

## James Madison and the Logic of Republican Government

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The American Constitution begins as an act of “We the People,” but the idea of popular sovereignty was left to implication. In *Federalist* 40, James Madison made this clear: the proposed constitution was “to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed.”<sup>1</sup> It was only with popular ratification that the Constitution would be legitimate. And, indeed, *The Federalist* framed the debate over the Constitution as a debate over the very possibility of establishing popular government.

Yet even while defending America’s republican experiment as a form of popular government, *The Federalist* spoke powerfully to the vices of popular government, deeply concerned about the “popular arts,” where the people might be “stimulated by some irregular passion” or where the people might be “misled by the artful misrepresentations of interested men.”<sup>2</sup> Madison in particular made a crucial distinction between two

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<sup>1</sup> Madison, *Federalist* 40. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* ed. Ian Shapiro (New Haven: Yale University Press, 2009), 202.

<sup>2</sup> Madison, *Federalist* 63, 320.

“species” of popular government: In a pure democracy, “the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents.”<sup>3</sup> Madison argued for the clear superiority of a republic over a democracy as the most defensible species of popular government. Madison did not find democracy superior but impractical. Nor did he think that a republican government should simply mirror the voice of the people. For Madison republican government was not a subsite for democracy, but a superior form of government.

While Madison began from the premise that the will of the people ought to ultimately govern us, he insisted that political institutions and intermediary civic institutions were essential in cultivating the “cool and deliberate sense of the community.”<sup>4</sup> This is the essence of Madison’s republicanism. By way of representation and other devices, Madison sought to put distance between the government and the people to better secure the public good. But, just as surely, Madison ultimately wanted the government accountable to the people. How to strike this balance? How to create a popular government that would not succumb either to the irrationality of the people or to a tyrannical government? The seminal texts of Madison’s republican vision, Federalist 10 and 51, speak to this balance, even while they do not represent the whole of his thinking. Federalist 10 argues for a large republic with a diversity of interests and representation, giving us a republican cure to the perils of a potentially unvirtuous people. The separation of powers articulated in Federalist 51 rests on this foundation, reflecting the diversity of

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<sup>3</sup> Madison, Federalist 14, 67.

<sup>4</sup> Madison, Federalist 63, 320.

interests in the large republic by way of political institutions, but also structuring institutions in a manner that contains overly ambitious government officers.

Madison's republican vision consistently sought to strike this balance between cultivating a true sense of the public good by way of representation and institutional design and keeping representatives and the government responsible to the people over time. These sentiments find expression in his early and late thinking, even if to tone and emphasis is markedly different. Crucial here, too, is the balance between what are often described as the liberal and republican elements of Madison's thought. Madison's republican vision was distinctly liberal, limiting the sort of things popular majorities could decide, thus protecting individual rights and minorities from overbearing majorities. Most importantly, Madison did not rely on a virtuous citizenry dedicated to the public good. Even so, Madison's republicanism sought to shape and educate the public mind to foster knowledgeable citizens prepared for republican self-government.

This chapter first takes up Madison's argument as a "votary" of republican government rooted in representation as superior to pure democracy. It then turns to Madison's analysis of representation within political institutions as refining popular will and constructing the public good. Worried about a people that succumbs to irrational desire, Madison's republicanism highlights the benefits of representation and the direct exclusion of the people from the government. But even here there is a balance between civil society and political institutions, as well as nods to shaping the public mind. These latter elements in Madison's republicanism come out much more fully in the 1790s as he turned to the importance of politics "out of doors" in defending the emergence of political

parties and other elements of civil society as crucial features of republican government.<sup>5</sup> The final section of this chapter focuses on the threat to republican government from an abusive government attempting to silence its critics with the Sedition Act of 1798. Examining Madison's thinking during both a moment of creating republican government and a moment of securing republican government is a helpful reminder that Madison is not only America's leading democratic and constitutional theorist, but a leading political actor and statesman who brought theory and practice together in a singular manner. At different moments in time, depending on the circumstances he faced, he played up different elements of his republican vision and refined his understanding based on experience.

#### <A>Republican Government and the Superiority of Representation

In *The Federalist*, Madison pointed to representation as the crucial distinction between a republic and a democracy. While arguing that the “people alone” are the “ultimate authority,”<sup>6</sup> Madison nevertheless insisted, “the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.”<sup>7</sup> Madison divided popular government into two

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<sup>5</sup> Jack N. Rakove, “Politics Indoors and Out-of-Doors: A Fault Line in Madison’s Thinking” in Jack N. Rakove and Colleen A. Sheehan, *The Cambridge Companion to The Federalist* (New York: Cambridge University Press, 2020): 370-399.

