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ABSTRACT

Scholarship on the political thought of James Madison has long been divided between adherents of the "liberal" and "republican" views, with a fusion between them recently emerging as the dominant understanding. Yet one element of Madison's thought cannot be neatly elided: the question of which value prevails when balancing mechanisms fail and a choice between majority rule and minority rights is unavoidable. This essay argues that Madison sided emphatically with majority rule, even when the majority in question was factious. His criticism of majorities is never tantamount to questioning their entitlement to rule: on the contrary, the analysis of *Federalist* 10, his clearest indictment of majority factions, is completely compatible with their democratic legitimacy. This vindication of majority factions when, however rarely, they formed is most evident in Madison's defense of the legitimacy of the 1820 Missouri Compromise, despite what he believed to be its factious nature.

The constitutional challenge to the Affordable Care Act that was resolved in *NFIB v. Sebelius* supplied evidence of a growing political trend: the constitutionalization of policy disputes and a concomitant effort to delegitimize majorities with which one disagrees. As the conservative Judge J. Harvie Wilkinson has noted, the Affordable Care Act was passed by a duly elected Congress and signed by a duly elected president, so it can be seen as a proxy for the will of majorities as the constitutional regime measures them (Wilkinson 2012). The essence of the plaintiffs' position with respect to one major issue in *NFIB* was to say the majority's decision to impose a mandate that individuals purchase health insurance was illegitimate: the majority had, in other words, no constitutional authority to reach the conclusion it did. To be sure, the delegitimization of majorities is hardly a conservative practice alone. The difference is

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merely that the right has tended to employ the strategy on economic issues like health care, while the left has used it on social ones such as abortion. Both sides evidently agree, however, that it is the role of the judiciary to police the boundaries between majority rule and individual rights.

They are not alone. Students of the American founding, whatever their interpretive or political proclivities, have generally assumed the same—that the essence of the American regime consists in what Robert Bork has called the "Madisonian dilemma": the regime is built on the twin pillars of self-government and minority rights. "The problem," Bork says, "is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty." On Bork's account, the dilemma is resolved by empowering the Supreme Court, "a nonpolitical institution," to demarcate the limits of majority rule and minority rights (1990, 139). In this limited point, Bork speaks for a wide range of constitutional theorists, including living constitutionalists, who invest the judiciary with comparable authority even while arguing about its proper application.

Yet what Bork casts as a "dilemma" is better understood as a "tension." Dilemmas, by definition, have no solution. Madison's did, as any workable democratic theory must: when push met shove, a possibility he hoped would rarely occur but one he could not entirely foreclose, majorities were to prevail. Madison did not foresee the Supreme Court resolving conflicts involving competing claims of majority rule and minority rights, even in cases of majority abuse. He assigned that role to majorities operating within institutional frameworks designed to encourage their reasonableness.

But Madison scholarship has yet to come fully to terms with the fact that the Madisonian dilemma is neither Madisonian nor a dilemma. It is, and must be, soluble, and Madison solves it by choosing majority rule when the two horns of Bork's dilemma collide. Instead, commentary on Madison's political thought has increasingly rejected what Michael Zuckert has called an "either/or" dualism in favor of a synthetic approach that emphasizes the founders' attempts to balance majority rule and minority rights (1996, 209; Gibson 2000). This schema, which transcends the liberalism-republicanism debate that dominated interpretive debates for much of the last half century, covers the vast majority of political situations in a Madisonian republic. But it is less serviceable for hard cases, those in which balancing mechanisms fail and a choice between majority rule and minority rights is unavoidable.

To be sure, Madison hoped those situations would be rare and erected institutional architecture to ensure they would be, but a failure to provide guidance for them would constitute a serious omission from his democratic thought, especially because whatever comfort might be drawn from their infrequency would surely be offset by their intensity. Conflicts that pit a majority's entitlement

to rule against a minority's claim of inviolable rights are among the most potentially explosive situations political society confronts, a dynamic that Madison witnessed in the nullification controversy, among others. If he attempted merely to wish those situations away, his political theory would be incomplete, perhaps dangerously so.

But Madison did anticipate these situations. Indeed, *Federalist* 51 says majorities will "seldom" form in an extended republic except on the basis of "justice and the general good"—a tacit acknowledgment that they "sometimes," however rarely, will form unjustly (271).[1] Commentators have long assumed Madison's preference when liberalism and republicanism collided was individual rights (see, e.g., Hartz 1955; Kloppenberg 1998). Others, such as Lance Banning, have argued that Madison sought to achieve both values. Of course, Madison's primary objective was to defuse such conflicts before they reached the point of decision, so it is accurate to say that his primary objective was to balance his liberal and republican commitments whenever it was possible to do so. But it is not true, nor is it tenable as democratic theory, to say as Banning does that Madison was "temperamentally unable to decide between his 'liberal' and his 'republican' convictions" (1995, 10). Minorities were morally bound to accede to the decisions of persistent majorities, even factious ones, because they consented to the procedure of majority rule. They had rights of protest and persuasion, even revolt, but not the right to claim society's benefits while selectively exempting themselves from its decisions.

