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The Federalist on Congress

Greg Weiner

The American civic canon holds that the Constitution creates three branches of government that are both separate and “equal.” Publius’s essays on Congress cast serious doubt on this supposition, at least with respect to the extent of each branch’s influence on the workings of the national regime. It is no mistake that both the Constitution and *The Federalist* treat Congress as the first branch of government. It is “justly regarded” as such, Louis Fisher says, primarily because of the appropriations power elucidated in *Federalist* 58.¹ *The Federalist* understands Congress, George W. Carey writes, “to be the heart of the proposed system.”² Even the doubts and concerns that Publius expresses about Congress reflect regard for its authority. *Federalist* 51, for example, acknowledges that the legislature “necessarily predominates” (*Fed.* 51, 350) in a republic, but it also seeks a remedy for the “inconveniency” this poses to the separation of powers. Institutionally, Congress has the power both to constitute and discipline the other branches, which have no comparable authority over it.³ Even when defending executive energy, Publius describes it as secondary to legislative deliberation.⁴ The centrality of the legislative branch is demonstrable not only institutionally but also theoretically, for it is here that Publius places his greatest hopes for solving one of his most fundamental problems: the reconciliation of a government with sufficient authority and energy on the one hand, with the preservation of both public and personal liberty, on the other – a concern that Hamilton and Madison respectively expressed in *Federalist* 1 and 37.

The answer to that problem is to construct a regime in which majorities rule but are likeliest to behave in a manner most consistent

with "the rights of other citizens" and "the permanent and aggregate interests of the community" (*Fed.* 10, 57). That is not the only problem that Publius faces, but it is a paramount one, and the legislature necessarily lies at the center of its resolution. Publius's solution to this problem is bound by his fidelity to the "fundamental principle of free government," majority rule (*Fed.* 58, 397). The challenge is to find ways to discipline majority rule from within the confines of a majoritarian system. Publius does so by erecting a prime mover in government – the legislature – that is institutionally prone to deliberation and the seasoning effects of delay, which diffuses popular passions, and which enables the people to favor their long-term interests over their immediate appetites.

The comprehensive vision of Congress portrayed in *The Federalist* is best understood through the collective eyes of its pseudonymous author, Publius. This is partly because *The Federalist* is not intended to express the private intentions of its authors. On the contrary, its particular value lies in its presentation of a political understanding of the Constitution, one that reflected the compromises and accommodations of diverse and powerful minds. The principal authors of the essays on Congress, Alexander Hamilton and James Madison, agreed neither wholly with each other nor each privately with what they wrote in *The Federalist*. Their essays reflect a rough division of labor according to which Hamilton wrote many of the papers on the powers of Congress, while Madison's themes tended toward assuring that those powers were reasonably exercised. Even within this division, there is overlap: Hamilton in *Federalist* 15 emphasizes the value of "deliberations" over "hurry[ing] into improprieties and excess" (*Fed.* 15, 96) a theme that also preoccupies Madison. Madison, by contrast, observes in *Federalist* 41 that "necessary" powers must be granted, especially since all powers are subject to abuse (*Fed.* 41, 268–69). It is generally the case that Publius unifies Hamilton and Madison behind the conclusion that the legislature must have adequate powers, and because it must, those powers must be channeled toward thoughtful uses.

POWERS OF CONGRESS

That Congress is such a prime mover is evident through the powers Publius accords to it. According to *Federalist* 15, government itself is associated with "the power of making laws" (*Fed.* 15, 95) while Publius indicates in *Federalist* 40 that the resolution of the Continental Congress authorizing the Philadelphia Convention of 1787 called for a government "adequate to the exigencies of the union" (*Fed.* 40, 258). This government's sphere will be limited, but within it, its powers will be extensive; indeed, some will, like the exigencies themselves, be incapable of "precise bounds." This Constitution accords adequate power for "every possible contingency . . . somewhere in the government" (*Fed.* 26, 156).

The succeeding essays, 41 through 43, explore those powers in detail. Jack Rakove notes that these essays assert unlimited national power with respect to defense and taxation while emphasizing the limited ends of national authority in other areas.⁵ These authorities are typically vested in the Congress, so much so that Publius often refers to the powers of the national government and the powers of the Congress interchangeably. *Federalist* 41 is entitled "A General view of the powers proposed to be vested in the union," but the analysis that follows refers almost exclusively and specifically to the powers of Congress. Publius indicates that the Union will have six classes of powers: security, international commerce, maintaining harmony among states, "miscellaneous objects of general utility," restraining states from abuse, and, finally, "[p]rovisions for giving due efficacy to all these powers" (*Fed.* 41, 269).