<sup>6</sup> The Federalist 46, 239.

<sup>7</sup> The Federalist 10, 51.

forms. In a democracy—which he often called a “pure” democracy—the people are directly engaged in the administration of government. Today, we usually call this direct democracy. In a republic a “scheme of representation takes place,” removing the people from the direct administration of government.<sup>8</sup> Today, we usually call this representative democracy. Both, again, are forms of popular government. Yet for Madison a republic is a superior form of popular government not a substitute for direct democracy. And a republic is superior precisely because it puts space between the “people themselves” and the administration of government. In this, Madison sought to secure representatives who were “fit characters” with “enlightened view and virtuous sentiments.”<sup>9</sup> Representatives would be drawn from a more knowledgeable class and would be somewhat insulated from the people. In Madison’s understanding, representatives were not to be the mere mouthpiece of the people, but to reflect on their own as they deliberated about public issues.<sup>10</sup> Madison clearly held, in Edmund Burke’s terms, a trustee view of representation and saw it as a crucial improvement to popular government.

Madison made the comparison between a popular representative government and popular democratic government explicit in *Federalist* 10, where he identified the problem of faction as the central problem of popular government and where he situated representation as a crucial republican solution to this problem. I will not rehash the whole of Madison’s argument regarding faction as it is taken up in another chapter, except

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<sup>8</sup> Madison, *Federalist* 10, 51.

<sup>9</sup> Madison, *Federalist* 10, 51.

<sup>10</sup> Madison, *Federalist* 63, 320-321.

insofar as it illuminates the nature of republican government and its superiority to pure democracy. Madison argues that the crucial distinction is, first, that in a republic the government is delegated to a small number of citizens elected by the rest and, second, that this increases the size of the political community. These two features provide a cure to the ills of popular government. Representation acts to “refine and enlarge the public views,” by way of having them engaged by a representative body. Public ideas and issues are better engaged within a representative body because they must pass through “a temperate and respectable body of citizens.”<sup>11</sup> This connects several elements of Madison’s thinking. Madison argued that the representatives themselves, selected by citizens, were much more likely to be knowledgeable and informed; their “wisdom” made them more likely to “discern the true interests of their country” and less likely to “sacrifice” it to “temporary or partial considerations.”<sup>12</sup> Consider that Madison’s great fear with popular government was that a “faction”—that is a self-interested group “adverse to the rights of other citizens, or to the permanent and aggregate interest of the community”—would more easily prevail in a pure democracy or a small republic. In both cases, because of the small size of the country, a faction that included a majority of the population could prevail by simple numbers. Small size made it more likely that overbearing majorities with similar interests could easily form, acting in ways that harm minorities and “invade the rights of other citizens.”<sup>13</sup>

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<sup>11</sup> Madison, Federalist 63, 320.

<sup>12</sup> Madison, Federalist 10, 51.

<sup>13</sup> Madison, Federalist 10, 52.

While this was true of both a small republic and a pure democracy, a pure democracy was even more susceptible to the ills of faction because the people themselves were more likely to be driven by passion and more likely to act on ignorance absent distance between the people’s immediate thoughts and governmental action. Pointing to the classical example of pure democracy, Madison insisted: “Had every Athenian citizen been a Socrates; every Athenian assembly would still have been a mob.”<sup>14</sup> Madison’s point was overwrought, but it made clear his prioritizing constitutional design and his suspicion of relying on virtue. How should the legislature be structured to nurture “the benefits of free consultation and discussion?” If it were too small, it would open itself to “an easy combination for improper purposes.” Yet in assemblies that were too large “passion never fails to wrest the sceptre from reason.”<sup>15</sup> Madison picked up this theme in Federalist 58, arguing that in ancient republics “where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as complete a sway as if a sceptre had been placed in his single hand.”<sup>16</sup> The irony was that a large assembly open to the people themselves may look “more democratic” but “the soul that animates it will be more oligarchic.”<sup>17</sup>

In just this way, pure democracy was thus more open to demagogues—men of “factious tempers,” “local prejudices,” and “sinister designs”—who would betray the

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<sup>14</sup> Madison, Federalist 55, 283.

<sup>15</sup> Madison, Federalist 55, 283.