In this sense, factious majorities were legitimate, as David M. Estlund defines that term: "legitimacy [refers to] the moral permissibility of the state's issuing and enforcing its commands owing to the process by which they were produced" (2008, 2). The terminology of contemporary political philosophy cannot, of course, be imposed on Madison himself. Its value, rather, lies in illuminating an often overlooked feature of Madison's thought: the founding's foremost critic and theorist of majority factions nonetheless thought they were legitimately entitled to rule.

MAJORITY RULE AND THE TENTH *FEDERALIST*

Commentary on the American Founding has traditionally been divided between those who see it as fundamentally liberal (Appleby 1984; Diggins 1984; Diamond 1986; Kloppenberg 1998) and those who see the influence of classical republicanism at work (Pocock 1975; Wood 1998), a dualism that has carried over into Madison scholarship in the question of whether he was, at

1. All citations to *The Federalist* are to the Liberty Fund edition (Madison et al. 1788/2001).

heart, a theorist of rights or of majority rule. Nowhere is the debate more evident than in interpretations of the Tenth *Federalist*, Madison's most direct and sustained commentary on factious majorities.

Adherents of the liberal view, as well as some commentators who wish classical republicanism had been preserved but believe it was not, see *Federalist* 10 as an indictment of majority rule. And, in fairness, the essay provides ample foundation for that view. Madison repeatedly criticizes factious majorities as corrupt and biased, and his emphasis appears to be protecting minority rights. Yet while *Federalist* 10 is Madison's clearest and certainly most famous indictment of majority factions, one of the essay's most significant insights may lie in what it never says: Madison nowhere suggests factious majorities are not entitled to rule. *Federalist* 10 merely seeks to inhibit their formation in order to make a choice between majority rule and minority rights less frequently necessary. But criticizing majorities is not the same thing as calling their entitlement to rule into question. On the contrary, *Federalist* 10 is bookended by reminders that republicanism is the limiting condition on its analysis. Madison announces at the outset that "the friend of popular governments" must seek a solution to the problem of faction "without violating the principles to which he is attached" (10:42). He similarly emphasizes at the end of the essay that he has found "a *republican* remedy for the diseases most incident to republican government" (48). One might understand "republicanism" to incorporate the idea of minority rights, but Madison did not. His definition in *Federalist* 39 associates republicanism with the criteria of removable officials drawn from the great body of the people, both of which are traceable to an ultimate concern with majority rule rather than individual or minority rights.

Madison's cure for the problem of faction is republican because, between those bookends, he nowhere steps outside the parameters of majority rule. He proposes no institutional controls on majorities; indeed, the essay proposes no institutional solutions except representation, which is forced by the extent of the proposed union's territory. Instead, Madison's emphasis is on identifying conditions that inhibit the formation of factious majorities in the first place.

To understand why this is not an indictment of majority rule, it is necessary first to clarify the relationship between liberalism and republicanism. While extreme situations may force a choice between them, they are not comparable values that Madison sought to balance. They are, rather, different in kind. Republicanism refers to a method of making decisions; liberalism, to a set of criteria for evaluating them (Weiner 2012, 6). All political decisions had to satisfy the requirement of republicanism; Madison hoped that most would meet the standard of liberalism too. But the fact that he feared some might not meet the standards of liberalism does not mean that in those cases he was willing, or even able, to forego republicanism. Even if one's priority is liberalism, as will

be seen, the relevant question in such cases remains whether one should expect a system other than republicanism to produce more liberal results. This distinction between liberalism and republicanism helps illuminate why there is no theoretical inconsistency in simultaneously criticizing a decision reached by the ruling authority and nonetheless acknowledging its legitimacy. A decision may in this sense be both unjust and legitimate, a point Madison makes in his "Memorial and Remonstrance": "True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is *also* true that the majority may trespass on the rights of the minority" (1962–91, 8:298–304; emphasis added). The two clauses are completely compatible from a theoretical perspective. The first acknowledges that there is no satisfactory alternative to majority rule; the second, that majorities sometimes act unjustly. But the fact of their occasional injustice does not impugn their authority to rule. With this backdrop, we can see the significance of Madison's claim in *Federalist* 39 that the proposed Constitution must be abandoned if it "departs from the republican character." Madison makes no comparable claim for liberalism, nor is liberalism part of his understanding of republicanism, which he defines solely in terms of majority rule: all authority must come ultimately from the people and be exercised by removable officials (39:194).

