John M. Ashbrook Center
for Public Affairs
Ashland University


Executive Staff: Charles E. Parton, Director; Bradford P. Wilson, Deputy Director; Peter W. Schramm, Associate Director; C. Bradley Thompson, Coordinator of Special Programs; Ken Masugi, Senior Fellow; Thomas W. Roepke, Assistant to the Director; Cheryl Given, Administrative Assistant.

The Ashbrook Center was inaugurated on May 9, 1983, by President Ronald Reagan at Ashland University. The Family and many friends of John M. Ashbrook determined that his memory would be best honored by the establishment of a university-based institute for the study of public affairs. Ashland University was selected as the Center’s home because of its long-standing liberal arts tradition, its location in John Ashbrook’s Congressional district, and its enthusiasm for integrating the plan of the Center into its academic program. The bylaws of the Ashbrook Center, as approved by the Boards of the Ashbrook Center and Ashland University, affiliate the Ashbrook Center and its academic program with Ashland University while delegating control of its budget and personnel to the Ashbrook Center.

The Ashbrook Center is devoted to the study, teaching and perpetuation of the great tradition of America, to which John Ashbrook dedicated his life’s work. At the core of that tradition lies the politics of freedom championed by our revolutionary forefathers. The Ashbrook Center’s programs are directed to the scholarly defense of individual liberty, limited constitutional government and civic morality, which together constitute our democratic way of life.
The Federalist
Post-1989

By
R. F. Hassing
About the Author

R.F. Hassing holds advanced degrees in physics, political theory, and philosophy from Cornell University, University of Toronto, and Catholic University. He visited Romania in 1974 as a National Academy of Sciences exchange grantee, and returned several times thereafter. In 1992 he began a continuing collaboration with the new political science department of the University of Cluj, Romania. He has published articles in physics and philosophy of nature, and is currently on the faculty of the School of Philosophy, Catholic University.

TABLE OF CONTENTS

Preface vii

Introduction: Republicanism in the Postcommunist Transition 1

On Federalist 10 and Faction: A Universal Problem, an American Solution 7
Introduction: Distrust and Alarm 7
Human Nature and the Causes of Faction 9
Majorities, Minorities, and the Extended Republic 20
Conclusion 24

On Federalist 47-52: Separation of Powers, and Checks and Balances 29
On Federalist 47 30
On Federalist 48 37
On Federalist 49 42
On Federalist 50 45
On Federalist 51 47

Summary of Principal Results and Conclusions 55

Acknowledgement 63

Notes 65

Copyright © 1995
John M. Ashbrook Center for Public Affairs
Ashland University

ISBN 1-878802-19-4
Preface

Does The Federalist have anything to offer in the postcommunist transition? Can this American reflection on constitutionalism make good, in a radically different context, "that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government"? The extraordinary events, and the arduous aftermath, of 1989 pose again Hamilton’s great 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." What happens to us by accident and force is beyond our power to control, like the weather. Is it thus within human power to make self-government good government, or will the forces and accidents of history bring the present endeavors to a disastrous conclusion? Must disorder and despotism come like bad weather?

It is not hard to find reasons for pessimism in The Federalist itself. The severity of the problem of faction is repeatedly made clear, indelibly so by Madison in Nos. 10 and 37:

So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions
have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.3

The history of almost all the great councils and consultations held among mankind for reconciling their discordant opinions, assuaging their mutual jealousies and adjusting their respective interests, is a history of factions, contentions, and disappointments, and may be classed among the most dark and degrading pictures which display the infirmities and depravities of the human character."4

Jay emphasizes in Federalist 2 that — from the beginning and through no effort of their own — the Americans were free of precisely those divisions that have fueled violent conflicts in the former Soviet Bloc: “Providence has been pleased to give this one connected country to one united people — a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government...”5 And the two non-European groups that did exist in early America, black African slaves and indigenous red Indians, continue to define social divisions recalcitrant to adequate solution. Slavery culminated in the American Civil War, a violent factional conflict, while the American Indians were killed off or marginalized on reservations by the advancing white majority. The American constitutional design — liberal democracy according to reflection and choice — has been less than a complete success on its native soil.6 Is it not then mere American naivete to think that liberal constitutionalism can be transplanted in countries and societies with deep divisions and hostile neighbors? Must we not accept the sad fact that accident and force, not intelligence and technique, decide political regimes? On this account, the universality, or universal applicability of our principles and procedures is an illusion facilitated by our own partiality, by our failure to see the larger whole that limits our part

and our powers of action. Lacking the requisite wisdom, we run the risk of willing the good and working the bad, and not for the first time. The difficulty with this position is the unwarranted conclusion to which it tends to lead: we do nothing.

The best reason for taking The Federalist seriously in the postcommunist context is the fact that most countries of the former Soviet Bloc have lacked a genuine political literature for 50 years or more. Thus, for example, the concept of checks and balances is unknown in many of the postcommunist countries.7 Yet, in the understanding of The Federalist, checks and balances are of crucial importance for moderate politics. The related ideas of deliberative democracy and a multicentric political system are unknown in the East — precisely where they are most needed.8 And it is unlikely that the new students of government and politics in the former Soviet Bloc will gain an adequate understanding of these things by the study of West European parliamentary democracies, in which checks and balances are either absent or only weakly present. The parliamentary systems are, in general, designed for an energetic implementation of the governmental majority’s program. Accordingly, the boundary dividing those in power from those who are not is often abrupt. In spite of democratic freedoms of speech and association, significant segments of society are not effectively represented. This may be acceptable in those countries of Western Europe that have benefited from a half century of peace, freedom, and overall prosperity. But in societies deeply divided by ethnic identity, social class, religion, and especially by relationship to the former Communist regime (thus by wealth and poverty), a more balanced, multicentric system — affording multiple points of access for individuals and groups — would be wiser. It would be wiser because it can ameliorate the strong tendency of postcommunist countries to become
oligarchies, that is, regimes superficially democratic wherein, however, control of wealth and property remains exclusively in the hands of the formerly privileged class: the nomenklatura and the secret police. This is a principal rationale for the study of American constitutionalism in the present context.

More generally, the lack of an effective (non-ideological) political discourse in the former Soviet Bloc has facilitated an apolitical or antipolitical intellectual tradition. Romantic communitarianism or “archaism,” antiliberal (isolationist) nationalism, and degraded versions of Herder are typical representatives. These currents of thought are de facto diversions from the realism of the major tradition of political philosophy from Aristotle through Montesquieu, The Federalist, and Tocqueville. As a result, the judgment (of both intellectuals and ordinary people) is often unpracticed in linking cause and effect in political experience. And this in turn leads to a lack of clarity concerning the most important questions of the hour: What is democracy? Is the current, widespread, precarious situation caused by democratization or the failure to democratize?

It is important to emphasize that the following account of The Federalist is addressed to students and teachers in the postcommunist countries, and not primarily to American readers. The specific character of a people or political culture requires great care, even “extreme circumspection,” in the application of common principles. For present purposes, this truth becomes clearest in light of Madison’s observation “that liberty may be endangered by the abuses of liberty as well as by the abuses of power... and that the former [abuses of liberty], rather than the latter, is apparently most to be apprehended by the United States.” In contrast, it is historically rooted abuse of power that is the problem in the East. This constitutes a major difference between the American and the postcommunist contexts.

and gives rise to focus and emphasis in the interpretation of The Federalist that differ from those most characteristic of the American problematic. In the following, it will thus be necessary to combine detailed textual analysis on points familiar to American scholars with illustrative examples taken from political experiences alien to Americans but all too familiar in postcommunist societies.
Introduction: Republicanism in the Postcommunist Transition

"Democracy" is probably the most common word in our current political vocabulary. Following the extraordinary events of 1989, democracy is universally acclaimed. A few people defend monarchy; no one speaks of, much less defends, aristocracy; virtually everyone wants democracy. But the content of democracy, as the term is now used, is rather thin. Democracy seems to mean three things: 1) pluralism, that is, tolerance of nonviolent competition between parties and groups; 2) popular elections to determine the representation of parties and groups in governing; 3) human rights, that is, protection for a broad range of individual and group rights whose foundations, corresponding responsibilities, and mutual compatibility are rarely made clear. The long history of democracy is seldom studied. Thus we have forgotten the doubts once attendant to democracy, doubts deriving from the simple fact that, whatever else it may involve, democracy always means majority rule. But wise judgment is often lacking in majority opinion, or the good judgment of the majority is easily distorted (accidentally or deliberately), hence the historic concern that wisdom and consent will fall too far apart for democracy to succeed. The problem was crystalized in the execution of Socrates by the Athenian democracy. Hitler
came to power through free elections. Churchill was
democratically defeated on the eve of crucial negotiations
with Stalin over the fate of Eastern Europe. Indeed it was
Churchill who said that “democracy is the worst form of
government, except [for] all those other forms that have
been tried from time to time.” This means that democracy
shines only in comparison to worse alternatives, like commun-
ism. When such regimes cease to threaten democracy,
democracy’s intrinsic and serious defects again become
apparent. And this in turn means that those most disap-
pointed with democracy will again be tempted to try a new
alternative. Failure to take this seriously — a failure
resulting from our own decent prejudice in favor of democ-
...
such as the relation between character and governing, a major theme of *Federalist* 52-83, which examine the human qualities required for the different branches of government (legislative, executive, judiciary). To remedy this defect, at least partially, relevant material from other essays are used in the following analysis.

*Federalist* 10 was written by Madison and treats the problem of faction. According to Madison, violent conflict between factions is the fundamental problem of republican government. In this essay, Madison presents the theory of the extended commercial republic as the antidote to faction.

