Chapter Three

American Innovations in Democratic Decision-Making

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While Americans clearly took from John Locke the notion of government by consent of the governed in regard to the *form* of government, American practice and theory regarding other elements of democratic decision-making had to come from elsewhere. This essay describes those other elements and their historic sources and assesses their effectiveness. Representative democracy was the first such element, arising from colonial practices, which are detailed below. By the mid-1780s it became apparent to thoughtful Americans that representative democracy by itself could not adequately address the need to protect minority rights from ill-advised actions by political majorities. Americans then developed several innovative institutional remedies for this problem: a written constitution to be popularly ratified and enforced by judicial review (Thomas Tudor Tucker, under the pen name "Philodemus," and Alexander Hamilton in *Federalist* no. 78), the establishment of a large and diverse republic to ride herd on the smaller republics that were the individual states (James Madison in *Federalist* no. 10, and the concluding section of *Federalist* no. 51), a system of checks and balances at the federal level and a division of sovereign power between the state and federal levels, and the potential for a veto over proposed policy by sizable interest groups directly and substantially affected by that policy (John C. Calhoun's *Disquisition on Government*, the filibuster system in Congress, and the Congressional seniority/committee system).

I. LEGISLATIVE DEMOCRACY

The early British colonies in America were settled by groups organized in the form of stockholder companies. Consequently, their company or colonial charters generally granted voting rights to all the adult male company members. These voters selected local governing boards that were generally left alone by British authorities.[1] Thus began in America what we moderns call "representative democracy." By the late 1700s it would come to be called "republican government."

The virtually universal manhood suffrage and virtual home rule of the early 1600s changed dramatically by the early 1700s, as more people immigrated who were not members of the original company or original church group. By the beginning of the eighteenth century, property and religious requirements for suffrage were fairly stringent; they produced an essentially oligarchical system. Still, Americans thought of themselves as living under "government by consent of the governed." They understood their community to be homogeneous and therefore to share a single common good. That understanding supported the notion that nonvoters could be *virtually* represented as the voters were *actually* represented. When the conflict with Britain heated up in the 1760s, this notion came to fall out of favor, but it would be resurrected for domestic purposes after the American Revolution.[2]

By the 1770s, suffrage arrangements had again significantly evolved. Religious exclusion had weakened, and the widespread availability of property had caused the electorate at least in the northern colonies to include substantial majorities of the adult male population. Property qualifications were far milder than the image of them portrayed in many US history textbooks. Even with the qualifications, voter turnout rates for adult males in the North in the 1770s compare favorably to those of the late twentieth-century United States.[3]

The dispute with Great Britain over whether Parliament could count as "virtually" representing Americans left the doctrine of virtual representation somewhat tainted after the American Revolution. As a consequence, suffrage restrictions were deliberately loosened in many of the early postrevolution state constitutions. Vermont adopted universal manhood suffrage, and New Hampshire loosened its restrictions to the point that they produced the same practical effect. Delaware, Georgia, and North Carolina had such minimal requirements that, in the words of one scholar, they "virtually guaranteed" universal manhood suffrage (aside from slaves). Moreover, Pennsylvania's rules excluded only 10 percent of adult males. Then in the 1790s Kentucky entered the union with universal adult white male suffrage.[4]

Another significant postrevolutionary development was a tremendous expansion in the size of state legislative bodies, sometimes to the point that they doubled or tripled. The logic was to put common people more in touch with their representatives; larger legislatures meant smaller districts for each representative. A second consequence of the size expansion was that a much larger portion of the socially "common" element of the public got elected to the state legislatures.[5]

By the 1780s, America's version of representative democracy differed starkly from what prevailed in Great Britain. In Britain, the guiding idea was that the House of Commons represented the interest of the non-nobility. Since this was still understood to be a homogeneous, common interest, it was not viewed as a problem that only 20 percent or so of the adult male public could vote, and the people understood themselves to be sending the "best and brightest" off to Parliament to discern their best interest. The United States, of course, eliminated Britain's institutions of the House of Lords, intended to speak for the nobility, and the monarch to speak supposedly for the good of the whole country. By the 1780s in the United States, by contrast, some 55 percent of the adult male public in the North voted, and titles of nobility were forbidden.[6]

The post-1776 state constitutions also contrasted sharply with the colonial legislatures that had preceded them. The colonies, although mostly left alone by the British king prior to the 1760s taxation crisis, had had governors and judges appointed by the British monarch and upper legislative houses that were mostly advisory to the governor and that were also appointed by the king.[7] The postrevolution state constitutions made these state senates elective by ordinary voters and gave them a larger role as a genuine second legislative chamber (except for Pennsylvania, which tried unicameralism for a while).[8] Moreover, because the former monarchical ties caused governors and courts to be distrusted by the former colonists, the new state constitutions weakened both these branches relative to the legislatures. Executive veto powers (formerly an absolute veto in eleven of the thirteen colonies) were eliminated or drastically weakened, and the constitutions made no mention of a power of judicial review.[9]

By contrast, the British Privy Council had wielded a power to veto, declare void, or repeal colonial legislation, in order to assure that it was in keeping both with British law and with the constitution of the colony itself. The Privy Council, while sitting as Britain's highest court of appeal, had first exercised the power to declare an unconstitutional colonial statute void in 1727, and even earlier had voided colonial statutes on the grounds of conflict with parliamentary ones.[10] Far more important in terms of frequency of exercise, and dating from the beginnings of the colonies, however, had been

the Privy Council's power to repeal an existing colonial law based on the Council's perception that the law was not in the best interests of the kingdom, or was "contrary to reason."[11]

These various British veto powers had increasingly aggrieved the colonists in the years leading up to the American Revolution, and the early US state constitutions emphatically rejected this approach. Instead, except for the existence of a second house of the legislature in order to provide for sober second thought, the initial state legislative systems adopted modes of democratic decision-making that came close to being representative versions of a plebiscitary system. This system generated noticeable problems by the mid-1780s.