Madison's position is comparable to Socrates's in *Crito*: the Athenian jury's verdict is unjust but nonetheless authoritative because Socrates has tacitly consented to majority rule as a principle of decision (Rowe 2011). For Madison, obedience is due to a decision of the political community not because of the substantive justice of that decision but rather because the individual consents—whether tacitly or explicitly—to the process by which it was made: namely, majority rule.[2] He wrote to Jefferson in 1790:

> On what principle is it that the voice of the majority binds the minority? It does not result, I conceive, from a law of nature, but from compact founded on conveniency. . . . If this assent can not be given tacitly, or be not implied where no positive evidence forbids, persons born in Society would not on attaining ripe age be bound by acts of the Majority; and either a unanimous repetition of every law would be necessary on the accession of new members, or an express assent must be obtained from these to the rule by which the voice of the Majority is made the voice of the whole. (Madison 1962–91, 13:20)

2. Here and throughout, my analysis of Madison is similar to Willmoore Kendall's of John Locke. On the supremacy of majorities even in cases of rights disputes, see Kendall (1950, 1959).

Madison's plain meaning is that unanimous and explicit consent are not required on every occasion. It is because of individuals' ongoing and tacit consent "to the rule by which the . . . Majority is made the voice of the whole" that they are obliged to abide by majority decisions. Majority factions are thus legitimate in Estlund's sense: the community has the moral authority to impose decisions because they were reached by a process to which all consented.

To be sure, if it could be shown that majorities were systematically prone to unjust decisions—and that they were more prone to injustice than other potential sources of authority—that fact might call their legitimacy into question. It might also counsel a mixed regime that respects the people's right to rule but installs makeweights to control them. But neither was Madison's view. In *Federalist* 63, Madison says that the will of the community should ultimately prevail but that "particular" moments may arise in which the public makes unwise decisions because of "irregular" passions, constructions that suggest they do not normally do so (327). Similarly, *Federalist* 14 specifies that the American model of representation is unique because it applies to an "unmixed" regime, a specific reference to and rejection of a mixed system on the British model, in which the one, the few, and the many are balanced against one another (63–64).

Isolating majority rule as a decision-making mechanism clarifies an essential question: Regardless of his disposition toward any given majority, did Madison ever endorse any means of making decisions other than majority rule? He clearly did not. In Aristotelian terms, the alternatives would have been controlling factions by diverting decision-making power to the one or the few—options Madison considered and rejected even while explicitly discussing how to control factious majorities (Aristotle 1984). Madison suggests what one might intuitively suspect: if rule by the many may produce some unreasonable decisions, rule by the one or the few would be apt to produce even more. *Federalist* 38, referring to the Greek election of Solon to govern with autocratic powers, questions why they would assume that "one illustrious citizen" would be "a more eligible depository of the fortunes of themselves and their posterity, than a select body of citizens [i.e., a representative assembly representing the many] from whose common deliberations more wisdom, as well as more safety, might have been expected" (187).

In *Federalist* 51, Madison, having dealt with the separation of powers, pivots to the topic of factious majorities, largely restating the extended republic theory of *Federalist* 10. He specifies, however, that the value of an extended republic lies in alleviating the need for introducing representatives of the one or the few into the regime in the first place. This is especially to be welcomed because arrangements relying on the one or the few were liable to produce even less liberal decisions than a republican regime empowering the many. A republican society, Madison writes, could prevent the influence of factions ei-

ther by relying on an independent authority outside the majority or by encompassing a sufficient multiplicity and diversity of interests that a factious combination would be unlikely. "The first method prevails in all governments possessing an hereditary or self-appointed authority. 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" (*Federalist* no. 51:270).

MAJORITY RULE AND THE COURTS

Commentators like Charles Beard (1986) have described both the Senate and the Supreme Court as quasi-aristocratic institutions through which the few check the many, but Madison saw neither in that way. During the constitutional convention, he argued fiercely, and on specifically majoritarian grounds, for basing the composition of the Senate on population rather than giving small and large states equal representation. Any basis for the Senate other than popular majorities would be "confessedly unjust"; proportional representation and, therefore, majority rule was "the proper foundation of government." On his reasoning, the utility of the Senate would lie in its longer terms and the broader pool of available candidates, but both of these benefits would be realized through majoritarian forms (*Federalist* no. 37:181). *Federalist* 62 proceeds to dismiss the state-based representation of the Senate as a naked political compromise that could not be tried "by the standard of theory" (320). The closest Madison comes to acknowledging an extramajoritarian influence for the Senate is his halfhearted speculation in that paper that it might help to impede "improper acts of legislation" by requiring both a majority of the people and a majority of the states. Yet Madison immediately backtracks by acknowledging that "this complicated check on legislation may, in some instances, be injurious as well as beneficial" (321).

