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Considering Congress, Part 3: A "Republican Remedy" to the Mortal Disease

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On Tuesday, January 3, 2023, the 118th Congress officially convened for the first time. In the House of Representatives, the first order of business is the election of a Speaker of the House, which occurs before Members are sworn in and before any actual business begins. House Republicans, returned to a bare majority in the 2022 midterms, struggled to complete this basic operational task because 20 Republicans refused to vote for Kevin McCarthy (R-CA). As of this writing, Representative McCarthy failed to achieve the necessary votes for the sixth time over two days, the House has adjourned a second time, and the outcome remains uncertain (Broadwater, January 4, 2023; Edmondson, January 3, 2023; January 4, 2023; Hulse, January 3, 2023; Lerer and Epstein, January 5, 2023; CRS Report, 97-780, updated May 16, 2017; CRS Report R44243, updated September 22, 2022; see also, Clerk of the House of Representatives, January 3, 2023). It has been 100 years since the House was unable to elect a speaker on the first ballot (Shafer, December 30, 2022). As we live through some of the consequences due to factions that so concerned the Framers, considering Congress becomes more pressing and prominent. Under this latest cloud of dysfunction in the Article I branch of the federal government, this article continues the discussion of the design of Congress (*farmdoc daily*, October 27, 2022; November 11, 2022).

Background

The 2022 midterm elections have concluded but delivered mixed results and narrow majorities in a split Congress. Republicans reclaimed the House of Representatives but with a narrow majority: 222 Republicans to 213 Democrats, with 218 votes needed. Democrats retained control of the Senate and added a Senator to their caucus. John Fetterman (D-PA) won the seat previously held by Senator Pat Toomey (R-PA) giving Democrats a 51 to 49 majority (see, *farmdoc daily*, December 8, 2022; APNews; New York Times; FoxNews). Initial analysis has concluded that nearly 47% of eligible voters actually voted in 2022; while it means less than half of the Americans eligible to vote cast a ballot, if the preliminary results hold it would make the 2022 midterms second only to the 2018 midterms in turnout over the last four decades (Perry et al., November 19, 2022); U.S. Elections Project; Potts, November 15,

2022). These results serve as background to this continuing discussion about the design of Congress in the U.S. Constitution. As discussed in the previous article, factions in government was a particularly acute concern for the Framers' efforts to design an entirely unique system of government. People undertake politics in groups and factions cannot be prevented, nor can the causes of faction be removed or prevented. The design of the government had to account for that reality and seek to control the most damaging effects or outcomes of factions (*farmdoc daily*, November 11, 2022). The following discussion returns to *The Federalist Papers* to better understand the theories behind the design of Congress (*The Federalist Papers*, Library of Congress).

Discussion

The issue of factions and factional power presented arguably the greatest challenge for the design of the new government; the power of factions continues to challenge our system of self-government to this day. In their essays advocating for ratification of the Constitution, the Framers argued to the citizens of the new Nation that they had designed a system to control political factions. Alexander Hamilton argued that the design provided "means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided" (Hamilton, *The Federalist* No. 9). James Madison memorably concluded his essay writing that the "extent and proper structure of the Union" provided a "republican remedy for the diseases most incident to republican government" (Madison, *The Federalist* No. 10). Taken at their words, the arguments from Hamilton and Madison were based on three aspects: (1) a representative form of government; (2) the size or extent of the republic; and (3) the structure of the government, especially Congress.