II. CONSTITUTIONS AND DEMOCRATIC DECISION-MAKING

Although the American Constitution was democratically adopted through popularly elected state ratifying conventions, the perceived need for that democratic ratification and its legal import were realities that evolved only gradually. The sixteenth- and early-seventeenth-century colonial charters allowing for settlement in British America initially evolved from authorizations for commercial and religious enterprises into frames for local government.[12] Additionally, the distance from England and the absence of a professionalized American bar in the seventeenth century made it useful to compile in writing the basic "rights of Englishmen," which were understood to come from a blend of common law, principles of human nature, and the Judeo-Christian moral code.[13] Thus, by 1700 Americans were familiar with charters of the people's liberties drawn up by their elected representatives. These charters were understood to declare the common understanding rather than to grant rights themselves.

Around this time, John Locke's *Second Treatise* was published, setting forth the doctrine later to be announced in the Declaration of Independence: People are by nature equally free and freely choose to empower governments to secure their natural rights, retaining an indefeasible natural right to "alter or abolish" their "form" of government if they judge that it has become destructive of their rights. With the Declaration it became the acknowledged right of Americans to live under a form of government to which they had consented. A paraphrase of this principle appears in eight of the fourteen (counting Vermont) state constitutions that appeared between 1776 and 1780.[14]

Nonetheless, the historical reality is that the first six constitutions adopted by the independent American states were adopted not by any popular decision but rather by the state legislatures. Three states—Delaware (1776), North Carolina (1776), and New York (1777)—then innovated by having their constitutions drawn by conventions specially elected for that purpose. But the innovation was not instantly popular. Four states followed with constitutions designed by their state legislatures. Not until 1780 did the idea of specially elected conventions for the purpose of writing constitutions become firmly fixed in America. And the innovation of having a public vote to ratify the document—literally a *democratic* decision as to the form of government—was not attempted at all before 1780. This idea, too, took a while to catch on. Between 1780 and 1800 only four state constitutions were ratified this way (two of them in New Hampshire, and one each in Massachusetts and Pennsylvania). The US Constitution, of course, in 1787–1788 followed a modified version of this ratification process. As a general matter, during the late 1770s and most of the 1780s in America, state legislatures amended constitutions, claimed the power to authoritatively interpret them, and in a substantial number of cases flagrantly violated them.[15]

Moreover, the very meaning of constitutions as constraints on legislatures was understood differently prior to the US Constitution of 1787. The American constitutions of that period contained bills of rights phrased as moral admonitions or guidelines, rather than outright prohibitions (in contrast to the US Constitution of 1787–1788 and its Bill of Rights of 1789–1791). For instance, the Virginia Bill of Rights of 1776 urged government to adhere firmly to "justice, moderation, temperance, frugality, and virtue." Where the US Constitution has terms like "shall" and "shall not," the earlier state constitutions used terms like "ought" or "recommend" (as in "freedom of the press ought not to be restrained"—Pennsylvania, 1776). Most tellingly, these constitutions typically suggested occasions in which the legislature would be permitted to violate the rights that were being announced, as in for example New Hampshire's constitution of 1784: "But no part of a man's property shall be taken from him . . . without his own consent, *or that of the legislative body of the people*" (emphasis added). One might also note that these constitutions generally bound the executive by oath to uphold the constitution, but had no such oath requirement for the legislature or the courts.[16]

This legislative power over constitutions stemmed from the widespread belief after 1776 that American state legislatures "re-presented" the people; the House of Lords and the monarchy were now out of the picture, and the franchise for choosing legislators was extended to all those citizens viewed as having sufficient independence to exercise it through the vote. It would take time for the idea to dawn on Americans that they might have a use for constitutions as a check on themselves *qua* rulers. Rather than serving as a check on democratic will, in 1776 constitutions were viewed as expressing the public consensus on how government would be arranged and what it should be doing.

Americans had not abandoned the old idea of a higher law that checked or should check government—both the common law of legal custom, and the natural law of right reason, as well as international law understood as the evolved custom of civilized nations for their dealings with each other based on right reason. But the binding character of this law was not understood to depend on its being written down. The written codification of bills of rights was meant simply as a clarification of the common understanding.

The 1786 case of *Trevett v. Weeden* from Rhode Island illustrates this approach. The attorney James Varnum was challenging a denial by the state of trial by jury. This right was not explicitly mentioned in the state constitution, but that constitution, adapted almost verbatim by the legislature from the colonial charter, guaranteed "all liberties and immunities of free and natural subjects . . . [of] England." Although Varnum did refer to this clause to claim that trial by jury was "a fundamental, a constitutional right," he buttressed his claim, in the fashion of the day, by allusions to both natural rights and British common law dating back to the Magna Carta. He argued that the custom even predated the Magna Carta and functioned as an institution to provide practical security for the natural right to equal liberty. His argument explicitly assumed that it is even more obvious that judges must uphold natural rights than that they must enforce constitutional ones.[17]

The *Trevett v. Weeden* court endorsed Varnum's arguments in principle, but nonetheless ducked a clash with the legislature by denying itself jurisdiction. This court opinion, despite its avoidance of a direct clash, aroused intense political controversy. Such controversy typified state exercises of judicial review prior to the ratification of the US Constitution in 1787. The relation between democratic decision-making and judicial review as it was understood in the first decade of American independence is elaborated in the next section.

III. THE CRISIS OF THE 1780S AND THE TRANSFORMATION OF DEMOCRATIC DECISION-MAKING

A. The People Above the Legislature

It is well documented that the mid-1780s in the US were years of genuine political crisis. Abuses of legislative power were legion: paper-money schemes, legal-tender laws, suspension of debt collection, bills of attainder and other legislative interferences with trial by jury, grants of exemptions from the standing laws, and so on.[18] Legal historian Julius Goebel documents reported incidents of legislative interference in ongoing trials in at least three states and cites Thomas Jefferson as authority for claiming that this also

occurred in a fourth.[19] In the course of this crisis, the dominant American understanding of appropriate democratic decision-making underwent a profound shift.