In a similar vein, Madison rejected an aristocratic role for the judiciary, going so far as to question the propriety of the Supreme Court possessing ultimate authority over the elected branches in matters of constitutional interpretation. Commenting on Jefferson's draft Constitution for Virginia, Madison noted that allowing the judiciary to pronounce last in sequence on constitutional questions—as opposed to allowing all three branches to construe the Constitution within their spheres—"was never intended and can never be proper," a seemingly explicit rejection of Bork's judicial resolution of the Madisonian dilemma (Madison 1962–91, 11:293).

Madison does, however, seem to suggest in two powerful contexts that he approves of the Supreme Court inhibiting majorities: federalism and the Bill

of Rights. But closer inspection indicates that the exercises of judicial review Madison countenances do not pertain to overruling the will of deliberate majorities.

In the case of federalism, Madison says in *Federalist* 39 that "some tribunal," a reference to the Supreme Court, is to decide disputes between the states. Even this claim—which Madison cited as his authoritative view in his correspondence with Judge Spencer Roane after the *McCulloch* decision—is at odds with his assumptions in *Federalist* 44 and 46 that national majorities would decide the extent of national powers (Carey 2004). But the relevant fact for the current analysis is that disputes involving federalism involve the claims of competing majorities—those at the national and state levels—not factious majorities accused of abusing minorities within a level of government.

The case of the Bill of Rights presents a more difficult challenge, for in introducing the measure to Congress, Madison seems at first glance to suggest it will empower the judiciary to overturn the will of abusive majorities: "If [the amendments] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights" (Madison 1962–91, 12:206–7). Notice, however, that the situation to which Madison refers is to abuse not by majorities of minorities but by "the legislative or executive" of the people. This kind of abuse occupied an analytically different category for Madison than the problem of majority faction, which he indicates explicitly in *Federalist* 51: "It is of great importance in a republic not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part" (270). It is the former situation to which Madison refers in saying the judiciary will be an "impenetrable bulwark." The latter scenario is one of factious majorities. As George W. Carey (1978) has shown, distinguishing between them is of decisive importance if Madison's thought is to be understood coherently.

Further evidence for the limited role Madison understood for the judiciary is suggested toward the end of the Philadelphia convention, when Madison argued that the Supreme Court's power of constitutional interpretation be explicitly confined to questions of a "judiciary nature." "The right of expounding the Constitution in cases not of this nature," he said, "ought not to be given to that Department" (Madison 1962–91, 10:157–58).

Madison did, to be sure, attempt to involve judges in the legislative process through his proposal for a Council of Revision, whose vetoes of bills would

have stood unless the legislature overturned them. But he was at pains to emphasize that the proposal's value was engaging judges when the legislature still had an opportunity to overturn them, thereby retaining legislative—and thus majority—sovereignty. In 1817, he wrote to Monroe, who had inquired as to the constitutionality of a particular federal road-building project: "These considerations remind me of the attempts in the Convention to vest in the Judiciary Dept. a qualified negative on Legislative *bills*. Such a Controul, restricted to Constitutional points, besides giving greater stability & system to the rules of expounding the Instrument, would have precluded the question of a Judiciary annulment of Legislative *Acts*" (Madison 1900, 8:406).[3]

Madison had also advocated another provision that has been widely understood as an assault on majority rule: the national veto on state laws. But his intent here was to protect the sovereignty of national majorities over national issues against the encroachments of state minorities. The "abuses" to which Madison referred in the states were also ones he described as interstate issues that implicated national interests and thus trespassed on the territory of national majorities (Weiner 2012).

It is true, to be sure, that the judiciary was indirectly drawn from the people and that it therefore complied with the criteria of republicanism as elucidated in *Federalist* 39. The argument here is not that judicial review is antirepublican per se. But majority rule is not a binary, black-and-white affair. It exists on a spectrum of distance from the people—the legislature being most proximal and the judiciary being most distant. The evidence supports the argument that Madison wanted disputes between majorities and minorities resolved closer to rather than further from the public—through the intermediary mechanism of representation, to be sure, but close to the people nonetheless.

What then was the judiciary to do? Clearly Madison did not discount the institution, having emphasized the importance of an independent judiciary in *Federalist* 51, among other places. But he appears to have confined its role to settling individual disputes, not handing down what he called "general and abstract doctrines." Madison preferred that precedents accrete from decisions confined in impact to the immediate parties to a case. He thus wrote to Roane in response to *McCulloch v. Maryland*: "It appears to me as it does to you that the occasion did not call for the general and abstract doctrine interwoven with the decision of the particular case. I have always supposed that the meaning of a law, and for a like reason, of a Constitution, so far as it depends on Judicial interpretation, was to result from a course of particular decisions, and not these from a previous and abstract comment on the subject" (Madison 1900, 8:447).