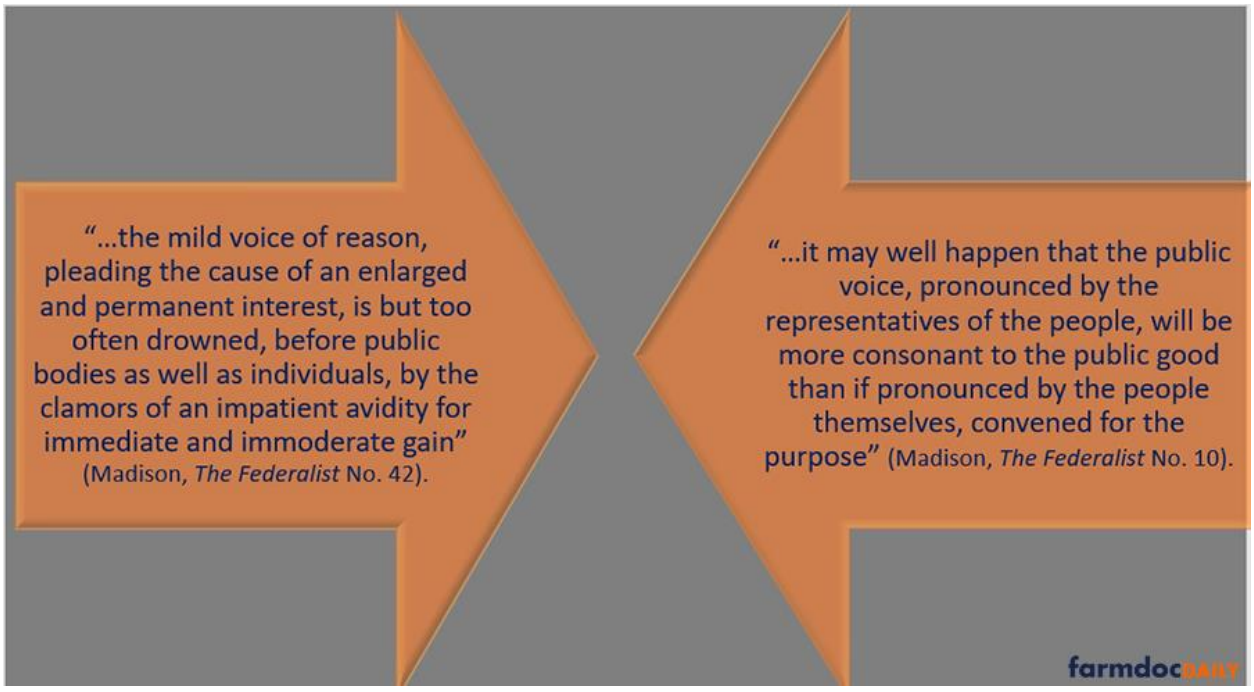
(1) A Government by Representation

The remedy for factions began with a republican government, defined as a representative democracy in which citizens elect representatives to speak and work on their behalf in the government. Madison defined it as "a government in which the scheme of representation takes place" through "the delegation of the government to a small number of citizens elected by the rest" (Madison, *The Federalist* No. 10). In a later essay, he added that it was "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior" (Madison, *The Federalist* No. 39). Hamilton also defined it in terms of "representation of the people in the legislature by deputies of their own election" (Hamilton, *The Federalist* No. 9). This concept was also written directly into the Constitution: Article IV, Section 4 provides that the "United States shall guarantee to every State in this Union a Republican Form of Government" (*U.S. Constitution*, Art. IV, Sec. 4, archives.gov).

To better clarify the definition, Madison contrasted the republican form of democracy with a "pure democracy, by which I mean a society consisting of a small number of citizens who assemble and administer the government in person" (Madison, *The Federalist* No. 10). He was referring to a system of government typically considered an Athenian Democracy in which the citizens directly govern themselves, debating and voting on laws as a body and collectively (see e.g., Blackwell, February 28, 2003 and January 24, 2003). Compared to our Congress, Athenian Democracy was centered on the Assembly, a regular meeting of all male citizens over a certain age at which any attendee could speak freely and all voted; as a group, the Assembly generally administered the government through decrees voted on by all, recorded and reported to the public.