The most important element of the change is that the people developed a sense of themselves as separate from the legislative body. This gradually produced other important shifts after the 1780s. First, now that drafters of state constitutions realized that the legislature (no less than the former king in Parliament) did have the power to rule over them, and that such power needed to be checked, they instituted stronger judicial and executive branches at the state level.[20] Second, beginning with the 1780 Massachusetts constitution states moved, albeit haltingly, toward combining specially elected bodies for writing constitutions with special votes by the people for ratifying them.[21] Once constitutions were emerging out of a direct vote from the *demos*, or people, the institutional groundwork was laid for a popular-sovereignty basis for higher law and for judicial review based thereon. Just such a theory came forth in the 1780s.

The first full-blown theory of popular control over government by means of a written constitution appears to have been articulated in the pamphlet *Conciliatory Hints*, by Thomas Tudor Tucker, writing under the pen name of Philodemus, in 1784.[22] In calling for a constitutional convention in South Carolina to replace the legislatively adopted charter with one that would have more legitimacy, Tucker reasoned, "In a true. . . democratic government all authority is derived from the people at large, held only during their pleasure . . . No man has any privilege above his fellow-citizens, except . . . what they have thought proper to vest in him." Thus a constitution should be based "on the firm and proper foundation of the express consent of the people, unalterable by the legislature, or any other authority but that by which it is to be framed . . . It should be declared paramount to all acts of the legislature, and irrepealable and unalterable by any authority but the express consent of a majority of the citizens collected by such regular mode as may be therein provided."[23]

Within a year, Gouverneur Morris similarly expressed the sentiment that if a constitution can be changed by the legislature, it is no constitution.[24] In effect, this new outlook counted the constitution as more binding because it was *more* democratically adopted. Metaphorically, it came directly from the people. Statutes, by contrast, now came not from a body that re-presented the people, but one that merely represented them and was therefore obliged to act as their deputy, obedient to the will that the people expressed in the constitution. Although this idea had been implicit in the Declaration of Independence, not until the 1780s did it begin to find institutional expression in the United States through constitutional conventions and extra-legislative ratification through direct democracy.

B. Transition to Judicial Review as Voice of the People

The earliest American experiments with judicial review also occurred in the 1780s in state supreme court cases. As with the theory of popular consent to the constitution, a role for popular sovereignty emerged only gradually. In the early judicial-review cases, it was not unusual for both attorney arguments and court opinions to rely on unwritten "constitutional" rights, as well as on written texts.[25] For instance, in 1784, attorney Alexander Hamilton argued in *Rutgers v. Waddington* that a New York law was void on the ground that it conflicted with the Articles of Confederation, the Treaty of Paris, and the unwritten law of nations.[26]

This approach, looking to "right reason" for the higher law that checked legislatures, and thereby allowing courts to declare statutes void, plainly echoed the former, much-resented Privy Council veto powers.[27] The resemblance was not lost on Americans of this era; such court actions triggered comparable resentments.

During this period, judicial review was extremely controversial. Opposition to it ranged from denials of its (legal) legitimacy made by opposing counsel (in *Rutgers v. Waddington* and *Commonwealth of Virginia v. Caton*, 1782), to the questioning of its legitimacy by judges on the bench (also in *Rutgers v. Waddington* and *Commonwealth v. Caton*).[28] This sort of judicial review also triggered a variety of more extreme reactions that included popular mass protest meetings (surrounding *Rutgers v. Waddington*) and popular petitions to state legislatures against it (concerning *Holmes v. Walton*, 1780).[29] Legislatures, too, opposed judicial review by holding votes that censured its exercise or perceived exercise (in the cases of *Rutgers v. Waddington* and *Trevett v. Weeden*, RI, 1786) or through attempts to outlaw it (in reaction to *Bayard v. Singleton*, NC, 1786–1787 and *Holmes v. Walton*).[30] In certain instances legislators insisted that judges accused of having engaged in judicial review appear at the legislature to be questioned about their misbehavior (as happened with regard to *Bayard v. Singleton* and *Trevett v. Weeden*), and even attempted to impeach such judges and remove them from office (in response to *Trevett v. Weeden* and *The New Hampshire Ten Pound Act Case*, 1786–1787).[31] To repeat, during this period in which judicial review was highly controversial, such review was not understood to be limited to the enforcement of a popularly adopted written text.

Meanwhile, the same increase in distrust of legislatures that was fueling the strengthening of state executive and judicial branches in newer state constitutions and fortifying direct voter control over the ratification of state constitutions contributed to the development of a new theory of judicial review in America. This new theory would soon overcome the widespread doubts about the practice that had emerged in the 1780s cases.

As with the argument that democratic control over the legislature could be established by means of a written constitution drawn up by a specially elected convention and ratified directly by the people, this new theory of judicial review was first suggested in print in Thomas Tudor Tucker's 1784 pamphlet *Conciliatory Hints*.[32] In this work Tucker first rehearsed the familiar arguments from Locke concerning the reasons for entry into the social compact, the delegation of power from the people to the government, and the principle that if the legislatures "should exceed the powers vested in them, their act is no longer the act of the constituents."[33]

But Tucker went on to suggest improvements on the Lockean theory that the people's power of revolution would serve to check potential governmental oppression. Tucker criticized the British "constitution" as lacking a peaceful remedy for oppression: Parliament's "privileges are undefinable, because it is impossible to say, how far they may be extended without rousing the people to a tumultuous opposition or civil war; for with them there is no other remedy against tyranny and oppression."[34] Americans, he wrote, were now able to improve on this situation by adopting democratically ratified constitutions that would include express statements specifying the limits of legislative power. Moreover, the people would be well-advised to contrive "the terms of the compact or constitution . . . to provide a remedy . . . without outrage or tumult" for all cases in which the rulers might attempt a "traitorous abuse of trust."[35] While Tucker does not go into detail as to how this new remedy might work, he does outline its general direction. He suggests that when the problem of inadvertent legislative transgression of the state constitution arose in a sister state, the abuse of legislative power might have been checked if only the constitution of that state had "expressly declared that no act of the legislature contravening it should be of force" in the courts of law.[36]