It is important to remark that the term "party," used frequently by Madison in *Federalist* 10, means any group with an actual or potential effect on the common good or the rights of individuals. Thus the great "variety of parties and interests" characteristic of the extended commercial republic does not mean that there exist many political parties in the contemporary Western sense. On the contrary, the United States has only two major political parties, the Democratic Party and the Republican Party, although America is the best example of the regime promoted in *Federalist* 10. The relation between Madison's "parties and interests" and political parties in the contemporary Western sense is briefly discussed below, in connection with checks and balances.16

The five essays, *Federalist* 47-51, also by Madison, treat separation of powers and checks and balances. According to Montesquieu, fear is the principle of tyranny, and political liberty is defined in terms of "government [in which] one citizen cannot fear another citizen."17 The necessary condition of such liberty is separation of legislative, executive, and judiciary powers. John Locke states that the legislative and executive powers ought to be separated so that the government does not come to have a "distinct interest from the rest of the community,"18 that is, so that those who hold power do not become an alien body in the middle of society. The problem, as Locke puts it, is "human frailty, apt to grasp at power."19 Hamilton places "the regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior" among the powerful means discovered or perfected by modern political science.20 By these means, "the excellencies of republican government may be retained and its imperfections lessened or avoided."21 *The Federalist* clearly maintains that the republican form of government has internal defects and that separation of powers is part of the solution. In contrast, the French Revolution insisted that the Republic in itself has no defects, only enemies.22 Accordingly, Turgot and Condorcet argued that the American practice of separation of powers was appropriate in a monarchy, but not in a republic.23 The question, "What is a good republic?" is thus intimately involved with the interpretation of separation of powers.
On *Federalist* 10 and Faction:
A Universal Problem,
an American Solution

Introduction: Distrust and Alarm

Although "the valuable improvements made by the American [state] constitutions ... cannot certainly be too much admired, ... [a] prevailing and increasing distrust of public engagements and [an] alarm for private rights ... are echoed from one end of the continent to the other." The situation is bad because of "the unsteadiness and injustice with which a factious spirit has tainted our public administration." The problem is a permanent one for representative governments. For example, the factional conflicts with which premodern republics were burdened are vividly described by Hamilton in the preceding essay, *Federalist* 9:

It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in state of perpetual vibration between the extremes of tyranny and anarchy. ... From the disorders that disfigure the annals of those
republics the advocates of despotism have drawn arguments, not only against the forms of republican government, but against the very principles of civil liberty. They have decried all free government as inconsistent with the order of society, and have indulged themselves in malicious exaltation over its friends and partisans.

Faced with the violence of factional conflict, the people themselves can be persuaded by "the advocates of despotism" to choose a dictator for the sake of stability and the national unity. Despotic political men know this well. They can promote chaos — by instigating ethnic hatred and ruining the economy — precisely to preserve or restore their power against liberalizing forces. For example:

Since the spring of 1991... Yugoslavia has been consumed by a cruel, multilateral war that has left hundreds of thousands dead, turned millions more into refugees, and horrified the entire world. Although often explained and even justified in terms of ethnicity and the historical and cultural legacies of the Balkans, the war has in fact been part of a purposeful and rational strategy planned and carried out by the minority of political actors in Serbia who were the most threatened by democratizing and liberalizing currents within the Serbian Communist party. This coalition used the rhetoric of ethnicity and nationalism to provoke violent conflict along ethnic lines.... It thus explicitly sought to discredit market-based economic reform and liberalizing political reform as "anti-Serbian." 27

Madison defines a faction in terms of passions and interests "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." 28 Here "passion" means, on the one hand, powerful attachments, and, on the other, anger and hatred that produce violent conflict. "Interest" means, in the first place, material interest, in money, privileges and possessions. We observe that a national minority can be a local majority, and thus a national majority can be a local minority, for example, Serbs in Kosovo. The problem remains the same, namely, the potential for violent conflict.

The methods of treatment are two: removing the causes of faction, and controlling its effects. It will turn out that the causes of faction prevent its removal from free societies. Madison's account of the causes of faction is thus of great importance; it entails a compact but remarkably general theory of human nature and political life. The account of controlling the effects of faction leads to the problem of majority faction. From these two accounts results the concept of the extended commercial republic with its "diversity of parties and interests" for which Federalist 10 is famous.

Human Nature and the Causes of Faction

There are two methods of removing the causes of faction: by destroying liberty; and by giving to all citizens "the same opinions, the same passions, and the same interests." The destruction of liberty is immediately excluded, for the cure would be worse than the disease.

The sixth paragraph of Federalist 10 begins Madison's account of human nature and the causes of faction. The argument is fundamental to Madison's understanding of moderate politics. It reappears explicitly in Federalist 48-51 on the importance of checks and balances in securing the separation of powers. Thus the American concept of separation of powers cannot be understood independently of the reasoning of Federalist 10.

Can the opinions, passions, and interests of each and every citizen be made the same? Can there be unanimity of belief and feeling, and unity of interest in a human society,
as there is, say, in a beehive? We doubt it very much. Madison grounds our doubt in short but powerful arguments from certain factors ubiquitous in our own experience. In the first argument, the imperfection of human reason guarantees that, in any society with freedom of speech, there will be a diversity of opinions on one and the same issue. Self-love, specifically, the desire to be first in the eyes of others, is a powerful human motive. Fallible reason and self-love can influence each other so that we become passionately attached to fallible opinions. Passionate attachment to opposed opinions produces conflict among men. This is the source of passionately opinionated factions, one of four types of faction explicated in *Federalist* 10.

In the next argument, the differences in the capacities, or, as Madison calls them, “faculties,” of individuals to acquire property divide society into groups and classes with opposed interests. Madison states that the first objective of free government is to protect these different and unequal faculties for acquiring property. Thus every individual should be able to exercise his or her own capacities to the greatest extent, consistent with the equal right of others to do the same and with the common good. The purpose of government is thus not, as it was for Aristotle, the perfection of men’s faculties according to an objective moral hierarchy; it is not, in other words, the formation of character through the promotion of virtue or human excellence. It is rather to delimit and secure a protected “space” around every individual, within which one is free to act as one chooses. Therefore, law is *limitative* for the individual, not *formative* of the community. This is the defining mark of liberalism. A government that protects the freedom of individuals through a system of majority rule is thus a *liberal democracy*. Contrasted with the oppressions of dictatorship, the liberal principle is salvific. But it is clear that the defining purpose of liberal democracy — the protection of freedom — cannot be achieved if society is beset (1) with violent conflict between extremist factions or (2) with class conflict between rich and poor. What solution does Madison offer?

The fallibility of reason, the force and forms of human self-love, and the differences in the productive and acquisitive capacities of individuals are, for Madison, properties of human nature: “The latent causes of faction are thus sown in the nature of man.” Attempting to abolish these causes means a war against human nature, and thus a society of unhappy individuals. Madison’s solution will consist not in removing the causes, but in controlling the effects of faction. But this solution depends fundamentally on the further analysis of faction. For different species of faction are “brought into different degrees of activity, according to the different circumstances of civil society.” There are (at least) four types of faction, of which we have been introduced to two, namely, passionately opinionated factions, and factions based on interest in property. From the further elaboration of these, two more types of faction will be explicated. We shall see that three of the resulting four types of faction are always destructive of the possibility of decent politics, because destructive of the productive and acquisitive faculties of large numbers of individuals. The fourth type of faction is milder. Since factions are inevitable in free society, Madison’s strategy is to encourage the less destructive type, and to marginalize the others by the promotion of the right “circumstances of civil society.”

What then are the four species of faction? Two of them are based on passion, the other two on material interest. The first we have seen above, and Madison now describes it in terms of a “zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice.” Included here are religious and ideological fanaticism, antisemitism, xenophobia, and, in general, shared suspicions generated by
conspiracy theories. The second type of faction is defined by "an attachment to different leaders... or to persons of other descriptions whose fortunes have been interesting to the human passions."36 The first type of faction is essentially related to opinion; the second type seems not to be based on opinion, but rather on intense loyalty to charismatic but potentially destructive leaders. Both, however, are united and actuated by the passions of love and hate, regardless of material interest. If they reach a high level of activity, these two species of faction are fatal: they have "divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good."37 People with different zealous opinions and passionate attachments cannot be satisfied to agree to disagree, or to try to persuade each other through dialogue and argument. Such people are full of anger and want to persecute as an end in itself.38

The Yugoslav war provides a paradigmatic example. Consider the following description by Cijeto Job, a former Yugoslav ambassador, of how the war was prepared by destructive opinions that festered within society, opinions promoted by certain opportunistic intellectuals:

These were people older than I, [Communist] party members and former [Tito] partisans — and their words and reasoning reflected only all-consuming hate of other people — narcissistic and paranoid, defensive and aggressive. In Belgrade, Albanians of Kosovo were derided as "Siptars": "good boys" only when doing menial work, sleeping in cellars, eating bread and onions. But when they asserted themselves in their autonomous province and challenged Serbian rule, even liberal Serbian friends of ours started describing them in mindlessly contradictory stereotypes — stupid but well organized, lazy but thrifty, anti-state plotters financed by money earned abroad. Then came ludicrous, sinister ravings by "historians" about an eternal global anti-Serbian conspiracy that included Tito, the Vatican, Stalin, Germans, the CIA, Albanians, NATO, Islam, the U.S. Senate, Western news media. False "scientific" tracts proliferate: In Serbia, there are tracts describing Serbs as "the most ancient people"; in Croatia, solemn dissertations on "900 years of Croatian parliamentary life." Both peoples celebrate a rich medieval past as proof of their superior cultural standing. Some Slovenes try to hide the fact that their first university was only founded in 1918. Some Bosnians seek to legitimize Bosnia and Herzegovina's claim of independence by citing the "national church" of medieval Bogomil heretics. It is as if new nations and states cannot come into being without such lineage. These irrationalities are partly traceable to the fact that with only a few brief intervals, we Yugoslavs were constantly under foreign rule, denied nation-building processes. We were barely touched by the Renaissance, the Enlightenment and humanism, and always aggressively compensated for ethnic and national insecurity with a pathetic insistence on our separate preeminence.39

Slavenka Drakulic describes the descent into war in terms of an opinion or idea of "national homogenization," first promulgated by writers, then exploited by demagogues:

You may not realize that it is the intellectuals, writers, and journalists who were the real avant-garde of the war. ... I remember when it started, when Slovenian and Serbian writers began writing open letters to each other in the mid-eighties ... about national literature as education. ... The question was, of course, how much from Slovenian and from Serbian literature should be included in the national curriculum. ... At that point, sides had already been drawn. The atmosphere was heating up. The Yugoslav Writers Association ... held meetings. It was the beginning of the long way down to
the bottom of the war. I am not saying that the writers caused the war or started it. I am saying that national homogenization, basically the cause of the war, began then and there, on the intellectual and cultural level. I have not even mentioned the declining economic conditions and the other social problems the country faced. Here, I am speaking of ideas. I am saying that the ideas about dividing the educational, literary territory, the territory of writers, started there, and there the idea of division has stayed ever since. . . . Then, the media split and the television audiences in each republic didn't have the faintest clue as to what the people were watching in the other republics. . . . This isolation was engineered on purpose, for propaganda; the less information, the more propaganda. . . . When Milosevic came into power, he did a very simple thing: he replaced all the key persons in the media. Then the center of power was in his camp; he was deliberating with his own people. It was a very old Bolshevik maneuver. And then the big game of openly blaming others, whoever they might be, could start. Of course, the name for it was nationalism. Perhaps that doesn't sound dangerous to you. But consider that this was a process that many faithful totalitarian minds had prepared for over six or seven years. They worked to legitimize national hatred. And they succeeded. If it doesn't sound dangerous enough, it certainly became dangerous, when Serbian writers and academics seriously embarked on outlining the blueprint for the new state, the greater Serbia. . . .

