state action, because each state would retain the power to initiate legislation and because the laws of the states as a whole would largely define the universe of the possible. Second, ongoing national monitoring would habituate local officials to the more enlarged and general perspective of the extended republic's legislators. Third, the monitoring process would also transfer local knowledge and the fruits of local experimentation to the national level, while diffusing each state's knowledge and experimental successes to the other states.

The last mentioned attribute of cooperative decentralization—the productive interaction of the states with each other and the national government—was a matter of particular interest to Madison, given problems encountered under the Articles of Confederation. In opposing the New Jersey Plan at the Convention because of its tendency toward multiple sovereignties, Madison recited the cautionary history of ancient federated governments, where associated states had tended to usurp the center's authority, encroach on each other's power and territory, and "bring confusion & ruin on the whole."[359] He attributed the same propensities to the thirteen states under the Articles, noting that some had entered into compacts with subsets of others, made separate treaties and wars with "the Indians," raised troops without the center's consent, and manipulated public lands to obtain claims on other states' territory.[360] Madison promoted the negative in part because it would have empowered Congress to veto separate wars, peace treaties, and deals made by the states reciprocally with their power under the Constitution to constrain the national government from obliging them and the people to take similar steps conjointly.[361] Even better, the negative would have served this purpose with-

358. Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1035 (1977). The Supreme Court has approvingly used the phrase "cooperative federalism" to mean approximately the same thing. See infra note 703 and accompanying text. We also sometimes use the phrase "interactive federalism" to refer to the same process.

359. Madison, June 19 Convention Speech, supra note 141, at 57.

360. Id.

361. Id. at 58.

out either dissolving the states and their capacity for local experimentation into a national whole or unproductively walling them off from each other, impeding the diffusion of their successes. Instead, it would have enhanced the spread of information from each state to the others through the center. Consistently with other aspects of the new government and with Madison's conception of interdependent, not separated, powers, the negative would have enhanced the role and stake of the national government and each of the thirteen states in the attainment of the objectives of all of the others.

5. *Madison's Near Miss: The National Negative at the Convention.* — It is perhaps doubtful whether Madison, even aided by fellow propagandists Hamilton and Jay, could have achieved the ratification of a Constitution containing the national negative.[362] But in fact he almost convinced the Convention to try. Switching the mode of analysis to a review of what transpired at the Convention, this Part shows just how important the national negative was to Madison, how hard he fought for it, what his explanations for his "internal" approach and doubts about the proposed "external" alternatives were, and the nature of the arguments that ultimately defeated it despite Madison's dogged efforts.

Early in the Convention, the national negative was included as part of the germinal Virginia Plan, although not to cover all state laws, as Madison had adamantly desired, and only "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of [the] Union."[363] Two days later, it was expanded without objection by the committee of the whole to permit vetoes of state laws contravening "any treaties," as well as "articles," "of the Union."[364] These rapid early victories evidently made Madison optimistic that the negative's structural protections would render unnecessary other protections. The same day the negative was expanded, Madison successfully moved to

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362. Jefferson's opposition is discussed infra Part VII.B. The strongest opposition to the Constitution came from those claiming it went too far in limiting the power of the states. The national negative would no doubt have increased that opposition. For this reason, Madison's Virginia colleague George Mason, who supported the veto in principle, argued against it at the Convention because it would have engendered controversy, threatening the effort to replace the Articles. See infra note 393 and accompanying text.

363. The Virginia Plan, Section 6 (May 29, 1787), *in* 10 Papers of Madison, supra note 2, at 12, 16. The Editor's note indicates that Madison preferred the language "in all cases whatsoever" as evidenced by his use of that phrase in letters and by his support for Pinckney's June 8 motion for an unlimited veto. "The vote on this unsuccessful motion indicates that Randolph and Mason were responsible for the milder version of the veto provided." Id. at 17 n.1 (editor's endnotes). The Virginia Plan was referred to the committee of the whole that day. Proceedings of the Convention, The Virginia Plan, May 29, 1787 (James Madison), *in* 1 Farrand, supra note 9, at 23–24 [hereinafter Madison, May 29, 1787].

364. Proceedings of the Committee of the White House, May 31, 1787 (James Madison), *in* 1 Farrand, supra note 9, at 47, 54 (noting that Benjamin Franklin moved to expand the negative, and without discussion or dissent the negative was agreed to in this expanded form).

table the Virginia Plan's provision permitting the national government's "use of force" against the states, given his "hope[ ] that such a system would be framed as might render this recourse unnecessary."[365]

A week later, Madison seconded Charles Pinckney's motion to expand the negative to apply to "all laws which [the national legislature] shd. judge to be improper."[366] During a contentious day-long debate on June 8, 1787, the crucial day for the negative, Madison gave two speeches.[367] Madison argued that without a plenary negative, states would "oppress the weaker party within their respective jurisdictions."[368] Ignoring, or failing to understand, his equal protection reasoning,[369] the delegates barraged the proposal with criticism. Many objected to the veto's impracticality. Would state laws have to be held in abeyance until Congress could decide whether to veto or not? How would Congress find time to evaluate the full range of state legislation?[370] How would it know whether a state law was "improper"?[371] Of even greater concern, however, was the power the veto would give Congress to dominate, or as Eldredge Gerry put it to "enslave," the states.[372] Aggravating these worries was Pinckney's own defense of the negative as the best way to keep the states "in due subordination to the nation."[373]

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365. Id. at 54.

366. Id. June 8, 1787 (James Madison), at 164 [hereinafter Madison, June 8, 1787]. Pinckney's own plan had proposed a similar negative, stating that "no Bill of the Legislature of any State shall become a law till it shall have been laid before" and received the approval of both Houses of Congress. See Proceedings of the Committee of Detail, July 24–26, *in* 2 Farrand, supra note 9, at 129, 134–35; Pinckney Plan, *in* 3 Farrand, supra note 9, at 595, 607.

367. Madison, June 8, 1787, supra note 366, at 164–65, 168.

368. Id. at 164.

369. See supra Parts II–III.

370. See Madison, June 8, 1787, supra note 366, at 167–68. Bedford asked:

> Besides, [h]ow can it be thought that the proposed negative can be exercised? [A]re the laws of the States to be suspended in the most urgent cases until they can be sent seven or eight hundred miles, and undergo the deliberations of a body who may be incapable of Judging of them? Is the National Legislature too to sit continually in order to revise the laws of the States?

Id. Madison suggested that that questions regarding the administrability of the negative might be answered in part by having only the Senate review state laws, and by enabling Congress or the Senate to give temporary assent to laws pending review. Id. at 168.

371. Gerry stated that he would not oppose a negative dealing only with, for example, paper money, but did oppose one reaching such issues as use of the state militia. Id. at 165. Sherman and Dickinson added that it would be impossible to draw lines between proper and improper state lawmaking, and between proper and improper uses of the negative. Id. at 166–67.

372. Gerry feared that the negative "may enslave the states" and "will be abused." Id. at 165–66. Bedford added, "Will not these large States crush the small ones wherever they stand in the way of their ambitions or interested views." Id. at 167.

373. According to Madison's notes, Pinckney argued in support of the resolution that the "States must be kept in due subordination to the nation," that the negative was needed to "defend the national prerogatives," and that the "negative of the Crown" provided a worthy precedent for the proposal. Id. at 164.

The motion to expand the negative was defeated, with only the large states supporting it.[374] The negative remained, but applied only to state laws that violated the constitution or treaties. In this form, the focus was not, as Madison desired, on equal protection against factional oppression, but instead on curbing state defiance of national prerogatives.

In the following weeks, the delegates took up and defeated the New Jersey Plan, which favored state over national prerogatives and included no negative. Madison's most vigorous criticism of the plan was its failure to protect the rights of minorities in the states, most particularly because it lacked a national negative.[375] Although the nationalists won this battle, their narrow margin of victory convinced them they had to "conciliate" the small states by further weakening the constitution's constraints on all states.

At this point support for the negative began to founder, even among the Virginia delegation. Its leader, Edmund Randolph, suggested to Madison that the veto be circumscribed with an essentially inadministrable line between state legislation of national as opposed to only local interest.[376] To deal with Madison's concerns about "unjust" laws tyrannizing local minorities, the compromise included a proto-equal protection clause permitting federal judicial review of "partial" or "unjust" state laws. Randolph then would have counter-balanced this increase in federal power with a provision permitting states to demand judicial review of congressional vetoes they claimed exceeded Congress's narrow veto power.[377] For reasons that are not clear, Randolph's proposal was never brought to the Convention.

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374. The motion was defeated seven to three, with only larger states, Massachusetts, Pennsylvania, and Virginia, voting to expand the negative to include "all laws which to [the national legislature] shall appear improper." Id. at 162–63, 168, 172–73.

375. Madison, June 19, 1787, supra note 9, at 315–16.

376. Because the line the compromise drew would have been unclear in nearly every instance, every time a state legislature passed a law, it either would have to submit it for congressional review or make a "federal case" out of its failure to submit.

377. Edmund Randolph, Suggestion for Conciliating the Small States (July 10, 1787), *in* 3 Farrand, supra note 9, at 55–56. Randolph's proposal permitted states to petition "the national Judiciary" to "void" vetoes that were "contrary to the power granted by the articles of the Union," and permitted "any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State [to] resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice." Id.

Madison himself had contemplated the need for a check on Congress's power to exercise the veto. One justification he gave for the Council of Revision in the Virginia Plan—a panel composed of the chief executive and a number of judges and empowered to overturn unwise congressional enactments unless Congress overturned the veto by a two-thirds vote—was that it would moderate Congress's use of the negative and render it "more respectable." Madison, June 4 Convention Speech, supra note 319, at 25; see infra notes 424, 677 (discussing the Council of Revision). The Council of Revision provides further evidence of the extent to which Madison feared the effect of factional strife and control, even in the national legislature. As proposed hy Madison, the Council would have had authority to veto "every [affirmative] act of the National Legislature before it shall

The tide turned entirely against the negative when the Convention narrowly voted (with Madison in the opposition[378]) to grant each state an equal vote in the Senate. The small states had previously feared that the negative would enable large states to band together and exert control over them—a worry Madison's repeated complaints about Rhode Island may have magnified.[379] With equal votes in the Senate, it was now the large states that worried that even the partial negative would allow small states to meddle in the large states' affairs. Serious practical objections continued to be voiced as well about how Congress could fulfill the time-consuming task of deciding in each case whether a state law contravened the Constitution[380] and what would happen to state laws between their adoption and review by Congress.[381] Reflecting all these concerns, Gouverneur Morris of Pennsylvania, an early supporter of the negative,

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operate," as well as to overturn Congress's exercise of its power to "negative" state legislation—subject in both cases to legislative override by supermajority vote. Madison, May 29, 1787, supra note 363, at 21; see Madison, Letter to Washington, supra note 16, at 385; Letter from James Madison to Edmund Randolph (Apr. 10, 1787), *in* 9 Papers of Madison, supra note 2, at 368, 370. Madison hoped the Council would mitigate the danger of factional abuse in the national legislature through the moderating influence of the other two, more "general" and "impartial" branches of the federal government. See Madison, June 4 Convention Speech, supra note 319, at 25 (describing the need for protection against the effect of faction in Congress, and suggesting as a solution to "add the Judiciary and . . . increase the respectability" of the legislative process); see also Madison, June 6 Convention Speech, supra note 92, at 35–36; Liebman & Ryan, supra note 193, at 710–12. The inclusion of federal judges in the proposed Council was defeated at the Convention, Proceedings of the Committee of the White House, June 4, 1787 (James Madison), *in* 1 Farrand, supra note 9, at 97–98, as was Madison and Wilson's attempt to revive it, Hamilton, June 6, 1787, supra note 203, at 131, 138, 140. All that remained in the Constitution as adopted, therefore, was the executive veto.

378. See, e.g., Madison, June 19 Convention Speech, supra note 141, at 60–61 ("Let them [the small states] have an equal vote, and a more objectionable minority than ever might give law to the whole."); James Madison, Speech at the Constitutional Convention (July 14, 1787), *in* 10 Papers of Madison, supra note 2, at 100, 100–02 (raising the fear, prescient given the Missouri Compromise and events leading to the Civil War, that with equal votes in the Senate, the "evil" of such representation would "increase with every new State that should be admitted" where "the real difference of interests" between the states "lay, not between the large & small but between the N. & Southn. States. The institution of slavery & its consequences formed the line of discrimination.").

379. See, e.g., Madison, June 8, 1787, supra note 366, at 167 (remarks of Gunning Bedford); supra notes 150, 173, 206, 281 and accompanying text (discussing Madison's complaints about Rhode Island).

380. See, e.g., Proceedings of the Convention, July 17, 1787 (James Madison), *in* 2 Farrand, supra note 9, at 27 (remarks of Luther Martin) [hereinafter Madison, July 17, 1787].

381. See id. ("Shall all the laws of the States be sent up to the Genl. Legislature before they shall be permitted to operate?"). Madison again proposed to solve this difficulty by allowing laws requiring immediate action to be reviewed by a local intermediate body—an "emanation of the [veto] power into the States, so far at least, as to give a temporary effect to laws of immediate necessity." Id. at 28 (remarks of James Madison).

turned against it, arguing that a judicially enforced supremacy clause would sufficiently discourage unconstitutional state laws.[382]

Madison made an impassioned final plea for the partial negative on July 17, 1787. "Nothing short of a negative on their laws," he argued, could "controul" the "propensity of the States to pursue their particular interests in opposition to the general interest."[383] Such a negative, he claimed, was "at once the most mild & certain means of preserving the harmony of the System."[384]

Later that day, the Convention voted down the negative and immediately thereafter, as an acknowledged substitute more palatable to state interests, unanimously approved the Supremacy Clause.[385] That Clause deviated from Madisonian orthodoxy in three ways: It was directed to state judges not legislators; it switched from an "interior" mechanism for channeling official behavior in the desired direction to an "exterior" admonition to obey federal law; and it applied only to state actions that violated the Constitution, laws, and treaties of the United States, not those that treated minority factions unjustly.

Dissatisfied, Madison repeatedly tried to revive the national negative.[386] On August 23, 1787, the nationalists moved a fourth time for a negative, in this case requiring "two thirds of the Members of each house assent"[387] and reaching any state law "interfering . . . with the General interests and harmony of the Union."[388] Gouverneur Morris from Penn-

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382. Id. Madison notes that Morris was "more & more opposed to the negative." Id. Morris stated that the veto would "disgust all the States." Id. Instead, he argued, a "law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law." Id.; see also Rakove, Origins, supra note 28, at 1047 ("[T]he negative was the first casualty . . . [of the] decision of July 16 giving the states an equal vote in the Senate."). Although Jefferson was serving as ambassador to France at the time, his June 20, 1787 letter to Madison predicted each of these objections and offered the same judicial review alternative that Morris and others proposed at the Convention. See infra notes 654–656 and accompanying text.

383. Madison, July 17 Convention Speech, supra note 144, at 102.

384. Id. at 103.

385. Madison, July 17, 1787, supra note 380, at 21–22, 28–29. Only Massachusetts, Virginia, and North Carolina voted for the negative; seven states voted against the proposal. Id. at 24. Immediately after the vote, Luther Martin moved for the adoption of a supremacy clause taken from the New Jersey Plan. That proposal was unanimously adopted. Id. at 28–29.

386. Madison raised the issue again on August 28 and on September 12. See Proceedings of Convention, Draft of Constitution Reported by Committee of Detail, Aug. 28, 1787 (James Madison), *in* 2 Farrand, supra note 9, at 437, 440; Proceedings of Convention, Sept. 12, 1787 (James Madison), *in* Farrand, supra note 9, at 581, 589.

387. Proceedings of Convention, Draft of Constitution Reported by Committee of Detail, Aug. 23, 1787 (James Madison), *in* 2 Farrand, supra note 9, at 380, 382.

388. Id. at 390 (motion of Charles Pinckney); see also id. (remarks of James Madison) (noting Madison had long been a "friend to the principle" but supported the modification proposed). James Wilson defended the proposal in Madisonian language, calling the veto "the key-stone wanted to compleat the wide arch of Government we are raising. . . . The firmness of Judges is not of itself sufficient. Something further is requisite—It will be

sylvania, in league with the usual coalition of smaller states, opposed the proposals, stating that the Supremacy Clause, which had been strengthened to make clearer that all federal law would be supreme over state law, rendered the negative unnecessary.[389] Again, the negative was defeated, this time for good. Instead the Convention strengthened the Supremacy Clause and the powers of the federal judiciary, which together with state officials' oath of loyalty to federal law, were expected to serve the purpose of Madison's negative.[390]

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His dogged efforts notwithstanding, Madison did not get his national negative. Nor, therefore, did he get the constitution he wanted or one he considered passably "effectual" in curing the most serious constitutional ailment of confederation and of republics generally, namely, majority oppression of minorities through the adoption and enforcement of "unjust" laws. For that purpose, neither the extended republic by itself, nor the Constitution's specific restrictions on the states, nor Supreme Court enforcement of the Supremacy Clause's admonition to obey federal law (which did not even include a requirement to behave justly toward minorities), would suffice. As the editors of *The Papers of Madison* noted, the Constitution lacked "the one ingredient that in his view was essential for establishing the supremacy of the central government and for protecting the private rights of individuals": a national negative or some other effective equal protection constraint on the states.[391] Even in *The Federalist*, Madison the political theorist could not restrain himself from chiding his colleagues on this point. Particularly as to matters dealing with distribution of powers between federal government and states, he complained that the finished product was the result of a series of unprincipled com-

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better to prevent the passage of an improper law, than to declare it void when passed." Id. at 391 (remarks of James Wilson).

389. Id. at 390 (remarks of Roger Sherman) (arguing that the veto was "unnecessary; the laws of the General Government being Supreme & paramount to the State laws according to the plan, as it now stands"); id. at 391 (remarks of Hugh Williamson) ("[A] revival of the question was a waste of time."). Others again raised the concern of how laws would take effect in the states prior to Congress passing judgment on them, id. at 390 (remarks of George Mason); id. at 391 (remarks of Oliver Elseworth), and the fear that the measure would endanger the states and be a "shackle" on them, id. (remarks of John Rutlidge) ("Will any State ever agree to be bound hand & foot in this manner."). Again overplaying his hand, nationalist Pinckney suggested as an alternative that Congress might directly appoint the state governors, then give them the power to veto state laws, which resulted in the prompt defeat of the motion. Id. (remarks of Charles Pinckney); cf. Hobson, supra note 1, at 227 (noting that Pinckney's solution, although more direct and practical, "smacked too much of the old hated royal government").

390. Upon the defeat of the negative—and also the Council of Revision, see supra note 377—"the Convention's deliberations came to focus increasingly . . . on the question of what version of judicial review, bolstered by what duty of loyalty on the part of state officials, would effectively restrain state law." Liebman & Ryan, supra note 193, at 760.

391. *Editorial Note* to Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 Papers of Madison, supra note 2, at 205.

promises: "[T]he convention . . . ha[d] been compelled to sacrifice theoretical propriety to the force of extraneous considerations."[392]

Madison could only hope—as he described his Virginia colleague, George Mason, doing—that even though "the public mind would not now bear" an equal protection constraint on the states, "experience would hereafter produce these amendments."[393]

V. THE SECOND CONSTITUTION'S FLAWED EQUAL PROTECTION CONSTRAINT

Out of the Civil War that Madison had predicted would someday result from a constitution lacking an effective way to keep states from "oppress[ing] the weaker party within their respective jurisdictions"[394] came a number of amendments, including one aimed at Madison's equal protection objective. Short of a national negative,[395] the Fourteenth Amendment's Equal Protection Clause,[396] together perhaps with the Due Process Clause,[397] appears rather close to the outcome Madisonian theory dictates. Although Madison felt that the promised judicial enforcement of the Supremacy Clause would not sufficiently deter factional injustice and other abuses by the states, one reason was that the Constitution included no provision expressly barring such abuses. The Fourteenth Amendment added such a provision—as Randolph's abortive compromise at the Convention had contemplated, and as Madison himself would try to do in the "fourteenth" amendment he proposed while the Bill of Rights was under consideration.