<sup>16</sup> Madison, Federalist 58, 299.

<sup>17</sup> Madison, Federalist 58, 299.

interests of the people.<sup>18</sup> In the ancient polity where pure democracies prevailed as the predominate form of popular government, the “scheme of representation” was “imperfectly known.”<sup>19</sup> The small republic was less prone to these shortcomings because it rested on the principle of representation, which allowed it to be relatively larger than a pure democracy. Yet even the small republic, which knew and utilized the representative principle, was prone to these weaknesses.

Here, as Jack Rakove notes, Madison’s argument drew on historical experience in its criticism of both pure democracy and the small republic, challenging the inherited wisdom of Western thought regarding popular government.<sup>20</sup> Democracies and republics, which had up to this point been small republics, had a turbulent history. Madison’s own experience in Virginia in the 1780s—and his survey of politics within the states—reinforced his conclusions. He witnessed the problems of deliberation within the legislature, as well the problem of overbearing majorities disregarding the rights of minorities. Indeed, Madison’s argument for a large republic had roots in his *Memorial and Remonstrance*, which argued for religious liberty in Virginia against efforts to, in his view, essentially establish religion.<sup>21</sup> Within the confines of a smaller republic where one

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<sup>18</sup> Madison, Federalist 10, 51.

<sup>19</sup> Madison, Federalist 10, 51.

<sup>20</sup> Jack N. Rakove, *A Politician Thinking: The Creative Mind of James Madison* (Norman, OK: University of Oklahoma Press, 2017), 67, 73.

<sup>21</sup> James Madison, “The Memorial and Remonstrance Against Religious Assessments” in Marvin Meyers, ed., *The Mind of the Founder* (Hanover, NH: Brandeis University Press,



single religious sect was likely to have a majority, Madison worried that an overbearing majority could intrude on the rights of religious minorities. The smaller the society, the more likely that a single religious sect dominates. Yet as the scope of the country was extended the number of religion sects increased, making it less likely that a single religious group could prevail over the others. A wider sphere would naturally bring a diversity of religious interests, making it likely that no single sect could dominate. Given this, religious liberty and tolerance would be in the self-interest of different religious sects. We should note, here, the distinctly *liberal* elements of Madison’s republican vision.

In a similar fashion, by increasing the size of the republic, a diversity of ideas and interests would naturally follow, making it much more difficult for any single group to form a majority. In the *Memorial* Madison was worried about religion, but in Federalist 10 Madison extended his concern to a much wider range of interests and opinions. Madison highlighted, in particular, the unequal division of property as the “most durable” source of faction.<sup>22</sup> But the essential logic was the same. Madison did not assume benevolence—faction, after all, was sown into the nature of man—but the larger sphere would make it difficult for any single faction to dominate. If the small republic turned on a homogenous people closely linked to the government, Madison turned this logic on its head: A diversity of interests would provide the republican cure to the disease of

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1981), 11. See George Thomas, *The Founders and the Idea of a National University: Constituting the American Mind* (New York: Cambridge University Press, 2015), 103.

<sup>22</sup> Madison, Federalist 10, 49.

republican government. The extended sphere, Madison argued, was also likely to increase the quality of representatives. Not only would the large republic increase the likelihood of “fit characters” for office, but the larger the number of citizens engaged in selecting “established characters” would make it more difficult for “unworthy candidates” to “practice with success the vicious arts.”<sup>23</sup> There is a tension in the logic of the extended republic. On the one hand, in Robert Putnam’s wonderfully provocative phrasing, Madisonian design seeks “to make democracy safe for the unvirtuous.”<sup>24</sup> On the other hand, it partly does so by seeking to elevate those with virtue to public office. Putnam certainly captures Madison’s reluctance to rely on a virtuous people committed to the ideal of a civic community. Yet he also adds an important wrinkle that complements Madison’s republicanism. The empirical evidence suggests that civic engagement and participation are more prevalent in modern liberal societies—where self-interest and conflict remain features of political life—than they are in the closed civic community that is taken to exemplify civic virtue.<sup>25</sup>

Madison’s large republic was rooted in self-interest and a wide variety of interest that would conflict, even while seeking to nurture representatives that had “wisdom” and “virtue” to act for the common good.<sup>26</sup> As Alan Gibson argues, for Madison the extended

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<sup>23</sup> Madison, Federalist 10, 52.

<sup>24</sup> Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton: Princeton University Press, 1993), 87.