Each of these categories largely addresses a power of Congress. Even the heading "[s]ecurity against foreign danger" refers immediately to the power to declare war before proceeding to the clearly legislative responsibilities to raise and equip armies and navies and call forth the militia. Of the remaining powers, the only ones not obviously legislative are the restraints on the states that appear in Article 1, Section 9 of the Constitution. Their inclusion in the legislative article is thus highly suggestive. Publius's discussion of the

Guarantee Clause of Article IV is the only exception to this rule, and even in that case, the Supreme Court in *Luther v. Borden* ultimately ruled that it was for Congress to decide whether a state's government was republican.⁶ By the end of *Federalist* 44, James Burnham notes, Publius pronounces his discussion of the powers of the federal government complete even though he has only discussed the powers of Congress at this point.⁷

Publius asserts repeatedly that Congress has only the powers specifically enumerated for it. *Federalist* 56, for example, denies that representatives need a comprehensive acquaintance with every interest of their constituents because they will have to be familiar only with those affecting "objects within the purview of [Congressional] authority" (*Fed.* 56, 379). Yet *within* that purview, he is equally clear that the limits of those powers themselves are difficult to specify, so that *where* the Congress has the power, the working extent of its authority is not easily defined. These powers are laterally but not vertically enumerated. Publius specifically contrasts the nature of legislative with executive and judicial power by saying the latter two can be clearly bounded while the first is "less susceptible of precise limits" (*Fed.* 48, 334). The clearest example of this broad nature is the power to provide for defense, which must be unlimited because potential dangers to national security are unlimited, too (*Fed.* 23, 148-49). The "direction" of the forces is of course an executive function, but their formation and support are plainly legislative. *Federalist* 31 denies the possibility of carefully defining all powers: "I repeat here what I have observed in substance in another place, that all observations, founded upon the danger of usurpation, ought to be referred to the composition and structure of the government, not to the nature and extent of its powers" (*Fed.* 31, 197).

The centerpiece of this "composition and structure" is the separation of powers, and far from seeking to cramp congressional powers, Publius says they are a vital part of the system's maintenance. This is especially true of the power of the purse, which *Federalist* 58 calls the most potent weapon for preventing executive aggrandizement. "This power over the purse may, in fact, be regarded as the

most complete and effectual weapon, with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure" (*Fed.* 58, 394).

Yet Publius also frankly recognizes the potential abuse of legislative powers: "[I]n every political institution, a power to advance the public happiness, involves a discretion which may be misapplied and abused" (*Fed.* 41, 269). The real question, he explains, is whether the powers are necessary.

It cannot have escaped those, who have attended with candour to the arguments employed against the extensive powers of the government, that the authors of them have very little considered how far these powers were necessary means of attaining a necessary end. They have chosen rather to dwell on the inconveniencies which must be unavoidably blended with all political advantages; and on the possible abuses which must be incident to every power or trust, of which a beneficial use can be made.

(*Fed.* 41, 268)

This analysis merits careful notice. If the powers are necessary, the risk of their abuse appears to be worthwhile. The passage illustrates the primacy Publius places on the public good. How to restrain authority is a vital yet derivative question, which is to say that once society determines it requires a set of authorities for the public good, the question is how to encourage their responsible use. Publius provides several reasons to believe Congress will do so: the device of representation, bicameralism, the size of the respective bodies, the length of their terms, and the tools with which the executive is empowered to check the legislature.

REPRESENTATION

In *Federalist* 9, Publius ranks "the representation of the people in the legislature, by deputies of their own election" as one of the improvements in "the science of politics" that make republican government

more practicable in modern than in ancient times (*Fed.* 9, 51). Representation, he further explains in *Federalist* 63, was not wholly unknown to the ancients, but the key innovation, reflecting modern improvements on classical practice, is the "total exclusion of the people, in their collective capacity, from any share" in American government (*Fed.* 63, 428, emphasis in original). That power would be exercised solely through the mediating device of representation.

Yet the nature of that representation was hotly disputed. Anti-Federalists generally hewed to what may be best understood as a "reflective" model of representation according to which the legislature should mirror the people in both composition and views. The Federal Farmer thus asserted that "a full and equal representation, is that which possesses the same interests, feelings, opinions, and views the people themselves would were they all assembled."⁸ Publius, by contrast, specifically denies in *Federalist* 35 that it is necessary for the House of Representatives to mirror the people in composition (*Fed.* 218–21). *Federalist* 57 emphasizes that everyone is equally eligible for service in the House – "[n]ot the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune" – but it is not important that elections produce an exact simulacrum of the populace (*Fed.* 57, 385). It is more important that the "interests and feelings" of the people be "understood" and "attended to" – "sympathy," in Publius's Scottish terminology – a task of which representatives will be capable. He thus explains that "[t]he aim of every political constitution is, or ought to be, first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust." It bears observation that part of virtue is maintaining one's trust to the people, but this also clearly includes exercising judgment as to the "common good," which comes "first" and is "common," not "personal." These representatives will be "distinguished by the preference of their fellow citizens" and thus

presumably will exhibit the qualities that "entitle them to" that preference (*Fed.* 57, 384–85).