As we develop in this Part, however, neither Madison's fourteenth amendment nor the postbellum Constitution's Fourteenth Amendment is consistent with Madisonian theory. On the contrary, Madison's objections to relying on the federal judiciary to constrain injustices by the states provide a poignantly accurate catalogue of the reasons the Fourteenth Amendment has failed to achieve the equal protection that Madison considered essential to a successful republic.

A. *Our (Madisonian?) Fourteenth Amendment*

1. *Madison's Fourteenth Amendment.* — Even after failing at the Convention, Madison continued to seek constitutional protection for individ-

392. The Federalist No. 37, supra note 10, at 230 (James Madison).

393. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 216.

394. Madison, June 8 Convention Speech, supra note 16, at 41.

395. Interestingly, the Reconstruction Congress temporarily exercised a sort of national veto, not only via its administration through the military of the rebellious states but also by premising reentry into the Union on the quality of the laws of the reconstructed states.

396. U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

397. See supra notes 33–34 and accompanying text (discussing Professor Kramer's linkage of the national veto to the protection of individual rights).

uals against abuse of power by the states. As a second- (or third-) best alternative to the structural protections he fought for at the Convention, Madison chose another route as a member of the first Congress. He attempted to use the Federalists' commitment at the ratifying conventions to amend the Constitution to admonish the national government to respect individual rights as an occasion for adopting similar rights against the states.[398] Hoping to add to the small set of constraints on the states that had already been built into the Constitution—forbidding states to enact bills of attainder or ex post facto laws, coin money or issue bills of credit, deny the privileges and immunities of persons out of state, or impair the obligation of contracts[399]—amendment "fourteen" in Madison's first draft of a bill of rights provided that "No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."[400] Madison's proposal was prophetic of course, not simply in its numbering and anticipation of the postbellum amendments by eighty years, but also in predicting the "incorporation" process that began sixty years after that.[401]

Using language reminiscent of his emotional defenses of the national negative at the Convention, Congressman Madison called his fourteenth proposal "the most valuable amendment in the whole list. If there

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398. Madison preferred structural ("interior") to admonitory ("exterior") protections, and considered the central constitutional problem to be the use of state power by local majorities to oppress minority groups—with violations of individual rights being an unfortunate symptom of that "mortal disease," not the malady itself. See supra Part III.B.; infra note 403 and accompanying text (noting that Madison's defense of his fourteenth amendment sounded in equal protection, not individual rights). Accordingly, exterior (as opposed to structural) protections for individual (as opposed to minority) rights were arguably a third-best solution—albeit the best available option at the time, given the Federalists' commitment to amend exterior protections of individual rights into the Constitution.

399. U.S. Const. art. I, § 10, cl. 1 ("No state shall . . . coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . . ."); U.S. Const. art. IV, § 2, cl. 1 ("The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."). These constraints targeted several of the abuses with which Madison charged state legislatures in his writings before the Convention. See Madison, Vices, supra note 140, at 349 (discussing states' trespasses against each other and the rights of their own citizens by, for example, issuing paper money and impairing contracts between debtors and creditors). The dormant Commerce Clause also protects out-of-state economic interests against discriminatory or abusive regulation by local majority factions. See Letter from James Madison to J.C. Cabell (Feb. 13, 1829), *in* 3 Farrand, supra note 9, at 478, 478 (explaining that this protection afforded by the incipient constitution "grew out of the abuse of the power by the importing States in taxing the non-importing [states], and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government").

400. 1 Annals of Cong. 435 (Joseph Gales, Jr. & William W. Seaton eds., 1789).

401. The First Amendment was initially incorporated into the Fourteenth Amendment and applied against the states in 1925. See Gitlow v. New York, 268 U.S. 652, 666 (1925).

was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments."[402] Similarly, notwithstanding the individual rights tenor of the provision itself, Madison based his defense of it on the floor of the House on the equal protection reasoning he had previously used in promoting his veto provision, which aimed first and foremost at protecting minorities, not just from the states, but also from the people:

> But I confess that I do conceive, that in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or the legislative departments of Government, but in the body of the people, operating by the majority against the minority.[403]

Madison's proposed amendment passed the House of Representatives but was defeated in the Senate.[404] Even in defeat, its equal protection goals were at the fore. While the debates are not recorded, it is possible that having secured the formal establishment of their churches in a number of states, majority factions there used their power to appoint members of the United States Senate to protect those gains against Madison's contrary national proposal to protect the rights of conscience of members of minority sects.[405] Regardless, the defeat of Madison's fourteenth amendment thus perfectly illustrated what he said in *The Federalist No. 51* about the Constitution's powerful structural protections of state majorities against exercises of national power, and what the same essay made plain, without saying, about the inability of minorities to protect themselves against overbearing state majorities.[406]

Madison's career as Founder and Framer began in 1776 when he succeeded—explicitly on equal protection grounds—in amending Virginia's proposed Declaration of Rights to provide that "all men are

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402. 1 Annals of Cong. 755.

403. Akhil Reed Amar, The Bill of Rights 22 (1998) (quoting 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1029 (1971)); see also Seminole Tribe v. Florida, 517 U.S. 44, 155 (1996) (Souter, J., dissenting) (discussing Madison's concern about the injustice of many state laws (quoting 5 Writings of James Madison 27 (G. Hunt ed., 1904))).

404. Edward Dumbauld, The Bill of Rights and What It Means Today 215–19 (1957); Rakove, James Madison, supra note 1, at 83 ("In effect, Madison belatedly attempted to revive his original intention of creating a national government capable of protecting private rights *within* the individual states.").

405. See 1 Journal of the Senate 72 (Sept. 7, 1789), available at http://memory.loc.gov/ammem/amlaw/lwsjlink.html#anchor1 (indicating the Senate's rejection of Madison's fourteenth amendment).

406. See supra Part IV.B.

equally entitled to the free exercise of religion."[407] Madison's founding and framing career ended in 1789 with the defeat of a similarly intended, though more broadly focused, effort to amend an equal protection requirement into the United States Constitution. More central than these bookend events, however, was the defeat at the Convention two years earlier of Madison's more general, and more cherished, national mechanism for structurally ensuring local minorities of the equal protection of state laws.

2. *Our Fourteenth Amendment.* — On one view, American constitutional history succeeded where Madison failed, albeit only after 200 years, encompassing a civil war, a second constitution, and the civil rights upheavals of the 1950s and 1960s. In his James Madison Lecture in 1985, Justice William Brennan argued that "[t]he passage of the Fourteenth Amendment fulfilled James Madison's vision of the structure of American federalism."[408] More precisely, in Brennan's view, it was the Fourteenth Amendment's empowerment of the national judiciary to enforce the Equal Protection and Due Process Clauses, together with the Warren Court's broad interpretation of the Clauses' admonitions against abusive exercises of power by the states, that achieved Madison's "noble purpose."[409]

There are, indeed, deep connections between the Equal Protection Clause and the structural equal protection that Madison unsuccessfully pursued at the Convention. At least in its enforcement heyday in the 1950s–1970s, the Fourteenth Amendment's Equal Protection Clause was intelligible in Madisonian terms as (1) an "exterior provision[ ]"[410]—a legal "thou shalt" or "shalt not"—that begins to (2) locate an "intermediate body between the State legislatures and the people interested in watching the conduct of the former."[411] The Clause accomplishes this by (3) empowering the life-tenured federal judiciary—the branch of the national government with the most "stability and independence"[412]—to strike down legislation and other official actions of the states. Such review, in turn, is based on (4) a determination that the "motive"[413]

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407. See Rakove, James Madison, supra note 1, at 13.

408. Brennan, supra note 27, at 536–37 ("The enactment of the Fourteenth Amendment . . . signaled the adoption of Madison's view and banished the spectre of arbitrary state power, his lone fear for our constitutional system.").

409. See id. at 552.

410. The Federalist No. 51, supra note 10, at 320 (James Madison); see supra Part III.A; supra notes 241–243 and accompanying text.

411. The Federalist No. 44, supra note 10, at 286 (James Madison); see supra notes 281–286, 381, and accompanying text; infra notes 423, 495.

412. The Federalist No. 51, supra note 10, at 324 (James Madison) (discussing "the stability and independence of some member of the government").

413. Id. at 325; Madison, Vices, supra note 140, at 351, 355 (describing "the ordinary motives by which the laws secure the obedience of individuals: a confidence which does honor to the enthusiastic virtue of the compilers"; giving as examples of these "motives" individuals' and officials' regard for the common good, respect for character, and religion); see supra note 188 and accompanying text.

(Madison's word for "virtue" or its absence) with which the actions were taken by legislators or promoted by constituents were "unjust"[414] or "partial"[415] because they lacked "a prudent regard to their own good as involved in the general and permanent good."[416] Although our principal goal in this Part is to show how far short of the Madisonian ideal the Equal Protection Clause falls, it first is important to acknowledge similarities between the two approaches.

a. *Interposing a Will Independent of the Majority.* — Consider, to begin with, the second and third of the Equal Protection Clause's four attributes from a Madisonian perspective. Above we describe *The Federalist No. 51* as Madison's greatest contribution to political science.[417] In it, Madison attempted nothing less than to "constitute" the world's first stable and effective republican form of government by using representation, separation of powers, federalism, and the extended republic as mechanisms to structure the behavior of individuals so they could govern themselves effectively. As Madison well knew, however, the clockwork mechanisms in the first Constitution were incapable of striking more than eleven.[418] While using representation, separation of powers, and federalism to preserve self-government and protect the people as a whole from both the national and state governments, and using the extended republic as a self-governing method of protecting minorities from interested majorities acting through the *national* government's "extended . . . sphere," the Constitution contained no technique for protecting minorities from interested majorities acting through the "more circumscribed . . . States."[419]

In fact, *No. 51* twice suggests how the states might themselves make the clock strike twelve, notwithstanding that the national Constitution had failed to do so. "[I]n exact proportion as the territory of the Union may be formed into more circumscribed . . . States," Madison wrote:

> oppressive combinations of a majority will be facilitated; the best security, under the republican forms [i.e., under the extended republic], for the rights of every class of citizen, will be diminished; and consequently the stability and independence of some

414. See, e.g., The Federalist No. 51, supra note 10, at 324 (James Madison); Madison, June 4 Convention Speech, supra note 319, at 25; supra notes 109–117, 165 and accompanying text.

415. See, e.g., The Federalist No. 10, supra note 10, at 77 (James Madison); Madison, Vices, supra note 140, at 352; Madison, Letter to Monroe, supra note 144, at 140; supra note 170 and accompanying text.

416. Madison, Vices, supra note 140, at 355; see supra Part II.B.2.c. Even "rational basis" equal protection scrutiny may be understood as a proxy for "motives" scrutiny, i.e., as searching for situations in which the only purpose or interpretation of the legislation is to promote (or harm) some private interest, rather than promoting the public good.

417. See supra note 240 and accompanying text.

418. See supra Part III.B.

419. The Federalist No. 51, supra note 10, at 324–25 (James Madison).

> member of the government, the only other security, must be proportionally increased.[420]

In the last clause, Madison referred to what he earlier has described as a "method" that "prevails in all governments possessing an hereditary or self-appointed authority" of placing the protection of minority rights in hands "independent of the majority . . . [and] the society itself."[421] As long as the concurrence of this independent authority is needed for legislation to be adopted or carried out, that authority's neutrality as between the majority and the minorities can provide some of the structural protection that is needed.

Although Madison's analogy to England's hereditary lords and self-appointed king calls into question the consistency of this method with "republican forms,"[422] his allusion was serious, if a tad wishful. In contemporaneous writings, Madison expressed the hope that states—as "a useful bitt in the mouth" of the legislature and as a "security against fluctuating & indegested laws"—would amend their constitutions according to the New York model and require legislation to be submitted to a "Council of Revision" composed of the governor and judges who could require reconsideration and prevent readoption except on a two-thirds vote of the legislature.[423] Madison made a similar proposal at the Convention, hoping a national council of judges with the power to revise national legislation would constrain Congress, not only for separation of

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420. Id. at 324. A page later, Madison underscored the second-best quality of this "will independent of the society," compared to a structural protection that routinely requires the concurrence in state action of "a coalition of a majority of the [extended republic's] whole society":

> In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will . . . independent of the society itself.

Id. at 325.

421. Id. at 323–24.

422. See supra notes 312–313 and accompanying text. Madison similarly called into question his first-best proposal for a national veto by analogizing it to the Crown's prerogative to strike down legislation adopted throughout the British colonies. See id.

423. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *in* 8 Papers of Madison, supra note 2, at 350, 351 [hereinafter Madison, Letter to Wallace] (containing Madison's advice on the proposed Kentucky constitution); id. at 357 n.4 (editor's endnotes). Providing an example of how such an intermediate institution would work, Madison's *The Federalist No. 48* describes Pennsylvania's appointment of a Council of Censors in 1783–1784 to "inquire whether the Constitution had been preserved inviolate in every part," and whether the three branches had aggrandized power improperly. The Council found rampant constitutional violations. The Federalist No. 48, supra note 10, at 311–12 (James Madison) (internal quotation marks omitted).

powers (few versus many) purposes, but more importantly for equal protection (many versus few) purposes.[424]

Madison thus hoped that the states themselves would adopt what he acknowledged in *The Federalist* was a missing check on state legislative action in contravention of the interests and rights of members of minority factions, namely, an "intermediate body between the State legislatures and the people [that is] interested in watching the conduct of the former [lest] violations . . . remain unnoticed and unredressed."[425] In describing the hoped-for qualities of this intermediate body, Madison said it should be like a "Judge," characterized by "stability," "independence," and "respectability,"[426] and also like "the Prince" in "absolute monarchies" who is "tolerably neutral towards different classes of his subjects," but unlike a Prince because disinclined to "sacrifice the happiness of all to [its] personal ambition."[427]

To be sure, the judicial review of state action that the Fourteenth Amendment's Equal Protection Clause permits is not the fully structural or "interior" control that Madison preferred. Unlike Madison's national veto and Council of Revision, judicial review does not occur automatically in the case of every legislative enactment nor, therefore, remain constantly in the minds of state actors.[428] But when judicial review does occur, it has the desired Madisonian quality of relying on an intermediate body between the state and the people, whose members' life tenure, and resulting stability, independence, and respectability, tend to insulate them from popular pressures, making them more neutral between majority and minority factions than frequently elected officials.[429] Judges are

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424. Madison, June 4 Convention Speech, supra note 319, at 25. Madison argued that a Council of Revision at the national level—that is, a power in a governor and the Supreme Court acting together to veto unwise congressional legislation—was necessary to:

> introduce the Checks, which will destroy the measures of an interested majority—in this view a negative in the Ex[ecutive]: is not only necessary for its own safety, but for the safety of a minority in Danger of oppression from an unjust and interested majority—The independent condition of the Ex[ecutive] who has the Eyes of all Nations on him will render him a just Judge—add the Judiciary and you increase the respectability.

Id.; see also supra note 377 and accompanying text (discussing Madison's Council of Revision proposal).

425. The Federalist No. 44, supra note 10, at 286 (James Madison) (discussing "violations of the State constitutions," a subset of "unjust" state legislative action).

426. Id. No. 51, at 324 (James Madison); Madison, June 4 Convention Speech, supra note 319, at 25; supra note 319 and accompanying text; see also The Federalist No. 63, supra note 10, at 384 (James Madison) (discussing the Senate: "[H]ow salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?").

427. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 214.

428. See supra notes 324–325, 377 and accompanying text; infra Part V.B.1.

429. The Federalist No. 49, supra note 10, at 316 (James Madison) (stating that judges "by the mode of their appointment, as well as the nature and permanency of it, are too far removed from the people to share much in their prepossessions"); see id. No. 78, at 469

likewise the best authorities to entrust with the role of enforcing external protections of the few (minorities) from the many (majorities), because they are the least likely to try to aggrandize the kind of power in the few (the government) that most threatens the many (the people).[430]

b. *Encouraging Virtue.* — It helps, as well, that the message sent when judges overturn state action under the Equal Protection Clause is at least potentially one that state actors can incorporate into their "motives." In *The Federalist No. 51*, Madison reports his unhappy "reflection on human nature" that, even when citizens of a republic govern themselves, some sort of "devices should be necessary to control the abuses of government."[431] "If angels were to govern men," Madison said, "neither external nor internal controls on government would be necessary."[432] As between the two kinds of controls Madison mentions, he of course preferred structural or "internal" controls—separated powers, the extended republic, the necessary agreement of a body with a will independent of the people—over "exterior" ones—legal thou shalts and shalt nots.[433] He formed this strong preference because of "how unequal parchment provisions are to a struggle with public necessity."[434]

This preference notwithstanding, Madison recognized that "neither moral nor religious motives can be relied on as an adequate control"[435] on temptations to oppress. He also believed that "a prudent regard to their own good as involved in the general and permanent good"[436] can sometimes lead even ruling individuals and factions, at least in their more far-thinking moments, to recognize their equality with others based on

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(Alexander Hamilton) (arguing that "nothing will contribute so much as this [life tenure] to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty"); id. at 465–66, 470 (describing life tenure as "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws" and describing the "firmness and independence" of the judiciary as "the citadel of the public justice and the public security").

430. See id. No. 48, at 310 (James Madison); id. No. 49, at 316 (James Madison); id. No. 78, at 465–66 (Alexander Hamilton) ("[I]n a government in which [the branches] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.").

431. Id. No. 51, at 322 (James Madison).

432. Id.

433. Id. at 320.

434. Id. No. 25, at 167 (Alexander Hamilton); see id. No. 41, at 257 (James Madison) ("It is in vain to oppose constitutional barriers to the impulse of self-preservation."); Madison, Oct. 17 Letter to Jefferson, supra note 191, at 297 (noting "[r]epeated violations of these parchment barriers have been committed by overbearing majorities in every State").

435. The Federalist No. 10, supra note 10, at 81 (James Madison); cf. id. No. 51, at 320 (James Madison) ("[A]s all these exterior [controls] are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constitutional parts may . . . be the means of keeping each other in their proper places.").

436. Madison, Vices, supra note 140, at 355.

their equal ability to choose and, proceeding "by [that] motive, to wish for a government which will protect all parties, the weaker as well as the more powerful."[437] And as the author of important portions of the Virginia Declaration of Rights and the federal Bill of Rights, he believed that it sometimes is "very practicable . . . to enumerate the essential exceptions" to the power of legislators that "may expressly restrain them from meddling with religion—from abolishing Juries from taking away the Habeus corpus—from forcing a citizen to give evidence against himself, from controuling the press" and the like.[438]

One reason Madison was sometimes willing to fall back on the last mentioned, somewhat formal and admonitory constraint was its potential for educating public actors and mobilizing public opinion. He believed the formal statement of a principle in legislation, especially *constitutional* legislation, had some capacity to improve the "motives" and "virtue" of the people and to trigger their far-thinking moments.[439] To the extent that this view perhaps anticipates the modern Equal Protection Clause's single-minded focus on the "motives" of government actors,[440] it also ex-

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437. The Federalist No. 51, supra note 10, at 325 (James Madison); see supra Part II.B.4.

438. Madison, Letter to Wallace, supra note 423, at 351 (making recommendations for the drafting of the Kentucky constitution). For other examples, consider Madison's appeal to the Virginia legislature to defeat a tax for teaching Christianity on the basis that it violated the Declaration of Rights, see Madison, Memorial, supra note 129, at 300; supra notes 125–130 and accompanying text, his assiduous work to secure passage of Jefferson's Bill for Religious Freedom, see supra note 128 and accompanying text, and his insistence on a "Guaranty Clause" in the Constitution to preserve republican governments in the states along with his consideration of the absence of the same type of protection in the state constitutions to be one of the "Vices," see U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."); The Federalist No. 39, supra note 10, at 242 (James Madison); id. No. 43, at 274–75 (James Madison); Madison, Vices, supra note 140, at 350–51.

439. See Letter from James Madison to James Monroe (June 21, 1785), *in* 8 Papers of Madison, supra note 2, at 306, 306 (explaining "language of the people" in the *Memorial and Remonstrance* as having been invited and justified—thus mobilized—by Virginia's Declaration of Rights).