While Tucker in 1784 was likely the first to develop this theory, it spread quickly in the hands of other influential figures. In 1786, the attorney James Iredell offered a more detailed version of the Tucker argument in a North Carolina newspaper in preparation of the court case *Bayard v. Singleton*. He then repeated the arguments in August 1787, in a letter to Richard Spaight while the latter was attending the Constitutional Convention in Philadelphia. Scholars have made a convincing case that Iredell's arguments influenced both Hamilton's well-known defense of judicial review in *Federalist* no. 78 and James Wilson's highly influential *Lectures on Law*, delivered in 1790–1791 and published in 1793.[37]

When Iredell first developed his version of the argument, in 1786–1787, he still allowed for additional judicial review grounded on natural justice (reminiscent of what the Privy Council had done to colonial laws of which it disapproved), but he viewed judicial review grounded in a written document

democratically ratified by choice of "*the whole people*" as preferable. Such a document could not be transgressed by the legislative assembly; to do so would be to "act without lawful authority." By contrast,

> without an expressed constitution the powers of the legislature would undoubtedly have been absolute (as the Parliament of Great Britain is said to be) and any act passed not inconsistent with natural justice (for that curb is avowed by the judges even in England) would have been binding on the people. The experience of the evils . . . attending an absolute power in a legislative body suggested the propriety of a real original contract between the people and their future government . . .
>
> It really appears to me [that with a popularly ratified constitution], the exercise of the [judicial] power is unavoidable, the Constitution not being a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse.[38]

By 1798, now sitting on the US Supreme Court, Iredell had lost his tolerance for judicial review based on the judges' perception of natural justice (a position he now attributed to "some speculative jurists"). In phrases that echoed his concern regarding "an imaginary thing" about which there might be "ten thousand different opinions," he wrote the following:

> It has been the policy of American states . . . and of the people of the United States . . . [in their respective constitutions] to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void . . . . If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: . . . all that the Court could properly say, in such an event, would be, that the legislature, possessed of an equal right of opinion, had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[39]

Just as Iredell's views on the legitimacy of unwritten-law-based judicial review evolved between the 1780s and the 1790s, so did those of the American judiciary. Even before the Supreme Court in 1798 began to espouse the democracy-based foundation of judicial review, state courts started doing so in 1789, following its popularization in Hamilton's *Federalist* no. 78 (soon after which it was to be underlined by James Wilson's *Lectures on Law*). Subsequently, a dramatic increase in the political acceptance of judicial review can be observed. In the 1790s, legislative attacks on the principle of judicial review ceased. In contrast to mass protest and impeachment attempts, one reads of instances where legislatures amended statutes in order to

comply with judicial objections (for example in Virginia, in response to *Kamper v. Hawkins*, 1793).[40] During the early years of the US Congress, repeated allusions were made to the propriety of judicial examination of the constitutionality of federal statutes.[41] In 1799, when several state legislatures announced their rebuttals to the interposition doctrine of the Virginia and Kentucky Resolutions, they pointedly spoke of the US Supreme Court as the final interpreter of the US Constitution.[42]

By 1802, the year before John Marshall in *Marbury v. Madison* would firmly entrench this Iredell-Hamilton-Wilson justification for judicial review as the guardian of the democratically expressed (via the Constitution) will of the people, high courts in eight of the states had endorsed judicial review, and federal courts had followed suit.[43] In the judicial decisions that discussed the subject, the preference for the new theory of judicial review grounded on popular consent to the Constitution is unmistakable. In the fifteen state supreme court cases between 1789 and 1802 in which judicial review was arguably at issue, nine contained judicial defenses of the power. Of these, seven either quoted or paraphrased the Iredell-Hamilton-Wilson rationale. The two that presented an alternative argument, quoting Sir Edward Coke and relying on the Magna Carta and "common right and reason," were both South Carolina cases: *Ham v. M'Claws* (1789) and *Bowman v. Middleton* (1792). It is instructive that in two follow-up cases in this state, *Lindsay v. Commissioners* (1796) and *White v. Kendrick* (1805), the Coke approach was dropped and replaced by the will-of-the-people-as-higher-law justification.[44]

During the 1790s judicial review not only gained a mighty ally in the democratic credentials conferred on it by the Iredell-Hamilton-Wilson argument about popular consent to the constitutional rules, but also gained renewed strength from much tougher language in state constitutions. Imitating the US Constitution, the six post-1790 eighteenth-century constitutions adopted "shall/shall not" in bills of rights in place of the formerly preferred "ought/ought not." State constitutions further strengthened the judiciary after the 1830s by moving judicial selection from the legislative body to popular elections.[45] The courts, no less than the legislature, were to embody the voice of the people.

In sum, the 1790s in the United States witnessed a change in the very concept of written constitutions. Now they were written in a language meant to be binding, and they were viewed as binding at least in part because they expressed "the consent of the governed." To a nation that took its bearings from the Declaration of Independence, this was no small addition to the defense of the judicial authority to check legislative power. Moreover, this development in American political thinking indicates what was to become a characteristic pattern in the proposals of Americans who worried about the

dangers of majority tyranny that had become obvious by the mid-1780s. The cures for democracy had to be found in democracy itself; Americans insisted by this point on popular government.[46]

IV. SOLUTIONS OF *THE FEDERALIST* TO DEMOCRATIC TYRANNY

The main currents of American political thought might be characterized as one long effort to check abuses of power, short of the Lockean resort to revolution which had launched the American polity. The preceding sections described the evolution in the understanding of how tying the adoption of constitutions to democratic structures could enable judges to check legislative measures that might be momentarily popular (and therefore adopted by popularly elected legislatures) but would violate the deliberate convictions that the people had entrenched in written constitutions. As Alexander Hamilton, writing in the *Federalist Papers* (originally published seriatim in 1787–1788 to convince Americans to favor ratification of the US Constitution) explained this judicial function, it had two dimensions. It worked as a "bulwark" to protect the people as a whole against governing officials who might try to wield power against them that is unauthorized or forbidden in the Constitution, and it also served to protect the constitutional "rights of individuals" and of "the minor party" against measures (however popular at the moment) that violated them.[47]