This understanding of representation is best understood as "refractive" as opposed to "reflective" because its purpose is to focus rather than reflect the public views. In Daniel W. Howe's phrase, representation is a "refining process in which higher faculties ... [are] sorted out, concentrated, and strengthened."⁹ This conception is most clearly expressed in the well-known prediction of *Federalist* 10 that an extensive republic will yield representatives best able to "refine and enlarge" the public views. The public views remain the raw material, so to speak, with which the representative works to fashion coherent policy. This is not a fundamentally anti-democratic or anti-majoritarian point of view. Contrast this with, for example, Edmund Burke's famous view of representation, which held that the representative's judgment is ultimately independent from the views of his constituents because he owes his judgment to an independent and objective moral good it is up to him to ascertain. This notion of refinement and enlargement might be compatible with either Colleen Sheehan's understanding that Publius (as James Madison) seeks the formation of public opinion into a dedication to the common good or Alan Gibson's emphasis on impartiality in representation. Both conceptions seek to focus rather than merely reflect the public views.¹⁰

The question, then, is how institutionally to assure, first, these representatives' fidelity and, second, their deliberativeness. These problems and the solutions to them are linked, beginning with bicameralism.

BICAMERALISM

Bicameralism – the practice of dividing the legislative authority into two chambers – was almost universally practiced in the American states. Publius explains that the first reason for bicameralism is to protect the public against faithless representatives: The Constitution "doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the

ambition or corruption of one would otherwise be sufficient" (*Fed.* 62, 418). Publius means no more here than that it will take, so to speak, two keys to launch a missile. He had said in *Federalist* 51 that a purpose of bicameralism was to divide the legislative authority because it was the strongest and thus the likeliest to encroach on the other branches. Here his point is that it is likeliest to encroach on the people.

Publius proceeds to say that the dissimilar composition of the two chambers, which are chosen by different mechanisms, makes their cooperation in perfidious schemes even more difficult. However, they should be distinguished only "by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government" (*Fed.* 62, 418). The capacity of the legislature to do what legislatures need to do – which complies with the republican principle according to which majorities should be able to work their deliberate will – superintends the concern about abuse. Publius claims in the succeeding essay that "[t]he people can never wilfully betray their own interests: But they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater, where the whole legislative trust is lodged in the hands of one body of men, than where the concurrence of separate and dissimilar bodies is required in every public act" (*Fed.* 63, 426–27).

Bicameralism also facilitates deliberation. Publius warns in *Federalist* 62 of "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions" (*Fed.* 62, 418). Publius's concern with passion offers important clues to his ideals of deliberation, which is needed to reconcile the turbulence of majority rule with the task of securing the public good and private rights. The temptation for deliberative assemblies is "passion," which Publius describes in terms of its "sudden" and also "violent" shifts, often producing resolutions that are not only "pernicious" but also "intemperate."

The solution to this is to constitute legislative bodies that are small enough and serve for sufficient terms that passions do not

spread or, if they do, have time to dissipate. Publius specifies that large assemblies are more prone to passion, apparently because of the relative anonymity of their members. The terms of Congress play a central role in slowing these passions by giving members of Congress time to cast controversial votes while still having time – as emotions cool – to recover their popularity before they face reelection. This is the keystone of Publius's institutional architecture for Congress. It is what will distinguish it from a direct democracy, which is incapable of deliberation.

INSTITUTIONAL ARCHITECTURE: THE HOUSE

Publius is tasked first with defending the Constitution's departure from the almost sacred American tradition of annual elections. He begins his discussion of the two-year terms for representatives by explaining that the House in particular "should have an immediate dependence on, and an intimate sympathy with the people" (*Fed.* 52, 355). This sympathy – initially obtained by the Constitution's specification that the House will be chosen by the same voters who choose the lower house of state legislatures – can be secured only by "[f]requent elections." These frequent elections "support in the members an habitual recollection of their dependence on the people," such that before power can go to their heads, they must "anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there for ever to remain, unless a faithful discharge of their trust shall have established their title to a renewal of it" (*Fed.* 57, 386).

Citing *Federalist* 52, David Mayhew regards reelection as the only dependable tie between representatives and constituents for purposes of either empirical analysis or accountability, but Publius writes that there is no "precise calculation" that can indicate how frequent these elections must be.¹¹ Significantly, Publius rejects abstract reason in favor of historical exploration: "Let us consult experience, the guide that ought always to be followed whenever it

can be found" (*Fed.* 52, 355). He finds that relevant examples of representatives' terms, including the experience of the American colonies prior to the Revolution, range as high as seven years, which suggests that two-year terms are amply safe. Reminding his reader of the aphorism that "where annual elections end, tyranny begins," Publius replies that it would be absurd to connect the "sun or the seasons" with "the period within which human virtue can bear the temptations of power." Instead of being "confined to any single point of time," liberty "lies within extremes, which afford sufficient latitude for all the variations which may be required by the various situations and circumstances of civil society" (*Fed.* 53, 359–60).

Publius surmises that the eagerness for one-year terms arises from an assumption that the House can alter its own power, yet – and here Publius most clearly distinguishes fundamental and statutory law – this will not be the case under the proposed Constitution. "The important distinction, so well understood in America, between a constitution established by the people, and unalterable by the government; and a law established by the government, and alterable by the government, seems to have been little understood, and less observed in any other country." Lacking a written constitution and thus any permanent security for freedom, one's natural tendency is to keep representatives on a short leash. In the United States, the fact that representative terms cannot be changed by "the ordinary power of the government" makes them safer than those in governments in which terms are shorter but alterable (*Fed.* 53, 360–61).