440. See Washington v. Davis, 426 U.S. 229, 240 (1976) (holding that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"); Robert A. Dahl, A Preface to Democratic Theory 32, 34, 36–38 (1956) (anticipating the Court's strong association of violations of the equal protection principle with oppressive motives); supra note 57 and accompanying text. This aspect of modern Equal Protection Clause jurisprudence would be rendered still more Madisonian if, as one of us has advocated elsewhere, the law also clearly focused on the "motives" of the constituents of the state actors in question in the lawsuit. Liebman, Desegregating Politics, supra note 66, at 1551 & n.392 (arguing that the equal concern and respect principle underlying the Equal Protection Clause should, and providing examples of courts recognizing that it does, apply to individuals insofar as they endeavor to influence public action). As Madison said in his *Vices* memorandum, factional oppression is an abuse not only by representatives but, more dangerously, by "the people," making it crncial to scrutinize, and to attempt to inculcate virtue directly into, the "motives" of the people. Madison, Vices, supra note 140, at 355 ("A still more fatal if not more frequent cause [of unjust laws] lies among tbe people themselves. . . . Whenever therefore an apparent

plains decisions permitting motive to be inferred from actions, outcomes, and the "message" they convey.[441] Because Madison's objective was always to use the structure of government or, failing that, the content of law to inculcate virtuous actions and habits, he presumably would value doctrines that require public actors to evaluate constantly the virtuousness not only of their perceived motives but also of their actions, outcomes of those actions, and of the message the actions and outcomes convey.[442]

Strict scrutiny of government distinctions based, for example, on race also has a Madisonian explanation. Not only does it "smoke out" impermissible motives after the fact, but it also encourages public actors before the fact to consider whether they can rule out invidious motives for racial classifications they are considering, given the close "fit" between the proposed action and an important state objective and the absence of alternative, nonracial means to the same goal.[443] If applied with a modicum of "bite,"[444] even rational basis scrutiny can have some of this virtue-inculcating quality. It thus can require public actors in every case to articulate the common good, as opposed to parochial interest, i.e., something beyond ambition, personal benefit, or factional advantage that the proposed action serves.

Madison even had preferences among types of constraints against unjust state action. He believed that banning the most predictable injustices—for example, by requiring the government to respect a laundry list of individual rights to free speech, free exercise, and the like—would not by itself suffice. Instead, the law had to do what the Fourteenth Amendment's Equal Protection Clause for the first time accomplished: forbid "[i]njustice . . . effected by . . . [the full] infinitude of legislative expedients."[445]

The Fourteenth Amendment's Equal Protection Clause thus was a big improvement on the fourteenth amendment that Madison had tried to get through the first Congress on the coat tails of the Bill of Rights. Like the rights enumerated in the ten constraints on the *federal* government that the first Congress endorsed, Madison's proposed fourteenth

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interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals?").

441. See, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 509 (1979) (Rehnquist, J., dissenting); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977); see also Liebman, Desegregating Politics, supra note 66, at 1573–76 nn.474–483 (collecting sources).

442. See sources cited supra note 72 (listing Supreme Court authorities).

443. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (stating that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool"); Ely, Democracy, supra note 27, at 148 (arguing that an impermissible motive is likely when "the goal is so trivial in context that you have to believe it's a rationalization for a racially motivated choice").

444. See Gunther, supra note 56, at 12–21.

445. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 212.

would only have constrained the states against violating a small set of specified individual rights. In this respect, the Equal Protection Clause is a vast improvement on the national negative. Whereas the negative would have regulated only state legislation, the Equal Protection Clause and legislation adopted pursuant to it also constrain many other kinds of state and municipal action,[446] and even, potentially, private action.[447]

c. *Mobilizing Courts Against All Unjust Expedients.* — Madison's and the other Federalists' sympathy for an independent judiciary interposed between minorities and majorities contributed heavily to the negative's undoing. The negative's opponents argued that judicial review was a fully adequate protection against unconstitutional state legislation that avoided the impracticalities and risks of placing state laws at the mercy of congressional approval.[448] And hard on the heels of the national negative's defeat—and as an explicit substitute for it—the Convention

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446. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 685 n.45 (1978) ("Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in the States and by States, or combinations of persons?" (quoting Cong. Globe, 42d Cong., 1st Sess. appx. 85 (1871) (statement of Representative Bingham, the author of the Fourteenth Amendment))); see also id. at 685 (quoting Senator Edmunds, Senate manager of the legislation that is now codified in 42 U.S.C. § 1983, describing the provision as "really reenact[ing] the Constitution" (quoting Cong. Globe, 42d Cong., 1st Sess. 569 (1871))); id. at 700–01 (concluding that § 1983 "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights").

447. Although the Supreme Court held early on that the Fourteenth Amendment did not reach private actors, The Civil Rights Cases, 109 U.S. 3, 25 (1883) (invalidating a federal statute prohibiting race discrimination by public accommodations), it repeatedly ruled during the 1960s and 1970s that Congress can reach private discriminators through broadly remedial civil rights legislation adopted under Section 5 of the Fourteenth Amendment or the Commerce Clause. See, e.g., Runyon v. McCrary, 427 U.S. 160, 179 (1976) (upholding Congress's Thirteenth Amendment authority to create a cause of action for refusal to contract on the basis of race, 42 U.S.C. § 1981 (2000)); United States v. Guest, 383 U.S. 745, 782 (1966) (Brennan, J., concurring, joined in result by six justices) (stating, in the broadest articulation of Congress's authority under Section 5 ever to have commanded a majority of the Court, that "Congress is . . . fully empowered to determine that punishment of private conspiracies interfering with the exercise of [the right to equal protection] is necessary to its full protection"); Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (noting that Congress's power under the Civil Rights Act of 1964 to prohibit racial discrimination in places of public accommodation affecting commerce is broad and sweeping within constitutional limitations); Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964) (upholding Congress's power under the Civil Rights Act of 1964 and enjoining motel from refusing accommodations for racial reasons); see also Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (barring private discrimination in the workplace); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (barring private discrimination in schools). See generally William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 Mich. L. Rev. 2062, 2319 (2002) ("The broad substance of modern antidiscrimination law was made possible by the Warren Court precedents of 1965–69, and the Burger Court's acquiescence in them.").

448. See supra note 382 and accompanying text.

adopted the Supremacy Clause,[449] believing it to be a crucial adjunct to the federal courts' Article III power of judicial review of state action.[450]

Expressing the prevailing view, Hamilton argued in *The Federalist* that judicial control was the equivalent of the national negative, not a second best. Using Madison's precise language from *Nos. 44* and *51*, Hamilton's *No. 78* identifies the federal courts as having been "designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."[451] Hamilton mainly valued the life-tenured judiciary's capacity to protect the prerogatives of the national government against the states, and to protect individual rights.[452] But he also noted the courts' ability to protect minorities and national legal norms against majorities and parochial norms,[453] and tracking precisely Madison's rationale for locating the negative in Congress, he emphasized the courts' generalizing as opposed to localizing tendencies and thus their independence not only of other government officials but of majorities within the public.[454]

As we have just noted, the one thing the first Constitution lacked from this perspective was an explicit ban on factional oppression of the sort the Fourteenth Amendment later added. But even here, Hamilton

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449. See supra note 385 and accompanying text.

450. See Liebman & Ryan, supra note 193, at 729–31.

451. The Federalist No. 78, supra note 10, at 467 (Alexander Hamilton); see also id. No. 80, at 475 (Alexander Hamilton) (discussing "constitutional method[s] of giving efficacy to constitutional . . . restrictions on the authority of the State legislatures"). It was here that Hamilton referred to Madison's national veto, arguing that there must be "some effectual power in the government to restrain or correct the [states'] infractions" and that "[t]his *power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union.*" Id. at 476 (emphasis added); see also Jefferson, June 20 Letter to Madison, supra note 310, at 64 (proposing a somewhat similar alternative to the national veto under which state legislation would be subject to state judicial consideration followed by a right of appeal to a federal court); infra Part VII.B (discussing same); supra text accompanying note 319 (discussing the analogy Madison drew between the national veto and judicial review).

452. See, e.g., The Federalist No. 78, supra note 10, at 470–71 (Alexander Hamilton).

453. In Hamilton's view:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which . . . have a tendency, . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id. at 469. Hamilton continued:

> [T]he effects of occasional ill humors in the society . . . sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. . . . This is a circumstance calculated to have more influence upon the character of our governments than hut few may he aware of.

Id. at 470.

454. Id. No. 22, at 150–51 (Alexander Hamilton).

found a rather Madisonian answer—in the federal judiciary. Recall Madison's claim in *No. 51* that even self-interested individuals, in their more prudent moments, are prepared to submit to government and, when those governments take the form of republics, to submit to an economized equal protection constraint, based on their recognition of all individuals' equal need to preserve their capacity for self-government and equal vulnerability (over the long haul) to "injustice" at the hands of a majority that excludes them.[455] In *No. 78*, Hamilton's famous paean to life-tenured federal courts with the power of judicial review of state action, he used precisely the same argument to explain why the public is prepared to give that power to the least republican branch:

> Considerate men of every description ought to prize whatever will tend to beget or fortify that temper ["integrity and moderation"] in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.[456]

For Hamilton, that is, life-tenured federal judges themselves "embody" the equal protection principle.

Given Madison's fervent belief in the need for protection against the "infinitude" of methods by which majorities oppress minorities, and his willingness to fall back on constitutional admonitions against violation of specific individual rights, it is puzzling that he never, even as a fallback, proposed a broader-gauged admonition against factional injustice of the sort the Equal Protection Clause later embodied. As we will see, however, Madison had his reasons. Recall that the goal of external admonitory constraints is not only to punish and redress violations of the admonition after the fact, but also to educate and inculcate virtue before the fact.[457] From this perspective, a dilemma (analogous to the modern rules-standards dilemma) arises, as Madison clearly perceived: Whatever a broader admonition gains in coverage, it loses in specificity and clarity and thus in its capacity to divert behavior into habit-forming channels.[458]

B. *Our Incomplete Constitution*

There is much about the Equal Protection Clause in its enforcement heyday that can be assimilated into Madisonian thought and the design of the Constitution as Madison himself described it in *The Federalist*. The fact remains, however, as we discuss in the remainder of this Part, that Madison viewed the constitution the conveners adopted as a bitter defeat of all that was required to restrain the worst, discriminatory "vices" of

455. See supra Part II.B.4.

456. The Federalist No. 78, supra note 10, at 470 (Alexander Hamilton).

457. See supra Part III.A; supra notes 334–336 and accompanying text.

458. See infra notes 505–509 and accompanying text.

republican government.[459] Nor, as his writings at the time reveal, would his fears have been mollified by a judicially enforceable "parchment" admonition to foreswear oppressing minorities that necessarily would have been as thin and weak as it was broad and encompassing.[460] The fact also remains, as we discuss in this and the next Part, that Madison was largely correct. Judicial review under the first Constitution was no match for the injustices that led to the Civil War. And the Equal Protection Clause has subsequently failed to forestall even the most blatant factional oppression save perhaps in a few decades of its 135-year history.[461]

1. *The Weakness of the Judiciary.* — Madison recognized, of course, that with the defeat of the national negative and the substitution of the Supremacy Clause, the federal judiciary would be the primary safeguard of minority rights. As he described at length in his October 24, 1787, letter to Jefferson, however, Madison derived no solace from this safegnard, believing as he did that the judiciary was at best a weak and inadequate bulwark. Madison foresaw that "experience would hereafter produce . . . amendments" to the Constitution to impose some kind of equal protection constraint on the states.[462] But in criticizing a suggestion by Jefferson,[463] Madison identified in advance the defects of the postbellum Fourteenth Amendment:

> It may be said [as Jefferson had] that the Judicial authority under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law, than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal agst. a State to the supreme Judiciary; that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible.[464]

Madison here predicted nearly all of the foibles of our judicially enforceable Equal Protection Clause—apart from the admonitory weakness of glittering generalities, which he later took as his subject in *The Federalist No. 37*.[465] Most importantly, waiting to enforce an exterior constraint against unjust state action until such action takes place, rather than internally structuring state action so injustice never occurs, is inefficient and awk-

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459. See supra notes 238–239, 286 and accompanying text.

460. See infra Part V.B.3.

461. See infra Part V.C.

462. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 216.

463. Jefferson, June 20 Letter to Madison, supra note 310, at 64 (discussed supra note 451 and infra Part VII.B); see also The Federalist No. 80, supra note 10, at 476 (Alexander Hamilton) (making a similar suggestion); supra note 451 (discussing *No. 80*).

464. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 211.

465. See infra notes 505–509 and accompanying text.

ward. It tends to run all the standard presumptions of judicial review—for example, the presumption of the regularity of the laws and against interference with operative rules and ongoing government processes in which reliance interests may have formed—in favor of validating state action whose injustice cannot be clearly demonstrated until it unfolds over the course of time.

Diffidence in the face of a fait accompli is particularly likely because of "how unequal parchment provisions are to a struggle with [the perceived] public necessity"[466] that triggered the state action and accounts for its injustice. In cases ranging from the infamous to the mundane, the Supreme Court has permitted the sacrifice of the rights of minorities to perceived public necessity. Illustrating the former is *Korematsu v. United States*, where the Court justified the internment of Japanese Americans during World War II on an unsubstantiated claim of military need.[467] To take a more mundane set of examples, the recent persistence of high crime rates has prompted the Court to find a host of ways to avoid interfering with law enforcement methods that rather evidently have been applied unequally against members of minority communities.[468] The Court instead has preferred to "operate[ ] near the margins," sometimes "nudg[ing] and gently tugg[ing]" state actors, but rarely throwing itself in the way of potentially abusive legislation or action that government officials strongly desire.[469] Even when the judiciary accepts responsibility for policing state action, its apparatus for doing so moves slowly: at best "with all deliberate speed."[470]

The inability of the least powerful branch of government to stop state factional abuse of minorities arises as well because of the imhalance of power and resources between the chronically weak minority party and

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466. The Federalist No. 25, supra note 10, at 167 (Alexander Hamilton).

467. Korematsu v. United States, 323 U.S. 214, 217–18 (1944).

468. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (placing sharp racial disparities in the use of the death penalty, which were unexplainable on grounds other than prosecutors' and jurors' assignment of disparate values to the lives of whites and African American criminals and victims, beyond the reach of the Constitution); City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (urging federal courts to exercise "restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws"); Rizzo v. Goode, 423 U.S. 362, 380 (1976) (relying in part on principles of federalism to deny injunctive relief against state and local law enforcement agencies); O'Shea v. Littleton, 414 U.S. 488, 493–94, 499–501 (1974) (denying relief for failing to "allege an actual case or controversy" and stating in dicta that monitoring state courts would violate principles of federalism and comity); Younger v. Harris, 401 U.S. 37, 44, 54 (1971) (forbidding federal courts to stay or enjoin pending state court prosecutions, based on concerns of federalism, comity, and equitable restraint).

469. Robert G. McCloskey, The American Supreme Court 229 (1960).

470. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955); see also Rosenberg, supra note 78, at 17. District judges in particular have considerable discretion to delay or postpone relief; parties may also delay and impose significant costs through repeated motions, discovery abuse, appeals and the like. Id. at 17–18.

the stronger party that permitted the injustice in the first place.[471] As Madison pointed out, if an unjust act by state officials

> be generally popular in that State . . . it is executed immediately . . . . The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the State, and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty.[472]

Prefiguring the numbing institutional intransigence and inertia of hundreds of prisons, social services administrations, and police departments, not to mention Jim Crow and Massive Resistance themselves,[473] Madison predicted that after-the-fact orders to desist from unjust behavior and fix the results would face "[t]he disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions . . . ."[474] This would trigger "difficulties" in "any State," and "in a large State" would invite "very serious impediments."[475] "[W]here the sentiments of several adjoining States happened to be in unison," majority resistance "would present obstructions which the federal government would hardly be willing to encounter."[476]

Whether because of judicial weakness or because coercion is unseemly and inconsistent with federal comity, federal courts indeed "underenforce" many constitutional norms.[477] As Hamilton wrote, because the judiciary lacks any "influence over either the sword or the purse," it "may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[478] Courts are particularly ham-

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471. Rosenberg, supra note 78, at 102–03 (noting that federal courts during the civil rights era sometimes provided political "cover" for officials making desired but controversial changes in abusive practices by allowing them to claim that the courts had forced them to act, but that even these improvements occurred only when officials were independently willing to improve the lot of minorities).

472. The Federalist No. 46, supra note 10, at 297 (James Madison).

473. See Rosenberg, supra note 78, at 42–71.

474. The Federalist No. 46, supra note 10, at 297–98 (James Madison).

475. Id. at 298.

476. Id.

477. Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213 (1978) (cataloging situations in which "the Court, because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries"); see also The Federalist No. 15, supra note 10, at 110–11 (Alexander Hamilton) (suggesting that government coercion through the courts is typically aimed at individuals; when aimed at "bodies politic," coercion of the "sword" becomes necessary); Epstein, supra note 68, at 38–39 (describing and analyzing Hamilton's argument).

478. The Federalist No. 78, supra note 10, at 465 (Alexander Hamilton); see Missouri v. Jenkins, 495 U.S. 33, 50–51 (1990) (holding that a district court order increasing taxes to

pered in seizing the resources that often are needed to remedy injustices. As Judge Bazelon wrote, where "the real problem is one of inadequate resources, . . . the courts are helpless . . . ."[479]

2. *The Courts' Dangerous, Enervating Distance from the People.* — In Madison's view, the main reason courts are unreliable protectors of tyrannized minorities is their distance from the people—the source of the greatest power, and danger, in a republic. Whereas power under the Articles of Confederation was distributed according to the consent of the states, Madison wrote of the new Constitution, "the real power lies in the majority of the Community."[480] When the people are the sovereign and, one way or another, are the source of all the branches' power, any agency of government that attempts to mete out justice against the will of the people does so at its peril.

But recall that the source of *faction* also "lies among the people themselves."[481] The liberty exercised by the people and their diversity of views and interests leads first to one-on-one conflict. Submission to a governing authority solves this prohlem by giving the few in command a monopoly on force. But that step places the liberty of the many at the mercy of the few who rule. Republican governments solve this problem by letting the people govern themselves through their elected representatives. But this solution comes at the expense of injustice against the few (minority factions) at the hands of the many. Left to their own devices, "the majority of the Community" and their representatives will exercise the republic's powers, not in pursuit of the public good, but under the "pestilential influence of party animosities," "betray[ing] the interests" of the minority.[482]

The major instrument of the majority's power to rule and oppress in a republic is the legislature. Because legislators "dwell among the people at large" and have "connections of blood, of friendship, and of acquaintance" with the sovereign people, the legislative branch draws the most

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fund a school desegregation remedy violated principles of comity and federalism and stating in dicta that the district court could instead order the locality to implement its own funding remedy).

479. David L. Bazelon, *Foreword* to A Symposium: The Right to Treatment, 57 Geo. L.J. 676, 676 (1969).

480. Madison, Oct. 17 Letter to Jefferson, supra note 191, at 211; see The Federalist No. 20, supra note 10, at 146, 152 (Alexander Hamilton) (stating that "the people of America" are the "pure, original fountain of all legitimate authority"); Beer, supra note 7, at 254–55 (describing theories of national sovereignty and nationalist thought); Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America 267 (1988) (arguing based on Madison's appeals to popular sovereignty that "the people of the United States as whole . . . alone could be thought to stand superior to the people of any single state").

481. Madison, Vices, supra note 140, at 355; supra notes 199, 231 and accompanying text; see also Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 Stan. L. Rev. 1031, 1045 (1997).

482. Madison, Oct. 17 Letter to Jefferson, supra note 191, at 211; The Federalist No. 37, supra note 10, at 231 (James Madison); id. No. 10, at 82 (James Madison).

legitimacy and power from that sovereign.[483] "[I]nspired by a supposed influence over the people with an intrepid confidence in its own strength,"[484] and "alone" endowed with "access to the pockets of the people" and controls over the salaries of the other agencies of government,[485] the legislature tends to "draw[ ] all power into its impetuous vortex."[486] It is not surprising, therefore, that Madison believed that state legislatures were the site of the worst republican abuses against minorities,[487] and that any effective effort to check them and the majority factions controlling them would have to come from an institution of similar strength that likewise derived its power directly from the people. The same reasoning left Madison dubious about relying on a nonlegislative branch to reckon with state factional abuse.