James Madison, writing earlier in the *Federalist* series, had analyzed the abuse-of-power problem as having the same two dimensions: Those who design constitutions need to provide mechanisms to curb the political impact of factions—self-interested groups who act against the common good or against the rights of others. Although elections (wherein the majority rules) suffice to check factions that comprise less than a majority of the voters (thereby protecting the many against the few), majority factions are a chronic problem in "popular governments"—that is, democracies and representative democracies. Madison's *Federalist* no. 10 argues that the only reliable solution is to make the representative democracy so large that it will encompass a diverse geography and diverse cultures and interests. Because of this diversity, the factions that inevitably form because of people's natural selfishness and opinionatedness will be numerous and therefore small—none big enough to capture majority power.[48] So Madison's first crack at a solution to the problem of majority abuse of power is not judicial review but rather a large federal union in which the national government will be strong enough to check abuses of power by more local majorities. By the time he writes *Federalist* no. 51 and is thinking about the structure of the federal government, Madison specifically addresses the fact that the legislature must represent the people's interests and sentiments. Majorities are going to *have* to form in the legislative body—if they do not, there will be no legislation. Thus in the lengthy final paragraph of *Federalist* no. 51 Madison revisits the problem of majority faction and concludes that at least in a very large country it will be improbable that an *unjust* majority can form. *Federalist* no. 10 had spoken to the improbability of any single national majority to form, and, if it formed, to communicate together. In *Federalist* no. 51, where Madison focuses his attention on the national Congress, he acknowledges that there will of course be legislative majorities. But these will always have to take the form of a "coalition" of smaller groups, and thus they will always entail some degree of compromise. Because the multiplicity of small groups need to compromise in order to form a majority coalition, they will need to moderate their inclinations, and this necessity for moderation makes an unjust outcome far less likely. "In the extended republic of the United States, and among the greater variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good."[49]

In the bulk of *Federalist* no. 51 Madison takes up the other dimension of abuse of power—abuse by governing officials against the people (i.e., the problem of the powerful few acting against the many). Here he argues, in a manner that parallels the eventually successful theory that grounded the American version of judicial review, that what the country needs is a "republican remedy for the diseases most incident to republican government."[50] The solution to the ills of democracy, if it is to prevail in America (given the inclinations of Americans) must be based on democracy.[51] So the basic argument of *Federalist* no. 51 is that the only reliable way to keep governing officials from abusing their powers (short of the catastrophic solution of violent revolution that Locke had offered) is to slice up the process of choosing representatives in several different ways.[52] Thus the president, Senate, and House will each have different constituencies to appeal to and will have incentives to check each other's power in order to maintain the favor of their own constituencies. "Ambition must be made to counteract ambition" because the human lust for power is too strong to be checked by "mere parchment barriers" like written constitutions.[53] Nor does it make sense to place one's hopes in the power of "enlightened statesmen" to first persuade the public to vote for them over less-enlightened candidates and then convince the people to accept solutions that serve the long-term public good rather than a majority's short-term interest.[54] The essence of Madison's solution for the abuse of power, then, was to create institutional structures that would channel such selfishness toward the public good (rather than quixotically attempt to eliminate it) and to ground the channels on a democratic foundation so as to give them legitimacy.

V. JOHN C. CALHOUN'S SOLUTION TO TYRANNY

As long as American perceptions matched the hopeful portrait painted by Madison of many small factions, none big enough to contain a majority, his argument that a large federal union would check majority tyranny made sense. Once the slavery issue heated up, however, many southerners viewed with alarm the fact that the people of the western territories were repeatedly organizing themselves as free states. The population balance and therefore federal power was dramatically shifting to free states. In 1790 the balance of slave (forty-nine) and free (fifty-seven) representation in the House was nearly equal; by 1850, the balance was 147 free to ninety slave-state representatives;[55] also by 1850 there were two more senators from free states than from slave states. Thus, when Calhoun followed his two terms as vice president to take a seat in the Senate (in 1832) he did so as a member of a group representing a "conscious and defensive minority," as one editor puts it.[56] Calhoun worked on his *Disquisition on Government* in 1845–1850, a time when some southerners were already talking of secession. In contrast with the other institutionalized techniques for checking abuse of power described here, Calhoun's theory was not grounded purely in the popular will. Instead he argued that a properly constituted government needs to check abuses of power in two ways. The first, requiring majority consent (or the consent of representatives of the majority), can (as Madison argued) check all abuses of power by a minority against the majority. Calhoun insisted, however, that each of the various politically significant minorities needs to possess a defense mechanism for checking the majority's power to harm it. And he suggested that the only truly efficacious mechanism would be a veto power in the hands of each significant interest group that would be affected by a proposed governmental action. Calhoun called this system "concurrent majority" because no measure could pass without the concurrence of a majority of each major interest group affected by it. Against the anticipated criticism that this would produce a perpetually stymied government unable ever to act, he insisted that any government action that was truly needed would be adopted because all the concerned parties would come up with a compromise. Those measures that evoked vetoes would be ones that were not truly needed.[57]

Although Calhoun's proposal for giving a veto power to all politically significant minorities over government action affecting them was never officially adopted, present-day scholars point out that certain congressional institutions do seem designed to allow for a veto (in practice) by intensely concerned and/or substantial minorities.[58] These include both the filibuster in the Senate and the committee system in Congress. Under the committee system, for instance, legislators from predominantly agricultural states can gain influence over the policies that most directly and substantially affect their constituents by getting onto the agriculture committees and subcommittees. In these committees they can bottle up legislation they oppose. The Senate filibuster allows a group of forty-one senators to prolong discussion of a bill interminably until the other senators, frustrated with their inability to move on to other needed legislation, agree to table the filibustered bill (and thus let it die).