There remain two types of faction based on material interest. They are distinguished from the factions based on passionate attachments to opinions and persons in that they oppress primarily as a means to preserve or acquire wealth, not as an end in itself. . . . In view of these distinctions, the four kinds of faction are:

R. F. Hassing

Passion-based factions (that persecute as an end in itself):
1. based on attachment to opinions
2. based on attachment to persons
Interest-based factions (that oppress as a means to profit):
3. related to amount of property
4. related to type of property

The first species of faction based on interest (the third on the above list) arises from the difference between rich and poor, and is "the most common and durable source of factions . . . . Those who hold and those who are without property have ever formed distinct interests in society." Rigid inequality destroys the right of those without property to use their faculties for acquiring it; rigid inequality thus undermines the first objective of government, and leads to class hate and class conflict. Aristotle describes this type of factional division and its psychological effects:

In all cities there are three parts . . . the very wealthy, the very poor, and third, those in the middle between these. Since, however, it is agreed that what is moderate and middling is best, it is evident that in the case of the goods of fortune as well a middling possession is the best of all. For it is readiest to obey reason, while for one who is overly handsome, overly strong, overly well born, or overly wealthy — or the reverse of these things, overly poor, overly weak, or very lacking in honor — it is difficult to follow reason. The former sort tend to become arrogant and base on a grand scale, the latter malicious and base in petty ways; and acts of injustice are committed either through arrogance or through malice. . . . In addition, those who are preeminent in the goods of fortune — strength, wealth, friends, and the other things of this sort — neither wish to be ruled nor know how to be. This is something that marks them from the time they are children at home, for the effect of living in luxury is that they do not become habituated to being ruled even
at school; but those who are excessively needy with respect to these things are too humble. So the ones do not know how to rule but only how to be ruled, and then only in the manner of rule by a master, and the others do not know how to be ruled by any sort of rule, but only to rule in the manner of a master. What comes into being, then, is not a city of free persons but of slaves and masters, the ones consumed by envy, the others by contempt. Nothing is further removed from affection and from a political partnership; for partnership involves the element of affection — enemies do not wish to have even a journey in common. The city wishes at any rate to be made up of equal and similar persons to the extent possible, and this is most particularly the ease with the middling elements. So this city must necessarily be governed in the best fashion if it is made up of the [middle class].... Moreover, of citizens in cities these most particularly preserve themselves. For neither do they desire the things of others, as the poor do, nor others their [property], as the poor desire that of the wealthy; and as a result of not being plotted against or plotting against others they pass their time free from danger. .... It is clear, therefore, that the political partnership that depends on the middling sort is best as well, and that those cities are capable of being well governed in which the middling element is numerous. Thus it is the greatest good fortune for those who are engaged in politics to have a middling and sufficient property, because where some possess very many things and others nothing, either [rule of] the people in its extreme form must come into being, or unmixed oligarchy, or — as a result of both of these excesses — tyranny. For tyranny arises from the most headstrong sort of democracy and from oligarchy, but much less often from the middling sorts [of regime] and those close to them.45

This classic text describes a society divided into rigid classes of rich and poor, into men who, because of their arrogance or their envy, act like masters and slaves.

It is important to see that, despite their great differences, the rich and the poor have much in common: they cannot be reasonable, because their judgment is distorted by passions; they cannot, therefore, be free (freedom, for Aristotle, being a moral-intellectual condition of the soul, not absence of external constraints on our actions); finally, they have short lifetimes, since the regime is unstable against continual plots and factions. For these reasons, a middle class is a necessary condition of decent government, but the existence of a middle class is "the greatest good luck"; that is, it is not within our power to create a middle class intentionally, thus not within our power to establish "good government from reflection and choice." This is an important reason for the cautious reserve of ancient political thought concerning what we can expect from politics. Between Aristotle and The Federalist stands the revolution of modernity, of the 17th Century, characterized by its exaltation of human creative power in science and technology, politics and economics. John Locke, the philosophical founder of liberal democracy, is a participant in this revolution. In The Second Treatise of Government we find a powerful expression of the modern political attitude: "that prince who shall be so wise and godlike as by established laws of liberty to secure protection and encouragement to the honest industry of mankind, against the oppression of power and narrowness of party, will quickly be too hard for his neighbors."44 This is the audacious optimism of modern political thought: the right kind of government (together with modern technology) can liberate the productive initiative of individuals interested in a better life for themselves and their children, and thereby create a middle class. Only in this way can the political community avoid the trap of extreme divisions and degrading dictatorship. Aristotle saw the trap but was unaware of the power of what came to be called political economy. In this respect, the Lockean
lineage of the authors of The Federalist can be seen in the
last species of faction listed by Madison.

The last species of faction (the fourth on the above list)
is defined not by the amount of property, that is, by wealth
and poverty, but by the kind of property: "A landed interest,
a manufacturing interest, a mercantile interest, a moneyed
interest, with many lesser interests grow up of necessity in
civilized nations, and divide them into different classes,
actuated by different sentiments and views."45 We see that
these groups have "sentiments and views" instead of pas-
sions and opinions, and that they appear in "civilized
nations." Madison thus indicates that this species of faction
is less dangerous. Indeed, "the regulation of these various
and interfering interests forms the principal task of modern
legislation."46 In contrast to factions based on passion and
the conflict between extremes of rich and poor, which either
destroy or corrupt the legislative body, competition be-
tween interest groups is compatible with a free democracy,
and even forms the principal subject of "modern legisla-
tion." For groups defined by a material interest in agricul-
ture, tourism, commerce, manufacture, banking do not
hate or contemn each other. They can make legislative
compromises.47 They give people a stake in monetary profit,
and thereby in the improvement of their own material
condition and education, things not directly related to race,
religion, ethnicity, nationality, or social origins. They
diversify society in a way that can cut across and weaken
factional divisions of the more extreme kinds. In fact we
recognize these interest-based factions as the economic
sectors of a middle-class society with private ownership and
a market economy. They are the basis of political parties in
the contemporary Western sense. For example, the Demo-
cratic Party in the United States was originally based on farm
interests and labor unions. Madison offers a regime which
is based on, and which in turn promotes, the middle class

— a regime, thus, in which the most dangerous factions are
replaced by less dangerous factions, or by factions which,
through the generation of jobs and wealth, can benefit the
whole community (which would remove them from the
category of "faction" as Madison defines it). Conversely, the
lack of a diverse and efficient economy is a sufficient
condition for a high level of activity of the most dangerous
factions, as we see today in the countries of the former
Soviet Bloc and in the third world. For example, in 1993,
a group of Somali-Americans volunteered to return to
Somalia to work as interpreters for US and UN military
forces. They reported that, "their years in the United States
had made them far less clan-conscious, and more aware that
fierce clan loyalty is what put Somalia on its path of self-
destruction."48 The unresolved question is whether, in
order to promote a middle class, there must not first be a
middle class, i.e. the socio-economic conditions, the per-
sonal moral-intellectual qualities, and the associated legal
order are reciprocal causes of each other. This is the three-
way chicken-and-egg problem that now dominates the
postcommunist transition, and admits no theoretical solu-
tion.

For Madison, the alternatives in political life are few and
hard: either we get rid of factions but destroy liberty, or we
preserve liberty but must cope with factions — factions
based on passion or on interest, or, in the worst case, on
both. The problem of ethnic factions is grave because it
involves aspects of all the types of factions described here.
But the decisive characteristic of ethnic factions seems to be
the conjunction of passionate hatred with a conviction of
the victimization of one's own group by outsiders and their
agents. There result in the worst cases, as Cvijeto Job's
description of the disintegration of Yugoslavia makes clear,
groups of people united and actuated by violent, narcissistic
paranoia.
At the conclusion of the seventh paragraph of *Federalist* 10, there appears for the first time the word "legislation." In the regulation of the diverse interests that interfere in a commercial society, the legislators are "advocates and parties to the causes which they determine." The legislators are in fact members of interested factions (or, worse, of passion-based factions). If a group of legislators in a faction constitutes a majority in parliament, they are likely to impose laws oppressive for the minority. Tax laws provide the classic example: "Every shilling with which they overburden the inferior number is a shilling saved to their own pockets." Thus, although the multiplicity of interests is a necessary condition for ameliorating the problem of faction, it is not by itself sufficient. Even in a society with diverse economic interests and activities, a democratic system permits the formation of a legislative majority that can follow a common impulse through legislation that oppresses a minority. Nor can we count on the superior quality of certain statesmen to direct the conflict of interests toward the common good. "Enlightened statesmen will not always be at the helm." And when they are, they will often be unable to convince those that are inspired by immediate interest. At this point, the content of Madison's argument is as follows: if we want liberty to be safeguarded, it is impossible to remove the causes of faction; the only remaining possibility is thus to control the effects of faction.