In Madison's view, courts in particular are no match for state legislatures. Because judges "are few in number," they "can be personally known to a small part only of the people."[488] Because judges with a "will" sufficiently "independent of the people" to dispose them to resist majority oppression had to be appointed and life-tenured, they inevitably "are too far removed from the people to share much in their prepossessions" and to partake of their trust.[489]

In so saying, Madison recognized the countermajoritarian difficulty.[490] He knew that the kinship of unelected, life-tenured judges to lords and princes[491] and their questionable consistency with "the republican form[ ]"[492] invited the argument (in Hamilton's words) that "courts, on the pretense of a [law's] repuguancy [to the Constitution], may substitute their own pleasure to the constitutional intentions of the legislature."[493] But Madison was far more troubled by the opposite consequence of the judiciary's distance from the people and the power that flows from their trust and support. However strongly *disposed* judges may otherwise be to counter majority injustices, their lack of popular support deprives them of the *power* and thus the courage needed to do so. It was the confirmation of this fear that drove Madison toward state interposi-

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483. The Federalist No. 49, supra note 10, at 316 (James Madison).

484. Id. No. 48, at 309 (James Madison); see id. at 310 (arguing that legislative powers are less circumscribed than those of the other departments and that legislators can easily disguise the purpose or nature of their actions).

485. Id. at 310.

486. Id. at 309.

487. See Madison, Vices, supra note 140, at 354.

488. The Federalist No. 49, supra note 10, at 316 (James Madison).

489. Id.

490. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (1962).

491. The Federalist No. 51, supra note 10, at 321, 324 (James Madison); Madison, Oct. 24 Letter to Jefferson, supra note 179, at 211.

492. The Federalist No. 51, supra note 10, at 321, 324 (James Madison); Epstein, supra note 68, at 190–92 (locating the unelected judiciary "at the edge of the strictly republican regime").

493. The Federalist No. 78, supra note 10, at 468–69 (Alexander Hamilton).

tion at the time of Virginia Resolutions. As he then argued, the federal judiciary's "concurrence" in the powers "usurped" by the Alien and Sedition Acts could not be permitted to "subvert forever, and beyond the possible reach of any rightful remedy, the very constitution, which [it was] instituted to preserve."[494] The Acts thus presented one of the "great and extraordinary cases" in which the states had to serve as an "intermediate" institution to arouse public opinion in opposition to the federal Acts.[495]

Most troubling to Madison, however, was the confluence of *both* countermajoritarian difficulties—that of keeping judges accountable to their constitutional obligations even though they were not directly accountable to the people, and that of giving judges the confidence and authority needed to protect minorities and disappoint majorities when that was judges' constitutional obligation. As Madison said, judicial review is only a "precarious security" because judges' independent power "may as well" align itself with the unjust majority as with "the rightful interests of the minor party" when that alignment suits the judiciary's own ends.[496] Those ends might well be served, moreover, by attempting

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494. Madison, Report of 1800, supra note 353, at 311–12.

495. Id. at 311, 350. In his Report of 1800 on the Virginia Resolutions, Madison wrote:

> However true therefore it may be that the Judicial Department, is, in all questions submitted to it by the forms of the constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power, would annul the authority delegating it; and the concurrence of this department with the others in usurped powers, might subvert forever, and beyond the possible reach of any rightful remedy, the very constitution, which all were instituted to preserve.

Id. On the need for the states to fill the "intermediate" role the courts had defaulted, Madison wrote:

> It cannot be forgotten, that among the arguments addressed to those, who apprehended danger to liberty, from the establishment of the general government over so great a country; the appeal was emphatically made to the intermediate existence of the state governments, between the people and that government, to the vigilance with which they would descry the first symptoms of usurpation, and to the promptitude with which they would sound the alarm to the public.

Id. at 349–50.

496. The Federalist No. 51, supra note 10, at 324 (James Madison). This passage makes the important point that it is not only the majority but the minority who may be oppressed by judges disposed to favor their own interests. Over most of their history, federal courts in this country have protected the elite, not other kinds of minorities. See JoEllen Lind, Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right, 5 UCLA Women's L.J. 103, 107 (1994) (describing the Court's role, during one hundred years of women's suffrage efforts, in denying women the franchise, and in "entrench[ing] a political process resistant to the demands of women and others for power sharing"); S. Sidney Ulmer, Selecting Cases for Supreme Court Review: Litigant Status in The Warren and Burger Courts, *in* Courts, Law, and Judicial Processes 284, 286–87, 294–95 (S. Sidney Ulmer ed., 1981) (concluding that even the Warren and Burger Courts

to curry favor with a popular sovereign, even an unjust one, whose support for judges is otherwise weak.[497] Without sorting out all the causes and effects and motives, it seems certain that the confounding countermajoritarian difficulties Madison anticipated have contributed to the Supreme Court's dramatic flip-flops on the Equal Protection Clause—from a century of nonenforcement,[498] to a quarter century of concerted, if often ineffective enforcement,[499] to the current Court's determined retreat.[500]

3. *The Thin Admonitory Force of "Parchment" Generalities.* — Madison worried about the weakness and inconstancy not only of judges but also of admonitory law as a means of mobilizing virtuous behavior by majorities and their representatives. In Madison's view, the main value of law as an exterior constraint is not in empowering effective judicial intervention after the fact, but in inculcating virtue before the fact, tempering abuses of minorities by popular majorities before they occur.[501] Madison realized that it is relatively easier to form the habit of exercising virtue *consistent* with self-interest than contrary to it. This accounts for his strong preference for structural constraints that aligned virtuous behavior with self-interest.[502] And it explains his belief in the power of exterior constraints to mobilize *majorities* to rise up against *government* oppression of the people at large—as he encouraged "interposing" states to do at the time of the Virginia Resolutions.[503] Madison had much less faith, however, in the power of exterior constraints—mere "parchment barrier[s]"—to operate effectively in "teaching the people to *curb* 'the impulses of interest and passion.'"[504]

As we already have noted, one of the main difficulties is making the law's exterior admonition broad enough and yet clear enough to guide public action in virtuous directions.[505] On the one hand, Madison recognized that a declaration of particular rights could never be "sufficient" to

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granted petitions of elites far more often than "[u]nderdogs"); cf. Charles R. Lawrence III, The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again, 15 B.C. Third World L.J. 1, 7 n.25 (1995) (describing infrequent interaction of the Justices with African Americans).

497. See generally Barry Friedman, The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court, 91 Geo. L.J. 1 (2002).

498. See infra notes 541–543 and accompanying text.

499. See infra Part V.C.

500. See infra Part VI.

501. See Rakove, James Madison, supra note 1, at 77; supra Part III.A; supra notes 334–336 and accompanying text.

502. See supra Part III.A.

503. See supra notes 255, 353, 495 and accompanying text. Madison also used the Virginia Declaration of Rights to mobilize the people against a 1785 Virginia act that imposed a tax to support Christian teachers. See supra notes 125–130 and accompanying text.

504. Rakove, James Madison, supra note 1, at 77 (emphasis added) (quoting Madison, Oct. 17 Letter to Jefferson, supra note 191, at 295–97).

505. See supra notes 312–314, 458 and accompanying text.

anticipate and ban every unjust and "partial" law that could be "effected by . . . [the full] infinitude of legislative expedients."[506] But he knew, on the other hand, that a more general and encompassing admonitory constraint would be "unavoidabl[y]" weak in proportion to the complexity of the ideas it was meant to convey and the ambiguity of the words used to convey the ideas.[507] Language is a "cloudy medium" in which meaning remains "dim and doubtful."[508] At best, meaning becomes "liquidated and ascertained" after a long and painstaking "series of particular discussions and adjudications"; at worst, meaning remains "more or less obscure and equivocal" despite the "experience of the ages, with the continued and combined labors of the most enlightened legislators and jurists."[509]

This "fresh embarrassment"[510] is nowhere better illustrated than in the jurisprudence of the Equal Protection Clause. As noted, Supreme Court interpretations of the Clause's "majestically inclusive" words have varied wildly.[511] Within decades of the Clause's adoption, the Court variously limited it to situations in which states had "discriminated with gross

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506. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 212; see supra notes 312–314 and accompanying text.

507. The Federalist No. 37, supra note 10, at 229 (James Madison) (concluding that the inaccuracy of words or phrases "unavoidabl[y]" increases as they are applied to more complex ideas).

508. Id.

509. Id. at 232–33. Madison's views about the "indeterminate" nature of legal constraints are strikingly consistent with the modern view:

> The experience of ages, with the continued and combined labors of the most enlightened legislators and jurists, has been equally unsuccessful in delineating the several objects and limits of different codes of laws and different tribunals of justice. . . . [Even in] Great Britain, where accuracy in [legal] subjects has been more industriously pursued than in any other part of the world[, t]he jurisdiction of her several courts . . . is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are . . . circumscribed. All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment.

Id. at 228–29. Of course, Madison's colleagues at the Convention expressed similar worries in regard to the standards Congress would have had to use in exercising the national veto. See Epstein, supra note 68, at 117; supra notes 362–363 and accompanying text.

510. The Federalist No. 37, supra note 10, at 229 (James Madison).

511. Michael Dorf, Equal Protection Incorportation, 88 Va. L. Rev. 951, 958 (2002); see Steven G. Calabresi, We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment, 87 Geo. L.J. 2273, 2290–91 (1999) (reviewing Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998)) ("A great constitutionalist, a James Madison, does not leave loose language and ill thought-out enforcement structures for his posterity. John Bingham [drafter of the Fourteenth Amendment] left us with both . . . .").

injustice and hardship" against blacks,[512] defined it (in a case brought by Chinese Americans) to afford all citizens "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,"[513] and in *Plessy v. Ferguson,* interpreted both glosses to permit explicit state-mandated segregation of the races.[514]

A more muscular antidiscrimination principle emerged in the three decades after *Brown*[515] overruled *Plessy*, although its formulation—that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race"[516]—was not terribly different from the former ones.[517] The result of this "new equal protection," and occasional emanations of still "newer" ones,[518] has been multiple levels of judicial scrutiny (strict, medium, and deferential) of public action that expressly distinguish among individuals on the basis of race, ethnicity, gender, age, disability, sexual preference, and the like. The Clause has stemmed countless battles over which classifications aimed at what disadvantaged groups should receive which level of scrutiny,[519] and caused vexing questions about explicit ra-

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512. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

513. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

514. Plessy v. Ferguson, 163 U.S. 537, 550–52 (1896).

515. Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954); Brown v. Bd. of Educ., 349 U.S. 294 (1955).

516. Washington v. Davis, 426 U.S. 229, 239 (1976); see supra note 440 and accompanying text.

517. See Paul Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 53 (1976).

518. See Romer v. Evans, 517 U.S. 620, 635 (1996) (applying what is arguably more than rationality review to overturn a state law invalidating all local ordinances designed to protect homosexual individuals from discrimination); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (holding there was no rational basis for city ordinance restricting housing for those with mental disabilities, although ordinance likely would have survived traditionally deferential "rational basis" scrutiny); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (according gender classifications an intermediate level of scrutiny); Craig v. Boren, 429 U.S. 190, 197 (1976) (same). See generally Gunther, supra note 56, at 12–20.

519. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365–68 (2001) (holding that strict scrutiny does not apply to persons with disabilities); Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (holding that "irrational and wholly arbitrary" treatment of one person, not based on membership in a class or group, is "sufficient to state a claim for relief under traditional equal protection analysis"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (holding that age discrimination does not deserve strict scrutiny); Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that alienage and nationality are subject to strict scrutiny); Ely, Democracy, supra note 27, at 145–70 (considering several explanations for why certain classifications are suspect and thus deserving of strict scrutiny); Eskridge, supra note 447, at 2251–69 (2002) (detailing the emergence of tiers of scrutiny and the history of efforts to secure enhanced scrutiny for different disadvantaged groups, from the NAACP's efforts regarding race-based classifications, through efforts regarding sex-based discrimination and discrimination regarding class, illegitimacy, disability, and sexual orientation).

cial and other classifications that are arguably "benign."[520] A throng of still more difficult questions arise when the classification drawn is not explicitly based on race or other problematic status and was never verbally defended on those grounds, but nonetheless has a disparate effect (often a blatantly harmful and self-evidently unequal effect) on individuals with one of those statuses.[521] Most importantly, evaluating those classifications requires courts to decide whether the real equal protection harm is the fact of subordination, a publicly conveyed message of subordination, or the actor's (or actors') intent to subordingate.[522] The "new equal pro-

520. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27 (1995) (rejecting "the surface appeal of holding 'benign' racial classifications to a lower standard [of scrutiny]" and applying strict scrutiny to federal affirmative action program); id. at 243–49 (Stevens, J., dissenting) (arguing that affirmative-action programs are not invidious discrimination); id. at 273 (Ginsburg, J., dissenting) (distinguishing permissible governmental use of race); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507–08 (1989) (applying strict scrutiny to an affirmative-action program). For criticism of the Court's approach, see generally Jed Rubenfeld, Affirmative Action, 107 Yale L.J. 427 (1997); Peter J. Rubin, Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After *Adarand* and *Shaw*, 149 U. Pa. L. Rev. 1 (2000).

521. See, e.g., *Garrett*, 531 U.S. at 372–73 ("Although disparate impact may be relevant evidence of racial discrimination, . . . such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny."); McCleskey v. Kemp, 481 U.S. 279, 291–99 (1987) (rejecting statistical proof of discrimination in the application of Georgia's capital punishment statute as insufficient to show purposeful discrimination); *Washington*, 426 U.S. at 239, 248 (noting disparate treatment without invidious intent is not subjected to strict equal protection scrutiny). But cf. Bush v. Gore, 531 U.S. 98, 105 (2000) (asking whether state satisfied an "obligation to avoid arbitrary and disparate treatment"); Gomillion v. Lightfoot, 364 U.S. 339, 341–42 (1960) (finding an equal protection violation based on redistricting which created a 28-sided district that excluded 395 of 400 black residents while excluding no white residents). For criticism, see Theodore Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36 (1977); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 319 (1987) (arguing that "a motive-centered doctrine of racial discrimination places a very heavy, and often impossible, burden of persuasion" on plaintiffs, because intent may be unconscious); Michael J. Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U. Pa. L. Rev. 540 (1977).

522. On the subordination principle, see Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. Rev. 1003, 1012–16 (1986) (contending that the anti-subordination principle explains substantial amounts of equal protection doctrine and should be explicitly incorporated into that doctrine); Crenshaw, supra note 78, at 1377–87. On the theory that a message of inferiority is the real equal protection harm, see Deborah Hellman, The Expressive Dimension of Equal Protection, 85 Minn. L. Rev. 1, 13–14, 34–35 (2000); Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 506–16 (1993); Richard H. Pildes, Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. Legal Stud. 725, 754–60 (1998); cases cited supra note 72. For the argument that it is the *fact* of subordination or chronic disparate treatment that matters, see *Hogan*, 458 U.S. at 725 (holding that nursing school denial of admission to men violated equal protection because it reflected "archaic and stereotypic notions" of the "roles and abilities of males and females"); Plyler v. Doe, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring) (finding equal protection violation in denial of education to illegal immigrant children based on statute's creation of "a discrete

tection" has caused disagreements about the kinds of arguably "public" action that are encompassed by the Clause's admonition to "*State*[*s*]" not to withdraw the "equal protection of the *laws*,"[523] as well as disputes between Congress and the Court over the former's capacity to supplement the latter's interpretation of the Clause, at least in service of expanded protection for minorities.[524]

The meaning of the word equality as a potentially enforceable legal category is itself elusive.[525] And all of these ambiguities in the legal doctrine are only the preliminaries; if the judge does find an equal protection violation, still more intractable problems arise at the remedial stage, such as the questions of causation, right-remedy coherence, federalism, separation of powers, institutional advantage and disadvantage, duration of judicial involvement, and the like.[526] So, although generality is necessary to enable the Equal Protection Clause to reach the many types of majority oppression at which it was aimed, the same generality inevitably dilutes the Clause's admonitory power to the point where little remains.

C. *The Disappointing History of Our Un-Madisonian Equal Protection Clause*

Madison's doubts about parchment barriers are borne out by the recent history of the Equal Protection Clause, in the wake of its enforcement heyday. Although for a time during the 1950s and increasingly dur-

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underclass" and perpetuatuation of a "'subclass of illiterate persons'"); Cass R. Sunstein, The Anticaste Principle, 92 Mich. L. Rev. 2410, 2430 (1994) (arguing that the harm is maintaining the systematic disadvantage of one group relative to another). Defending a requirement of purposeful discrimination are, e.g., Brest, supra note 517, at 43; John Hart Ely, The Centrality and Limits of Motivation Analysis, 15 San Diego L. Rev. 1155, 1160–61 (1978); Larry G. Simon, Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination, 15 San Diego L. Rev. 1041, 1097–1107 (1978). For the theory that it is the social meaning of discrimination that defines equal protection, see Lawrence, supra note 521, at 355–56 (advocating an equal protection test that would focus on not just racial stigma, but the "cultural meaning" of the alleged racial discrimination); Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1114 (1997) (arguing that status regulation and discrimination evolve and that legal standards fail to keep pace); see also Kenneth L. Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 5–11 (1977) (proposing that a principle of equal citizenship guide equal protection doctrine).

523. U.S. Const. amend. XIV, § 1 (emphasis added); see, e.g., Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 27–32 (1959) (noting also that "the words [of the Fourteenth Amendment] are general and leave room for expanding content as time passes and conditions change"). See generally Richard S. Kay, The State Action Doctrine, the Puhlic-Private Distinction, and the Independence of Constitutional Law, 10 Const. Comment. 329 (1993).

524. See infra Part VI.

525. See, e.g., Steven D. Smith, Getting Over Equality: A Critical Diagnosis of Religious Freedom in America 13–17 (2001); Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982). But see Kent Greenawalt, How Empty Is the Idea of Equality?, 83 Colum. L. Rev. 1167 (1983).

526. See infra notes 548–558 and accompanying text.

ing the 1960s and 1970s, events seemed to bear out Justice Brennan's hopes for a federal judiciary mobilized in the ways Hamilton and other Federalists had envisioned as a reliable alternative to the national veto,[527] more recent events raise all the Madisonian red flags.

A brief Hamiltonian history of the Civil Rights era might go as follows. When it became clear following the Second World War and the onset of the Cold War that the broader public interest lay in jettisoning the embarrassment of racial segregation[528] and, with it, the apartheid regime through which powerful majority factions in substantial reaches of the nation had systematically oppressed their minority populations for many decades,[529] it was the Supreme Court that ordered the change and the lower federal courts that undertook to implement it.[530] From their "intermediate [position] between the State legislatures and the people," and vigilance in "watching the conduct of the former [lest] violations . . . remain unnoticed and unredressed,"[531] the courts not only forced local majorities to cease segregating everything from schools[532] to swimming pools,[533] but eventually mobilized the full powers of the other two branches of the extended republic's government to support and extend the effort.[534] When national popular majorities weighed in, they provided courts with additional tools for using lawsuits brought by public and private parties to police the day-to-day decisions of local majorities and their representatives for injustices against minorities in the operation not only of schools and swimming pools, but of police departments and prisons and indeed of entire spheres of local governmental action such as the administration of criminal justice and the provision of social services.[535] The broad remedial decrees that resulted helped, in turn, to inculcate "equal concern" virtue in local political actors and activity where it had not previously been manifest—giving far-thinking local officials the politi-

527. See supra Part IV.C.1–2.

528. See, e.g., Mary Dudziak, Cold War Civil Rights 250–51 (2002); Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 524–25 (1980).

529. See Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 424 (1960).

530. See, e.g., Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (ruling school segregation unconstitutional); Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (giving lower federal courts important responsibility for enforcing the edict of *Brown I*).

531. The Federalist No. 44, supra note 10, at 286 (James Madison).

532. See, e.g., Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (per curiam).

533. See, e.g., Palmer v. Thompson, 403 U.S. 217, 218–19 (1971). See generally Jack Greenberg, Crusaders in the Courts 380–81 (1994).

534. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); Cooper v. Aaron, 358 U.S. 1, 18 (1958); Gary Orfield, The Reconstruction of Southern Education 102–51 (1969) (giving most of the credit for bringing about actual desegregation of Southern schools during the 1960s to the federal Department of Health, Education and Welfare, acting under the authority of the Civil Rights Act of 1964).

535. See, e.g., Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons (1998).

cal "cover" they needed to effect desired but controversial improvements in the lot of minority citizens;[536] prompting complex forms of structural relief with broad avenues for local public input.[537] New racially and socially diverse coalitions of citizens and officials who were habituated to treat each other with concern and respect were then emboldened and empowered[538] to adopt a wide array of creative, other-concerning innovations in local practice;[539] and federal district courts themselves were cast, in their remedial role, as public-minded national institutions that considered the interests of all relevant groups in the process of solving local social problems.[540]

A first objection to this rosy Hamiltonian account of the disposition and power of the federal judiciary to protect local minorities may be framed as a mostly rhetorical question: If the federal courts are such a reliable source of protection of minorities against "partial" and "oppressive" state legislation, where were those courts between 1868 and 1954? Of course, the answer, by and large, is that the federal courts were on the side of the oppressive local majorities. For example, when Louisiana butchers attempted early on to enforce the Equal Protection Clause against self-evidently "partial" state legislation granting the most naked monopolies to powerful local interests absent any concern for the public good, the Court limited the Clause to discrimination against a different group: emancipated slaves.[541] Yet, when that minority group attempted to enforce the Clause against racial segregation, and to use federal legisla-

536. Rosenberg, supra note 78, at 102–03; see also supra note 471.

537. See, e.g., Susan Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1355 (1991).

538. See, e.g., Liebman, Desegregating Politics, supra note 66, at 1601–35; supra notes 69–73 and accompanying text.

539. See Jennifer Hochschild, The New American Dilemma: Liberal Democracy and School Desegregation 80–82 (1984); Jeffrey Raffel, The Politics of School Desegregation: The Metropolitan Remedy in Wilmington 120–53, 208–17 (1980); Colin S. Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43 (1979) (exploring the courts' role in institutional reform litigation vis-à-vis local officials); Liebman & Sabel, Puhlic Laboratory, supra note 79, at 200 (describing the role of federal courts in multidistrict desegregation cases during the civil rights heyday: "[F]ederal judges in Wilmington, Delaware, Charlotte, North Carolina, and Louisville, Kentucky for a time energized surprising and effective coalitions of actors, both inside and outside the schools.").

540. See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282–84 (1976).

541. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71–83 (1872) (giving the Equal Protection Clause an extremely narrow scope in the Court's first comprehensive analysis of the provision). For subsequent narrow interpretation of the Equal Protection Clause, see United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175–76 (1980); New Orleans v. Duke, 427 U.S. 297, 303 (1976); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). If Chief Justice Rehnquist had his druthers, the nation would return to the circumscribed Equal Protection Clause of the *Slaughter-House Cases*. See Trimble v. Gordon, 430 U.S. 762, 777–86 (1977) (Rehnquist, J., dissenting) (arguing that the equal protection forbids only classifications based on race and national origin).

tion adopted under it against a variety of local tyrannies, the Court was quick to find the Clause inapplicable[542] and the legislation unconstitutional.[543]

As often as not, moreover, the reason the Court gave for these outcomes was the one Madison had predicted: "[I]n the absence of language which expresses such a purpose too clearly to admit of doubt," unelected judges, at a great distance from the power bestowed on state governments by the people, were unprepared to "fetter and degrade the State governments" or "radically change[ ] . . . the relations of the State and Federal governments to each other . . . ."[544] Whether or not it is accurate to say, therefore, that "Madison erred in underestimating the authority of the judiciary and the import of the supremacy clause" as manifested during the Clause's enforcement heyday in the mid-1950s to the mid-1980s,[545] his prognostication cannot be faulted when the century preceding (and, as we will see, the decades following) that heyday are considered.[546]

A second possible objection to this account of the judicially enforced Equal Protection Clause during the Civil Rights era is that it may be less a history of what actually happened across the board and more an optimistic projection of possibilities revealed by the era's occasional, often temporary, successes.[547] Even the outcomes of canonical instances of equal protection and related litigation in areas such as urban school desegregation,[548] the assignment of children to special education pro-

542. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 555 (Harlan, J., dissenting) (noting how little scope the majority's decision approving state-sponsored racial segregation gave to the Equal Protection Clause, notwithstanding the Clause's clear intent to "[add] greatly to the diguity and glory of American citizenship, and to the security of personal liberty").

543. See, e.g., The Civil Rights Cases, 109 U.S. 3 (1883) (interpreting narrowly the power of Congress under the post-war amendments to ban private discrimination).

544. The Slaughter-House Cases, 83 U.S. at 78; accord, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 39–44 (1973).

545. Rakove, Madisonian Moment, supra note 25, at 498.

546. See Calabresi, supra note 511, at 2291 (concluding that the result of the irresponsibly ambiguous and ill-considered drafting of the Equal Protection Clause "is that for 130 years now the U.S. Supreme Court has done that which it ought not to have done and it has left undone that which it ought to have done").

547. For other accounts that are equally sympathetic to the goals of the Civil Rights Movement but less sanguine about the contribution the courts made to it via traditional equal protection and related litigation, see, e.g., Rosenberg, supra note 78, at 1–42; Ross Sandler & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government 117–38, 153–61 (2003); William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 695–97 (1982); Gewirtz, supra note 59; Sabel & Simon, supra note 79.

548. See, e.g., Missouri v. Jenkins, 515 U.S. 70, 78–79, 82–83 (1995) (describing a dearth of evidence of progress towards the district court's goal of closing the achievement gap between white and black children following a decade of remedial orders costing billions of dollars); Morgan v. Nucci, 831 F.2d 313, 315–17, 321 (1st Cir. 1987) (affirming the district court's abandonment of efforts to achieve racial balance in the Boston public schools upon finding that that segregation was rooted in "intractable demographic obstacles"); Bell, supra note 78, at 112–13 (expressing skepticism with respect to the

grams,[549] and big-city housing discrimination,[550] reveal disturbing failures to improve the conditions of the minority plaintiffs.

A third objection, also anticipated by Madison, is that however far the federal courts went in protecting minorities from factional oppression in the decades following *Brown*, their efforts eventually got the courts into big trouble with the people.[551] Their efforts also drowned themselves and the people in a sea of conflicting interpretations and theories about what the Clause's glittering generalities require.[552] The resulting confusion and backlash largely overwhelmed, and certainly kept from becoming habitual, any virtuous dispositions the litigation prompted among public actors.[553] Negative reaction and jurisprudential uncertainties also led the courts to adopt a range of limitations on justiciability[554] and Hi-

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judicial role in desegregating schools); Rosenberg, supra note 78, at 9, 28; Liebman & Sabel, Public Laboratory, supra note 79, at 195–200 (discussing federal courts' increasing reluctance to address the thornier questions desegregation presented when litigation moved from the rural South to urban areas, particularly in the North and West).

549. See, e.g., Sandler & Schoenbrod, supra note 547, at 45–97 (discussing protracted but largely fruitless litigation over the method by which children in New York City are assigned to special education programs and the services they receive).

550. See Sabel & Simon, supra note 79, at 1047–52 (describing failure of housing desegregation decrees); see also Peter H. Schuck, Judging Remedies: Judicial Approaches to Housing Segregation, 37 Harv. C.R.-C.L. L. Rev. 289, 324–64 (2002) (discussing large-scale and acrimonious housing and school desegregation litigation, with disappointing results, in Yonkers, New York).

551. Documenting serious and widespread doubts about the democratic legitimacy of the courts' countermajoritarian interventions on behalf of minorities are, for example, Nathan Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy (1975); Sandler & Schoenbrod, supra note 547, at 117–38, 153–61; Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L. J. 1725, 1738–44 (1996); Paul J. Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949, 951–53, 976 (1978); Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 661 (1978); John Choon Yoo, Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts, 84 Cal. L. Rev. 1121 (1996). Critics of judicial efforts to manage complex institutions and reforms in the name of antidiscrimination and related principles include, for example, Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Schools 258–83 (1976); Rosenberg, supra note 78, at 42–71; Donald L. Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L.J. 1265, 1265–69.

552. See, e.g., Liebman, Desegregating Politics, supra note 66, at 1476–1540.

553. See, e.g., J. Anthony Lukas, Common Ground: A Turbulent Decade in the Lives of Three American Families 232–51 (Vintage Books 1986) (1985); Rosenberg, supra note 78, at 127–31; Sandler & Schoenbrod, supra note 547, at 117–38, 153–61; Gewirtz, supra note 59, at 614–17, 628–59.

554. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 105–08 (1983) (holding that, to establish standing for an injunction against abusive police practices, the plaintiff must show not only that he has been the victim of abuse but also that there is a high probability that he himself will again be subjected to similar abuse in the future); Trainor v. Hernandez, 431 U.S. 434, 444 (1977) (holding that federal judges may not enjoin state civil proceedings); Rizzo v. Goode, 423 U.S. 362, 379–80 (1976) (suggesting that federal courts should avoid ongoing intrusion into the policies of state law enforcement agencies; "'the principles of equity, comity, and federalism' must . . . restrain a federal court" (quoting Mitchum v. Foster, 407 U.S. 225, 243 (1972))); O'Shea v. Littleton, 414 U.S. 488,

malayan standards of proof[555] and to curtail drastically their notion of appropriate equitable discretion.[556] In other cases, the courts simply refused to take the next logical steps.[557] And in still others, Congress slashed the courts' remedial powers.[558]

501–02 (1974) (denying relief on ripeness grounds and stating that federal court monitoring of state courts would violate principles of federalism); Younger v. Harris, 401 U.S. 37, 45 (1971) (holding that federal courts must generally dismiss suits for equitable relief against pending state criminal proceedings). See generally Fletcher, supra note 547, at 635–49 (cataloging various ways in which trial courts attempt to avoid the exercise of remedial discretion); Brandon Garrett, Remedying Racial Profiling, 33 Colum. Hum. Rts. L. Rev. 41, 74–80 (2001) (criticizing federal courts' dismissal of lawsuits affecting local law enforcement at the outset based on justiciability, although the decisions appear to largely turn on unarticulated remedial concerns).

555. See, e.g., Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978) (holding that to secure federal judicial relief under 42 U.S.C. § 1983 against local government or senior state officials on the basis of misconduct by subordinates, plaintiff must show that misconduct was a matter of explicit "policy" or a tacitly condoned "pattern and practice"); *Rizzo*, 423 U.S. at 362 (holding, in order to effectuate federalism values, that nineteen specific incidents of unconstitutional police brutality did not warrant issuance of an injunction requiring the police department to establish a procedure for handling citizen complaints because that number of incidents did not demonstrate official authorization or condonation). Sabel and Simon criticize the "objective limitation" the Supreme Court has placed on relief in school desegregation cases, in order to tighten the link between right and remedy, that decrees must be limited to undoing the "the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs": "The effort to isolate such effects poses insuperable fact-finding burdens . . . . It is highly unlikely that courts could ever command the necessary evidence or methodology to isolate the effects of particular unlawful decisions." Sabel & Simon, supra note 79, at 1085 (quoting Missouri v. Jenkins, 515 U.S. 70, 101 (1995)).

556. See, e.g., Lewis v. Casey, 518 U.S. 343, 362 (1996) (reversing prison order as "inordinately—indeed, wildly—intrusive"); *Jenkins*, 515 U.S. at 83–90 (condemning, as vastly beyond the district court's remedial powers, a plan to desegregate the Kansas City schools by inducing white suburban children to transfer voluntarily into the city district); *Lyons*, 461 U.S. at 112 (urging "restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws"); Bell v. Wolfish, 441 U.S. 520, 562 (1979) (disapproving orders that "enmeshed [lower courts] in the minutiae of prison operations"); see also *Lewis*, 518 U.S. at 349 (Scalia, J.) ("[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.").

557. See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29–40 (1973) (retracting much of what the Court had said in *Brown v. Board of Education* about the fundamental interest in an adequate public education in the process of refusing to address the constitutionality under the Equal Protection Clause of funding and outcome disparities in public education).

558. See, e.g., Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 18 U.S.C.) (cutting back substantially on federal courts' capacity to remedy constitutional violations in the process of convicting state prisoners of criminal offenses); Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. § 3626, 28 U.S.C. §§ 1346, 1915, 42 U.S.C. § 1997, and other scattered sections) (imposing an array of procedural restraints on prison reform litigation in the federal courts). See generally John Boston, The Prison Litigation Reform Act, *in* 16th Annual Section 1983 Civil Rights Litigation (PLI Litig. & Admin., Course Handbook Series No. H.-649, 2000); David M. Adlerstein, Note, In Need of

Witnessing the opening stages of this retreat, even Justice Brennan acknowledged that "the Court [was] involved in a new curtailment of the Fourteenth Amendment's scope."[559] Whether the courts retreat all the way back to the pre-1954 status quo,[560] the Equal Protection Clause's history vividly confirms the raggedness and unreliability of "parchment barriers" and "exterior" constraints that Madison had predicted.[561]

VI. Diluting the Extended Republic's (Incomplete) Structural Equal Protection

As we have just seen, the modern Supreme Court has borne out Madison's low regard for the ability of the judiciary to check majority oppression of minorities, in applying the Constitution's thin "exterior" Equal Protection Clause constraints. Adding serious injury to this backhanded compliment, the modern Court has systematically degraded the incomplete "interior" constraints on factional tyranny that Madison did manage to install in the Constitution via the extended republic—that is, the security for civil rights that Madison supposed would emerge from the enlarging and interest-broadening effect of locating important powers in Congress. Adding insult, the Court has frequently justified these decidedly un-Madisonian decisions by wrapping itself in the mantle of the "Father of the Constitution."

A. *Federal Versus State Race-Conscious Affirmative Action Programs*

The Court's most direct defection from Madisonian equal protection has come in the affirmative action context. Things began propitiously from a Madisonian perspective when the Court in *City of Richmond v. Croson*[562] recognized a sharp distinction between avowedly benign race-conscious affirmative action rules adopted by state and local lawmakers, whose impartiality and freedom from factional capture was suspect, and similar legislation adopted by agents of the more general and broadly representative extended republic, where partiality and parochialism were

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Correction: The "Iron Triangle" of the Prison Litigation Reform Act, 101 Colum. L. Rev. 1681 (2001).

559. Brennan, supra note 27, at 546. Justice Brennan hoped state courts would step in to safeguard rights of minorities. See id. For evidence that state courts are beginning to accept Brennan's challenge, see Garrett & Liebman, Experimentalist Equal Protection, supra note 8 (manuscript at Part VII).

560. For proposals to do just that, see, e.g., Trimble v. Gordon, 430 U.S. 762, 777–86 (1977) (Rehnquist, J., dissenting); William Bradford Reynolds, An Experiment Gone Awry, *in* The Affirmative Action Debate 130 (George Curry ed., 1996); William Bradford Reynolds, Individualism vs. Group Rights: The Legacy of *Brown*, 93 Yale L.J. 995, 1001–02 (1984) (arguing that civil rights movement's pursuit of "equality of results for groups" rather than "equality of opportunity for individuals" is "without constitutional justification").

561. See supra Part III.A.

562. 488 U.S. 469 (1989).

structurally far less likely.[563] Citing Madison's *The Federalist No. 10*, Justice Scalia made the Madisonian point most directly in his separate opinion, which concurred in the majority's decision to scrutinize strictly and strike down a program of racial preferences for African Americans adopted by a city counsel on which African Americans were a majority:

> [R]acial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history.[564]

Writing for the Court, Justice O'Connor made a similar distinction based on Congress's mandate under Section 5 of the Fourteenth Amendment to "define" situations in which "prophylactic rules" are needed to protect constitutional "principles of equality":

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.[565]

When, however, *Adarand Constructors, Inc. v. Pena*[566] offered the Court the chance to consider affirmative action provisions adopted by the extended republic, no member of the majority made mention of Madison or the Founding Fathers, or even claimed to be their intellectual heirs. On the contrary, the Court cited *Croson* as essentially decisive precedent for holding that *all* public affirmative action programs, federal as well as state, must be strictly scrutinized and almost always violate the Equal Protection Clause.[567] It fell to Justice Stevens in dissent to point out that the Madisonian principles relied upon in *Croson* for the presumption that *state* race-conscious affirmative action programs are unconstitutional called for the opposite presumption in reviewing a federal affirmative action program: The Madisonian presumption of partiality and abusive factional capture that applies in the state context gives way in the federal sphere to a presumption of impartiality and benign legislation for the puhlic good.[568]

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563. See supra Part III.B.

564. 488 U.S. at 523 (Scalia, J., concurring in judgment).

565. Id. at 490.

566. 515 U.S. 200 (1995).

567. Id. at 221–24.

568. See id. at 251–52 (Stevens, J., dissenting) (quoting Justice Scalia's concurring opinion in *Croson* and citing The Federalist No. 10, supra note 10, at 82–84 (James Madison)); see also J. Christopher Jennings, Note, Madison's New Audience: The Supreme Court and *The Tenth Federalist* Visited, 82 B.U. L. Rev. 817, 854 (2002) ("That Justice Scalia's use [in *Croson*] of *Federalist No. 10* was taken and championed next in a dissenting opinion [in *Adarand*], to support the same proposition that Justice Scalia likely abandoned, does little to solidify [*No. 10*] as a consequential constitutional expository tool

B. *The Power of Congress to Regulate State Injustices and Supersede or Harness State Authority*

Adarand's sin was one of omission: forgetting the "interior" protections provided by Madison's extended republic against the injustices the Court thought it needed to prevent. In other contexts, the Court's sin has been of commission: dismantling the Madisonian extended republic and its partial interior check on state majority tyranny, with the result that minorities in the states are even more vulnerable to that tyranny than Madison feared they would be in the absence of the national negative.[569] In consistently anti-Madisonian fashion, the Court has (1) diminished Congress's capacity under Section 5 of the Fourteenth Amendment to "enforce, by appropriate legislation," the assurance that the states will afford persons the equal protection of the laws, in the process vastly broadening the scope of the states' Eleventh Amendment sovereign immunity from private lawsuits to enforce federal statutes barring discrimination and unfair practices by the states;[570] (2) narrowed Congress's regulatory power under the Commerce Clause, delivering larger spheres of legislation into exclusive state control;[571] and (3) forbidden Congress to require the assistance of state and local officials in enforcing federal law.[572]

In each of these contexts, "the present Court's zeal for intervening on behalf of states is clearly animated by the conviction that, in doing so, it is acting virtuously to recapture the 'real' Constitution."[573] And in each case, the constitution the Court claims expressly to be recapturing is Madison's. In fact, however, the Court in each case has seriously undercut the interior equal protection that Madison himself considered his most important—if only partly realized—contribution to the constitutional structure.

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in the Court's affirmative action jurisprudence."). The affirmative action program at issue in *Adarand* was administrative, not legislative, which might have provided the Court with a basis for rejecting a Madisonian preference in its favor. One might argue, to the contrary, that the extended republic's ameliorative effect on national administrative regulations is at least no weaker than its effect on national legislative acts. The main point, however, is that, rather than considering the Madisonian implications of the differences between the state program in *Croson* and the federal one in *Adarand*, the members of the *Adarand* majority simply ignored the extended republic altogether.

569. See supra notes 238–239, 286 and accompanying text.

570. See cases cited infra notes 581–589.

571. United States v. Morrison, 529 U.S. 598, 619–27 (2000); see also United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating the Gun Free School Zones Act on the ground that it exceeded Article 1 Commerce Clause power).

572. Printz v. United States, 521 U.S. 898, 935 (1997) (invalidating provisions of the Brady gun control law that required state and local governmental officials to assist in executing a federal statutory requirement of background checks for prospective buyers of firearms); New York v. United States, 505 U.S. 144, 149, 168 (1992) (invalidating "take-title" provision of the Low-Level Radioactive Waste Policy Amendments Act, finding that it unconstitutionally compelled states to enact legislation).