Moreover, since "the federal legislature will possess a part only of that supreme legislative authority" that the British Parliament and colonial assemblies exercised completely, it can be trusted with longer terms: "It is a received and well founded maxim, that, where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration; and, conversely, the smaller the power, the more safely may its duration be protracted" (*Fed.* 52, 358). Biennial elections are not only safe, they are also "useful," one

reason being that a legislator acquires skill by means of both "information" and "experience," both of which require time, especially when one is unfamiliar with the more diverse objects of federal legislation.

Another reason, perhaps less obviously stated, for these two-year terms is to assure an appropriate constitutional distance between the legislators and the people so as to facilitate deliberation. For the same reason, the House should be relatively small. Well before proceeding to the design of the chamber, Publius has already identified the challenge in *Federalist* 10: "In the first place, it is to be remarked, that however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude" (*Fed.* 10, 62–63). In *Federalist* 55, defending the initial constitution of the House at sixty-five members – a number that opponents of the Constitution assailed as insufficient to represent the diversity of the country – Publius denies that one can "found our political calculations on arithmetical principles." Bigger is not necessarily better. One of the most famous passages from Publius's pen follows. The size of assemblies should occupy a mean between being too small – in which case there might be too few individuals and ideas present for meaningful deliberation to occur – and too large, which might lead to chaos. "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob" (*Fed.* 55, 374).

According to this robust assertion about human nature, we appear to be all but incapable of retaining our wits in large groups, even those "fit characters" whom Publius had predicted in *Federalist* 10 would naturally rise to the top of an extensive republic. The reason seems to be a combination of the close contagion of passions and the faceless anonymity that operates in such settings. Moreover, Publius explains in *Federalist* 58, "in all legislative assemblies, the greater the number composing them may be, the fewer will be the men who will in fact direct their proceedings" (*Fed.* 58, 395). The reason for this is

both what we have already seen – that passion gains the advantage over reason in large assemblies – but also a sort of converse of *Federalist* 10's prediction that a large republic would produce more high-quality representatives. The larger the assembly, he explains, the larger the number of "members of limited information and of weak capacities," who will naturally be the dupes of their eloquent and manipulative colleagues (*Fed.* 58, 396).

This suggests that Publius wants power diffused through the representative body rather than controlled by a handful of elite leaders, which arises from his basic commitment to majority rule. Add to this Publius's striking answer to the question of how Americans can be confident that the sixty-five House members elected will not be tyrants. Publius – contrary to the portraits of him by, among others, American Progressives like the historian Charles Beard as an aristocrat seeking to enchain the populace – trusts the people. Significantly, excessive caution about abuses appears in this passage as a "passion":

The sincere friends of liberty, who give themselves up to the extravagancies of this passion, are not aware of the injury they do their own cause. As there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust: so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.

(*Fed.* 55, 378)

For this reason, Publius makes a seemingly un-Publian declaration: "I am equally unable to conceive, that there are at this time, or can be in any short time in the United States, any sixty-five or an hundred men, capable of recommending themselves to the choice of the people at large, who would either desire or dare, within the short space of two years, to betray the solemn trust committed to them" (*Fed.* 55, 376). Accordingly, Publius not only trusts the people, he trusts those whom

they elect. One of the assurances he provides is that these representatives will have to abide by the laws they pass, a principle "that has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together" (*Fed.* 57, 386). Yet that leaves the reader to wonder what will compel them to do so. Publius answers: "the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America; a spirit which nourishes freedom, and in return is nourished by it" (*Fed.* 57, 387). This, again, is striking, as it seems more a political than an institutional solution. Of course, "the genius of the whole system" includes the separation of powers and bicameralism. But Publius recalls that the Constitution ultimately relies on a vigilant public even to maintain mechanisms such as that. "If this spirit shall ever be so far debased, as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty" (*Fed.* 57, 387).

INSTITUTIONAL ARCHITECTURE: THE SENATE

One reason for confidence about his commitment to majority rule is that Publius accords popular authority space in which to operate. Thus six-year Senate terms – and the Senate more broadly – serve a particular purpose, a substantial part of which is stabilizing the political system. While this may seem at first blush like an anti-republican function, Publius does not see it that way. He notes on several occasions the propensity of the American legislatures to change laws frequently at the behest of immediate majorities, but he explains in *Federalist* 62 that this operates to the detriment of settled majorities, who will not be comforted "if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood: if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is to-day, can guess what it will be to-morrow" (*Fed.* 62, 421). Under such circumstances, no one will "hazard his

fortunes" in investment or entrepreneurial activity. Worse still, evoking Aristotle and reinforcing a point he had made in *Federalist* 49, Publius explains that constantly changing laws induce "that diminution of attachment and reverence, which steals into the hearts of the people, towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes" (*Fed.* 63, 422).