<sup>25</sup> Putnam, *Making Democracy Work*, 114-115.

<sup>26</sup> Madison, Federalist 57, 290.

republic made it more likely that representatives would act for the common good.<sup>27</sup> Not simply by bargaining among diverse factions and interests that would be represented in Congress (though this would occur), but by filtering the public views by passing them through the legislature. Enlightened representation would allow Congress to act for the permanent interests of the community.<sup>28</sup> And the key to enlightened representation was placing distance between the people and the government.<sup>29</sup> This also comes out in Madison’s discussion of the separation of powers, which at least partly works as it does in his eyes because it rests on the extended republic. Yet before turning to the institutions of government, we should pause to note a deep problem that Madison was acutely aware of: The problem of slavery in a republican government. But it’s a problem that Madison largely ducked. He did work at the Constitutional Convention to remove any explicit reference to “property in man,” but he also supported the Constitution’s three-fifths clause, which counted enslaved human beings—even if it only referred to them

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<sup>27</sup> Alan Gibson, “Madison’s Republican Remedy” in Jack N. Rakove and Colleen A. Sheehan, eds., *The Cambridge Companion to The Federalist* (New York: Cambridge University Press, 2020), 295.

<sup>28</sup> Jeremy D. Bailey gives us good reason to be skeptical of the idea that Madison thought representation would be quite so virtuous. Bailey, *James Madison and Constitutional Imperfection* (New York: Cambridge University Press, 2015), 52-56.

<sup>29</sup> If this might sound aristocratic, in Federalist 55 and 63, Madison noted how important it was that both suffrage and political offices be open to all and not concentrate along class divisions.

obliquely—as three-fifths of a person for the *purposes of representation*. But there was no consideration that they would be represented as part of the people.<sup>30</sup>

#### <A>Political Institutions, Representation, and Constructing the Public Good

In accord with the large republic—the primary way to create “equilibrium in the interests and passions of the Society itself”—American political institutions were crafted to be responsive to the people over time, but put space between the people and their representatives.<sup>31</sup> As Madison put it in *The Federalist* 57, “The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.” Elected political officials, who held their office as a public trust, were not merely to act as a mouthpiece of the citizenry, but to see farther than ordinary citizens: “to refine and enlarge the public views,” to have the wisdom to “discern the true

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<sup>30</sup> In Federalist 54, Madison gave the three-fifths clause a perverse, if somewhat tepid, defense of the different sorts of interests that could be represented. Madison, Federalist 54, 281. For Madison on this issue, see Noah Feldman, *The Three Lives of James Madison: Genius, Partisan, President* (New York: Random House, 2017), 155-159.

<sup>31</sup> Rakove, “Politics Indoors and Out-of-Doors,” in Jack N. Rakove and Colleen A. Sheehan, eds., *The Cambridge Companion to The Federalist* (New York: Cambridge University Press, 2020), 371.

interest of their country,” and to do so against “temporary or partial consideration.”<sup>32</sup> And yet such leaders were to remain dependent on the people. How dependent the different political offices were—and to which version of the people—varied within the separation of powers. The result was a complex system of representation that provided for varying degrees of independence from the people, allowing for representatives with “sound judgement and a certain degree of knowledge” to work for the public good.<sup>33</sup> Within the separation of powers, the various and conflicted interests of a diverse and extended republic get voiced.

The dynamic—and potentially contentious—interaction between the branches of government is similarly designed to achieve the public good by channeling, shaping, and refining popular opinions. We associate Madison first and foremost with checks and balances, with the idea that the government itself must be limited and contained, but even the separation of powers is designed to refine popular understandings within the large republic. Indeed, Madison’s most famous discussion of the separation of powers in Federalist 51—where “ambition must be made to counteract ambition”—concludes with a discussion of the large republic. “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.”<sup>34</sup> Here Federalist 51, the seminal paper on the

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<sup>32</sup> Madison, Federalist 57, 290.

<sup>33</sup> Madison, Federalist 53, 274.