Majorities, Minorities, and the Extended Republic

The effects that must be combated are the denial of the rights of other citizens and the erosion of the common good, which are sacrificed to the passion or interest of the predominant faction. These effects will appear in a democracy whenever a faction unites a majority of the people with a corresponding majority in the legislative body. The problem of oppressive majorities in a democratic regime is, therefore, the subject of Madison's argument henceforth. Combating the effects of faction reduces to preventing the formation of a majority faction that is able to be politically effective as such. This is in fact "the great object to which our inquiries are directed."

Preventing the formation of a majority faction can be realized either (1) by preventing the formation of the same passion or the same interest in a majority, or (2) by the fact that a majority that has such a common impulse is impeded "by their number and local situation" from uniting and implementing its plans of oppression. Madison's argument will be that the multiplicity and variety of parties and interests in a large republic maximizes the probability of achieving this objective (either 1 or 2). Important in this paragraph is what will not serve the purpose: "If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control." We see here the severe realism of *Federalist* 10. The problem of faction means that a durable structure for freedom and democracy cannot be left to depend on human virtue, on the justice and self-control of individuals. However necessary such virtue may be, it is not sufficient.

A pure or direct (nonrepresentative) democracy is defenseless against faction. Equality of rights leads to inequality of possessions, and difference of opinions, and passions. From this form of government in a small population and living in a small territory, a common impulse and an opportunity to act will necessarily arise. Thus, "there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual." Direct democracy is thus not a viable option.
A republic, in contrast to a direct democracy, is a viable option. "Republic" means a form of government "in which the scheme of representation takes place." The account of republicanism. For Madison, "republic," means in the first place representative democracy. Within the genus "democracy," it is thus to be contrasted with pure or direct democracy. Federalist 47-51, on separation of powers, will deepen the account of republicanism, by comparison to other forms of political rule: monarchy, aristocracy, oligarchy, tyranny.

A republic is distinguished from pure democracy through two characteristics: 1) the activities of government are carried out by elected representatives; 2) the number of citizens and the size of the country can be greater than in a pure democracy. The effect of the first characteristic could be the refinement or filtration of the public views in favor of moderation and the common good. But, "[o]n the other hand, the effect may be inverted. Men of factious tempers . . . or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people." Again we see that, although human virtue is extremely important for a decent political system, we cannot count on it. Justice needs material support, here, in the form of geographic extent: for "extensive republics are most favorable to the election of proper guardians of the public weal" at least more so than small republics. This effect follows from two causes. In the first place, in any republic, large or small, the number of representatives is bounded by upper and lower limits (usually from 200 to 800). The number must not be too small, in order to avoid "the cabals of a few," nor too large, in order to avoid "the confusion of a multitude." Thus "if the proportion of fit characters" in a large republic is approximately equal to that in a small republic, the large republic will present a greater option, and consequently a greater probability of a "fit choice." This argument as well as the next one are mathematical in character.

In the second place, the greater the number of citizens that vote for a candidate, the smaller the chance that the candidate can "practice with success the vicious arts by which elections are too often carried." If the electoral district is too large, the representatives will not know the local problems and circumstances concerning which they must legislate. If it is too small, the representatives will not have a vision of the whole, being too close to local problems and circumstances. The effect of the size of the republic is thus important: the extended republic will comprehend "a greater variety of parties and interests . . . [making it] less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other."

In a democratic republic, "to act in unison" would mean in the first place that the elected representatives of the majority faction make laws adverse to the rights of the minority. Madison's intention is that, owing to the variety of parties and interests in the extended commercial republic, each representative should represent multiple interests, being thereby obligated to make legislative compromises for "the regulation of these various and interfering interests." A democracy beset with majority faction contrasts clearly with a Madisonian republic. The disease of majority faction means that each representative represents one or the other of two exclusive and radically opposed interests, either the interest of the majority, or that of the minority. Thus the division of the society into two contradictory parts is immediately reflected in the legislative body (parliament or congress). The contradiction between majority and minority is expressed in laws oppressive of the
minority. The resulting conflict leads to the breakdown of decent government.

Conclusion

As David Epstein sharply observes, human diversity exists by nature and is by nature a powerful irritant.\textsuperscript{63} Thus by nature, factions form and enter into conflict among themselves. The extended commercial republic, promoted by The Federalist, offers the best possibility of reducing the dangers of faction to the rights of citizens and the common good. Being commercial, this republic encourages factions based on interest in order to discourage factions based on passion. Being large, it includes a multitude of groups and interests, thereby impeding the formation of a faction composed of a majority.

The theory contained in Federalist 10 is realistic: visions of human perfection and appeals to moral virtue play little role, because factious passions and demagogic egotism are too powerful. The rights of the individual in a democracy can be assured only if human passions and interests are accepted as natural and are channeled in the least destructive way.

But this doctrine, although successful, is troubling; it seems low and selfish. Does successful democratic practice require a low theoretical understanding of man? This is a notorious philosophical problem of liberal democracy. Harvey Mansfield has summarized it well:

There are two main objections to liberal democracy . . . one by communism, the other by fascism. Those two objections have some validity to them, even if communism and fascism don't. Communism objected that liberal democracy is too selfish and unconcerned with the whole and fascism claimed that liberal democracy is base and unconcerned with the noble. Both of those are to some extent true. That's why I would say that liberal democracy is not a complete fulfillment of human nature.

\ldots One could always imagine a challenge to it, a better regime. In practice, this "better" might turn out worse, as happened with communism and fascism, but people may well be tempted to try.\textsuperscript{56}

Thus liberal democracy shines only when it has an antidespotic mission. To be seen as noble, to inspire devotion and sacrifice, our concept of freedom must be seen from the perspective of slavery.

Slavery and the Civil War constitute the catastrophic failure of American government. These events can and should be viewed through the prism of Federalist 10. In the southern states, the rights of a minority were destroyed by the local majority. Through the territorial extension of the Union, the local majority, the supporters of slavery, were becoming a national minority, and thus a minority in Congress (rather than an equal part). This position was unacceptable to the southern states, which refused to abolish slavery. At the same time, the mentality characteristic of a society of masters and slaves blocked the economic development essential for "a multiplicity of parties and interests." That mentality, discussed by Aristotle in Politics \textsc{IV.11}, was described again by Tocqueville in 1831:

For the first time we have had a chance to examine the effect that slavery produces on society. On the right bank of the Ohio, everything is activity, industry, labor is honored; there are no slaves. Pass to the left bank and the scene changes so suddenly that you think yourself on the other side of the world; the enterprising spirit is gone. There, work is not only painful; it is shameful, and you degrade yourself in submitting yourself to it. To ride, to
hunts, to smoke like a Turk in the sunshine: there is the
destiny of the White.\textsuperscript{67}

The servility of the slave, the arrogance of the master, and
—the point that Aristotle did not make — the contempt for
work common to both sealed the economic fate of the
American south in the antebellum period.

The southern states and their representatives in Con-
gress thus crystalized into a single bloc actuated by a
common interest adverse to the rights of individuals and the
common good. The northern states united into a single bloc
opposed to slavery with no possibility of peaceful compro-
mise between the two factions. There resulted the crises of
secession and the Civil War, the bloodiest war in American
history. This event, without which there would be no statue
of liberty in America, profoundly transformed the United
States. In the words of Mark Twain and Charles Dudley
Warner,

\begin{quote}
\textbf{The eight years... from 1860 to 1868 uprooted}
institutions that were centuries old, changed the politics
of a people, transformed the social life of half a country
and wrought so profoundly upon the entire national
character that the influence cannot be measured short of
two or three generations.}\textsuperscript{68}
\end{quote}

This transformation is probably the closest thing in Ameri-
can history to the postcommunist transition begun in 1989.
The American Civil War was no accident; it was fought for
a clear intention, for the restoration of the fundamental
principle of liberal democracy: individuals have rights and
the purpose of government is to protect them. Thus we can
say that America had to be founded twice, or that the
adequate founding lasted 89 years. It was indeed, as
Hamilton proposed, a product of “reflection and choice”—
and excruciatingly difficult. Locke’s audacity is appropriate;
On *Federalist* 47-51: Separation of Powers, and Checks and Balances

Separation of powers did not prevent slavery and the American Civil War. It cannot be the whole solution. It is not sufficient for successful foundings. It is, however, necessary: without a well designed constitutional structure of separated and counter-balanced powers, “All would be lost,” as Montesquieu says.70

Preliminary to any discussion of separation of powers, we must note Madison’s earlier remark in *Federalist* 37:

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient clarity, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.71

The exact determination *in practice* of the three powers and the boundaries between them remains a problem central to the interpretation of the American, and any real, constitution. In the American tradition of judicial review, the Supreme Court is the ultimate interpreter of the constitu-
tion and arbiter of disputes in practice. This crucial function of the Supreme Court begins to emerge in _Federalist 51_, and is further developed in _Federalist 78_, which describes the special character of the Supreme Court.

The five essays on separation of powers do not, therefore, solve once and for all the abiding problem of determining in practice the boundaries of the three powers. Rather, they explain the structure of separation of powers within which this problem is to be managed. That structure consists of legislative and executive checks and balances, and judicial independence. The value of _Federalist 47-51_ consists in the argument for the structure of separation of powers.

**On Federalist 47**

The essay begins with a general objection directed against the proposed system of government, namely, that the constitution does not separate the executive, legislative, and judiciary powers adequately. This objection is potentially deadly, for Madison replies that, if it were true, then indeed the American constitution would be a failure. His account then consists of, first, an affirmation of the validity of separation of powers and, second, an argument that the American constitution does indeed meet the test of separation of powers *properly understood*. The explicit essential point will be that to ensure an adequate separation, the powers must be partially combined. The implicit essential point — accessible to careful reading — will be that in a republic, unlike a monarchy, separation of powers has a double function: the anti-tyrannic (as in a monarchy), but also (as applied in a republic) an anti-republican function, namely, to separate the operations of government from the people. This point remains implicit precisely because it is disturbing to the republican temperament, to the popular opinion to which _The Federalist_ must appeal. Yet the argument for the anti-republican function of separation of powers in a republic must be made, because this function is extremely important. Let us see how Madison's account emerges from the text of _Federalist 47_.