573. Kramer, Putting the Politics, supra note 256, at 290.

1. *State Sovereignty Versus Congressional Sovereignty.*

a. *Congressional Power to Define Actionable State Injustices.* — In *City of Boerne v. Flores*, the Court overturned the Religious Freedom Restoration Act of 1993,[574] in which Congress had relied upon its authority under Section 5 of the Fourteenth Amendment to forbid a broader array of state limitations on the free exercise of religion than the Court's recently curtailed First Amendment jurisprudence then banned.[575] In the Court's view, Section 5 authorizes Congress to define remedies but not "to determine what constitutes a constitutional violation."[576] The latter function, the Court held, belongs exclusively to it.[577] In so holding, the Court drastically narrowed its earlier holding in *Katzenbach v. Morgan* that, "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[578]

b. *Congressional Power to Regulate State Injustices Free of State Sovereign Immunity and Other Federalism-Based Constraints.* — Initially, there was reason to doubt the effect of *City of Boerne*'s limitation on the power of Congress to adopt laws protecting state minorities against what "generalizing" coalitions of the extended republic's "people" identified as unjust state laws and practices.[579] The breadth of Congress's Commerce Clause power to adopt laws regulating activity with a "substantial" cumulative effect on interstate commerce, including civil rights laws not primarily aimed at regulating commerce,[580] seemed to render *City of Boerne* a minor matter of scrivening, not a monumental rearrangement of constitutional power. In the future, Congress simply had to cite the Commerce

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574. 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2000)).

575. City of Boerne v. Flores, 521 U.S. 507, 536 (1997). The Court concluded:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior[,] paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power.

Id. at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

576. Id. at 519; see also id. at 527 ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.").

577. Id. at 519, 527–29, 536; see also Dickerson v. United States, 530 U.S. 428, 444 (2000) (suggesting that, while the Court may create a prophylactic constitutional rule, Congress may not do so).

578. 384 U.S. 641, 651–52, 656 (1966) (holding that Section 5 authorized enactment of the Voting Rights Act of 1965 because Congress's judgment that it was needed to secure Fourteenth Amendment protections was reasonable); see Rachel E. Barkow, More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 303 (2002).

579. See supra Part III.B.

580. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 301–05 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257–58 (1964).

Clause and identify a significant effect of the regulated practice on the flow of goods and services across state lines.

This sanguine view ignored the interaction between *City of Boerne* and the Court's decision the previous year in *Seminole Tribe v. Florida*.[581] *Seminole Tribe* held that the Eleventh Amendment gave states immunity from private lawsuits to enforce federal statutory bans on state discrimination and other unlawful state practices, even when Congress had expressly acted to abrogate the states' immunity from such suits.[582] The only exception is for lawsuits against states pursuant to statutes adopted under Section 5 of the Fourteenth Amendment or the analogous provisions of the Thirteenth and Fifteenth Amendments, which trump the Eleventh Amendment.[583] Under *Seminole Tribe*, therefore, it matters greatly whether Congress properly adopted a statute under Section 5 (in which case, the law binds the states and may be enforced by private lawsuits) or under some other constitutional provision (in which case, the states are immune from judicial enforcement via private lawsuits).

In a string of subsequent decisions, the Court relied upon *City of Boerne* and *Seminole Tribe* to overturn federal statutes authorizing private civil enforcement lawsuits against states for discriminating against, among other groups, disabled[584] and older[585] individuals and for willfully denying female victims of violent crimes the protection of state criminal laws.[586] In each case, the Court concluded that Congress had improperly

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581. 517 U.S. 44 (1996).

582. Id. at 76. For discussion, see Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1996 Sup. Ct. Rev. 1.

583. 517 U.S. at 59; see also Fitzpatrick v. Bitzer, 427 U.S. 445, 452–56 (1976).

584. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372–74 (2001). Garrett invalidated the part of the Americans with Disabilities Act (ADA) that abrogated states' sovereign immunity from suit to enforce the Act's ban of disability discrimination. The Court concluded that the provision was not a proper exercise of Congress's Section 5 powers because the protection it afforded disabled plaintiffs against disparate treatment by the states based on disability was broader than the protection afforded by the Court's limited equal protection ruling in Cleburne v. Cleburne Living Center, 473 U.S. 432, 442, 450 (1985). *Garrett*, 531 U.S. at 372–74.

585. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67, 91 (2000). *Kimel* invalidated the portion of the Age Discrimination in Employment Act (ADEA) that abrogated the states' sovereign immunity from suit to enforce the Act's ban of age discrimination. The Court concluded that the provision was not a proper exercise of Congress's Section 5 powers because the protection it afforded older plaintiffs against disparate treatment by states based on plaintiffs' age was broader than the limited protection the Court had afforded in its equal protection rulings in Gregory v. Ashcroft, 501 U.S. 452, 473 (1991), Vance v. Bradley, 440 U.S. 93, 111–12 (1979), and Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 316–17 (1976) (per curiam). *Kimel*, 528 U.S. at 67, 91; see also Gregory v. Ashcroft, 501 U.S. at 456–64 (narrowly interpreting ADEA to exclude state judges from class of state employees to which Act applies in order to avoid federalism-based constitutional questions that would be raised if Congress were permitted to regulate terms and conditions of employment of state judges).

586. United States v. Morrison, 529 U.S. 598, 601–02, 619–20, 625–27 (2000) (invalidating provisions of Violence Against Women Act that authorized civil law suits against states by females victimized by crimes as a result of states' under-enforcement of

relied upon Section 5 of the Fourteenth Amendment, because the protection the statute afforded against states exceeded that given by the Court's own definition of a constitutional violation by state actors.[587]

In the disability and age discrimination cases, the Court ruled that the protection Congress afforded minorities against states was more than was provided by the Courts' decisions refusing to treat disability and age as suspect classifications and validating state laws and practices supported by any rational argument. Nor did Congress's own findings convince the Court that disability or age discrimination were sufficiently widespread problems to justify departing from the Court's prior precedents.[588] Absent a Fourteenth Amendment basis for the laws, Congress could not withdraw a state's sovereign immunity from private suits brought to enforce them.[589]

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their criminal laws, concluding that provisions were overbroad exercise of Congress's Section 5 power and thus inadequate basis for abrogating states' sovereign immunity).

587. In addition to the cases cited supra notes 581–586, see Alden v. Maine, 527 U.S. 706, 712 (1999) (invalidating Congress's effort to abrogate state sovereign immunity from law suits brought under the Fair Labor Standards Act and holding states immune from suit in state courts); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (holding that Trademark Remedy Clarification Act had improperly abrogated state sovereign immunity from private law suits); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630, 645–48 (1999) (holding that protection afforded private litigants from state violations of Patent and Plant Variety Protection Remedy Clarification Act lacked the "congruence" and "proportionality" with harms to constitutionally recognized patent interests needed to justify Congress's exercise of its Section 5 power). But see Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1981–82 (2003) (holding that state governments may be sued for violating the Family and Medical Leave Act provisions regarding leave to care for ailing family members because Congress justified provisions as remedies for longstanding gender discrimination, which the Court has subjected to higher level of Fourteenth Amendment scrutiny than discrimination at issue in the Court's earlier decisions). See generally Ernest A. Young, State Sovereign Immunity and the Future of Federalism, 1999 Sup. Ct. Rev. 1, 2.

588. In regard to Congress's efforts to provide a private right of action against states for disability discrimination, for example, the five-person majority held that:

> Congressional enactment of the [ADA] represents its judgment that there should be "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in Cleburne. Section 5 does not so broadly enlarge congressional authority.

Garrett, 531 U.S. at 374 (citation and footnote omitted).

589. Of course, Eleventh Amendment sovereign immunity does not bar injunctive suits against state officials in their individual capacity, nor suits against municipalities as opposed to states. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 699–701 (1978) (holding that state sovereign immunity does not extend to municipalities); Henry Paul Monaghan, The Sovereign Immunity "Exception," 110 Harv. L. Rev. 102, 103 (1996) (pointing out that, despite Court's state-autonomy rhetoric in recent state sovereign

The other shoe dropped in *United States v. Morrison*.[590] *Morrison* ruled unconstitutional the federal Violence Against Women Act, which established a civil remedy against private perpetrators of gender-motivated violence.[591] Congress based the Act on "numerous findings" documenting the longstanding failure of local law enforcement officials to protect female victims of cross-gender violence and on "the serious impact that gender-motivated violence has on victims and their families" and on interstate commerce.[592] Notwithstanding these findings, the Court ruled that the remedy was beyond Congress's power to adopt under the Commerce Clause.[593] Drastically curbing Congress's ability to use the commerce power to assure groups frozen out of local majorities the equal protection of state laws, the majority abandoned the longstanding assumption that "Congress may regulate noneconomic . . . conduct based solely on that conduct's aggregate effect on interstate commerce."[594] In the majority's view, only a circumscribed set of "economic" activities are "truly national" and thus subject to congressional regulation if they substantially affect interstate commerce.[595] The Court thus deemed large "areas of traditional state concern," including the enforcement of the criminal law, to be "truly local," and thus beyond Congress's commerce power no matter how large their incidental effects on commerce.[596]

c. *Congress's Power to Harness State Regulatory Capacity in Service of Its Own.* — In *New York v. United States*, the Court invalidated a federal statute requiring states, either individually or through regional compacts, to regulate the disposal of nuclear waste generated within their borders.[597] "'[T]he Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,' an outcome that has never been understood to lie within the au-

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immunity cases, states in practice are accountable for violations of federal law through suits against officials in their individual capacity); see also Seminole Tribe v. Florida, 517 U.S. 44, 75–76 (1996) (noting same). There is no question, however, that forbidding Congress to create compensatory remedies against states and state actors—particularly in an era in which the Court is treating more and more officials previously deemed to be local as instead *state* officials, see McMillian v. Monroe County, 520 U.S. 781, 793 (1997) (defining locally elected county sheriffs as state officials because they generally follow state rather than local imperatives)—reduces Congress's capacity to deter and remedy state injustices towards local minorities.

590. 529 U.S. 598.

591. 42 U.S.C. § 13981 (2000).

592. *Morrison*, 529 U.S. at 614; see id. at 629–36 (Souter, J., dissenting). The Court ruled other provisions of the Act unconstitutional as exceeding Congress's powers under Section 5 of the Fourteenth Amendment. See id. at 619–27; supra note 586.

593. *Morrison*, 529 U.S. at 614.

594. Id. at 617. For prior decisions supporting the longstanding assumption, see supra note 580 and accompanying text.

595. *Morrison*, 529 U.S. at 617–19.

596. Id. at 611, 617–19.

597. 505 U.S. 144, 176, 188 (1992).

thority conferred upon Congress by the Constitution."[598] In *Printz v. United States*, the Court expanded the ban on federal "commandeering" to include state administrative officials, barring Congress from requiring state police officers to assist in administering federal firearm legislation by conducting background checks on prospective handgun purchasers.[599] In both *New York v. United States* and *Printz*, the Court rejected not only the Commerce and Spending Clauses, but also the Supremacy Clause, as a basis for requiring state officials to uphold and enforce federal legislative mandates. Acknowledging that the last-mentioned clause "permit[s] imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions relate[ ] to matters appropriate for the judicial power,"[600] the Court concluded that only this one "sort of federal 'direction' of state [officers] is mandated by the text of the Supremacy Clause."[601]

2. *The Modern Court and the Madisonian Constitution.* — Sharp dissents have greeted the Court's decisions forbidding Congress to interpret the Equal Protection Clause more broadly than the Court had done, to regulate the relationship between states and their employees, and to abrogate the states' Eleventh Amendment sovereign immunity.[602] In large measure, the ensuing debate has been over whether the majority or dissenting Justices are truer to James Madison's constitution.

In support of its limitations on Congress's power to regulate certain forms of discrimination, the majority cites Madison's statement that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined," while "[t]hose which are to remain in the State governments are numerous and indefinite."[603] Against federal commandeering of state administrative officials, the Court asserts that "[i]f it was indeed Hamilton's view that the Federal Government could direct the officers of the States, that view has no clear support in Madison's writings, or as far as we are aware, in text, history, or early commentary elsewhere."[604] In support of broad state sovereign immunity, the Court quotes Madison's statement at the Virginia ratifying con-

598. Id. at 176 (citation omitted).

599. 521 U.S. 898, 933 (1997).

600. Id. at 907.

601. New York v. United States, 505 U.S. at 178–79 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause.").

602. See, e.g., dissenting opinions discussed supra notes 568, 592 and accompanying text.

603. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (citing The Federalist No. 45, supra note 10, at 292–93 (James Madison)).

604. *Printz*, 521 U.S. at 915.

vention that "[i]t is not in the power of individuals to call any state into court."[605]

The dissenting Justices reply in kind, claiming Madison as their own. They, for example, call the absolutism of the Court's notion of state sovereign immunity "antirepublican" and "more akin to the thought of James 1 than of James Madison."[606] And they argne that "assigning roles, powers, or responsibility, not just to federal administrators, but to citizens . . . [through] a private remedy against a State" is consistent with Madison's and the other Federalists' "unchanging goal: the protection of [individual] liberty."[607] The dissents have provoked the majority to name-call back, juxtaposing Madison with another European dictator with blood on his hands:

> The proposition that "the protection of liberty" is most directly achieved by "promoting the sharing among citizens of governmental decisionmaking authority" might well have dropped from the lips of Robespierre, but surely not from those of Madison . . . whose north star was that governmental power, even—indeed, especially—governmental power wielded by the people, had to be dispersed and countered. And to say that the degree of dispersal to the States, and hence the degree of check by the States, is to be governed by Congress's need for "legislative flexibility" is to deny federalism utterly.[608]

It is a risky business to project Madison's view of the constitutionality of statutes adopted 200 years after he developed his political science.[609]

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605. Seminole Tribe v. Florida, 517 U.S. 44, 70 n.12 (1996) (quoting 3 Jonathan Elliot, Debates on the Federal Constitution 533 (2d ed. 1836) (statement of James Madison at the Virginia ratifying convention)).

606. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 704 (1999) (Breyer, J., dissenting).

607. Id. at 702; see id. at 705 ("[B]y making that doctrine immune from congressional Article 1 modification, the Court makes it more difficult for Congress to decentralize governmental decisionmaking and to provide individual citizens, or local communities, with a variety of enforcement powers.").

608. Id. at 690; accord New York v. United States, 505 U.S. 144, 181 (1992) (noting that "[s]tate sovereignty is not just an end in itself" because "the Constitution divides authority between federal and state governments for the protection of individuals"); *Gregory*, 501 U.S. at 458–59 ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

609. On the question of how much weight Madison's views are due in constitutional decisionmaking, especially views expressed in *The Federalist* and elsewhere outside the Convention itself, see, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 613 n.7 (1997) (Thomas, J., dissenting) (disparaging the majority for relying on views Madison expressed at times distant from the Convention); William N. Eskridge, Jr., Should the Supreme Court Read *The Federalist* but Not Statutory Legislative History?, 66 Geo. Wash. L. Rev. 1301, 1323 (1998) (providing justification for Court's reliance on *The Federalist*); John F. Manning, Textualism and the Role of *The Federalist* in Constitutional Adjudication, 66 Geo. Wash. L. Rev. 1337, 1365 (1998) (arguing that *The Federalist* should be a source of persuasive support but is not authoritative on constitutional meaning);

This is especially so when two of the key constitutional provisions, the Eleventh and Fourteenth Amendments, post-date Madison's days as a Framer *and* political scientist. We are confident about one conclusion, however: The Court's "federalist" majority has James Madison all wrong.

The Court is clearly wrong to assimilate Madison's views to its own on a variety of specific issues. For example, contrary to the Court's billiard-ball notion of the distribution of power among the branches of government and between the national and state governments, Madison the political scientist is famous for his "deviations" from that naïvely Montesquieuian view, and for advocating the *sharing* of powers among the different organs and levels of government.[610] Just as the President could veto legislation, Senators could reject presidential nominations and the judiciary could overturn legislation approved by both political branches in Madison's "neither wholly *national* nor wholly *federal*" government.[611] Federal judges could invalidate state legislation or direct state judges to do so; state legislatures could name members of the national Senate; and, of course, if Madison had had his way, Congress would have had the power to veto state legislation in "all cases whatsoever."[612] When a fellow member of the first House of Representatives took something like the current Court's inflexible view that "it would be officious" for Congress to intrude on the courts' role by independently interpreting the Constitution,[613] Madison was quick to say that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty . . . ."[614]

Given the Madisonian assumption of overlapping powers among the organs of government, it is not at all clear that Madison's belief that *individuals* could not haul states into court implies that *Congress* lacked power

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Jennings, supra note 568, at 839 (criticizing the Court's "refusal to engage the text of *Federalist No. 10*" and its frequent misuse of that document); see also Ira C. Lupu, Time, the Supreme Court, and *The Federalist*, 66 Geo. Wash. L. Rev. 1324, 1328 (1998) (collecting the Court's citations to *The Federalist*). It is difficult to improve upon John Marshall's answer to this question: Although the authors of *The Federalist* are entitled to "great respect," "in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 433 (1819).

610. The Federalist No. 51, supra note 10, at 321 (James Madison); see supra notes 244–248 and accompanying text.

611. The Federalist No. 39, supra note 10, at 246 (James Madison); see also id. at 246 ("The proposed Constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal Constitution, but a composition of both."); sources cited supra notes 244–248.

612. See supra notes 311–316 and accompanying text. For Madison's rejection of the idea of absolute separation between the two levels of government, see supra notes 244–248 and accompanying text.

613. See City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (quoting 1 Annals of Cong. 519 (Joseph Gales, Jr. & William W. Seaton eds., 1789)).

614. 1 Annals of Cong. 520. The *City of Boerne* majority noted Madison's statement but gave it little scope. See *Boerne*, 521 U.S. at 535.

to require states to appear there.[615] Recall as well that for Madison, the core goal of all governing arrangements is the protection of human liberty.[616] And in a republic, the greatest risk to liberty is from tyranny by the majority faction, exercising its power over state governments against the chronically weak minority factions.[617] Given these views, Madison would surely be surprised by the current Court's view that Congress has greater power to regulate the exercise of *individual* liberty by, for example, authorizing disability and age discrimination suits against private employers, than it does to use the same method of regulating discrimination by the *states* through their employees.[618]

On the "commandeering" question, Madison, no less than Hamilton, expected the national government to administer its programs with the assistance of state officers. Madison assumed that the "collection [of taxes], under the immediate authority of the Union, [would] generally be made by the officers, and according to the rules, appointed by the several States," and that "it is extremely probable that in other instances, . . . the officers of the States will be clothed with the correspondent authority of the Union."[619] Nor was Madison operating under the naïve "assumption that the States would consent to allowing their officials to assist the Federal Government."[620] For Madison, the ongoing availability of state officers to fulfill federal administrative tasks was not a choice of the states, but a structural protection of the national government and local minorities *against* the states. As Madison wrote in *The Federalist No. 46*, the purpose of the national government's employment of state officers was to dispose them to make the generalizing interests of the Union "the objects of their affections and consultations,"[621] which is not an objective Madison would have left to the mercy of the states. A requirement

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615. Cf. Seminole Tribe v. Florida, 517 U.S. 44, 112–16 (1996) (Souter, J., dissenting) (arguing history of Eleventh Amendment suggests Founders intended it to allow citizens to sue states in federal court where federal questions are at issue).

616. See supra Part II.B.1.

617. See supra notes 114–115 and accompanying text.

618. Cf. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001).

619. The Federalist No. 45, supra note 10, at 292 (James Madison); see supra notes 347–353 and accompanying text. As Justice Stevens wrote in dissent in *Printz*:

> "At the time the Constitution was being framed . . . Massachusetts had virtually no administrative apparatus of its own but used the towns for such purposes as tax gathering. In the 1830s Tocqueville observed this feature of government in New England and praised it for its ideal combination of centralized legislation and decentralized administration." This may have provided a model for the expectation of "Madison himself . . . [that] the new federal government [would] govern through the state governments, rather in the manner of the New England states in relation to their local governments."

Printz v. United States, 521 U.S. 898, 946 n.4 (1997) (Stevens, J., dissenting) (alterations in original) (quoting Beer, supra note 7, at 252).

620. *Printz*, 521 U.S. at 911 (citations omitted).