<sup>34</sup> The Federalist 51, 266.

separation of powers, echoes Federalist 10 and the logic of the extended republic. What is crucial for Madison is that the public good is constructed from the “many parts, interests, and classes of citizens” that come from civil society. The separation of powers, representing these different parts, interests, and citizens, passes these views “through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country.”<sup>35</sup> This is from Federalist 10, which points to the institutions of government—the medium—where representatives refine popular understandings. Madison repeats this argument in his defense of the Senate, when clashing with the House, as a “temperate and respectful body of citizens” that can correct the “public mind.”<sup>36</sup>

Consider that the institutions of the national government represent different versions of the people. The people are not represented as a single entity, but are broken into different versions, each represented in our national institutions. Members of the House represent small districts that are likely to have similar interests and opinions, though drawn together in a way that speaks to the “great theatre of the United States.”<sup>37</sup> Senators represent the whole people of their respective states, which necessary broadens the range of interests and views represented giving it a “due sense of national character”.<sup>38</sup> The president does represent the people as a whole, but not in a national

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<sup>35</sup> Madison, Federalist 10, 51.

<sup>36</sup> Madison, Federalist 63, 320.

<sup>37</sup> Madison, Federalist 53, 274.

<sup>38</sup> Madison, Federalist 63, 318.

plebiscite, though as Jeremy Bailey notes Madison did in time come to see the president as representative of national will in a way that balanced against the Congress representing a complex version of the public.<sup>39</sup> And the federal judiciary, by way of the appointment process and life tenure, is distant from the people.

Even the terms of national offices, staggered as they are, was designed to both give voice to the people in different capacities, as well as to shape that voice. The two-year term of Representatives keeps them close to the people and allows for an immediate expression of popular understandings based on a range and variety of opinions reflected in the variety of House districts. A six-year term in the Senate, on the other hand, allows for a longer-range vision, which can resist popular passions for “enlightened policy” and an “attachment to the public good.”<sup>40</sup> The four-year term of the presidency similarly allows for resistance to “every sudden breeze of passion” or “every transient impulse” of the people, while also broadening to the whole people, diluting the more impassioned voices, to strike a balance among the multitude of interests and voices across the nation.<sup>41</sup> By way of the clash of different interests and ideas, nourished by institutional design, the Madisonian vision seeks the refinement and enlargement of the public mind. As Madison said, particularly in a large country, it is often difficult for the public’s “real opinion to be ascertained.”<sup>42</sup> Public opinion is not a simple given; nor, even if it can be “ascertained,”

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<sup>39</sup> Bailey, *James Madison and Constitutional Imperfection*, 66.

<sup>40</sup> Madison, Federalist 63, 325.

<sup>41</sup> Hamilton, Federalist 70, 362.

<sup>42</sup> Madison, “Public Opinion,” *The National Gazette*, December 19, 1791.

is it necessarily reflective of the public good. When Madison spoke of the “permanent and aggregate interests” of the community or the public good, he had something in mind that was more objective than interest group bargaining.<sup>43</sup> At the same time, this was something constructed within political institutions relying on civil society, as he rejected the idea of a “will independent of the society itself.”<sup>44</sup> For Madison, the multiplicity of interests did not preclude a genuine common interest.<sup>45</sup> Yet this is just where institutional design could help provide for political leadership even while Madison knew that statesman would not always be at the helm; indeed, precisely because they would not, institutions could help facilitate the construction of a common good. The Madisonian vision sought to force this recognition by requiring the building of complex political majorities made necessary by the large republic and a system of separated power.

Much of Madison’s argument about the large republic was speculative—and has only been partially confirmed in the two hundred plus years of representative democracy in America. He wrote eloquently about the passions of the public sitting in judgment rather than its reason. He resisted the popular impulse not simply because he knew that “men were not angels”—which applies just as powerfully to those in power—but because he worried that in the ordinary course of things the public might be inflamed or misled. While this positions Madison as a critic of pure democracy, he was nevertheless a defender of *popular government*. Madison attempted to design American political

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<sup>43</sup> Madison, Federalist 10, .

<sup>44</sup> Madison, Federalist 51, 266.

<sup>45</sup> Gibson, “Madison’s Republican Remedy,” 267.



institutions to overcome its weaknesses, which required enlightening the public mind, even while ultimately being dependent on the public. Madison emphasizes this understanding, and almost certainly comes to it more fully, in the battles of 1790—particularly over the issue of freedom of speech—as those in power become the crucial threat to the future of republican government.