He goes further: Not only does mutable legislation harm majorities, it also empowers minorities. Allowing the people to insist on as many laws or changes in laws as they like may seem democratic, but Madison argues it will have the opposite effect. Only "the sagacious, the enterprising, and the moneyed few" can monitor and exploit the changes, which gives them an advantage "over the industrious and uninformed mass of the people. . . This is a state of things in which it may be said, with some truth, that laws are made for the few, not for the many" (*Fed.* 62, 421).

Six-year Senate terms are Publius's steadying answer: the foundation of an institution that will "blend stability with liberty" (*Fed.* 63, 426). There are other stabilizing influences in the Senate — members must be older, and, as Gary C. Jacobson and Jamie L. Carson emphasize, only a third of the body turns over with each election, a device so important that Publius says the Senate would be more stable with terms a third of the length, or two years, yet only gradually turning over, than with triple the length, or eighteen years, but with the entire body changing at once (*Fed.* 61, 413–14).¹² Publius writes that, ironically, these terms increase dependence on the people by making one body responsible for the long-term consequences of legislation. This may raise the concern that they will permit an aristocracy to entrench itself, but Publius's answer to this concern is suggestive: "To this general answer, the general reply ought to be sufficient; that liberty may be endangered by the abuses of liberty, as well as by the abuses of power; that there are numerous instances of the former, as well as of the latter; and that the former, rather than the latter, is apparently most to be apprehended by the United States"

(*Fed.* 63, 428–29). The underlying concern here is the protection of liberty, not the protection of power; the question is merely what endangers it in this particular political culture. He proceeds to explain that a senate, to accomplish such a “revolution,” would have to “corrupt itself”; corrupt the state legislatures, which elect it; corrupt the House, whose authority is coordinate with it; and, significantly, “must finally corrupt the people at large,” who remain the ultimate safeguard for liberty.

Most importantly, these six-year terms permit the dissipation of public passions. This mechanism works because passions are, by their very nature, transient. Thus *Federalist* 63 avers that the Senate will help defend “the people against their own temporary errors and delusions”:

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

(*Fed.* 63, 425)

This passage in many ways encapsulates Madison’s democratic theory.¹³ First, its empirical and normative elements converge. The sense of the community *should* prevail in *all* governments, but it is particularly the case in free governments that it *will* prevail regardless. Second, it is a particular kind of sense: the “cool and deliberate” one, which – again, note the temporal overtones – “ultimately,” as opposed to immediately, prevails. Next, there are “particular”

moments when things go awry, which is not the normal course of affairs because Publius notes that the people are then induced by an "irregular passion." Evidently the default tendency, then, is a sensible disposition of public affairs.

When these unusual moments arise, it will be useful for a "temperate" group to "suspend the blow" the people have struck "against themselves." This idea of "suspension" suggests that legislators cannot permanently block the public will, and indeed it is not their job to do so, because the public sense inevitably prevails "ultimately." The idea of suspension is to provide time and space for "reason, justice, and truth" to "regain" their authority, a formulation that suggests they had authority to begin with but simply lost it "temporar[ily]." Because passions are by their very nature fleeting, time bears a substantial burden for dissipating them.¹⁴ So do the "fit characters" of *Federalist* 10, who perform a pedagogical function in encouraging reconsideration of unreasonable public demands – something that is, of course, likelier to succeed if passions cool.

Consequently, the Senate operates as a fail-safe mechanism for the extensive-republic theory Publius previously elucidated in *Federalist* 10. It may appear that this theory has rendered a mechanism like the Senate unnecessary since "a people spread over an extensive region, cannot, like the crowded inhabitants of a small district, be subject to the infection of violent passions; or to the danger of combining in the pursuit of unjust measures" (*Fed.* 63, 425). Yet in the only instance in which *The Federalist* qualifies that theory, Publius specifies that the Senate operates as an "auxiliary precaution" that is necessary because the same extensiveness that makes contagious passions unlikely will also make them harder to cure if they spread (*Fed.* 63, 425–26).

The Senate of course exhibits the anti-majoritarian feature of the equality of state representation. Publius has already betrayed some degree of concern about this feature in *Federalist* 58, which describes as "a peculiarity in the federal constitution" the fact that

one chamber will represent "citizens" and the other "the States." It may, he allows, be inferred that the Senate, leaning toward the interests of smaller states, will resist augmenting the size of the House when population growth justifies increases. But Publius allays this concern by reassuring readers that the House, being more numerous and drawing its power directly from the people, will enjoy a natural advantage over the Senate in institutional combat, especially given its power over appropriations (*Fed.* 58, 392).

Still, the equality of state representation in the Senate is not an insignificant departure from the Constitution's normal commitment to seasoned majority rule. But what is striking from the perspective of *The Federalist* is that Madison, who elsewhere in the book defends measures he did not support at the Constitutional Convention, declines to apologize for this one. At the Convention, Madison had bitterly opposed the equality of state representation, calling its anti-majoritarian character "confessedly unjust."¹⁵ By the time of *The Federalist*, he seems not to have yielded in that opinion. "It is," he declares, proceeding to quote George Washington's circular to the states accompanying the proposed Constitution, "superfluous to try, by the standard of theory, a part of the constitution which is allowed on all hands to be the result, not of theory, but 'of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable.'" The suggestion is that the equality of state representation was a necessary concession to obtain the imperative of "[a] common government, with powers equal to its objects" (*Fed.* 62, 416).