621. The Federalist No. 46, supra note 10, at 296 (James Madison); cf. Kramer, Putting the Politics, supra note 256, at 291 (concluding that "the interlocking state-federal structure of the [national] administrative bureaucracy . . . safeguard[s] state sovereignty").

of state consent also would have undermined Madison's goal of placing "local information" and the "assistance of the State codes" routinely at the disposition of the national government.[622]

The Court also misunderstands the primary mechanism by which Madison expected the states to protect themselves against the national government. Madison's mistrust of the judiciary's capacity and disposition to constrain popular majorities and the legislatures they elect[623] was matched by his respect for the power of the states in Congress and his ability to mobilize the people against Congress as he did with the Virginia and Kentucky Resolutions.[624] Madison, therefore, would probably have agreed with the dissenting Justices that the Court's current majority is wrong (as were "the old judicial economists" of the *Lochner* era) "in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance."[625] Instead, "Madison . . . sensed [that] national politics [would] protect[ ] the states' interests. The National Government '[would] partake sufficiently of the spirit [of the states], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.'"[626]

But these Madisonian points of contention between the modern Court's majority and dissent are small potatoes compared to a point both sides have ignored. For Madison, the principal objective of the new Constitution, even without the national negative, was to empower the extended republic to forestall tyranny by state majorities against minorities.[627] Yet, at each step of the way, the modern Court has broadly obstructed the means by which Madison expected that responsibility to be exercised to protect minorities from factional injustice.

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622. The Federalist No. 56, supra note 10, at 347–48 (James Madison); see supra notes 211–212, 354–356 and accompanying text.

623. See supra Part V.B.1–2.

624. See supra notes 255–256, 353, 495 and accompanying text.

625. United States v. Morrison, 529 U.S. 598, 647 (2000) (Souter, J., dissenting).

626. Id. at 647–48 (quoting The Federalist No. 46, supra note 10, at 297 (James Madison)). The Tenth Amendment, drafted by Madison, is not to the contrary. Madison's careful language in drafting the Amendment was designed to expand, not diminish Congress's power. The Amendment's (we can safely assume) self-consciously "cloudy," "dim and doubtful" language, The Federalist No. 37, supra note 10, at 229 (James Madison), is notably different from the specific prohibitions in the other bill of rights provisions Madison drafted. Madison's language—"The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively"—omitted the word "expressly" before "delegated." 1 Annals of Cong. 453 (Joseph Gales, Jr. & William W. Seaton eds., 1789). Under the Articles of Confederation, the national government's powers were limited to *express* grants. "In a clever act of statesmanship, Madison acceded to the Anti-Federalist request of including . . . an amendment [that tracked the analogous clause in the Articles of Confederation], but left out the one word that would have given the provision any substantive meaning." Staab, supra note 232, at 240.

627. See supra Part III.B.

Where Madison expected Congress's exercise of its legislative jurisdiction to preempt important areas of public activity that otherwise would be at the mercy of "partial" majority factions at the state level,[628] the modern Court has walled off entire areas of "noneconomic" activity from congressional jurisdiction. Where Madison hoped Congress's relatively greater disposition toward general and impartial legislation for the public good would serve as a caution and a model to state majorities otherwise bent on tyrannizing local minorities,[629] the Court's sovereign immunity decisions have forbidden Congress to impose enforceable standards on state actors for the impartial treatment of, for example, older Americans, the disabled, religious minorities, and female victims of violations of under-enforced state criminal laws. Where Madison counted on Congress's power to use state officials to administer federal programs to provide another method of attracting those officials' affections toward the generalizing spirit of the extended republic while supplying the national government with important information about local conditions,[630] the modern Court has rigidly banned the federal "commandeering" of state employees. The federal relationship, defined by both the extended sphere and the national negative, was envisioned by Madison to be dialectical, or interactive—cycling state activity through federal referees who model a generalizing and educative breadth and impartiality of consideration, and directing federal activity through state administrators with practical data about a wealth of approaches to legislation and administration that did and did not work locally.[631] Yet the Court has walled off the two levels of government into discrete strongholds, with suspicious judges occupying the space between them.

It was Madison's strong belief that federal judicial enforcement of the Constitution's "parchment" limitations on state oppression of minorities was a pallid substitute for the real power to accomplish this goal, which lay in the day-to-day exercise of responsibility by the strongest (because elected) and most "impartial" and generalizing (because most broadly representative) organ of the national government: the legislature.[632] But the modern Court has ruled that its own interpretations of the "parchment" constraints preempt Congress's power to reinforce its own interpretations with effective enforcement mechanisms.[633]

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628. See supra notes 274–277 and accompanying text.

629. See supra notes 272–274 and accompanying text.

630. See supra Part IV.C.4.

631. See supra Part IV.C.4.

632. See supra Part V.B.1–2.

633. Cf. Dorf, supra note 511, at 1015–16 (arguing that there are some areas over which Congress is institutionally better suited than the courts to define the scope of the Fourteenth Amendment); Sager, supra note 477, at 1264 (concluding that "Congress is empowered by section 5 of the fourteenth amendment to enforce the equal protection clause at those margins which are unenforced by the federal courts"). For evidence that Congress historically has led rather than followed the Court in defining, as well as providing remedies for, violations of that equal protection principle, see Robert C. Post &

Madison, finally, was convinced that the states had more than ample political protection against Congress through their influence over the composition and policies of the national government and through their ability to mobilize the most powerful organ of government, the people. For Madison, it was the ability of local minorities to protect themselves against the states that was the weakest link in the new government.[634] This was specifically due to the defeat of the national negative, which forced minorities to rely on a fickle judiciary far distant from the power of the people for protection.[635] As if to confirm this belief in the unreliability of the judges as protectors of local minorities, the modern Court has turned Madison's extended republic on its head, assiduously using its power to immunize the states against enforcement of antidiscrimination norms that Congress adopted to protect local minorities against majority injustice in the states.[636]

Whatever the validity of the Court's decisions as interpretations of constitutional amendments that Madison did not help frame, the decisions are not justified in assuming the mantle of "the most profound, original, and far-seeing among [the Framers]."[637] Instead, the decisions go a long way toward obliterating Madison's constitutional design. This is true even of the Constitution we have, without the national negative. But this is especially true of the constitution Madison wanted, with a power in Congress "in all cases whatsoever" to subject State law to the generalizing

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Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After *Morrison* and *Kimel*, 110 Yale L.J. 441, 520 (2000) (giving examples of Congress precipitating or at least anticipating the Court's Fourteenth Amendment jurisprudence). The Court's prior "ratchet" doctrine, barring Congress from diminishing Fourteenth Amendment rights while permitting it to extend those rights, and giving the Court the authority to determine what constitutes diminution and extension, see Katzenbach v. Morgan, 384 U.S. 641, 651–52, 656 (1966), provides a far more Madisonian meshing of congressional and judicial power than the *City of Boerne* analysis. Interestingly, the potential conflict between excessive extensions of the constitutional free exercise principle—inviting numerous exceptions to regulatory statutes for identified religious activities and organizations—and the constitutional anti-establishment principle might very well make the Religious Freedom Restoration Act a good candidate for judicial rejection under the "ratchet" doctrine on the ground that it could not unequivocally be said to have extended, as opposed to diminished, constitutional protections.

634. See supra notes 238–239, 286 and accompanying text.

635. See supra note 390 and accompanying text.

636. As Herbert Wechsler wrote a half century ago, the Supreme Court is "on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states." Wechsler, Political Safeguards, supra note 214, at 559. For the even stronger view that the Founders believed the Court had no business reviewing the constitutionality of congressional acts, see Kramer, Putting the Politics, supra note 256, at 237 ("Permitting judges to resolve legitimate disagreements about the meaning of the Constitution would have violated core principles of republicanism, which held that such questions could only be settled by the sovereign people."); Gordon S. Wood, The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less, 56 Wash. & Lee L. Rev. 787, 796–99 (1999).

637. Rakove, James Madison, supra note 1, at x (quoting Michael Kammen).

test of the congressional veto.[638] Madison understood the incapacity of the federal judiciary to protect minorities far better than the current Court understands him and his constitutional aspirations.

VII. Looking Forward

Madison's abiding and underappreciated preoccupation with local factional injustice and the need it creates for structural equal protection provides a penetrating diagnosis of what ails current equal protection doctrine and our centuries-old constitutional structure. Whether it also points the way to a current, realistic cure is a topic for a later article.[639] The question does, however, merit brief consideration here in concluding our analysis of Madison's own cure—the national negative—which his colleagues rightly rejected because it was unrealistic, even then.

A. *Madisonian Foresight*

As Madison recognized, republican self-government provides the best protection available for liberty, but only the liberty of the majority.[640] To extend the protection to minorities requires an at least weakly fraternal recognition on the part of all, even the majority, of their own vulnerability to factional oppression and of the interest all share in the government's concern for the libertarian capacities of each person.[641] Effectively achieving that recognition, however, requires more than mere admonition—even constitutional admonition backed up by judicial intervention after defections occur.[642] Yet, with or without an Equal Protection Clause, mere admonition and after-the-fact judicial intervention is all our Constitution has ever assured.

To begin with, despite his best efforts, Madison could not convince his colleagues at the Convention of the need for a continuous, *before*-the-fact defense against state-level factional tyranny—one that structures equal protection and the recognition of each individual's stake in the government's concern for his or her libertarian capacities into the everyday operation of government. Or more precisely, he could only convince his colleagues to adopt half of his two-fold equal protection solution.

The first half of Madison's solution was the creation of an extended republic and a layer of government beholden only to it.[643] Second were mechanisms to connect local officials to national ones in ways that habituate the former to the latter's broadening, generalizing dispositions. Chief among these mechanisms was the national negative—a power in Con-

638. Madison, Letter to Washington, supra note 16, at 383.

639. See generally Garrett & Liebman, Experimentalist Equal Protection, supra note 8.

640. See supra Part II.B.4.

641. See supra Part II.B.4.

642. See supra Part V.

643. The Federalist No. 46, supra note 10, at 296–97 (James Madison); id. No. 51, at 325 (James Madison); see supra Part III.B.

gress to veto "unjust" state legislation, thus inducing local legislators to augment their parochial, faction-driven concerns by anticipating and internalizing the objections of their less "partial" counterparts at the center.[644] Carrying this "dialectical" or "interactive" federalism[645] a step further, Madison hoped that by investing state and local officials with primary responsibility for administering national initiatives, Congress could marshal the "affections and consultations" of local executive officials in service of the national government's "more enlarged plan of policy," while also allowing national officials to craft those initiatives using "local information" and "the assistance of State codes."[646]

Although the Constitution did establish Madison's extended republic, it omitted his national negative. And the result he most feared in the absence of the negative has repeatedly come to pass. Reliance on occasional federal judicial review of state action for injustice has "neither effectually answer[ed] the national object" of avoiding factional tyranny in the states "nor prevent[ed] the local mischiefs which every where excite disgusts agst the state governments."[647] Forecasting the nation's worst cataclysms, Madison warned that the result would be "a constant tendency in the States . . . to oppress the weaker party within their respective jurisdictions," and that the national government's "only remedy wd. lie in an appeal to coercion."[648]

Later, of course, the framers of the Fourteenth Amendment did at least attempt to bar (in Madison's phrase) the entire "infinitude of . . . expedients" through which majorities oppress minorities.[649] But even the Radical Republicans' solution failed Madison's test.[650] In place of his continuous, structural prophylaxis, they adopted precisely the kind of "exterior" remedy whose "ineffectual" character he repeatedly denounced: episodic after-the-fact enforcement, carried out by unelected officials operating at a debilitating distance from the people, of "dim and doubtful" words penned on "parchment barriers."[651] Confirming Madison's prediction of failure, the Equal Protection Clause has been enforced only fitfully by the courts and, even in its heyday in the 1960s and 1970s, was vulnerable to its own severe interpretive difficulties, to aggrieved minorities' lack of effective access to the courts, and to judges' uncertain remedial competence, weak enforcement powers, and incon-

644. The Federalist No. 10, supra note 10, at 77 (James Madison); see supra notes 354–356 and accompanying text.

645. See supra Part IV.C.4.

646. The Federalist No. 46, supra note 10, at 296–97 (James Madison); id. No. 56, at 347–48 (James Madison); see supra notes 211–212, 354–356 and accompanying text.

647. Madison, Sept. 6 Letter to Jefferson, supra note 13, at 163–64 (emphasis omitted); see supra notes 238–239, 277 and accompanying text.

648. Madison, June 8 Convention Speech, supra note 16, at 41.

649. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 212.

650. Id.

651. Madison, Oct. 17 Letter to Jefferson, supra note 191, at 295, 297; The Federalist No. 37, supra note 10, at 229 (James Madison); see supra Part III.A.

stancy in the face of resistance from other branches and levels of government and the public.[652] Recently, the Supreme Court has made matters worse by doubly truncating the extended republic—narrowing the range of issues over which Congress may exercise preemptive or joint responsibility vis-á-vis the states and forbidding Congress to require state officials to administer federal programs.[653]

B. *Madisonian Impracticality, in Hindsight*

Regrettably, however, Madison's prowess as a constitutional theoretician and prognosticator was not matched by his powers as a constitutional architect. Notwithstanding his foresight in identifying the defects of a constitutional order without an effective structural solution to the problem of equal protection, his own solution, the national negative, was manifestly impractical in its own day and would surely have collapsed under the weight of the modern administrative state.

Particularly illuminating in this regard is the reaction of Thomas Jefferson, then the Confederation's ambassador in Paris, to Madison's Convention-eve letter outlining his national negative. Politically astute as always, Jefferson raised precisely the objections that would doom the proposal at the Convention—and no doubt would doom any revival of the proposal today. First were practical objections—the burden the negative would place on Congress in reviewing myriad state laws for an occasional deviation from a norm so vague that it would tempt Congress into thousands of debates. "[U]pon every act there will be a preliminary question[,]" Jefferson complained: "Does this act concern the confederacy? And was there ever a proposition so plain as to pass Congress without a debate?"[654] Far from being what Madison called "the mildest expedient that could be devised for preventing these miscbeifs [sic],"[655] the negative was perceived by Jefferson as overkill.[656]

Equally important were the states' political objections to the power the negative would have given to the national legislature. Congress's closeness to tbe people and its own legislative power were much more to be feared than the occasional jurisdiction of geographically and politically distant federal courts. As Jefferson wrote to Madison:

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652. Madison, June 8 Convention Speech, supra note 16, at 41.

653. See supra Part VI.

654. Jefferson, June 20 Letter to Madison, supra note 310, at 64.

655. Madison, June 8 Convention Speech, supra note 16, at 41.

656. Jefferson wrote:

> It fails in an essential character, that the hole [and] the patch should be commensurate. But this proposes to mend a small hole by covering the whole garment. Not more than 1. out of 100. state-acts concern the confederacy. This proposition then, in order to give them 1. degree of power which they ought to have, gives them 99. more which they ought not have, upon a presumption that they will not exercise the 99.

Jefferson, June 20 Letter to Madison, supra note 310, at 64; see supra notes 370–371, 377 and accompanying text (discussing similar objections made at the Convention).

> It will be said that this court may encroach on the jurisdiction of the state courts. It may. But there will be a power, to wit Congress, to watch & restrain them. But place that same authority in Congress itself, and there will be no power above them to perform the same office. [Courts] will restrain within due bounds a [legislative] jurisdiction exercised by others much more rigorously than if exercised by themselves.[657]

Madison's prediction of judicial "ineffectual[ness]" in reply to Jefferson[658] was more prescient over the long haul than the latter's prediction of judicial "rigour[ ]." But Jefferson's prediction of what their colleagues would do over the next few months in Philadelphia was dead on.

From a Madisonian perspective, the negative's breadth was its strength. Any list of specifically banned state legislative acts—including the "restraints agst. paper [money] emissions, and violations of contracts"[659] that the first Constitution actually included[660]—is "not sufficient" to reach the "infinitude of legislative expedients" that states can use to oppress local minorities.[661] Congress thus had to have a "negative *in all cases whatsoever* on the legislative acts of the States."[662]

But this inflexibly broad coverage was also the negative's downfall among the other conveners. It was wildly impractical, and the hammer over the states it would have given the most powerful federal branch could gravely threaten the "security" against *national* oppression that the states were supposed to afford the people.[663] With no "jurisprudence" limiting Congress's choice of when to exercise the negative, it created the possibility that Congress might itself succumb to partiality and oppression[664]—as it soon did, in Madison's view, with the Alien and Sedition Acts. The negative required a decidedly un-Madisonian leap of faith about the angelic dispositions of men and institutions. And neither Madison nor his colleagues could have fully anticipated the dangers presented by the two-party juggernaut that developed in the next century, and the power it gave mobilized minority factions within parties—includ-

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657. Jefferson, June 20 Letter to Madison, supra note 310, at 64; see supra notes 372, 377, 382 and accompanying text (collecting similar views expressed at the Convention).

658. See supra notes 238–239, 286 and accompanying text.

659. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 212.

660. See U.S. Const. art. I, § 10, cl. 1; id. art. IV, § 2, cl. 1; see also supra note 399.

661. Madison, Oct. 24 Letter to Jefferson, supra note 179, at 212.

662. Madison, Letter to Washington, supra note 16, at 383; see supra notes 234–235, 324–325 and accompanying text.

663. See supra text accompanying notes 253–255.

664. Madison wrote:

> For the same reason that the members of the State legislatures will be unlikely to attach themselves sufficiently to national objects, the members of the federal legislature will be likely to attach themselves too much to local objects. The States will be to the latter what counties and towns are to the former. Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual States.

The Federalist No. 46, supra note 10, at 296 (James Madison).

ing the moneyed interests that Madison so detested.[665] The national negative not only invited arbitrary use against the states, but also could have magnified factional oppression at the national level. If members of Congress have, as Madison feared, "too frequently displayed the character rather of partisans of their respective States than of impartial guardians of a common interest,"[666] there is little reason to think they would have done better with the negative. As powerful a threat as it posed to states and their majorities, the negative also presented them with an opportunity, given their adeptness at influencing Congress's agenda.[667] For these and other reasons, the negative might have provided insufficient protection to local minorities.[668]

And as comprehensively as Madison's negative would have covered state legislative enactments, it would not have applied at all to the ordinances and actions of the "counties and towns" whose influence over the states Madison feared. Over time, "state legislation" might have been read to encompass more than state statutory law—for example, state and municipal administrative regulations, guidelines, and manuals, and, at the limit, even the kinds of unwritten but systematic "policies" and "patterns and practices" that modern civil rights doctrine sometimes treats as law.[669] But it is hard to imagine any interpretation under which the Madisonian negative could have reached a school board's decision about where to assign particular children to attend school,[670] a warden's decision about which prisoners to discipline and which to afford medical care,[671] a police officer's choices among cars or pedestrians to stop and

665. See supra notes 149–152 and accompanying text.

666. The Federalist No. 46, supra note 10, at 296–97 (James Madison).

667. See supra notes 254–256, 354, 377 and accompanying text.

668. See, e.g., Primus, supra note 78, at 1018–21 (discussing surprising absence of cases holding federal government accountable for race discrimination, and offering that federal courts, out of deference and acting in tandem with the other federal branches, may be unwilling to act to prevent executive branch race discrimination).

669. See, e.g., City of Canton v. Harris, 489 U.S. 378, 389 (1989) (holding that municipal liability may be established for deliberate indifference in failure to train employees); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) (holding that a municipal government may be liable under section 1983 when injuries are caused pursuant to a policy, practice, or custom).

670. Cf. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 463–64 (1979) (affirming lower court decisions finding equal protection violations due to "systemwide segregation in the . . . schools that was the result of recent and remote intentionally segregative actions of the Columbus Board").