#### <A> Intermediary Institutions and the Public Mind

In the debates over the framing and ratification of the Constitution, Madison played up the importance of the government controlling the governed by way of institutional design and enlightened representation.<sup>46</sup> In the 1790s Madison's defense of republican government was more deeply concerned with those in power. To be sure, Madison repeatedly voiced this concern in his defense of the Constitution.<sup>47</sup> Yet with deep divisions on foundational constitutional questions throughout the 1790s—questions of war and peace, the reach of national power, and freedom of speech—Madison came to defend extra-constitutional means of organizing and shaping the public mind. This included political parties—or at least proto-political parties—along with newspapers and educational institutions as essential to making representative democracy work under the Constitution. Madison's initial efforts during this period included his essays for the party press, where he came to articulate a Republican vision at odds with the Federalists.

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<sup>46</sup> Madison, Federalist 51, 264.

<sup>47</sup> Madison, Federalist 55, 285, notes that republican government depends more on virtuous characteristics than other forms of government.

Madison, of course, was a leading Federalist—indeed, one of two key authors of *The Federalist*—when it came to defending and ratifying the Constitution. Yet he would break with his co-author Alexander Hamilton on key issues, concerned that Federalists were, in fact, pushing against republican government. The Alien and Sedition Acts of 1798 brought this out just before the election of 1800.

There is an important and longstanding scholarly debate over Madison’s consistency. I am not concerned with that debate except to say that scholars can tend to treat Madison as a philosophical thinker rather than a political actor. Madison was a deep political thinker, but he was also a political actor who was engaged in bringing his political understandings and principles to life in the conflicted world of late eighteenth and early nineteenth century America. It is best to understand his writings and his actions in the 1790s as wrestling with constitutional development in the early years of the Republic where he was attempting to secure the promise of republican government just as he was doing in the 1780s writing as Publius. Madison’s tone certainly changed as he learned from events, but on the essentials of republican government (if not all the particulars) Madison’s arguments were largely consistent.

Colleen Sheehan in particular has focused on his “party press” essays and “Notes on Government” to illuminate Madison’s republicanism as preoccupied by shaping, mobilizing, and guiding public opinion as the animating spirit of self-government. Sheehan overstates her case (especially in downplaying the liberal features of Madison’s thought), but she is persuasive in illustrating how the themes evident in these later essays are evident in his essays as Publius in *The Federalist* as well—even in the vaunted *Federalist* 10. As Sheehan argues, “Public opinion is not the sum of ephemeral passions

and narrow interests; it is not an aggregate of uninformed minds and wills.”<sup>48</sup> Rather, it is something to be refined and constructed—within political institutions to be sure—but also by way of political parties, newspapers, and educational institutions.

I turn to Madison’s arguments about free speech in challenging the constitutionality of the Sedition Act of 1798 because they are often overlooked in highlighting his republican understandings. The Sedition Act allowed the government to prosecute its critics for seditious libel effectively criminalizing criticism of the government.<sup>49</sup> Purportedly concerned about being drawn into war, preoccupied by the makeup of recent immigrants, and worried about agitation against the government, Congress passed the Alien and Sedition acts together to empower the government to preserve itself against such agitation. The Sedition Act made it a crime to write or speak “false, scandalous and malicious” things against the government with the intent to defame it or bring it into contempt or disrepute.

Madison’s critique of the Sedition Act deepened his understanding of republican government and helped forge a crucial constitutional development during this period: legitimating organized opposition to the party in power.<sup>50</sup> The debate around the Sedition

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<sup>48</sup> Colleen A. Sheehan, *James Madison and the Spirit of Republican Self-Government* (New York: Cambridge University Press, 2009), 79.

<sup>49</sup> Terri Diane Halperin, *The Alien and Sedition Acts of 1798* (Baltimore, MD: Johns Hopkins University Press, 2016), 29.

<sup>50</sup> Bailey, *James Madison and Constitutional Imperfection*, 105, 107. See also, Gerald Leonard and Saul Cornell, *The Partisan Republic: Democracy, Exclusion, and the Fall of*

Act was inextricably linked to the development of two political parties vying for control of the government. If there was agreement in 1787-88 on ratification of the Constitution—where a Madison and a Hamilton could unite—there was profound disagreement in the 1790s over the meaning of the new Constitution. The development of America’s political parties stemmed from these disagreements. Yet if Madison’s analysis of republican politics in *The Federalist* focused largely on political institutions, as Rakove notes his actions in the 1790s focused more on politics “out-of-doors.”<sup>51</sup> Madison’s action and writings criticizing the Sedition Act were a way to mobilize and educate the public to preserve the Constitution against representatives—indeed, a president—who were threatening popular government itself.