CONTROLLING CONGRESS

Publius places both institutional and political controls on Congress. The institutional controls are the checks exercised by other branches and levels of government and by the two branches of the legislature on each other. The political controls on which Publius ultimately relies are the checks provided by public opinion, manifest in elections.

In extraordinary cases, which Publius means clearly to discourage, the extra-constitutional remedy of rebellion is available.

The case for institutional checks begins with Publius's observation in *Federalist* 48 that Congress is especially prone to exploit its power. The reason is that it occupies a middle position for abuse: It is large enough to be in contact with and thus to draw energy from "all the passions which actuate a multitude," yet not too large "to be incapable of pursuing the objects of its passions" by using reason. Moreover, although the countervailing executive and judicial powers are carefully circumscribed, the boundaries of the legislature's power are inherently blurred. The legislature in a republic is "inspired by a supposed influence over the people" and is fueled by "an intrepid confidence in its own strength" (*Fed.* 48, 334). This intriguing expression – "influence over the people" – indicates that the contamination of passions works in both directions: they can be communicated from the people to their representatives, but also the other way around.

Consequently, the legislature should be the great object of institutional jealousy. Yet in the end, the only institutional check Publius provides within the national government is the executive veto, which he describes in defensive terms – it is "the natural defence with which the executive magistrate should be armed" – and implies is to be directed mainly against the House, since the Senate's institutional link with the presidency will help to strengthen the use of the negative and inhibit its abuse (*Fed.* 51, 350). Because the state legislatures will also keep watch on the Congress, the institutional checks are intergovernmental as well as interdepartmental. *Federalist* 52 assures readers that "the federal legislature will not only be restrained by its dependence on the people, as other legislative bodies are; but that it will be moreover watched and controled by the several collateral legislatures, which other legislative bodies are not" (*Fed.* 53, 359). Similarly, the federal government could never manipulate elections "without causing an immediate revolt of the great body of the people, headed and directed by the state governments" (*Fed.* 60, 404). In fact, encroachments of the federal government would pit "one set of

representatives" against "thirteen sets of representatives," and the "whole body" of the people would side with the latter (*Fed.* 46, 320).

Publius also mentions checks internal to the legislature. Since the legislature "necessarily predominates" in a republic and it is "not possible" to equip each branch equally – a formulation that implies that the branches are not intended to be equal in power – Publius's first response is "to divide the legislature into 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" (*Fed.* 51, 350). These institutional controls are limited, then, by the twin principles of the common functions of the houses – that is, they need to be able to do what they need to do – and the republican principle of dependence on the majority.

Ultimately, though, Publius relies on the people to check the legislature. In an instance of Hamilton endorsing republican controls, *Federalist* 31 thus concludes that the balance between the national and state governments "must be left to the prudence and firmness of the people" (*Fed.* 31, 198). In *Federalist* 59, Publius again soothes concerns regarding federal control of elections by noting that an abuse of such a trust could only proceed from "a fixed and rooted disaffection in the great body of the people; which will either never exist at all, or will, in all probability, proceed from an experience of the inaptitude of the general government to the advancement of their happiness; in which event, no good citizen could desire its continuance" (*Fed.* 59, 401). This argument rests on several points. One is that the security of the system ultimately depends on the sense of the people, and what matters is their "fixed and rooted" sense, not their transient feelings. Finally, and strikingly, a government so inept as to produce a fixed and rooted sense of corruption would have no claim to continue existing. Lest there be any doubt what Publius means, *Federalist* 60 clarifies it: federal interference in elections would "occasio[n] a popular revolution" (*Fed.* 60, 404).

CONGRESS IN RELIEF

The Congress that Publius theorizes is, in many senses, not the vastly larger Congress we have today. The Senate, the great chamber of deliberation, is half again larger than the original House of Representatives. The House, capped at 435 members, consists of districts in which the number of electors would have stunned the framers and panicked their opponents. Its approval rating is the stuff of late-night comedy television shows even though the reelection rate of incumbents who wish to return is near universal. Congress legislates sometimes ploddingly and sometimes sporadically, but rarely with any consistency according to the measures of legislative "productivity" that appear incessantly in press coverage, which focuses on the number of bills enacted. Meanwhile, against all the predictions in *Federalist* 51, Congress has willingly spun off powers and deferred to the presidency. Whereas *Federalist* 73 describes the executive veto as "a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body," Congress today sees itself as a brake on the executive rather than the other way around (*Fed.* 73, 495).

The most dramatic result of this has been a surge not only in presidential but also in administrative governance. Congress has delegated wide swaths of authority to agencies, often with hardly any standards for their execution. As a result, administrative governance poses a dual problem: First, the combination of policymaking, executive and judicial authority in violation of the separation of powers, and second – because Congress does not prescribe rules, only objectives – the vulnerability of these agencies to capture by the very entities they are supposed to regulate.