3. References to writings not yet published in the Virginia series are to the Gaillard Hunt edition (Madison 1900).

This suggestion of gradual accumulation of precedent is further emphasized by Madison's repeated preference for seriatim rather than majority opinions, as he expressed in the same letter: "I could have wished also that the Judges had delivered their opinions seriatim. The case was of such magnitude, in the scope given to it, as to call, if any case could do so, for the views of the subject separately taken by them. This might either by the harmony of their reasoning have produced a greater conviction in the Public mind; or by its discordance have impaired the force of the precedent now ostensibly supported by a unanimous & perfect concurrence in every argument & dictum in the judgment pronounced" (Madison 1900, 8:447).

MADISON AND MAJORITY FACTIONS

Having rejected government of the one or the few—as well as a mixed regime—Madison was left with lodging authority in the many, and his belief in their entitlement to rule was neither conditional nor reluctant. There are, to be sure, several passages in which Madison criticizes the decisions of majorities, but none in which he questions their rightful authority.

His oft-quoted condemnation of the Jay-Gardoqui treaty, which would have restricted access to the Mississippi, illustrates the point: "There is no maxim in my opinion which is more liable to be misapplied, and which therefore more needs elucidation than the current one that the interest of the majority is the political standard of right and wrong" (Madison 1962–91, 9:140–42). Several commentators have cited the passage as evidence that liberalism trumped republicanism when the two conflicted (McGinnis 1996, 75 n. 108; Kloppenberg 1998, 178). Ralph Ketcham, for example, says the passage indicates Madison's belief that "concepts of right and justice were paramount to expressions of majority rule" (1990, 181). Yet Madison says nothing of the kind. He merely acknowledges that majorities can do wrong and therefore denies that the apparent or immediate interest of a majority is of itself evidence of moral rightness. In other words, majorities can be wrong, even immoral. But that does not mean Madison questions their legitimacy generally or even on occasions of illiberality. Put otherwise, he explicitly separates the issues of moral rightness and political legitimacy. If rightness and legitimacy converge, it is only in the area of majority rule: he goes on in the passage to say that the "ultimate" interest of the majority is the standard of right and wrong. Recall, again, that republicanism is about how decisions are made: the alternatives are not republicanism and liberalism but rather republicanism and some other mode of making choices, which Madison explicitly considers and explicitly rejects.

He made a similar point at the Philadelphia convention in denying that a breach of the Constitution by any one state constituted sufficient grounds to

dissolve the compact. On the contrary, "the compact itself"—that is, the Constitution—"gives an *indefinite* authority to the majority to bind the whole in *all* cases" (Madison 1962–91, 10:55–61; emphasis added). Indeed, republicanism necessarily preceded liberalism—both temporally and in order of priority—because Madison believed rights were established and their boundaries set within political contexts. Even the Bill of Rights ultimately existed to provide a basis for common deliberation on the parameters of rights (Weiner 2012, 111–18).

Similarly, Madison argued during the opposition phase—epitomized by his *National Gazette* essays as well as his "Notes on Government"—for a republican regime grounded in the cultivation and ennoblement of public opinion (Sheehan 1992, 2009). The essays of this period, such as "Property," emphasize individual rights but regard an educated public opinion—that is, majority rule—as the best guarantor for them.

This dimension of Madison's thought is evident in the case of what he regarded to be a manifest injustice: the Alien and Sedition Acts of 1798. We may see the point by tending to the differences between Madison's Virginia Resolutions and Jefferson's Kentucky Resolutions. The latter argued that the acts were inoperative because they were unjust: "Whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force" (Frohnen 2002, 399). By contrast, Madison was self-consciously careful not to say the acts were inoperative. Instead, the Virginia Resolutions served a rhetorical purpose within the parameters of majority rule. It was the job of states "to watch over and oppose every infraction of [constitutional] principles," going so far as "to interpose for arresting the progress of the evil" (398). The precise meaning of interposition was never clear, and Madison dampened the intensity of even that circumscribed view further in the Virginia Report of 1800, which concluded by saying that the purpose of the resolutions was not to deny the legitimacy of the Alien and Sedition Acts but rather merely to rouse public opinion against them. The acts remained in effect until undone by constitutional means: "The declarations [of resolutions like those passed in Virginia] are expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection" (Madison 1962–91, 17:348). Moreover, Madison acknowledged in the 1800 report that even his sacred right of political expression had boundaries that had to be legislatively set: "The committee are not unaware of the difficulty of all general questions, which may turn on the proper boundary between the liberty and licentiousness of the press. They will leave it therefore for consideration only, how far the difference between the nature of the British government, and the nature of the American governments, and the practice under the latter, may show the degree of rigour in the former to be inapplicable to, and not obligatory in the latter"

(Madison 1962–91, 17:337).[4] Madison's point here is that America must legislate its own common law rather than accepting Britain's. But political expression was nonetheless a fair subject of legislation; he merely asserts that he believes the boundaries should be drawn widely, not that boundaries themselves are illegitimate.