The committee system was established not for the sake of protecting minorities but to build specialized expertise into the lawmaking process. That it has evolved into a system that gives certain groups extra influence over the fate of bills that most affect their interest has been an unanticipated consequence of its adoption. Similarly, the filibuster did not begin as a protection for minority rights. In the earliest years of Congress there was no right to filibuster—legislators in either house could "call the question" to shut off debate by a simple majority vote. In 1806, the Senate dropped this option, perceiving it to be unnecessary, since the presiding officer (usually the vice president) had the power to rule a speech out of order if it were "impertinent . . . beside the question, superfluous, or tedious"; this ruling could be appealed to the sense of the Senate, which could overturn it by majority vote.[59] Before 1841, the primary value of this power was seen to lie not in its ability to cut off speech viewed as irrelevant or tedious (as in modern filibusters) but rather in its exclusion of speech that was "impertinent"—that is, that insulted other senators too directly.[60] In 1841 the filibuster took its modern form at the hands of Calhoun and his allies, who attempted without success to use prolonged debate to thwart the recharter of the National Bank advocated by Henry Clay. When Clay threatened in exasperation to urge the Senate to return to the rule that would allow a majority to cut off debate, Calhoun protested that such a rule would unconstitutionally violate the minority's "undoubted right to question, examine and discuss those measures which they believe in their hearts are inimical to the best interests of the country."[61] As it happened, the procedural debate launched by Clay's threat revealed widespread Senate commitment to the right of unlimited debate, and thus the right has more or less persisted to this day. In 1917, during the Wilson administration, the Senate allowed for debate to be closed off by a two-thirds vote, while in more recent decades, the requirement became a vote of sixty senators (60 percent of the Senate membership). In effect, if the concerned minority is as strong as forty plus one, then that minority is allowed to block government action.

Neither of these congressional measures exactly replicates Calhoun's proposals. The filibuster functions not for every significant interest group but only for those sizable enough to command forty-one votes. The power of Congressional committees can be overcome by various discharge techniques, which the House or Senate will deploy for bills strongly desired by a majority. But to the extent that Calhoun's proposed veto power does modify demo-

cratic decision-making in the United States, its impact is worth exploring. Basically, Calhoun proceeded from the premise that oppression can come from only one quarter—government. In his view, if all harmful measures from government could be blocked, oppression would cease and liberty would be maximized. To the degree that the US system approximates a Calhounian one, government in the United States is less active than it might otherwise be, leaving relatively untouched *private* power relations (such as, in Calhoun's day, the relation of slave and master).

VI. 20th Century liberalism

At around the turn of the twentieth century, amid the growth of concentrations of private economic power produced by the industrial revolution, Progressive writers and political leaders made the argument that private economic power no less than public power could operate in oppressive ways, as for instance in company-owned towns. This thinking produced yet another development in democratic decision-making, broadly known as twentieth-century liberalism, which sought to inject the American scheme of checks and balances into the relation between government power and economic power, treating the former as countervailing the latter. This point of view is exemplified in President Franklin Roosevelt's Second Inaugural Address: "In . . . these last four years, we have made the exercise of all power more democratic; for we have begun to bring private autocratic powers into their proper subordination to the public's government . . . We are beginning to abandon our tolerance of the abuse of power by those who betray for profit the elementary decencies of life."[62] Thus, the American polity deliberately extended the realm of democratic decision-making into the economic world, again with the motive of checking abuses of power.

VII. CONCLUSIONS

This essay has reviewed American innovations in the theory and practice of democratic decision-making. It has uncovered four themes: (1) The goal throughout has been the checking of abuses of power. (2) The abuses of power were perceived to be of two kinds: the few against the many, and the many against the few. (3) With the exception of Calhoun's theory, which is to some degree approximated in Congressional decision-making procedures, each of the checks on power that has been successful in America has been grounded in some sense on the *demos*, or the people themselves. (4) A major blind spot in Calhoun's theory—the oppressive potential in private power—was itself corrected in the development of the theory and practice of twentieth-century liberalism, which extended the countervailing power of democratic government to check perceived abuses of economic power.

NOTES

1. Donald Lutz, *Popular Consent and Popular Control* (Baton Rouge: Louisiana State University Press, 1980), 24–26, 100–101; Julius Goebel, *History of the Supreme Court of the US: Antecedents and Beginnings to 1801* (hereafter, *History*) (New York: Macmillan, 1971), 3–4, 85; Willi Paul Adams, *The First American Constitutions*, trans. Rita and Robert Kimler (hereafter, *First Constitutions*; Chapel Hill: University of North Carolina Press, 1980), 230–33.

2. Lutz, *Popular Consent*, 100–105; Bernard Bailyn, *The Ideological Origins of the American Revolution* (hereafter, *Ideological Origins*; Cambridge: Harvard University Press, 1967), 61–175; Gordon Wood, *The Creation of the American Republic 1776–1787* (hereafter *Creation*; Chapel Hill: University of North Carolina Press, 1969), 167–85.

3. Lutz, *Popular Consent*, 24–26, 100–105. Cf. George Haskins, *History of the Supreme Court of the US: Foundations of Power—John Marshall, 1801–1815* (New York: Macmillan, 1981), 41; Chilton Williamson, *American Suffrage from Property to Democracy* (Princeton, NJ: Princeton University Press, 1960); J. R. Pole, *Political Representation* (New York: St. Martin's, 1966); and Charles Hyneman, "Republican Government in America: The Idea and Its Realization" (hereafter "Republican Government,") in George and Scarlett Graham, eds., *Founding Principles of American Government. Two Hundred Years of Democracy on Trial* (hereafter *Founding Principles*; Bloomington: Indiana University Press, 1977), 15–16.

4. Lutz, *Popular Consent*, 105–108.

5. Elisha Douglas, *Rebels and Democrats* (Chapel Hill: University of North Carolina Press, 1935); Jackson Turner Main, "Government by the People: The American Revolution and the Democratization of the Legislature," *William and Mary Quarterly*, 3rd series, 23 (1966): 391–407; Lutz, *Popular Consent*, 106–10; Wood, *Creation*, 167–68.

6. Lutz, *Popular Consent*, 24–26, 100–105.

7. Three colonies were exceptions with non-appointed upper chambers: Connecticut, Rhode Island, and Massachusetts. In 1774, Britain made the upper chamber in Massachusetts, too, appointed by the Crown. Dudley McGovey, "The British Privy Council's Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto," *University of Pennsylvania Law Review*, vol. 94, no. 1 (October 1945): 59–93, at 60. Hereafter, "Privy Council."