Collective-action problems alone do not explain Congress's abdication, but polarization might. Since the "McGovern reforms" of the 1970s, which were designed to make parties more transparent and democratic, candidates have generally been nominated by the

most partisan voters – those who participate in primaries – rather than by party leaders whose interest is not ideological purity but rather appealing to the broader electorate. Members now fear facing primaries from their right or left, a phenomenon that has contributed to the intense polarization in Congress since moderates of either party must contend with challenges from the extremes. The sorting-out of party identification that has led conservative Democrats to become Republicans and liberal Republicans to become Democrats has further undermined the legislature's capacity to stand up for itself against the presidency. This is especially so in the Senate, which operates on informal consensus. Meanwhile, gerrymandering certainly contributes to this partisanship in the House, but it cannot explain the same phenomenon in the Senate. Moreover, not even changes to the McGovern regime might solve polarization, as growing evidence suggests the Congress simply reflects a polarized electorate.

The Federalist provides scant guidance for such problems. Publius, especially in Madison's essays, generally assumes that durable ideological parties will not exist, yet Madison himself helped to theorize and create the first party system. One sense in which Publius can illuminate the problem is that *Federalist* 10 says there is a point of diminishing returns on the extended republic theory. If electoral districts are too large, voters do not know candidates for office; if they are too small, officeholders are beholden to parochial interests (*Fed.* 10, 63). The essay had similarly explained that the "vicious arts" of politics, by which Publius seems to mean bribery and the notorious practice of "treating" voters to whiskey and other indulgences before they cast their ballots, could not be practiced in large districts. But another mean may apply here, according to which new vicious arts – demagoguery, superficial campaigns that give scant attention to meaningful issues, and the like – take over once electoral districts become too large.

But in other ways, Publius might help show us the way forward by taking the route back. That would begin with an appreciation of

Congress as the First Branch and an understanding of its task, which is not merely to legislate in volume but rather to represent its constituents and to deliberate about justice and the general good. Measures of legislative productivity that simply gauge output presume that the job of Congress is to pass legislation. William G. Howell and Terry M. Moe, for example, see Congressional dysfunction as a reason to transfer authority to the executive. "To act," they write, "governments must pass laws."¹⁶ But government should not necessarily act in every situation. Sometimes it should; other times it should refrain. A member of Congress who has deliberated extensively and reasonably on a piece of legislation, taken his constituents' genuine interests and views into account, and then opposes its passage has done his or her job as much as one who seeks its passage. That is, there is no inherent reason bills should be passed; there may be inherent reasons they should be opposed, not the least of which are Madison's warnings about the "multiplicity" of legislation. Legislation itself is value-neutral. The value for Publius is the public good, and the devices for attaining it are representation and deliberation. An emphasis on change for its own sake would make an equally important function of regimes – their own maintenance and the conservation of customs and mores – difficult and may even dismiss these goals as dysfunctional.

Ever since Andrew Jackson warred with Congress over the National Bank, presidents have claimed a superior right to represent the public views because they are said to represent all the people. Yet this diminishes one of Congress's foremost contributions to representation, which Publius emphasizes: the multiplicity of views it encompasses. The presidency is a unitary institution. One who votes for the president finds his or her views represented for four years; one who was on the losing side of an election is on the outs. Yet Congress is large and diverse enough to encompass a broad spectrum of views. Virtually everyone within the mainstream of American politics will find his or her views accommodated in the legislative process, even if not necessarily by his or her own representative. Congress

has a superior claim to representation precisely because it is virtually impossible in an extensive republic to speak of a single, undifferentiated public will.

Still, critics complain that the American legislative process is ill-suited to contemporary political life. As Willmoore Kendall argued, the executive branch has acquired an aura of scientific expertise, whereas Congress is viewed as parochial.¹⁷ Eric A. Posner and Adrian Vermeule, both executive supremacists, say legislatures cannot govern the administrative state.¹⁸ It is true that if the state is to be primarily administrative, Congress may be too plodding to conduct its business, but two cautions are in order. One is that, as Theodore J. Lowi has written, Congress can still delegate authority to the executive branch while retaining its legislative nature by doing so with specific standards attached.¹⁹ Second, these accounts tend to arise from a politics of instant gratification according to which the deliberate pace of Congress is unfitted to the lightning speed of contemporary political life. Such complaints are hardly new. Woodrow Wilson voiced them as early as 1885: "*Power and strict accountability for its use are the essential constituents of good government. It is, therefore, manifestly a radical defect in our federal system that it parcels out power and confuses responsibility as it does.*"²⁰

Yet the slow pace of Congress, whose purpose was to diffuse passions and facilitate deliberation, was an intended feature of the legislature.²¹ The very diffusion of power that Wilson indicted is a benefit rather than a defect of Congressional government. It is also sometimes said that Congress is incapable of acting because of the collective-action problems endemic to a large body. But Congress was also large enough to trigger collective-action problems when Wilson complained about its dominance over a century ago.