By the time the Tariff of 1828 was enacted, Southerners had taken license with what Madison actually said, arguing that he meant to accord states the right to nullify a national law—that is, to declare it to be illegitimate and therefore inoperative within their borders.[5] Madison, who believed the tariff that spurred the crisis was a reasonable exercise of federal authority, dismissed nullification as both a constitutional fiction and an assault on the principle of majority rule. Aggrieved states, he wrote, could plead their case to the people or push for constitutional amendments. However, "Should this resort also fail, and the power usurped be sustained in its oppressive exercise on a minority by a majority, the final course to be pursued by the minority, must be an object of calculation, in which the degree of oppression, the means of resistance, the consequences of its failure, and the consequences of its success must be the elements" (Madison 1900, 9:597). Madison herein explicitly says an oppressed minority—even in a case of "usurpation"—must endure the abuse unless it is so unjust as to warrant the extraconstitutional step of revolution. Within political society, however, minorities must respect majorities' entitlement to rule, even in cases of alleged oppression.

However, the utility of the tariff crisis as a test case for Madison's views on the legitimacy of majority factions is limited because he supported or at least tolerated the underlying policy. One might therefore understand him to be biased in favor of its legitimacy. To isolate his views on majority factions, it would be necessary to identify a case in which Madison believed a policy to be factious but nonetheless regarded it as legitimate. Such was his reaction to the Missouri Compromise of 1820.

4. Compare the Virginia Assembly's instructions on the property rights of Tories to the 1783 Congress to which Madison was a delegate: "Resolved therefore unanimously that when the former constitution or social compact of this Country & the Civil Laws which existed under it, were dissolved—a Majority of the Inhabitants had through necessity, an unquestionable natural right to frame a new social compact & to admit as parties thereto, those only who would be bound by the Laws of the Majority—& consequently as no individual can claim immunities, privileges or property in any community but under the Laws of that community, so all those who were members of the former government which and its dependant Laws have been dissolved abrogated and made void—cannot have legal claim to any immunity, privilege or property under or present constitution, or those Laws which flow from it if they were not parties to the present Social compact originally, or have [not] become parties by the subsequent Laws thereof" (Madison 1962–91, 5:409–10).

5. Their argument was a faithful reading of Jefferson but not of Madison, even if the latter's rhetorical excesses might have conduced to the misunderstanding.

THE CASE OF THE MISSOURI COMPROMISE

The compromise itself admitted Missouri as a slave state while banning slavery in the rest of the Louisiana Territory. Madison objected to the unfolding policy at several points. When Northern interests in the House attempted to attach a condition to Missouri statehood that would have prevented slaveholding Southerners from emigrating there, Madison asserted that Congress could not admit Missouri on terms that would have made it unequal to other states (Madison 1900, 9:6–10). Moreover, Madison appears to have objected to the ban on slavery in the territories. His views here are complicated by his advocacy of diffusionism—the belief that slavery was likelier to be abolished if it was diffused, such that banning it in the territories might actually perpetuate the institution by concentrating it—but he also seems to have regarded the ban as an infringement of the property rights of Southerners.[6] He wrote of the Northern majority in the House: "Parties under some denominations or other must always be expected in a Govt as free as ours. When the individuals belonging to them are intermingled in every part of the whole Country, they strengthen the Union of the Whole, while they divide every part. Should a State of parties arise, founded on geographical boundaries and other Physical & permanent distinctions which happen to coincide with them, what is to controul those great repulsive Masses from awful shocks against each other?" (Madison 1900, 9:12).

"Parties" were not synonymous with "factions" for Madison, but the stigmata of faction nonetheless appear in this passage: one party—in this case the North—imposes itself through brute force rather than persuasion and accommodation. Moreover, because Madison believed the compromise violated the right of slave owners to use their property as they wished, it placed them at a disadvantage in settling the territory to emigrants from the North. This would appear to be a classic case of a majority violating a minority's rights: in other words, factious behavior. The Northern states were also behaving as a faction of the most dangerous kind: a division that was fixed in unchanging geography rather than the fluid majorities and minorities that *Federalist* 10 anticipates in American society.

If Madison believed majority factions to be illegitimate, we should expect to see that here. On the contrary, however, Madison—declining to join Judge Spencer Roane's assaults on the Marshall Court—says the oppressed minority is bound to abide the abuse unless it can convince the majority to change its mind: "But what is to controul Congress when backed & even pushed on by a

6. Madison's view of slaves as property assumes an obviously troubling cast in this context, but the scope of this essay permits only an acknowledgment rather than an exploration of that fact.

majority of their Constituents, as was the case in the late contest relative to Missouri, and as may again happen in the constructive power relating to Roads & Canals? *Nothing within the pale of the Constitution* but sound arguments and conciliatory expostulations addressed both to Congress & to their constituents" (Madison 1900, 9:58; emphasis added).