"[T]he preservation of liberty requires that the three great departments of power should be separate and distinct." Madison here presents an incisive formulation of the anti-tyrannic function of separation of powers: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." This formulation is radical. It says that, without separation of powers, even a system of majority rule and free and fair elections is tyrannic. And it is modern (post-Machiavellian) in that it defines tyranny in terms of institutional arrangements that facilitate concentration of power, rather than in terms of rule by a person with an extremely corrupt and degraded psyche. In this respect, it is similar to, but goes beyond the French Declaration of the Rights of Man and Citizen of 1789: "Every society in which the guarantee of rights is not assured or the separation of powers not determined has no constitution at all." The French formulation refers to a nonconstitutional order, rather than outright tyranny, resulting from the absence of separation of powers. And the French formulation contains an important ambiguity: it is not clear whether separation of powers will involve checks and balances to secure the limitation of power in practice, and thus the protection of liberty, or merely a functional separation for the sake of more efficient government.

Most significantly, Madison's formulation cuts across the traditional, Aristotelian classification of the six forms of
government according to good or bad rule by one, few, or many.\textsuperscript{79}

\begin{tabular}{|c|c|}
\hline
\textbf{Good:} & \textbf{Bad:} \\
\hline
One: & Monarchy & Tyranny \\
Few: & Aristocracy & Oligarchy \\
Many: & Democracy & Ochlocracy \\
\hline
\end{tabular}

In this Aristotelian scheme, the moral character or virtue of those who rule is crucial, for it determines whether those in power promote the common good or undermine it by promoting only their own selfish good. Madison replaces the good-bad distinction with the presence or absence of separation of powers. It seems as if the role of virtue will be entirely replaced by clever institutions. This is the Machiavellian aspect of modern political theory; we must ask if this can really suffice, and if it is really the whole approach of \textit{The Federalist}. It will become clear that it cannot be, for the judicial sector will require special virtues.

Madison's scheme looks like this:

\begin{tabular}{|c|c|}
\hline
\textbf{with SP:} & \textbf{without SP:} \\
\hline
One: & Monarchy & Tyranny \\
Few: & Aristocracy & Tyranny \\
Many: & Democracy & Tyranny \\
\hline
\end{tabular}

Where in this scheme do we place the American system of government proposed by \textit{The Federalist}? The United States will be a republic (thus non-monarchic) with a constitution of separated powers (thus non-tyrannic). Therefore, we know that it must lie in the left-hand column, either under "Aristocracy" or "Democracy." But will the United States be a democratic republic or an aristocratic republic? By aristocratic republic, let us understand a form of government with a scheme of representation, but also with a fundamental distinction of social classes between the ordinary majority, and the aristocrats: an elite minority defined by hereditary possession of land, wealth, and a superior education aimed at political rule. In an aristocratic republic, powers can be separated and reciprocally limited through representation of the two distinct social classes. In such regimes, the sovereignty does not derive wholly from the people. Although the people may, in certain cases, be able to remove by vote particular representatives of the aristocracy, the electoral system would be arranged so that those removed will be replaced by other members of the aristocratic class, who thus represent the same distinct interest. Therefore, the principle danger to which aristocratic republics would be exposed consists in the unchecked accumulation of power in the representatives of the aristocratic class. This leads to the corruption of the aristocracy into an oligarchy — rule by a self-centered minority with great wealth, and thus with the power to maintain itself to the detriment of the majority.

In the American republic, however, there is no aristocratic class because the human material is lacking. The United States must be a democratic republic. In \textit{Federalist} 39, Madison in fact defines the term "republic" in such a way that it can only be democratic not aristocratic:

we may define a republic to be... a government which derives all its powers directly or indirectly from the great body of the people... It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic. It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people...\textsuperscript{80}
Specifically, in the American republic, both the federal government and the state governments will be "substantially dependent on the great body of the citizens of the United States." In a democratic republic, sovereignty derives wholly from the people; therefore, those in power have no power in their own right. Conversely, on this Madisonian account, if any part of the system of government, any sector of power, any service of the state, cannot be changed or removed — directly or indirectly over a shorter or a longer period of time — that system is neither democratic nor a republic. The strength of a democratic republic is, therefore, its resistance (when properly designed) to the tyranny of one or a few.

The democratic character of the American republic could have been inferred from Federalist 10 in which republic is simply taken to be a species of democracy, namely, representative democracy. Here, in Federalist 47, we come to the same conclusion but from a broadened perspective, one that enables us to see how the factional problem of Federalist 10 affects the American implementation of separation of powers. For in a democratic republic (majority rule mediated by a scheme of representation), the usurpation of power against which separation of powers must be designed comes in some way from the majority. This conclusion derives from the following reasoning: In a monarchy, separation of powers must be directed against royal usurpation; in an aristocratic republic, it must be designed against encroachments by the representatives of the elite minority; in a democratic republic, it must be designed against encroachments by the representatives of the majority. To facilitate representative democracy that is both free and stable against both degrading dictatorship and factional conflict, separation of powers must in some way separate government from the people. This is the anti-republican aspect of separation of powers in The Federalist.

It brings us to the following paradoxical position: in a democratic republic with separation of powers, government is made dependent on the people to guard society against the tyranny of one or a few, and independent of the people to guard society against the tyranny of the many. This is clearly a most delicate project in the art of government. It embodies the American founders' answer to the democratic problem of wisdom and consent. Failure to arrange this balance of dependence and independence of the power in relation to the people renders democracy vulnerable to majorities made irrational by the manipulation of demagogues, who then either seize dictatorial power themselves, or serve the interests (by becoming the populist crutches) of an oligarchy, that is, "a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers."  

We must ask, what is the very special sense in which separation of powers separates government from the people? We shall find in Federalist 51 that the answer consists in this, that the structure and operation of separation of powers is separated from the people by means of checks and balances between legislative and executive branches, and by means of the independence of the judiciary branch, specifically the Supreme Court.

Let us complete our analysis of Federalist 47. Madison's explicit argument (against those who object that the constitution does not separate the powers of government) is that the proposed constitution does indeed meet the requirements of separation of powers. For this, Madison turns to Montesquieu and the British Constitution.

"The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry." It is striking that, for his defense of separation of powers in the new American republic, Madison uses the English monarchy as a model. There follows a detailed examination of the
British Constitution as well as the republican constitutions of eleven of the thirteen American states. Madison shows that "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." Thus it is not reasonable to maintain — as do Madison's objectors — that the three powers must be absolutely or totally separate. Rather, the powers must be partially combined precisely to make possible the checks and balances (such as the executive veto, and legislative review of executive appointments) without which there are no effective barriers in practice to usurpations by one or another sector. Therefore, properly understood, separation of powers requires that "the whole power of one department [must not be] exercised by the same hands which possess the whole power of another department." All the examples cited fulfill this requirement, as does the federal constitution here proposed. But what is the difference between the examples; is there any significance to the striking fact that Madison picked a monarchy as his first example of a free constitution? The American state constitutions all fail, in spite of their salutary efforts, to secure the separation of powers in practice: "in no instance has a competent provision been made for maintaining in practice the separation delineated on paper." This is a crucial defect of the American state constitutions. Is it also a defect of that British Constitution so highly regarded by Montesquieu? On the contrary, Madison makes no such criticism of the British Constitution. The great criticism of monarchy overarch the Federalist is, of course, that, after the abuses to which the American colonies were subjected by King George (see the Declaration of Independence), America will not have a king, and so the new constitution will be republican. Here, however, in Federalist 47, Madison places the British Constitution in a positive light: the American republican states failed to secure in practice the separation of powers written into their constitutions, thereby jeopardizing the liberty of the citizens; the British Constitution did not fail in this way, so that the liberty of the citizens of England was protected. The reason for this difference is that the republican American states did not realize that, in a democratic republic, the principal threat to liberty comes not from the executive power, but — as we inferred above — from the legislature, from the representatives of the majority. This is the subject of Federalist 48.

On Federalist 48

"It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. . . . the . . . most difficult task is to provide some practical security for each [power] against the invasion of the others. What this security ought to be is the great problem to be solved." Separation of powers must be realized in practice, otherwise it is worthless. Madison makes two basic points. First, a merely written description of the boundaries of power — "parchment barriers" — will hardly suffice. This is obvious to all. Less obvious is his second point: in a democratic republic, unlike a monarchy or a pure democracy, the threat of usurpation, of violation of separation of powers, comes principally from the legislative branch. "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The American states ignored the legislative vortex, and concentrated instead on the threat of executive usurpation. They failed to understand the implications of their new form of government, the democratic republic. Madison's reasoning here merits careful attention. He considers three cases:
first, monarchy; second, pure or direct democracy; third, representative democracy, that is, a democratic republic.

The danger presented by a hereditary monarch is clear. The throne possesses the executive power, and the people cannot change or remove the king by any system of elections, direct or indirect. Therefore, in structuring separation of powers in a constitutional monarchy, the throne must be “justly regarded as the source of the danger, and watched with all the jealousy which a zeal for liberty ought to inspire.”

The danger in a pure or direct democracy is two-fold: factional conflict as discussed in Federalist 10, but also, as described here in Federalist 48, executive usurpation. This violation of separation of powers comes from the incapacity of a large number of people to sustain a process of deliberation and effective action. Because of this, the executive officers may exploit confusion and collective indecision for their own interests. They may appeal through propaganda and disinformation to the fears and uncertainty of the people—especially in the face of a perceived emergency—and execute laws of their own making. Thus also in a pure democracy, separation of powers should be designed with a view to executive usurpations.

In a democratic republic, however, there occurs in the legislative assembly (congress or parliament) a specific conjunction between its confidence in its own strength, its numerical size, and its capacity for rational deliberation over ends and means. Madison’s analysis of reason, passion, the power, and the people, under conditions of majority rule and republican representation was evident in the account of factions in Federalist 10. This analysis reappears here, applied not to society as a whole, but to the legislative body in order to determine implications for the structure of separation of powers. Specifically, the legislative assembly is inspired by a supposd influence over the people with an intrepid confidence in its own strength; [it] is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes.

Unless checked by special arrangements, the legislative assembly runs the risk of acting like a passion-based faction (in the sense of Federalist 10) with respect to ends, and like a single individual or small group, thus efficiently, with respect to means. The legislature may do this either as the representatives of an overbearing majority, or of an oligarchic minority masquerading behind democratic language and popular but meaningless elections.