8. Adams, *First Constitutions*, 293–307.

9. Wood, *Creation*, 135–50, 160–73; Lutz, *Popular Consent*, 44; McGovey, "Privy Council," 60.

10. McGovey, "Privy Council," 60 and 80.

11. McGovey, "Privy Council," 61–69, 88–91. The Privy Council gave itself veto power over pending colonial legislation only in the early 1700s, and it was a power often flouted in the colonies.

12. Lutz, *Popular Consent*, 27–29; Bailyn, *Ideological Origins*, 189–93; Goebel, *History*, 3–4; Andrew McLaughlin, *The Court, the Constitution, and Parties* (Chicago: University of Chicago Press, 1912), 249–65.

13. Bailyn, *Ideological Origins*, 187–89 and 193–98.

14. Hyneman, "Republican Government," 15–16; W. P. Adams, *First Constitutions*, 63–65, 138; Ronald Peters, "The Written Constitution," in Graham and Graham, eds., *Founding Principles*, 174. Vermont declared independence from Britain in 1777 but did not join the American union until 1791.

15. Lutz, *Popular Consent*, 45, 65–69, 71–75, 81–83; Peters, "Written Constitution," 171–72; Gerald Stourzh, "The American Revolution, Modern Constitutionalism, and the Protection of Human Rights," in Kenneth Thompson and Robert Myers, eds., *Truth and Tragedy: A Tribute to Hans Morgenthau* (New Brunswick: Transaction Books, 1984), 166; Wood, *Creation*, 274–75, 279; Goebel, *History*, 101, 142; Edward S. Corwin, "The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention" (hereafter, "Progress of Constitutional Theory"), *American Historical Review* 30 (1925): 511–36, 511–20; Sylvia Snowiss, "From Fundamental Law to Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review in the US" (hereafter, "From Funda-

mental Law"), paper presented at the 1981 American Political Science Association meeting, 13–14. (Future references are to this paper, but the arguments are repeated in Snowiss, "From Fundamental Law to Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review," *Studies in American Political Development* 2 [1987]: 1–67; and Snowiss, *Judicial Review and the Law of the Constitution* [New Haven: Yale University Press, 1990].)

16. Lutz, *Popular Consent*, 61–68, 49, 35; Wood, *Creation*, 271–73, 279; Peters, "Written Constitution," 176–77; Goebel, *History*, 108.

17. Goebel, *History*, 139, no. 147; F. N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies*, vol. 6 (Washington, DC: Government Printing Office, 1909), 3220; McLaughlin, *The Court, the Constitution, and Parties*, 44–45; William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1953), II:962–65; James Varnum, *The Case Trevett against Weeden* (Providence, RI: John Carter, 1787), 20–29; Leslie F. Goldstein, *In Defense of the Text: Democracy and Constitutional Theory* (Savage, MD: Rowman & Littlefield, 1991), 88–89, n. 51.

18. Corwin, "Progress of Constitutional Theory," 511–20; Wood, *Creation*, 403–25; Lutz, *Popular Consent*, 116–22. See also James Madison's essay of 1787 in *The Writings of James Madison*, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1901), vol. 2, 361ff.

19. Goebel, *History*, 98–99.

20. Lutz, *Popular Consent*, 45; Wood, *Creation*, 161, 447–63. According to G. Alan Tarr, this inclination to impose checks on the state legislature from the other two branches after the 1830s took the particular form of moving toward selection of state judges by popular rather than legislative vote. Tarr, *Without Fear or Favor: Judicial Independence and Judicial Accountability in the American States* (Stanford: Stanford University Press, forthcoming, 2012), 13–14.

21. Lutz, *Popular Consent*, 62–65, 71–75, 81–83; Stourzh, "American Revolution," 166; Wood, *Creation*, ch. 8.

22. Thomas Tucker, *Conciliatory Hints Attempting to Remove Party Prejudice*, reprinted (from 1784 ed.) in Charles S. Hyneman and Donald Lutz, eds., *American Political Writing during the Founding Era 1760–1805*, vol. 1 (Indianapolis: Liberty Press, 1983), 606–30. Originality attributed in Wood, *Creation*, 280–83.

23. Tucker, *Conciliatory Hints*, 612, 620, 627.

24. Charles Haines, *The American Doctrine of Judicial Supremacy* (hereafter, *Judicial Supremacy*, Berkeley: University of California Press, 1932), 95.

25. These decisions were generally not published. They are reviewed in Haines, *Judicial Supremacy*, chs. 4–7; Snowiss, "From Fundamental Law," 10–16; Edward S. Corwin, "The Establishment of Judicial Review," *Michigan Law Review* 9 (1911): 102–25, 110–20; Goebel, *History*, 124–41; McLaughlin, *The Court, the Constitution, and Parties*, 41–50; Crosskey, *Politics and the Constitution*, II, 944–75; and Charles Warren, *Congress, the Constitution, and the Supreme Court* (Boston: Little, Brown, 1925), 43–48.

26. Julius Goebel, ed., *The Law Practice of Alexander Hamilton* (New York: Columbia University Press, 1964), 282–315, 393–419.

27. Those powers are described in McGovey, "Privy Council."

28. Haines, *Judicial Supremacy*, 95–104; Crosskey, *Politics and the Constitution*, II, 952–65; Corwin, "Establishment of Judicial Review," 110–20; Goebel, *History*, 126–28.

29. Haines, *Judicial Supremacy*, 92–95, 98–104; Crosskey, *Politics and the Constitution*, II, 948–52, 962–65.

30. Haines, *Judicial Supremacy*, 92–95, 104–20; Crosskey, *Politics and the Constitution*, II, 962–65, 968–75; Goebel, *History*, 37–141.

31. Haines, *Judicial Supremacy*, 105–20; Crosskey, *Politics and the Constitution*, II, 971–75; Goebel, *History*, 137–41.

32. See note 22 above.

33. Tucker, *Conciliatory Hints*, 613–14, 622–23.

34. Tucker, *Conciliatory Hints*, 612.

35. Tucker, *Conciliatory Hints*, 614.

36. Tucker, *Conciliatory Hints*, 627. See note 44 below for evidence that as early as 1782 some prominent Americans were espousing unpublished versions of the idea that the people through written constitutions enforceable by courts can check legislative power.