Again, we see the markings of faction: an aggressive majority running roughshod over the normally intervening mechanism of representation to impose itself on a minority whose rights are thereby curtailed. Yet the latter's only recourse is "sound arguments"; moreover, and significantly, it is the aggrieved minority that is expected to conciliate the majority rather than the other way around. By specifying that no other remedy exists within the Constitution, Madison signals that aggrieved minorities have no alternative but to exit political society if the oppression is sufficiently unbearable, something he plainly believed not to be the case here. Indeed, he told President Monroe that "the cool and candid" could not blame architects of the compromise for a measure that "was deemed urgent" and was not "irreconcilable with the Constitution" (Madison 1900, 9:25).

These considerations are also evident in a somewhat ham-handed allegory Madison wrote around 1821, which would eventually become the last piece he published during his lifetime (Madison 1900, 9:77–85; Allison 1991). Crafted in the "Jonathan and Mary Bull" form popular during this era, the story has received some attention for its literary method and its discussion of slavery, but its importance for Madison's theory of majority rule has been largely overlooked (Schaedler 1946; McCoy 1989; Allison 1991; Burstein and Isenberg 2010). The parable relates the marriage of "Jonathan Bull," representing the North, and "Mary Bull," representing the South, who united in matrimony to resist the abuses of "Old Bull"—Great Britain: "They had a great horror of falling into the hands of old B. and regarded the marriage of their proprietors under whom they held their freeholds as the surest mode of warding off the danger." Each possessed a considerable estate that was united "under a common superintendence." Their marriage produced several offspring (i.e., new territories), each of which was entitled upon reaching the age of majority (statehood) to "a portion of land sufficient for a good farm to be put under the authority of the child." Madison then alludes to the difficulty of Missouri: "It happened that at the expiration of the non-age of the 10th or 11th fruit of the marriage some difficulties were started concerning the rules & conditions of declaring the young party of age, and of giving him as a member of the family, the management of his patrimony. Jonathan became possessed with a notion that an arrangement ought to be made that would prevent the new farm from being settled and cultivated [by tenants from Mary's estate—i.e., the South]" (Madison 1900, 77–79).

Whether Madison alludes here to the ban on slavery in the territory or to the defeated Northern proposition that the importation of slaves be banned in Missouri proper is unclear, but in either case, the markings of faction—that is, a violation of the property rights of Southerners at the hands of an overbearing majority—are evident. This conflict, in turn, leads to bickering over the fact that tenants of Mary's land had more often been chosen the "Head Steward" (i.e., president) than those of Jonathan's. Jonathan threatens to prevent her tenants from ever again attaining the office—which "was virtually in his power"—"unless she purges herself of a black stain (slavery) that covers the whole of her left arm" (Madison 1900, 79–80).

By any Madisonian reading of the tale, Jonathan treats Mary factiously. Her tenants are denied "the equal right . . . to remove with their property to new farms" (Madison 1900, 79). Significantly, Jonathan does this by threatening to overwhelm Mary by brute force of superior numbers: Mary is "virtually in his power." Yet Mary makes no claim against Jonathan's authority on account of his unjust behavior. On the contrary—and in a fashion Madison clearly wishes the South would emulate—she calmly attempts to persuade him to change his mind. She is initially moved to indignant protest, but that passion quickly dissipates:

> Mary was so stunned with the language she heard that it was some time before she could speak at all; and as the surprise abated, she was almost choked with the anger & indignation swelling in her bosom. Generous and placable as her temper was, she had a proud sensibility to what she thought an *unjust* & degrading treatment, which did not permit her to suppress the violence of her first emotions. Her language accordingly for a moment was such as these emotions prompted. But her good sense, and her regard for J. whose qualities as a good husband she had long experienced, soon gained an ascendency, and changed her tone to that of sober reasoning & affectionate expostulation. (Madison 1990, 80; emphasis added)

With regard to the restrictions representing the Missouri Compromise, Mary seems clearly prepared to abide them despite their injustice, in the hope that they will eventually be overcome by persuasive means: "As to the case of providing for our child just coming of age [the Missouri territory] . . . we both have such tender regard for him and such a desire to see him on a level with his brethren as to the chance of making his fortune in the world, that I am sure the difficulties which have occurred will in some way or other be got over." Mary acknowledges that Jonathan is the "stronger" party in the marriage yet argues that—given her estate's superiority in resources if not in population—it is in

his interest to accommodate her, precisely the argument Madison directed at the North when sectional disputes flared. Thus, Mary: "I am far from denying that I feel the advantage of having the pledge of your arm, your stronger arm if you please, for the protection of me & mine; and that my interests in general have been and must continue to be the better for your aid & counsel in the management of them. But on the other hand you must be equally sensible that the aid of my purse will have its value" (Madison 1900, 82).