But the separation-of-powers theory of *Federalist* 51 also indicates that the only motive, or "ambition," in the argot of that essay, that will impel a restoration of Congress is the desire of its members to exercise their power. Institutional reforms may help here. Suggestions

have included reclaiming its taxing, spending and borrowing powers, utilizing sunset provisions for delegations of authority to the executive, and term limitation.²² These suggestions all merit serious reflection, but Publius also says that the ultimate safeguard both for Congressional authority and for public liberty is the republican character of the people. In *Federalist* 38, Publius wonders that the ancient Greeks were driven to entrust their liberty to a single "illustrious citizen" like Solon or Lycurgus rather than "a select body of citizens, from whose common deliberations more wisdom, as well as more safety, might have been expected" (*Fed.* 38, 240–41). The ultimate reason to see Congress as the First Branch is that the primary controls on it are internal and political rather than imposed from without. This is inevitable in a republican system in which the legislative authority "necessarily predominates" and should be preeminent because of its "sympathy" with the people. The challenge, and responsibility, it imposes is that the same authority – that is, the republicanism of the people – is the only ultimate force that can restore Congress when, as is now the case, it has eroded.

NOTES

- 1 Louis Fisher, *Constitutional Conflicts between Congress and the President*, 6th ed. (Lawrence: University Press of Kansas, 2014), 215.
- 2 George W. Carey, *The Federalist: Design for a Constitutional Republic* (Urbana, IL: University of Illinois Press, 1994), 32.
- 3 See George W. Carey, *A Student's Guide to American Political Thought* (Wilmington, DE: ISI Books, 2014), and Garry Wills, *A Necessary Evil: A History of American Distrust of Government* (New York: Simon and Schuster, 2002).
- 4 "In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority. When a resolution too is once

- taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable" (*Fed.* 70, 475). That is, the executive function is swiftly and firmly to execute resolutions of the legislative body.
- 5 Jack N. Rakove, *Original Meanings: Politics and Ideas in the Framing of the Constitution* (New York: Alfred A. Knopf, 1996), 198.
 - 6 *Luther v. Borden* 48 US 42 (1849).
 - 7 James Burnham, *Congress and the American Tradition* (New Brunswick, NJ: Transaction Publishers, 2003), 94–95.
 - 8 Federal Farmer II, in *The Complete Anti-Federalist*, ed. Herbert J. Storing (Chicago, IL: University of Chicago Press, 1981), I, 230.
 - 9 Daniel W. Howe, "The Political Psychology of *The Federalist*," *William and Mary Quarterly*, 44 (1987), 506.
 - 10 Colleen Sheehan, *James Madison and the Spirit of Republican Self-Government* (New York: Cambridge University Press, 2009) and *The Mind of James Madison: The Legacy of Classical Republicanism* (New York: Cambridge University Press, 2015); Alan Gibson, "Madison's Republican Remedy: The Tenth *Federalist* and the Creation of an Impartial Republic," Chapter 8 above.
 - 11 David Mayhew, *Congress: The Electoral Connection* (New Haven, CT: Yale University Press, 2004), 17.
 - 12 See Gary C. Jacobson and Jamie L. Carson, *The Politics of Congressional Elections* (Lanham, MD: Rowman & Littlefield, 2016), 9.
 - 13 Some controversy persists as to whether Madison or Hamilton wrote this essay, but it bears the unmistakable imprint of Madison's democratic thought more generally, especially in this passage and in its general commitment to the rule of deliberate majorities.
 - 14 See Greg Weiner, *Madison's Metronome: The Constitution, Majority Rule and the Tempo of American Politics* (Lawrence: University Press of Kansas, 2012).
 - 15 Constitutional Convention, June 29. *PMF*, X, 86–87.
 - 16 William G. Howell and Terry M. Moe, *Relic: How Our Constitution Undermines Effective Government, and Why We Need a More Powerful Presidency* (New York: Basic Books, 2016), 16 (emphasis in original).
 - 17 Willmoore Kendall, "The Two Majorities," in *Willmoore Kendall Contra Mundum* (New Rochelle, NY: Arlington House, 1971).

- 18 See, generally, Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010).
- 19 Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* (New York: W. W. Norton and Company, 2009).
- 20 Woodrow Wilson. *Congressional Government: A Study in American Politics* (Mineola, NY: Dover Publications, 2006), 186–87.
- 21 On the importance of Congressional deliberation, see Burnham, *Congress and the American Tradition*, esp. 28–33, where Burnham associates support of Congress with what he calls the conservative “syndrome” in American politics.
- 22 See Christopher DeMuth Sr., “Reviving a Constitutional Congress,” *Imprimus: A Publication of Hillsdale College*, 44 (2015), esp. 4–5. See also Josh Chafetz, *Congress’ Constitution: Legislative Authority and the Separation of Powers* (New Haven, CT: Yale University Press, 2017), 61. On the case for term limitation generally, see George F. Will, *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy* (New York: The Free Press, 1992). The idea is that term limitation might attract a type of lawmaker whose sole interest is exercising power for a brief interval rather than entrenching him- or herself for the sake of careerism. William Kristol, endorsing term limitation, argues that the case for the device entails a refutation of Publius, who considered and rejected it. See William Kristol, “Debate: *The Federalist* and the Contemporary Debate on Term Limits – Term Limitations: Breaking Up the Iron Triangle,” *Harvard Journal of Law and Public Policy*, 16 (1993), 95–100.