37. Snowiss, "From Fundamental Law," 16; Wood, *Creation*, 460–61; Goebel, *History*, 130; Haines, *Judicial Supremacy*, 116–20; McLaughlin, *The Court, the Constitution, and Parties*, 74–75, no. 1; Stourzh, "American Revolution," 169–72.

38. Griffith McRee, ed., *Life and Correspondence of James Iredell*, 2 vols. (New York: Peter Smith, 1949, reprint of 1858 ed.), II, 145–49, 173–74. Emphasis in original.

39. *Calder v. Bull*, 3 US 386 (1798), at 398–99.

40. Haines, *Judicial Supremacy*, 152–57. Alan Tarr, while affirming this pattern of acceptance of judicial review at the state level, does describe what he considers "an apparent anomaly in Kentucky in 1823." The anomaly, he concludes, was more apparent than real because the Kentucky voters endorsed judicial review in 1825 and 1826. Tarr, *Without Fear or Favor*, 30–31.

41. Warren, *Congress, the Constitution, and the Supreme Court*, chapter 4; Crosskey, *Politics and the Constitution*, II, 1028–46.

42. McLaughlin, *The Court, the Constitution, and Parties*, 16–17; Haines, *Judicial Supremacy*, 189–91.

43. Corwin, *The Doctrine of Judicial Review* (Gloucester, MA: Peter Smith, 1963, reprint of 1914 ed.); Haines, *Judicial Supremacy*, chs. 7–8; McLaughlin, *The Court, the Constitution, and Parties*, 10–16, 19–30; Charles Warren, *The Supreme Court in US History* (Boston: Little, Brown, 1923), ch. 1; Goebel, *History*, 778–84.

44. An overview of the cases is offered in Haines, *Judicial Supremacy*, ch. 7; and McLaughlin, *The Court, the Constitution, and Parties*, 19–30. *Ham v. M'Claws*, 1 Bay 93 (SC 1789); *Bowman v. Middleton*, 1 Bay 252 (SC 1792); *Lindsay v. Commissioners*, 2 Bay 61 (SC 1796); *White v. Kendrick*, 1 Brevard 469 (SC 1805). This list was compiled prior to the uncovering of several additional 1790s cases by William Michael Treanor in "Judicial Review Before *Marbury*," *Stanford Law Review* 58 (November 2005): 455–561. Treanor's article reaffirms the widespread acceptance of judicial review in this period, although his direct concern is more focused on whether or not the particular constitutional interpretation deployed by the court was debatable. His article also shows that individual attorneys were already making the Thomas Tudor Tucker argument as early as 1782. Edmund Randolph, Virginia attorney general, argued, for instance, in the *Caton* case "that a constitution is a 'touchstone' that allows the determination of 'how far the people, the fountain of power, have chosen to deposit it in their legislative servants.'" Treanor, at note 163, citing a rough draft of Randolph's argument for the case, *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782), found in James Madison's papers.

45. See above, note 20.

46. In the Constitutional Convention, according to Madison's *Notes*, on June 4, George Mason of Virginia made this point: "Notwithstanding the oppressions and injustice experienced among us from democracy; the genius of the people is in favor of it, and the genius of the people must be consulted." Max Farrand, ed., *Records of the Federal Convention of 1787*, 4 vols. (New Haven: Yale University Press, 1966), I, 101.

47. Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Clinton Rossiter (New York: Mentor Books, 1961), no. 78, 469.

48. Hamilton et al., *The Federalist*, no. 10, 77–84.

49. Hamilton et al., *The Federalist*, no. 51, 323–25. Quotation at 325.

50. The phrase is from *Federalist* no. 10, 84, but the thought very much fits Madison's argument in no. 51.

51. Madison makes the point in the second paragraph of *Federalist* no. 39 (240–41) that "the genius of the people of America will tolerate no government that is not republican," which he defines two paragraphs later as one empowered either directly or indirectly by vote of "the great body of the people," and whose officials serve terms limited either by specified time or "good behavior."

52. Madison obliquely refers to that catastrophic solution in *Federalist* no. 39 (246), where he maintains that lodging in the US Supreme Court the authority to settle disputes between states and the federal government over the extent of federal power is needed in order to "prevent an appeal to the sword and a dissolution of the compact."
53. Hamilton, *The Federalist*, no. 51, 320–22. The warning against trusting in paper constitutions alone appears in *Federalist* no. 48, 308.
54. Hamilton, *The Federalist*, no. 10, 80.
55. Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006), 126–28.
56. C. Gordon Post, "Introduction," in John C. Calhoun, *A Disquisition on Government*, ed. Post (Indianapolis: Bobbs-Merrill, 1953), 17.
57. Post, "Introduction," 10–31, 51–54.
58. This is such a common insight that it seems arbitrary to single out one or two works.
59. Richard R. Beeman, "Unlimited Debate in the Senate: The First Phase," *Political Science Quarterly*, 83.3 (1968): 419–34, 420–25.
60. Beeman, "Unlimited Debate in the Senate," 425–26.
61. Beeman, "Unlimited Debate in the Senate," 426–28.
62. www.bartleby.com/124/pres50.html accessed August 25, 2009.

Chapter Four

In Defense of Democracy

Antidemocratic Sentiment and Democratic Deliberation from Ancient Athens to the American Founding

Dustin A. Gish

The vice . . . of democracy [is] rage and violence.

—John Adams

A perfect democracy is the most shameless thing in the world. As it is the most shameless, it is also the most fearless.

—Edmund Burke

Many forms of Government have been tried and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.

—Winston Churchill[1]

INTRODUCTION

Democracy has traditionally been regarded as an inherently flawed political order, characterized by unreflective and impassioned judgment, and prone to erratic, irrational, lawless, and finally self-destructive decisions and actions. Critics of democracy (*dēmokratia*, the authoritative "power" of "the people") throughout the Western tradition of political thought—from Plato and Plutarch to the framers of the American Constitution—have argued that, without restraints (such as adequate constitutional protections, the separation and