671. See, e.g., Hope v. Pelzer, 536 U.S. 730, 738 (2002) (finding "obvious" the Eighth Amendment violation where prison officials disciplined prisoner by painfully handcuffing him to a hitching post for seven hours, in the hot sun, and taunted his discomfort and prolonged thirst); Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (holding that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment and states a cause of action under section 1983).

when to frisk,[672] or a municipal board's decisions about whom to license to operate laundries or to conduct parades.[673]

Nor would Madison's proposal have had any way of reaching state court or administrative decisions or of monitoring the discriminatory *absence* of action in providing for "the protection of the laws." Moreover, with every expansion in the kinds of official action and inaction by the fifty states and their administrative agencies that qualified as "legislation" or was otherwise subjected to the veto— not to mention the actions of the 3,000 counties and their agencies and countless municipal entities— would come an exponential leap in the amount of monitoring required of Congress. As a number of Madison's colleagues recognized, his proposal was administratively impractical from the outset. Under modern conditions, his proposal is inconceivable.[674] As right as he was about "exterior" alternatives to the veto, perhaps Madison was wrong about his preferred "interior" solution.

C. *An Exercise in Madisonian Foresight*

As powerful as they are, these criticisms of Madison's proposals are in hindsight. They suggest the impossibility of Madisonian equal protection in a world as it in fact developed over two hundred years in the absence of the mechanisms and institutions that Madison proposed to shape the governance landscape differently. It thus is worth momentarily considering the counterfactual—how the adoption of his proposals from the beginning might have avoided the critiques. To begin with, Congress's partisan character and transformation following the rise of the two-party system might not be a mark against Madison's proposal but rather a product of the Convention's failure to adopt it in full. Whether or not Madison fully anticipated the rise of a two-party system, he clearly saw the possibility of powerful semipermanent coalitions at the national level, and he vigorously opposed them. Such parties, or "factions," were indeed the precise danger to which *The Federalist No. 10* sounded the alarm, and were Madison's reason for proposing constitutional structures that were designed to moderate partisanship among legislators (notwithstanding

672. See, e.g., Whren v. United States, 517 U.S. 806, 813 (1996) (suggesting that "selective enforcement of the law based on considerations such as race" might independently violate the Equal Protection Clause); Terry v. Ohio, 392 U.S. 1, 27 (1968) (holding under the Fourth and Fourteenth Amendments that a stop and frisk search must be justified at its inception on the basis of a reasonable suspicion of criminal activity).

673. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (holding that local ordinance regulating laundry facilities violates Equal Protection Clause as it is "applied and administered with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances").

674. See Rakove, Madisonian Moment, supra note 25, at 497 ("The significance of [Madison's veto] proposal rests . . . on its logic rather than its obvious impracticality.").

his own later role in the creation of the nation's first two-party arrangement).[675]

Nor did Madison believe that the broader perspective given members of Congress by the extended republic would suffice by itself to prevent factionalism in Congress. Additional preventative measures were necessary. Among those measures was the national veto itself, which might have further broadened the perspective of members of Congress by keeping them focused on solving problems and not coalescing into powerful permanent parties, by keeping constantly before their eyes the full panoply of local problems and comparisons of the states' various responses to them, and by fostering continuous, collaborative relationships with state and local institutions in solving local and, in the aggregate, national problems.[676]

Another important mechanism for reining in congressional faction was to have been the Council of Revision. As proposed by Madison, the Council would have been composed of federal judges and members of the executive branch who would have been empowered to review all pending national legislation and veto any that was tainted by a partisan spirit. In particular, Madison expected the Council to veto unjust legislation that was harmful to minorities and also to forestall partisan exercise of Congress's national negative against *just* state legislation. The result, in Madison's words, was to have been an additional check that could "destroy the measures of an interested majority" and protect "the safety of a minority in Danger of oppression from an unjust and interested majority."[677]

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675. See, e.g., J.R. Pole, Political Representation in England and the Origins of the American Republic 530–31 (1966). Pole states that:

> [W]hen [Madison] discussed the problem of interests in the tenth number of The Federalist, he was occupied immediately with the problem of so dividing the government as to resist the formation of political parties. . . . Madison anticipated the division of the country into conflicting and competing economic . . . interests . . . . The political organisation of these interests he called factions, a disparaging name for parties—but he hoped that parties would merely come and go as their temporary objects dictated. By an irony which he cannot have either anticipated or enjoyed, Madison himself soon became one of the leading agents in the process by which interests were consolidated into parties . . . .

Id.

676. See supra Part IV.C.4.

677. Madison, June 4 Convention Speech, supra note 319, at 25; see supra notes 377, 423–424 and accompanying text (discussing the Council of Revision). Madison argued that bis Council of Revision proposal, modeled on New York's 1777 Constitution, would provide "an additional check" against "unwise [and] unjust measures" at the national level, James Madison, Revisionary Power of the Executive and the Judiciary, Speech at the Constitutional Convention (July 21, 1787), *in* 10 Papers of Madison, supra note 2, at 109, 109; would "introduce the Checks, which [would] destroy the measures of an interested majority"; and was "not only necessary for [the executive's] own safety, but for the safety of a minority in Danger of oppression from an unjust and interested majority," Madison, June 4 Convention Speech, supra note 319, at 25. In explaining the composition of the Council to include judges as well as executive officials, Madison noted that "[t]he independent

As with Madison's national negative, the Council has not generally been understood as a mechanism for achieving equal protection (in this case at the national level), and instead has been treated as a means of maintaining one or another balance of forces between the competing branches of the federal government.[678] But both the negative and the Council shared a similar operation and a similar, deeply interactive, equal protection function. The Council would have engaged in the same sort of prior review of congressional action as Congress would have exercised over state legislation via the national negative. Moreover, the Council would have protected the states from invidious or partisan rejection of state legislation by curbing excessive exercises of the negative itself.

Whether these controls would have given Congress a more "impartial" cast is no less certain than any other counterfactual proposition. But that was to be their function, and their defeat at the Convention provides a strong Madisonian argument against the inevitability of congressional partiality and a range of other governance pathologies that have been convincingly laid at the door of political parties: the locking into power of established local majorities (or minorities) that support the dominant national party;[679] Congress's resulting tolerance and even encouragement of local factional oppression;[680] and the subordination of local insti-

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condition of the Ex. who has the Eyes of all Nations on him will render him a just Judge—add the Judiciary and you increase the respectability." Id.; see supra note 319 and accompanying text; see also Madison, Letter to Wallace, supra note 423, at 351 (describing New York's Council "[a]s a further security against fluctuating [and] indegested [sic] laws").

678. See, e.g., Saikrisbna Prakash, The Essential Meaning of Executive Power, 2003 U. Ill. L. Rev. 701, 776 (contending that Madison intended tbe Council of Revision to strengthen executive prerogatives). But cf. Rakove, Origins, supra note 28, at 1057 ("The objective of both [Madison's arguments for the Council and the negative] was to discourage the passage of unjust or ill-conceived laws, and in so doing, to protect private rights and the public good against legislative impulse.").

679. For example:

> Unions, business groups, the Christian Coalition, Jews, Cuban Americans, the NRA, and the AARP often gain disproportionate influence [in a national two-party system] because of their powerful presence in one of the parties. Extremist, well-organized, or well-financed 'minorities' can capture a party and skew the party's nominees and platform toward the preferences of a small faction.

Nathaniel Persily, Toward a Functional Defense of Political Party Autonomy, 76 N.Y.U. L. Rev. 750, 809 n.215 (2001).

680. See, e.g., Gerald Leonard, Party as a "Political Safeguard Of Federalism": Martin Van Buren and the Constitutional Tbeory of Party Politics, 54 Rutgers L. Rev. 221, 226 (2001) (arguing that the first modern mass political party was created to "replace lawmaking by a Madisonian deliberative Congress with lawmaking by popular will through the party," with the effect of insulating state governance from national regulation that otherwise might have curbed local oppression). Districting battles—which often expose the worst tendencies of party politics—provide a powerful example of the two-party system's harmful effects on local minorities. See, e.g., Terry Smith, Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction, 25 Hastings Const. L.Q. 277, 329–30 (1998) (discussing the effect of partisan gerrymanders, and noting that in the South in particular, Republicans serve in a

tutions, problems, and solutions to the national ones that are the focus of national party politics.[681] Consequently, the criticism of Madison that, for all of his talk at the time of the framing about the dangers of faction, his constitution did nothing to prevent a virulently factionalized two-party system from emerging, is misplaced.[682] More accurately, it was the other Framers who assiduously ignored Madison's talk about the dangers of faction[683]—about the need for much more than the extended republic to provide structural equal protection against minority oppression at both the local and national levels—and then proceeded to reject all his remedies for that most threatening of republican maladies.[684]

Nor is it as certain as we suggest above that the national negative's limitation to state legislation would have deprived a fully Madisonian regime of an effective response to factional oppression in the broad array of private and public activities that are regulated administratively, not legislatively, or are regulated at the municipal, rather than state, level. As Madison thought would occur, it is possible that the kind of mutual institutional engagement Madison envisioned at the national level in Con-

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majority of congressional seats despite "virtually no Black support," and that whites may be increasingly moving to the national Republican ticket to avoid forming coalitions with predominantly black Democrats; proposing that the problem be solved through the creation of remedial Senate districts); see also T. Alexander Aleinikoff & Samuel Issacharoff, Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*, 92 Mich. L. Rev. 588, 615–18 (1993); Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 Harv. L. Rev. 1663, 1666–67 (2001) (proposing an "aggregate rights" framework for mediating the conflict between individualistic and group conceptions of rights); Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643, 706 (1998) (posing question "whether the emphasis in the 1990s on creating 'safe' minority districts has had the ancillary effect of facilitating the election of more conservative legislators overall").

681. See Issacharoff & Pildes, supra note 680, at 644, 716. For a disturbing account of the increasing use and effectiveness of gerrymandering to prevent electoral districts nationwide from being contested, particularly through sophisticated new technology, see Jeffrey Toobin, The Great Election Grab, New Yorker, Dec. 8, 2003, at 63; see also Robert Allen Rutland, The Democrats: From Jefferson to Clinton (2d ed. 1995) (presenting a history of Democratic Party machine politics that illustrates the power of a national party system to cement oppressive local factional control). For the contrary view—that in a two-party system in a nation as vast as our own, the "big tent" required of national parties achieves the Madisonian goal of a broadened, embracing, and in the end relatively *im*partial national perspective—see Kramer, Putting the Politics, supra note 256, at 269–71.

682. Cf. Issacharoff & Pildes, supra note 680, at 652; supra note 664.

683. See supra Parts IV.C.3, IV.C.5.

684. Although Issacharoff and Pildes note Madison's fervent opposition to national parties, Issacharoff & Pildes, supra note 680, at 713–15 & nn.297–300, they expressly include him in their criticism of the Framers for failing to take effective steps to constrain parties; cf. id. at 652 (arguing that "one of the great unappreciated ironies of the original constitutional vision is that although the Framers were exquisitely sensitive to the need to create formal checks and balances between governmental organizations, they failed to see the need to ensure sufficient competition between political organizations"). To the contrary, had the Framers followed Madison's plan for a national negative and Council of Revision, they would have gone a long way toward realizing Issacharoff and Pildes's goal of preserving competition between factions at both the local and national levels.

gress could also have developed—under Congress's tutelage via the threat of its exercise of the negative—in states, municipalities, and administrative agencies.[685]

As we develop in a companion piece, this claim is not entirely counterfactual. The very dominance of party politics at the national legislative level, as a result of the rejection of Madison's Council of Revision and his other constraints on factional control of Congress, may have the effect of driving the kinds of governance mechanisms he promoted out of the national legislative arena and into administrative, state, and local regimes.[686] The result may be tantamount to the adoption of yet another Madisonian proposal—the creation of a multitude of Councils of Revision at the state (and, as things have developed, at the municipal) level[687]—for infusing a broader, more impartial perspective and for integrating minority concerns and participation into local decisionmaking and problem solving.

The chief remaining criticism of Madison's negative is the time and energy Congress would have spent in reviewing each local measure before it could take effect. Here, again, hindsight looms. In a world in which the norm for state legislation is the kind of self- and faction-serving outcomes that Madison abhorred, it is hard to imagine a conscientious Congress having time for anything other than swatting down oppressive state laws. But Madison hoped that the "happy effect" of the negative would be the defeat of unjust proposals in the states in the first instance, and that only a cursory review of state laws based on straightforward cross-state comparisons would be required to reveal the occasional unjust outlier.[688] The thrust of his theory thus was entirely practical: to avoid the time-consuming, difficult, and potentially divisive after-the-fact review of government action that has instead become a staple of our judicial enforcement of "exterior" admonitions to afford equal protection.[689]

That being said, counterfactually, we have not had a Madisonian world for over two centuries. How distraught, then, might we expect Madison to be if he suddenly reappeared and undertook to review what is commonly, if inaccurately, believed to be his handiwork?

D. *The Legacy of Madisonian Equal Protection*

Although the "Father of the Constitution"[690] begat neither the constitution nor the equal protection he desired, he might not be entirely disappointed by the structures of government that have emerged. Arguably, aspects of the modern American administrative state suggest the pos-

685. See supra Part IV.C.4.

686. See Garrett & Liebman, Experimentalist Equal Protection, supra note 8 (manuscript at 24–25).

687. See supra notes 377, 423–424, 677 and accompanying text.

688. See supra note 32 and accompanying text.

689. See supra Parts III.A, V.B.2.

690. See supra note 1 and accompanying text.

sibility of a passably Madisonian, while thoroughly modern and workable, method of preserving liberty and extending fraternity by protecting equality against parochial majoritarianism.[691]

The point of departure is the half of Madison's equal protection solution that he did convince his colleagues to adopt: the extended republic. Yet, particularly since the New Deal, that extended republic's centralizing effect has provided a degree of equal protection against local majority factions that Madison thought only the broadened republic *plus* the legislative veto could provide.[692] Although *Congress*—the engine of Madison's extended republic—has turned out to be far more susceptible to parochial and locally-influenced factionalism than Madison had hoped,[693] a different and potentially more promising set of interactions between the federal and state governments has become a fixture of the *administrative* apparatus of the modern national state. Professor Beer, for example, claims that there is a strong affinity between Madison's interactive federalism[694]—what Beer calls "horizontal federalism"—and "the huge expansion of conditional grants in aid by the federal government," which invite "state and local governments" to serve as "the administrative agents of a vast array of national programs."[695] Related developments include review of state and local administrative actions by federal agencies,[696] administration of federally-funded state programs according to federal mandates,[697] and federal adoption of state standards developed through cooperative processes of monitoring.[698]

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691. See supra note 79.

692. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521–22 (1989) (Scalia, J., concurring) ("As we said in Ex parte Virginia, the Civil War Amendments were designed to take away all possibility of oppression by law because of race or color and to be . . . limitations on the power of the States and enlargements of the power of Congress." (internal citations omitted)); Sandalow, supra note 27, at 1191 (arguing that "pluralistic politics furnish substantial safeguards to minorities" in many situations); supra Part V.A.2.

693. For discussion of Madison's fear that states were more likely than Congress to suppress political minorities, and his solution to incorporate the Bill of Rights against the states, see Ely, Democracy, supra note 27, at 79–87; Brennan, supra note 27, at 536–37, 539–40. Madison was clearly aware of the possibility of factional strife and control in the national legislature. See The Federalist No. 46, supra note 10, at 296 (James Madison) ("A local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular States."). As happened with the national veto, however, his proposed solution to the problem—a national council of legislative revision—was defeated at the Convention. See supra notes 377, 390.

694. See supra Part IV.C.4.

695. Beer, supra note 7, at 252–53.

696. See supra notes 669–674 and accompanying text; see also Garrett & Liebman, Experimentalist Equal Protection, supra note 8 (manuscript at Part VII).

697. See, e.g., 42 U.S.C. § 1396a(q)(1)(A) (2000) (institutionalized persons); id. §§ 1396a(a)(10), (a)(17) (general Medicaid statute). These sections require that state plans to treat different populations must provide certain minimum allowances to meet federal guidelines.

698. See, e.g., No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (Supp. 1 2001).

The question then—to which we turn in a companion article[699]—is whether modern forms of administration can in fact do the work of Madison's failed national negative and the largely ineffectual Equal Protection Clause. More particularly, the remaining question is whether all forms of modern locally and centrally interactive administration are the same for this purpose. For example, to the extent that federal-state interaction is defined by a post-New Deal command-and-control structure, it would seem to offend Madison's collaborative vision, while also risking the liberty-threatening national hegemony that Madison's colleagues associated with his negative. Nor, however, would the alternative approach in vogue today of decentralizing national administrative authority to states and localities satisfy Madisonian equal protection. On the contrary, by joining the current Supreme Court in dismantling the extended republic,[700] any such extension of unabated state and local authority over matters previously thought to be of national concern might increase the power of local majorities to oppress minorities in the manner that Madison feared.[701]

The constitutional structure Madison envisioned was thus neither a top-down national hierarchy connecting a center and subservient instrumentalities, nor a bottom-up confederacy of independent states that occasionally conferred authority on a central body to act on their collective behalf. Instead, Madison imagined continuous state-federal-state interaction running *both* ways between thirteen productively diverse states with design and implementation responsibilities and a center with oversight responsibility.[702] Whether any aspects of modern intergovernmental administration approximate Madison's preferred governmental design—in particular, whether the need for a vibrant cooperative federalism to solve otherwise intractable public problems has driven national and local agencies of government voluntarily to establish interactive structures providing a modern-day Madisonian equal protection[703]—remains an important question for future scholarship.

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699. See Garrett & Liebman, Experimentalist Equal Protection, supra note 8.

700. See supra Part VI.

701. See supra notes 366–368 and accompanying text.

702. See supra Part IV.C.4.

703. Potentially more in line with Madison's vision is federal regulation through conditional preemption, or what the Supreme Court itself has aptly dubbed "cooperative federalism." Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981). Under this form of administration, Congress imposes a default scheme of federal regulation but invites the states to opt out of it if they adopt their own, experimental, regulatory regimes that meet general federal minimum standards and that are subject to approval mechanisms amenable to interstate comparison. In areas in which it has authority to preempt state regulation, Congress may instead, without engaging in impermissible "commandeering," offer states the choice of adopting a regulatory scheme pursuant to federal standards or be subjected to preemptive federal regulation. See New York v. United States, 505 U.S. 144, 161–63 (1992) (observing that conditional preemption does not directly compel states to enact federal mandates, and thus does not violate the Tenth Amendment); Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992) (describing state

CONCLUSION

If Madison is properly called the "Father of the Constitution,"[704] he was justly disappointed in his progeny.[705] Absent an effective mechanism for structuring equal protection into the daily operation of state and local governments—of the sort upon which Madison staked his energy and credibility at the Convention—the Constitution has repeatedly allowed local majorities to perpetrate tragic injustices against minorities. Partly to blame is the unfair treatment of Madison himself. Even given the undue credit he has received for framing a constitution he disowned, and the blame he deserves for his impractical proposals to improve it, Madison deserves better than the indifference shown to his brilliant equal protection theory and prognostication by his colleagues at the Convention, the drafters of the Fourteenth Amendment, the academy, and the current Supreme Court.[706] What remains to be seen is how far we can go—or, perhaps, how far the modern administrative state has already gone—toward completing Madison's constitutional project, avoiding the need for cataclysmic constitutional change, and achieving Madisonian equal protection.[707]

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water quality regulations as governed by federal standards in a constitutionally permissible partnership relationship that does not violate the Tenth Amendment); Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 758–59, 764–65 (1982) (noting that "state involvement in a pre-emptible area of energy regulation can be conditioned on mandatory local consideration of federal standards"); *Hodel*, 452 U.S. at 288 (noting that there is no "commandeering" where states are allowed to opt out of federal programs, leaving the hurden of regulation on the federal government).

704. See supra note 1 and accompanying text.

705. See supra notes 238–239, 286 and accompanying text.

706. As we develop above, even Madison's eloquent defense of the new Constitution in *The Federalist* sounds a silent alarm. See supra Parts III.B, IV.C.4–VI.

707. Again, we indicate how experimentalist remedies can embody Madisonian equal protection in a companion essay, Garrett & Liebman, Experimentalist Equal Protection, supra note 8. For further suggestions on reading experimentalist techniques generally into the existing Constitution, see Dorf & Sabel, Democratic Experimentalism, supra note 79, at 289, 469–73; James S. Liebman, Slow-Dancing with Death: The Supreme Court and Capital Punishment, 1963–2003, at 170–75 (Feb. 2004) (unpublished manuscript, on file with the *Columbia Law Review*).