The special arrangements for moderating the legislative sector that are most familiar today concern bicameralism: division of congress or parliament into two chambers, with different terms in office (for example, two years and six years), and different modes of election (for example, by direct popular election and, indirectly, by regional delegates). These arrangements derive from the reasoning of Federalist 47-51. The principal purpose of bicameralism is, as we shall see in Federalist 51, to create different and, thus to an extent, counterbalancing interests in the two houses. Typically, members of the lower house are motivated by immediate and local concerns due to the shortness of their term and their direct dependence on the people in their district. In contrast, members of the upper house are freed to act with a view to longer term national issues. The extremely important question of proportional representation versus single-member districts is involved here, for “it is essential to liberty that the government in general should have a common interest with the people.”
Under a system of single-member districts (a system sometimes called uninominal), the performance of the elected representative is determined mainly by two factors: 1) the platform of his or her party; 2) issues and interests specific to his or her geographic district. In contrast, under proportional representation, the party lists for which citizens vote are the same nationwide, so that there is no geographic factor, no local attachment, in the performance of the elected representative. Under proportional representation, then, "to represent" means strictly to support the party platform, which often means simply following the party leader. In contrast, a system of single-member districts embodies a broader concept of representation, and affords multiple points of access for individuals and groups that might otherwise be excluded from representation (because excluded from the governing majority). Furthermore, a privileged group of party leaders, even if aristocratic initially, is likely to become corrupt and oligarchic through their own entrenchment and the resulting accumulation of power in their own hands, as the cases of Italy and Japan make clear.

The distinct interests of the two houses created through bicameralism — the lower house being more popular and the upper more stable and deliberative — can help to moderate the factional force of even a disciplined majority in parliament. In this way, separation of powers is more effective, and the common good better protected against both oligarchic and majoritarian usurpation. Let us return to Madison's account.

As evidence in support of his reasoning, Madison quotes a remarkable passage from Thomas Jefferson's Notes on the State of Virginia, in which is described what Jefferson calls "an elective despotism [which] was not the government we fought for." The problem is precisely that in the Virginia state constitution, "no barrier was provided between these several powers. The judiciary and the executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it." As a result, says Jefferson, "All the powers of government, legislative, executive, and judiciary, result to the legislative body." The importance of salaries or subsistence cannot be overstated. In Federalist 79, Hamilton states that, "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." To a great extent, this is how the Communist Party — an oligarchic minority — kept millions under its control (after having first brought them there by the brutalities of Stalinization). This is why privatization and, in general, the system of law supporting private property and enterprise, is a life and death issue for the postcommunist transition.

The implications of Jefferson's remarks are severe: free and fair multi-party elections are necessary but far from sufficient for free government. Bad government is compatible with pluralism and popular elections. The cause of this malady is a constitutional order deficient in the separation and mutual limitation of powers. Madison cites as a second example of legislative abuse the findings of the Pennsylvania Council of Censors, about which he will have more to say in Federalist 50.

The problem of securing the separation of powers in practice remains unsolved. In Federalist 49, Madison considers and rejects Jefferson's own proposed solution, namely, to recur to the decision of the people to correct violations of the separation of powers. In Federalist 49 and 50 we find Madison's argument that separation of powers should work in a way that is independent of the people. Separation of powers will, therefore, separate the actual operations of governing from the people.
On Federalist 49

Jefferson proposes "whenever any two of the three branches of government shall concur in opinion . . . that a convention is necessary for . . . correcting breaches of [the Constitution], a convention shall be called for the purpose."\(^{102}\) Madison makes clear that Jefferson's proposal conforms to the principle of democratic republicanism, that is, every part of the system of government, every sector of power, depends (directly or indirectly) on the people: "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."\(^{103}\) And Madison indeed agrees that, "a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions."\(^{104}\) But, as a means to interpreting or correcting violations of the separation of powers, the "road to the decision of the people" must be closed. Neither in principle, nor in practice, would recurrence to the people be good. Why?

Madison makes three basic points: 1) the constitution must be the object of a very special kind of public opinion, namely, deep respect or \textit{veneration}; 2) appeals to the people to judge violations of separation of powers will generate a factious spirit adverse to veneration; 3) a popular decision concerning violations of separation of powers would, therefore, not be made on the merits of the case.\(^{105}\)

In making his argument, Madison returns to a central thesis of Federalist 10, the weakness of reason and the strength of the self-regarding passions. In all free political debates, men come to a diversity of opinions on one and the same subject. If the subject engages powerful passions or interests, the debate becomes angry, and one's reasoning and judgment distorted in favor of those who share one's own particular passion or interest, i.e. one's own faction. The fundamental quality of the constitution must not become the object of this kind of public debate; it must not become the object of passionate factions, and of a public suspicion that the whole system is defective, lest the wisest and freest governments [lose] the requisite stability.\(^{106}\) The great value of stability in free government is well stated in Federalist 37:

Stability in government is essential to national character and the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society. An irregular and mutable legislation is not more an evil in itself than it is odious to the people.\(^{107}\)

Instability means either anarchy or rule of the \textit{arbitrary:} subjection to "the capricious will of another."\(^{108}\) Continued over generations, instability produces in the people either abject lawlessness, or a mentality of passivity and a deep-seated lack of confidence — in oneself, in others, and thus in the future. In either case, citizens have no belief in their own capacity for self-government. Furthermore, and of great importance today, long-term financial investments are impossible, since the long-term contracts on which they are based lack credibility due to pervasive distrust.\(^{109}\) For these reasons, "stability in government is essential to national character."

But according to Madison, there is a remedy for the spirit of faction and the effects of instability:

the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and
confidence in proportion to the number with which it is associated. When the examples which fortify opinion are ancient as well as numerous, they are known to have a double effect.  

An opinion held by many persons, an opinion based on examples that are many, and old — examples of the constitution working successfully — would engender the unanimous respect or veneration of the constitution essential for stability in government. This special and rare kind of public opinion cannot take root if the whole people are called upon to decide the most difficult problems of constitutional interpretation: alleged violations of separation of powers.  

It might be objected that, at the time of the revolution, the independent states of America revised their forms of government and composed their own constitutions through public deliberation and action. Why could this procedure not be continued by the United States as a whole for the correction of violations of separation of powers in the new federal constitution? Madison replies that moments of national exaltation and unity, such as that afforded by the American Revolution, or the East European revolutions of 1989, are extraordinary and do not provide a lasting basis for government:

all the existing [state] constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed do not present any equivalent security against the danger which is apprehended.  

Revolutionary fervor is unforgettable but, unfortunately, useless for the establishment of good government. A diversity of opposed opinions passionately held, concerning issues and leaders, will arise in the ordinary operations of republican government. This combination of reason and passion, resulting in judgment distorted by partiality, is acceptable within the framework of the constitution, within the structure of separation of powers: It is acceptable in the election of presidents and representatives, and to a degree, in legislative debates, where often "[t]he passions, . . . not the reason, of the public would sit in judgment." But judgment distorted by partiality is not acceptable concerning the most serious problems of the constitution, that is, concerning the structure and operation of separation of powers itself. For "it is the reason alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."  

Madison considers in Federalist 50 one further possibility for recurring to the people for correction of violations of the separation of powers: instead of making occasional appeals, make regular and periodical appeals.

On Federalist 50

Regular appeals to the people to correct violations of the separation of powers is subject to the same objections raised by Madison in Federalist 49. Of greatest interest in Federalist 50 is Madison's use of the "Council of Censors which met in Pennsylvania in 1783 and 1784, [in order] to inquire, 'whether the [Pennsylvania] Constitution had been violated, and whether the legislative and executive depart-
ments had encroached on each other." The uniqueness of this case (it does not exemplify periodic appeals to the people), would seem to disqualify it, but Madison insists that it is, nevertheless, a very good example of the truth of his reasoning. The most essential point is this: Owing to their attachments to the two parties in the dispute (the executive and legislative bodies under investigation), the judgment of the Council of Censors was distorted. In the key paragraph of Federalist 50, Madison focuses on "the temper of their deliberations. Throughout the continuance of the council, it was split into two fixed and violent parties. The fact is acknowledged and lamented by themselves." The best evidence of this is that,

In all questions, however unimportant in themselves, or unconnected with each other, the same names stand invariably contrasted on the opposite columns. Every unbiased observer may infer ... that, unfortunately, passion not reason, must have presided over their decisions. When men exercise their reason coolly and freely on a variety of distinct questions, they inevitably fall into different opinions on some of them. When they are governed by a common passion, their opinions, if they are so to be called, will be the same.

Here each faction has its own common opinion opposed to that of the other faction, but this is precisely the wrong kind of common opinion.

As a result of the defective character of their deliberations, "[i]t is at least problematical whether the decisions of this body do not, in several instances, misconstrue the limits prescribed for the legislative and executive departments, instead of reducing and limiting them within their constitutional places." Finally, whether right or wrong, the Council of Censors had no way to enforce decisions on the legislative or executive bodies.

The Pennsylvania Council of Censors exemplifies the "factious spirit [that] has tainted our public administration," with which Federalist 10 begins. This body of political men is for that reason unqualified to judge violations of the separation of powers. It is now clear that whoever will be empowered to judge the separation of powers must have very special qualities and a very special place in the system of government — remote from the people and their elected representatives. The qualities of character necessary for the judiciary branch are described in Federalist 78, mentioned below. The special, non-republican place of the judiciary in the American republican system begins to emerge in Federalist 51.

Madison's basic principle is this: by filtering and thus refining the passions and opinions of the American people and their representatives, separation of powers will make those who hold power more reasonable. The filters are: 1) checks and balances between legislative and executive, and within the legislative branch; 2) the independent judiciary.

On Federalist 51

Federalist 51 represents the culmination of the treatment of separation of powers begun in Federalist 47. It is a central point in the argument of The Federalist, for it recapitulates crucial theses from Federalist 10, and points ahead to the account (in Federalist 52-83) of each of the branches of government, especially the judiciary (Federalist 78-83).