Mary proceeds to express Madison's view that North and South must be united to resist potential encroachments from "Old Bull" (i.e., Great Britain) as well as her "hope that there are other ties than mere interest to prevent us from ever suffering a transient resentment on either side, with or without cause, to bring on both all the consequences of a divorce." She rebuts his implicit claim that it was somehow unjust for more of her tenants to be chosen head steward than his, noting that they were freely elected by tenants from both estates. But, significantly, if Jonathan chooses to overwhelm her with force in that matter, she will respect the result: "Laying aside all these considerations, I repeat my dear J. that the appt. of the Head Steward lies as much if not more with you than with me. Let the choice fall where it may, you will find me faithfully abiding by it, *whether it be thought the best possible one or not*" (Madison 1900, 85; emphasis added). Mary thereby accepts the framework of majority rule, even when she disagrees with its results and even, crucially, if those results are the product of mere force rather than justice.

The foregoing analysis has endeavored to establish that Madison believed a majority could be simultaneously unjust in the sense of violating minorities' rights yet also legitimate in the sense of having the moral authority to impose its views. That does not mean, of course, that justice was not a concern for Madison; far from it. *Federalist* 10, among other writings, is clearly animated by a concern for conditions that will discourage unjust behavior on the part of majorities. Nor does it mean Madison believed in unlimited government. The question is simply what decision-making mechanism will be used in cases of conflict.

Significantly, Madison's emphasis lies in encouraging majorities to behave reasonably, not in institutional restraints on their authority. In this sense, he is better understood as a deliberate democrat than a Jacksonian one. The extended republic theory of *Federalist* 10 uses cooling mechanisms such as distance and representation to inhibit factious majorities in the rare cases in which they form but not, as has been seen, institutional barriers to their authority. The Senate relies on longer terms yet retains ultimate accountability to the people. The separation of powers, which exerts an auxiliary drag on majorities, operates wholly within the confines of majority rule: each branch, Madison emphasizes, derives its authority ultimately from majorities.

MADISON IN CONTEMPORARY CONTEXT

If this reading of Madison is persuasive, it is substantially at odds with a contemporary political culture that emphasizes individual rights over majority rule. It suggests in particular that we should reconsider our view of Madison as the father of individual rights; indeed, as one commentator has observed, his paternity of the Bill of Rights was reluctant at best (Finkelman 1990). Its purpose, ultimately, was to season rather than inhibit majorities (Weiner 2012). Yet the contemporary understanding is precisely the opposite: that the Bill of Rights and constitutional protections more generally are tools for delegitimizing majorities. Even an advocate of judicial restraint such as Bork ultimately, if implicitly, accepts this framework.

To the extent that political communities depend on citizens' perceptions of their legitimacy, this development is problematic. The appeal to the Supreme Court rather than to majoritarian means to deal with objections to the Affordable Care Act is only the latest in a long line of cases in which both Right and Left have gone beyond criticizing majorities to saying that their decisions are illegitimate (*NFIB v. Sebelius* [2012]). The resulting "rights talk" that commentators like Mary Ann Glendon (1991) have decried routes decisions around the political process, thereby endangering the vitality of the political community. If all decisions with which one disagrees are illegitimate, moreover, then society cannot reconcile after disagreement on the basis on which democracies generally do so: on the losing side's perception that the process, however regrettably concluded, was reasonable and fair. Similarly, delegitimizing rather than either criticizing decisions or attempting via political processes to undo them imposes the added cost of potentially unsettling every decision of the community, thereby depriving society of the stability and predictability that supply government with its most elemental purpose. In addition, the resort to the courts has tended to backfire, often leaving rights in a less secure position than they were before, as Gerald Rosenberg has documented (2008).

Madison's analysis also suggests a lacuna in recent republican and rights theory, which have increasingly emphasized the avoidance of "domination" as the sine qua non of politics. While these analyses provide ample criteria for evaluating decisions—and, in fairness to them, generally aspire to do no more than that—Madison reminds us that the question of how decisions should be made deserves equal attention. This is especially so because Madison's generation considered self-governance through the mechanism of majority rule to be an individual right, perhaps *the* individual right, in itself.

For Madison, the question distills not to whether majorities sometimes behave unjustly—they obviously do—but rather to whether another mechanism for making decisions would be preferable. On his analysis, one clearly would not. He is thereby able to maintain his preference for majority rule while simultaneously criticizing certain majorities under specific circumstances.

Ultimately, even the best-laid constitutional plans cannot permanently settle all disputes. Sovereignty must be lodged somewhere, even when that sovereign authority—in spite of all institutional encouragements to the contrary—acts unjustly. It is therefore significant that toward the end of his life, Madison cast the options for lodging authority in a regime as an essential choice "between a republican Govern't in which the majority rule the minority, and a Govt in which a lesser number or the least number rule the majority" (1900, 9:523). The presence of a factious majority does not absolve one of having to make that choice, and Madison's was clear: the regime would take all available precautions to ensure just majorities prevailed, but when factious ones slipped through, they had the legitimate authority to impose themselves. The vaunted "Madisonian dilemma" thus turns out not to be a dilemma at all.

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