To better understand Madison’s argument and its deep link to popular government, let me begin with the defense of the Sedition Act by leading Federalists who followed the common law jurist William Blackstone to gloss the meaning of the freedom of speech and the press. Federalists argued that punishing seditious libel was entirely consistent with freedom of speech: given that free republican government was more dependent on the “good opinion of the people” than other forms of government, it was imperative that such a government be able to punish false speech. As Supreme Court Justice Samuel Chase put it, a licentious press was particularly harmful to the republican

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*the Founders’ Constitution, 1780s-1830s* (New York: Cambridge University Press, 2019).

<sup>51</sup> Rakove, “Politics in Doors and Out-of-Doors,” 373.

form of government because it could “corrupt the public opinion . . . and destroy the morals of the people.”<sup>52</sup>

In contrast, Madison argued that republican government requires “the right of freely examining public characters and measures.” This was crucial, in a republican government, “to the just exercise of [the peoples’] electoral rights.” Indeed, Madison went so far as to insist that free communication among the people in evaluating public issues and public characters with the intent of influencing fellow citizens and pressuring the government is “justly deemed the only effectual guardian of every other right.”<sup>53</sup> Federalists rejected this understanding of public debate. While they acknowledged the importance of elections to republican government, leading Federalists insisted that once the government was in power the minority must “surrender up their judgment.” Only those whom the nation has chosen by way of elections may weigh in on such questions. Many Federalists doubted it was the place of an ordinary citizen to venture public criticism of the sitting government. Once elections had occurred, “private opinion must give way to public judgment, or there must be the end of government.”<sup>54</sup> At the trial of Thomas Cooper, who was an able defender of freedom of speech and the press, the

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<sup>52</sup> Wendell Bird, *Press and Speech Under Assault: The Early Supreme Court Justices, the Sedition Act of 1798, and the Campaign against Dissent* (New York: Oxford University Press, 2016), 397.

<sup>53</sup> Madison, Report of the Virginia Resolutions, in Philip B. Kurland and Ralph Lerner, eds., *Founders’ Constitution* (Indianapolis: Liberty Fund, 1987), V: 144-145.

<sup>54</sup> Bird, *Press and Speech under Assault*, 297.

prosecutor reflected this mindset: “It is no less than to call into decision whether Thomas Cooper, the defendant, or the President of the United States, to whom this country has thought proper to confide its most important interests, is best qualified to judge whether the measures adopted by our government are calculated to preserve the peace and promote the happiness of America.”<sup>55</sup> Cooper, in short, was in no position to second guess President Adams because Adams had been elected. In publicly criticizing Adams for his public deeds, Cooper was found guilty of seditious libel. He was fined \$400 and sent to prison for six months for voicing these criticisms.

Madison categorically rejected this understanding of freedom of speech as at odd with the republican government. In the American system, power flows from the people, which requires a robust conception of freedom of speech, allowing the people—the popular sovereign—to criticize the government, which is bound by the Constitution. The nature of governments elective, limited, and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion than might be tolerated by the genius of such a government as that of Great Britain. In the latter, it is a maxim that the King, an hereditary, not a responsible magistrate, can do no wrong, and that the Legislature, which in two-thirds of its composition, is also hereditary, not responsible, can do what it pleases. In the United States the executive magistrates are not held to be infallible, nor the Legislatures to be omnipotent; and both elective, are both responsible. Is it not natural and

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<sup>55</sup> Cooper, *An Account of the Trial of Thomas Cooper*, 35.

necessary, under such different circumstances, that a different degree of freedom in the use of the press should be contemplated?<sup>56</sup>

A popular government of the sort the Constitution brought into being demands that citizens and the press have freedom in canvassing “the merits and measures of public men.” In fact, Madison went so far as to argue “it is natural and proper, that, according to the cause and degree of their faults, they should be brought into contempt and disrepute, and incur the hatred of the people.”<sup>57</sup> Whether the government ought to defame “can only be determined by a free examination” and “free communication among the people.”<sup>58</sup> Not only would this require criticism of public officials and public policy, it would allow criticism rooted in differing political opinions. Holding the government accountable requires information and debate that speaks to the “merits and demerits” of public officials and their policies.<sup>59</sup> If the party in power can use governmental power to silence opponents, to criminalize differences of political opinion, the political process is undermined and republican government corroded. Public officials cannot be held to be infallible.

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<sup>56</sup> James Madison, “Report on the Virginia Resolutions” in Philip B. Kurland and Ralph Lerner, eds., *The Founders Constitution* Vol 5 (Chicago: University of Chicago Press, 1987), 142.