Madison begins with the question that has defined the inquiry since Federalist 48: "To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution?" We have learned in Federalist 48-50 that neither "parchment barriers" nor popular con-
ventions and referenda are the solutions to this problem. The solution consists rather in "so contriving 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." We are pressed to ask, How is this to be done?, for we have come to see that a true separation of powers must be an extraordinary achievement. It seems, however, that Madison will give us only partial satisfaction: "Without presuming to undertake a full development of this important idea I will hazard a few general observations which may perhaps place it in a clearer light." Why is there no "full development" of this crucially important idea? Is it because such a development must—as we have inferred—reveal a certain anti-republican aspect of separation of powers, namely, that it separates the power, especially the judiciary, from the people? (Concerning the judiciary, there is only a single, but very important, sentence in Federalist 51, quoted below.) Is it because the security of separation of powers in practice must depend on the willingness of men and women to take extreme action—such as risking one's life in defense of the Constitution—whose outcomes cannot be foreseen, and are thus not subject to theoretical analysis? Let us review what Madison has to say about "the interior structure of the government." In spite of his reticence, he presents some of the most important characteristics of modern constitutional democracy.

**Different modes of appointment for the different branches:** "each 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 other." This measure acquires its efficacy when combined with different terms of office for the executive, and for the upper and lower houses of the legislative body, described below.

---

**Salaries and rewards of one branch not subject to determination by other branches:** otherwise "their independence in every other [respect] would be merely nominal." The importance of salaries was emphasized above in the comments on Federalist 48.

**Checks and balances for legislative and executive branches:** "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." Here Madison presents the special arrangements for moderating the legislative assembly and strengthening the executive. They are bicameralism, and the (qualified) executive veto over legislation:

In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is to divide the legislature into two different 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.... [A veto] on the legislature appears... to be the natural defense with which the executive magistrate should be armed.

The remainder of Madison's argument then qualifies the presidential veto by a complicated arrangement which became (in the American system) the right of the Congress to override the President's veto by two-thirds majorities in both Houses. As the ultimate check on executive abuse, the Congress has the power to impeach the President.

These are "constitutional means" designed to strengthen the "personal interest," and appeal to the ambition, of members of the executive and legislative branches of government. It is as if The Federalist were saying to political men and women, "it is in your interest to direct your ambition to the correct performance of your constitutional
function, and one object of your ambition is now to resist encroachments by the other power." The mutual awareness of this fact is a strong inducement for both executive and legislative to reach compromise through deliberation and consultation. Madison's institutional devices make for a complex system of government. But the reason is simple: a system of government without parts will become despotic or unstable.

*The special character of the judiciary branch: Federalist* 51 contains a single, extremely important sentence on the judiciary:

> In the constitution of the judiciary department ... it might be inexpedient to insist rigorously on the principle [of separate electoral channels for each branch]: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; second, because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them.\(^{126}\)

Here, the principle of selection is not the faithful representation of the people, but rather the moral and intellectual qualities of judges. Any dependence on the people (through their representatives in the other two branches) must be removed by permanent tenure. This is the basis of judiciary independence, which is anti-republican in that, once in office and assuming they commit no crimes, judges cannot be removed by the people. But this non-republican measure is for the sake of a good republic, one free of factional conflict and instability. The account of the judiciary in *The Federalist* makes clear that institutional arrangements for the limitation of power, no matter how necessary for free government, cannot ultimately provide the wisdom and courage needed for good government.

The Supreme Court then is very special indeed. It is not subject to checks and balances, and it has the crucial function of interpreting the Constitution: "A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."\(^{127}\) This means that the Supreme Court is the final arbiter of infringements of separation of powers: whenever Madison's "inventions of prudence" fail to resolve a conflict between legislative and executive branches, the issue will go to the Supreme Court. But this power has no constitutional means to defend itself, or to enforce its decisions against the other two branches:

The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. 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.\(^{128}\)

This raises what is perhaps the most radical question for the study of American government, and even of human institutions generally, namely, how would the members of the Supreme Court enforce their decision and defend themselves against an angry executive — the power commanding men with guns — who was willing to arrest them? They clearly cannot defend themselves, and so the question becomes, what compels an angry executive to restrain
himself and respect the Constitution as interpreted by the Supreme Court? It seems that it can only be fear of the consequences of offending the public veneration of the Constitution, thus fear of offending that special kind of opinion that Madison described in Federalist 49, and thereby provoking a national crisis of incalculable proportion.

Hamilton makes the argument for permanent judiciary tenure in Federalist 78, wherein there emerges a picture of the judicial character. Firmness or fortitude and an independent spirit, but combined with moderation and impartiality; knowledge, integrity, and outstanding legal competence — these are the special qualities necessary for the judiciary branch. They are seldom found together in the individuals of the executive and legislative sectors. Permanence of tenure does not create these qualities (in the way that bicameralism and checks and balances create equilibrating interests and ambitions) but it is, in Hamilton's view, necessary to protect such qualities from the pressures of the more interested and ambitious legislative and executive powers:

as nothing can contribute so much to [the] firmness and independence [of the judiciary] as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice. . . . 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. . . .

The stakes are very high: "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." Thus, for example, the corruption of judges through bribery or privileges has grave implications. It seems that failure here, in the judiciary branch, means failure of the entire regime of free and stable government, sooner or later. Is this not an echo of Plato? Artful institutions notwithstanding, without wisdom or phronesis, good government cannot last.

The concluding paragraph of Federalist 51 is unusually long. It contains a remarkable warning that in today's climate of separatist opinion throughout the former Soviet Bloc is especially sobering. Small independent republics will fail even if they implement separation of powers in their own governments. The problem is that, in a small territory, there will not be a sufficient diversity of economic interests and classes of citizens.

The smaller the society, the fewer probably 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.

Madison gives as a potential example Rhode Island, the smallest of the American States, and does not hesitate to offend the belief of citizens of Rhode Island in their capacity to govern themselves as an autonomous republic; they could not do it:

It can be little doubted 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
The basic reasoning is taken directly from Federalist 10, and consists of two essential theses: 1) “the latent causes of faction are...sown in the nature of man”; 2) the smaller the country, the more easily a majority faction in a democracy can “concert and execute their plans of oppression.” The resulting conflict will lead to a general desire for “some power altogether independent of the people,” thus a constitutional monarchy, a dictator, or foreign military intervention. “This, at best, 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.” According to Madison, republics need to be large. By implication, constitutional monarchy may be the best possible form of government for small countries. Small republics will tend to fall into factional conflict and, thereby, lose both individual liberty and national sovereignty.

Summary of Principal Results and Conclusions

The most basic meaning of democracy is majority rule, whether the majority be defined by race, religion, ethnicity, language, economic interest, or just a common opinion. The attractions of democracy are the freedom enjoyed by the majority from being ruled by one or a few, and the tolerance shown among the members of the majority. The problem of democracy is the status of the minority: will they be tolerated or oppressed? Will a perception of their victimization make the minority unreasonable? Will mutual suspicion destroy the common good? The history of democracy is marred by cycles of violent conflict between majorities and minorities, followed by dictatorship embraced by all for the sake of civil peace, or by foreign domination (Fed. 9, 10, 51). These tendencies are widely and regrettably evident today, perhaps most vividly in the Caucasus.

The successful democracies are those that, since the 17th Century, have been able to establish powerful institutions that protect essential rights and liberties (life, property, religion, speech, and association) of all individuals, whether of the majority or the minority. This kind of democracy is liberal democracy. The liberal principle is that each individual has a pre-political right to use their own
capacities as they choose — consistent with the equal rights of others and with the common good (*Fed.* 10). To make freedom of religion, speech, and association effective, the right to property and to its productive use by owners, employers, and workers must be secure, for “In the general course of human nature, a power over a man’s subsistence amounts to a power over his will” (*Fed.* 79). Hence, privatization and the system of contract law supporting private property and enterprise is of crucial importance for the viability of liberal democracy, and is a life and death issue for the postcommunist transition.

A republic is “a [system of] government in which the scheme of representation takes place,” so that the activities of governing are delegated “to a small number of citizens elected by the rest,” who must accordingly represent the electorate (*Fed.* 10). The detailed structure of “the scheme of representation” — the specific arrangements of the public offices — is the constitution of the republic; it constitutes the political life of the republic and shapes the private lives of citizens.

A republic is to be contrasted with a monarchy: in a pure or absolute monarchy, the governing power (the throne) is completely independent of the people, who thus enjoy no self-government. In a republic, the governing power is, in some way, dependent on the people. But a republic could be either aristocratic or democratic. A democratic republic is one in which the delegated representatives are drawn “from the great body of the society” so that the “government ... derives all its powers directly or indirectly from the great body of the people” (*Fed.* 39). This means that those in power have no power in their own right. Democratic republic and representative democracy are synonymous terms. In contrast, an aristocratic republic is one in which an elite minority, “a favored class” (*Fed.* 39) with a special, permanent and distinct interest is represented either exclu-

sively or along with the majority of the people. In an aristocratic republic, the representation of the favored class (the aristocracy) cannot be changed or removed by popular elections.

Separation of powers is related to the idea of political liberty: separation of powers is a condition necessary for the protection of liberty in any form of government, whether monarchic or republican. “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates, [or] if the power of judging be not separated from the legislative and executive powers” (Montesquieu, *Spirit of the Laws* XI.6, and *Fed.* 47). The anti-tyrannic function of separation of powers is stated most radically by Madison: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” (*Fed.* 47).

In order to secure the separation of powers by keeping each power within its limits, it is necessary to combine the powers *partially* in the same person or body. The presidential veto over parliamentary or congressional legislation is an example: the veto is a legislative power in the hands of the executive whereby he can defend himself against legislative encroachments. Such arrangements of the structure of separation of powers, whereby one sector can check and balance with its own power the power of another sector, are called “checks and balances.” Therefore, separation of powers including checks and balances can be formulated as follows: “where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted” (*Fed.* 47). Separation of powers and checks and balances can be designed against
the defects and dangers specific to each form of government.

The danger in a monarchy consists in the accumulation of all powers in the hands of the king and thereby the corruption of the king into a tyrant.