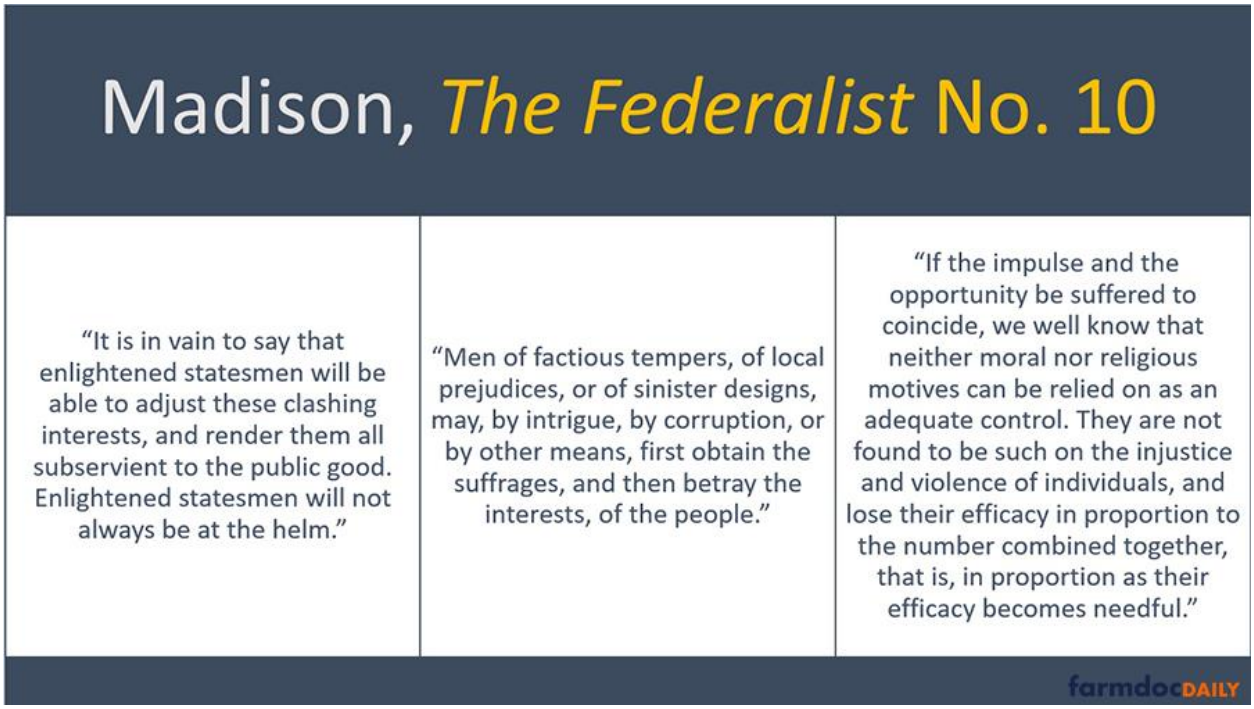
In theory, government by representation provided a "medium of a chosen body of citizens" that could "refine and enlarge the public views" and "whose wisdom may best discern the true interest of their country." The republican form would substitute the myriad problems of direct citizen involvement in government with "representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice" (Madison, *The Federalist* No. 10). In Madison's arguments, a problem with direct citizen involvement was that the public voice or the mild voice of the public interest struggles to be heard in government over the voices of factional interests, as highlighted by the quotes in Figure 1. By channeling all voices through a system of representation, the design would provide better balance and opportunities for the public voice or interest to be heard and responded to.

Figure 1. Madison's Views on Representation



Of course, this theory depends substantially on the quality and virtues of the representatives elected. There was, however, little the design could accomplish in terms of guaranteeing the election of representatives who would listen to the public voice over factional voices or prioritize the public interest over private interests. More troubling to Madison, this reality meant there was little to ensure such interests would "prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole" (Madison, *The Federalist* No. 10). Ultimately, in a system of self-government, it is the responsibility of the governed to choose their representatives. Figure 2 highlights some of Madison's acknowledgements of the challenges inherent in such a system.

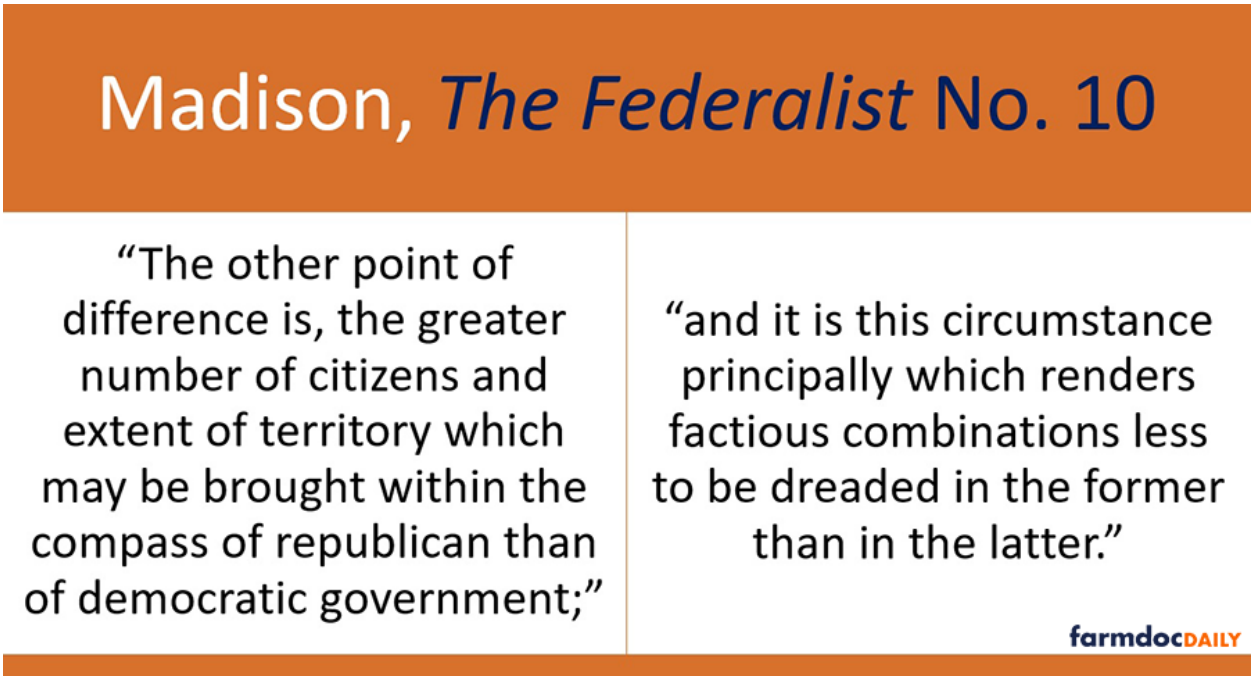
Figure 2. Highlights of Madison's Concerns About Representatives