<sup>57</sup> Madison, Report of the Virginia Resolutions, 144.

<sup>58</sup> Madison, Report of the Virginia Resolutions, 144.

<sup>59</sup> Madison, Report of the Virginia Resolutions, 145.

Madison made this argument in helping to pass the Virginia Resolutions in the state legislature, which were then published and sent to the other states and to Congress to persuade these bodies that the Sedition Act was unconstitutional and ought to be repealed. Madison further took to the newspapers to defend the Democratic-Republican Party in its fight against the Sedition Act and the Adams Administration more generally. His defense of the Virginia Resolutions in the Virginia Report was written to influence election of 1800. The arguments over the Sedition Act were part of the creation of political parties and the development of a distinction between the government and political parties, which would necessarily allow for what we now think of as the loyal opposition: parties that are loyal to the government itself and the constitutional scheme, but disagree, often profoundly, with the party in power. To put this in perspective, consider that the election of 1800, when Adams stepped down and Jefferson stepped into the presidency, is often thought of as the first peaceful transition of power between opposing political parties within a constitutional scheme. It was an essential step in securing republican government. Yet the concerns that animated Madison's critique of the Sedition Act, and pushed him to articulate a robust understanding of freedom of speech in a republican government, were long-standing. They were evident in his first foray into politics with the *Memorial and Remonstrance*. The *Memorial* argued for "the equal freedom" of individuals to follow the dictates of their conscience with regard to religion. This required, much as with freedom of speech and the press, the government to allow the flourishing of different opinions within civil society. This argument, as I have noted, presaged the argument of Federalist 10. In the Virginia Report, Madison similarly insisted on rights of conscience and freedom of speech—insisting the individual mind



must be free to reach judgments, whether about religion or politics, on its own accord. In each instance, Madison took up his pen to persuade his fellow citizens and bring pressure on those in power. The *Memorial* was written to stop a bill in the Virginia House of Delegates that he viewed as akin to an establishment of religion that harmed religious liberty. In successfully halting the assessment bill, he then helped secure passage of the Virginia Statute on Religious Freedom. In a similar fashion, the Virginia Resolution was written to fellow citizens and the representatives of various states legislature to persuade Congress to repeal the Sedition Act of 1798. More ambitiously, the lengthy Virginia Report was written to influence the election of 1800.

Madison was engaged in shaping the public mind on such issues—highlighting the relationship between civil society and formal institutions. When it came to shaping American’s understanding of freedom of speech and the press in a republican government, this was a continuation of Madison’s work in framing the Bill of Rights. In a famous letter to Jefferson, Madison argued that a bill of rights could be most useful in educating the public: “The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”<sup>60</sup> It is also important to recall that in defending freedom of speech, Madison had initially included a provision in what would become the Bill of Rights that protected both speech and religion against the states: “No state shall violate the equal rights of

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<sup>60</sup> Madison to Thomas Jefferson, 17 October 1788, accessed August 11, 2020 (<https://founders.archives.gov/documents/Madison/01-11-02-0218>).

conscience, or the freedom of the press.”<sup>61</sup> Introduced in 1789, this proposed amendment to the Constitution never made it out of Congress.

Yet Madison echoed these concerns throughout his life. Writing on importance of public education in the 1820s, he insisted, “Learned institutions ought to be the favorite objects with every free people. They throw that light over the public mind which is the best security against crafty and dangerous encroachments on the public liberty.”<sup>62</sup>

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Madison defended republicanism as a form of popular government when popular government was novel and much in need of a defense. To be sure, Madison only set in motion a republican form of government that required two centuries of struggle to make genuinely republican. And just as surely, America’s constitutional scheme has not worked fully in accord with a Madisonian vision. And a Madisonian mindset would have us learn from experience rather than be beholden to the past. But Madison’s worries about the “popular arts” where the people might be “misled by the artful misrepresentations of interested men”<sup>63</sup> remains an enduring problem of popular government. As does his worry that government might become abusive of its power or disconnected from the people it is meant to serve. Striking the right balance between the

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<sup>61</sup> Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore, MD: Johns Hopkins University Press, 1991),13.

<sup>62</sup> Madison to William T. Barry, August 4, 1822.

<sup>63</sup> Madison, *Federalist* 63, 320.

government and the people—the degree of dependence and independence between them—may be the enduring question of republican government. It was Madison’s central preoccupation as constitutional thinker and political actor.