The danger in an aristocratic republic consists in the accumulation of power in the representatives of the privileged class, and thereby the corruption of the aristocracy into an oligarchy: rule by a minority with great wealth and no concern for the common good. Such a despotic minority rules only for the preservation and increase of its own power and wealth. Oligarchic society is thus divided into the wealthy and corrupt minority and the powerless and poor majority.

As described above, the danger in a democratic republic consists in the accumulation of power in the representatives of the majority (Fed. 48), leading to oppression of minorities (however defined), and violent conflict between the two. Dictatorship can often follow by popular choice due to the universal insecurity of life and property in a civil war. Factional conflict and dictatorship are the most serious diseases to which democracy is most vulnerable (Fed. 9, 10, 51).

The specific defects and the corresponding remedial design of checks and balances define the major objectives of the constitution in each form of government. In a democratic republic, protection against factional conflict and dictatorship implies that stability and liberty must be principal objectives of the constitution. “Stability in government is essential to national character . . . as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society” (Fed. 37). In addition, the objective of good popular representation follows from the republican form of government itself. Finally, in any form of government, defense of national independence against foreign intervention requires energy in the executive. But these four objectives — popular representation, liberty, stability, and energy — are almost always in tension. Weighing these competing ends of government demands an extraordinary degree of judgment in political men and women. And this presupposes “that spirit of moderation which is essential to a just estimate” of public measures (Fed. 37). Unfortunately, “it is a misfortune, inseparable from human affairs . . . that this spirit is more apt to be diminished than promoted by those occasions which require an unusual exercise of it” (Fed. 37). In fact, any major political issue “may be viewed in so many lights and relations and . . . touches the springs of so many passions and interests” (Fed. 37), that human moderation and judgment need institutional support against the power of passions and interests that would undermine the common good. The promotion of moderation is, therefore, a principal function of separation of powers and checks and balances in a republic. We can summarize this complex line of reasoning with a simple formulation. In a republic, two things are of supreme importance: popular representation and rational deliberation.

Representation. Those delegated to govern (especially those in the legislative branch) should represent faithfully the interests and opinions of those who elected them. But not all interests and opinions are just and true (consider, for example, the interest in maintaining slavery in the United States up to 1865), and those that are partially just and true are always in conflict with other partial interests and opinions. The political words “party,” “partisan,” “particular,” come from “part”: as human, we are moved by only a part of the whole, namely, that part to which we are attached by powerful passions that can distort our vision of the whole truth.


Deliberation. Rational deliberation is the attempt to overcome our partiality (by seeing and weighing the other parts of the problem) and to judge wisely; a good judge is impartial. In a republic, the political process consists in a ceaseless clash of partisan positions, positions that are often angry and potentially violent (Fed. 10). In a republic, therefore, it is essential that rational deliberation have a place in the system of government for the sake of stability and the common good. A good republic is one in which faithful representation of the people is balanced by the rational deliberation of the representatives. A bad republic is one in which legitimate interests of the people are not represented, and rational deliberation is undermined by extremists or corruptionists. Extremists are those who willfully destroy human judgment by the instigation of hatred attaching to extreme and false opinions. Extremist individuals and parties often degenerate into violent, narcissistic paranoia. A republican constitution that permits or promotes extremists in the legislative body is like a doctor that produces sickness instead of health.

The corruption of elected representatives, and of the leaders of business, unions, churches, schools and media destroys the people's belief in the very possibility of good government. In a republic, a popular mentality of cynicism and resignation is the political equivalent of AIDS.

In all forms of government, separation of powers and checks and balances must prevent accumulation of all powers in the same hands. In a republic, separation of powers must in addition promote, through checks and balances, rational deliberation as the necessary accompaniment to popular representation. Modern republicanism, as understood by The Federalist, is the study of human qualities and institutional arrangements that can combine representation and deliberation. This study and the resulting political practice are what republicanism offers concerning the historic problem of wisdom and consent in a democracy.
Acknowledgement

My understanding of the importance of the institutional conditions of rational deliberation in the argument of *The Federalist* derives from the invaluable instruction of Terence Marshall.

In 1992, the University of Cluj, Romania, established the first postcommunist political science curriculum at a Romanian university. Grants from the United States Information Agency and The Lynde and Harry Bradley Foundation supported the development and translation of the preceding material, together with the text of *Federalist* Nos. 10 and 47-51, for use in the new curriculum at Cluj. The energetic intelligence and linguistic skills of Anca M. Hassing were essential to this effort.
Notes

2. Federalist No. 1, p. 33.
3. Federalist No. 10, p. 79.
4. Federalist No. 37, p. 231.
5. Federalist No. 2, p. 38.

6. The meaning and adequacy of the constitutional design, and the major question whether the evolution and devolution of American society result from the fulfillment or the rejection of that design are vital issues in the study of American government.

7. For example, there is no standard term in Romanian for checks and balances.


16. Of great value are Peter W. Schramm and Bradford P. Wilson, eds., American Political Parties and Constitutional Politics (Lanham, MD: Rowman & Littlefield, 1993), and Ceaser, "Constitutionalism and a Semiparty System in the United States."


19. Ibid.
20. Federalist No. 9, p. 72.
21. Ibid., p. 73.
25. Ibid., p. 78.
28. Federalist No. 10, p. 78.
30. Federalist No. 10, p. 78.
31. Aristotle: "virtue must be a care for every city... otherwise... law becomes a compact... but not the sort of thing to make the citizens good and just" (Politics III, 1280b7-12). Aquinas: "the proper effect of law is to lead its subjects to their proper virtue" (Summa Theologiae, Q.92, A.1, reply).
32. Locke: "freedom... is the fence to [my preservation, and] the foundation of all the rest... the end of law is... to preserve
and enlarge freedom.” (Second Treatise, §§ 17 and 57). Subtle but important differences between Locke and Madison concerning “faculties” and “property” are brought out by Epstein, The Political Theory of the Federalist, p. 74.
35. Federalist No. 10, p. 79.
36. Ibid.
37. Ibid.
42. Federalist No. 10, p. 79.
45. Federalist No. 10, p. 79. See also Michael Allen Gillespie, “Political Parties and the American Founding,” in Schramm and Wilson, American Political Parties and Constitutional Politics, p. 20.
46. Federalist No. 10, p. 79.
47. “In short, unequal faculties give men different opinions and property; self-love heatedly attaches them to the former and coolly interests them in the latter.” Epstein, The Political Theory of the Federalist, p. 76.
49. Federalist No. 10, p. 79.
50. Ibid.
51. Ibid., p. 80.
52. Ibid.
53. Ibid.
54. Ibid., p. 81.
55. Ibid.

R. F. Hassing

56. Ibid. See also Madison’s remark on Athens in Federalist No. 63, p. 384.
57. Ibid.
58. Ibid., p. 82.
59. Ibid.
60. Ibid.
61. Ibid.
62. Ibid.
63. Ibid., p. 83.
65. Ibid., p. 77.
69. Federalist No. 39, p. 240.
71. Federalist No. 37, p. 228.
72. Federalist No. 47, p. 301.
74. Federalist No. 47, p. 301.
75. Ibid.
76. Plato, Republic, 562a-576b; Aristotle, Politics, 1313a33-1314a29.
77. Article 16; Walter Laqueur and Barry Rubin, eds., The Human Rights Reader (New York: New American Library, 1989), p. 120.
78. Marshall, “Separation of Powers, Human Rights, and Constitutional Government,” p. 20; see also Herbert J. Storing,
What the Anti-Federalists Were For (Chicago: Univ. of Chicago, 1981), pp. 53-63.
81. Federalist No. 46, p. 294.
82. Federalist No. 39, p. 241.
83. Federalist No. 47, pp. 301-302.
84. Ibid., p. 304.
85. Storing, What the Anti-Federalists Were For, p. 61.
86. Federalist No. 47, pp. 302-303.
87. Ibid., p. 308.
88. Federalist No. 48, p. 308.
89. Ibid.
90. Ibid., p. 309.
91. Ibid., p. 309.
92. Ibid.
93. For a recent example, see Gagnon, "Serbia's Road to War," pp. 128-129.
94. Federalist No. 52, p. 327.
96. Federalist No. 48, p. 311.
97. Ibid.
98. Ibid., p. 310.
100. Federalist No. 48, pp. 311-312.
102. Quoted by Madison in Federalist No. 49, p. 313.
103. Federalist No. 49, p. 313.
104. Ibid., p. 314.
105. Ibid., pp. 314-316.
106. Ibid., p. 314.
109. "Distrust is a pervasive legacy of communist rule." Richard Rose, "Postcommunism and the Problem of Trust," Journal of

Democracy Vol. 5 (July 1994), p. 18. The communist regimes usually destroyed trust in any relations beyond family and intimate friends. The roots of distrust in Southeastern Europe and Russia (not to mention the Middle East), however, probably go deeper in history, arising from centuries of arbitrary personal rule, i.e. generations without rule of law in the ancient and medieval sense.
111. Ibid., p. 315.
112. Ibid., p. 317.
113. Ibid.
114. Federalist No. 50, p. 318.
115. Ibid., p. 319.
116. Ibid.
117. Ibid.
118. Ibid.
119. Federalist No. 51, p. 320.
120. Ibid.
121. Ibid., p. 321.
122. Ibid.
123. Ibid.
124. Ibid., p. 322.
125. Ibid., pp. 322-323.
126. Ibid., p. 321.
127. Federalist No. 78, p. 467.
128. Ibid., p. 465.
129. Federalist No. 78, pp. 466 and 469.
130. Ibid., p. 466.
131. Federalist No. 10, p. 83. For example, if the population of a country were permanently eighty percent agricultural, even separation of powers would not protect the domestic manufacturing interests from oppressive tax legislation. For in the course of one or two generations, all branches of government, even the judiciary, would be dominated by the same agricultural interest. In the plan of The Federalist, the size of the United States and laws fostering economic diversity should prevent this from happening.
132. Federalist No. 51, p. 325.
133. Ibid., p. 324. The American Supreme Court would be a dangerous power independent of society if it were united to the executive or legislative power; this is precisely Hamilton's (and Montesquieu's) caution in Federalist 78, above; hence the importance of a judiciary that has "neither force nor will but merely judgment." We thus return to the specifically American question of the relation between the original constitutional design and the actual history of American constitutional interpretation.