(2) An Extended Republic

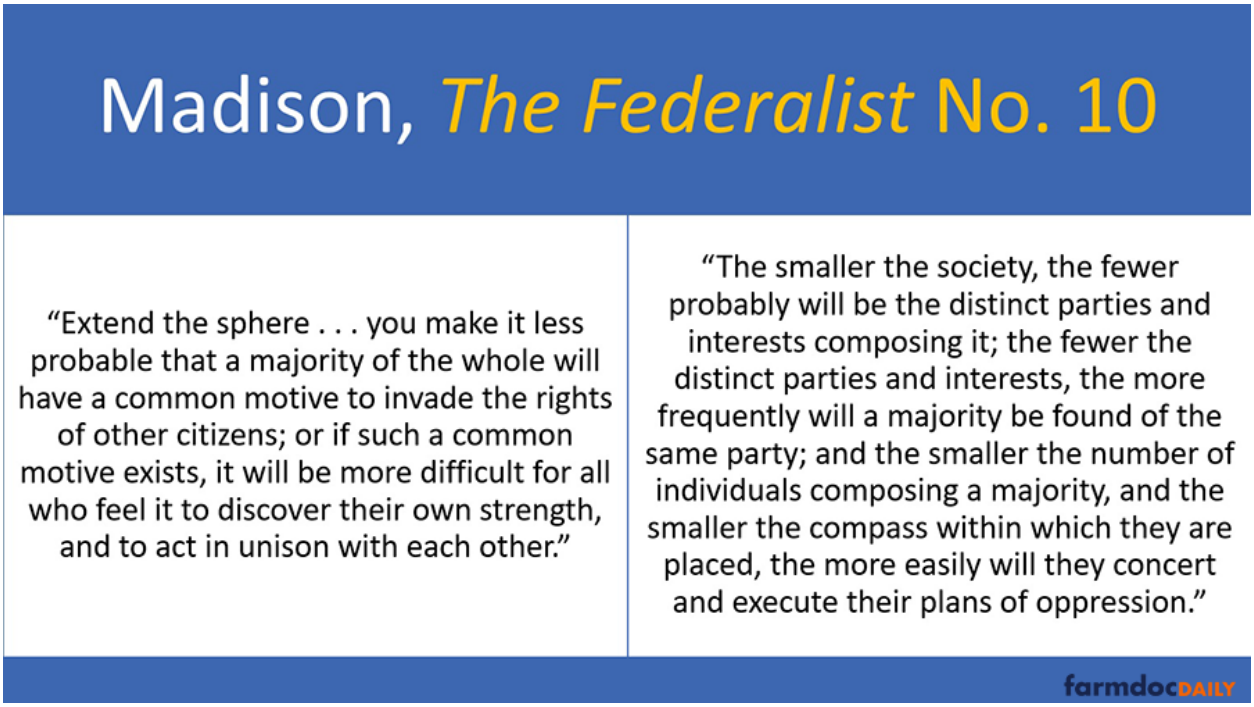
To support the theory of representation, Madison placed great emphasis on the size and extent of the society or republic. He wrote, "as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to [elect] men who possess the most attractive merit and the most diffusive and established characters" (Madison, *The Federalist* No. 10). While there is little to support this part of the theory, the concept of an enlarged republic encompassed more than the election of quality, virtuous representatives. Madison built much of his argument on this view that the extent of the American republic would provide an important check on factional power, as highlighted in Figure 3 (see e.g., Feldman, 2017, at 180-90).

Figure 3. Madison on the Extended Republic



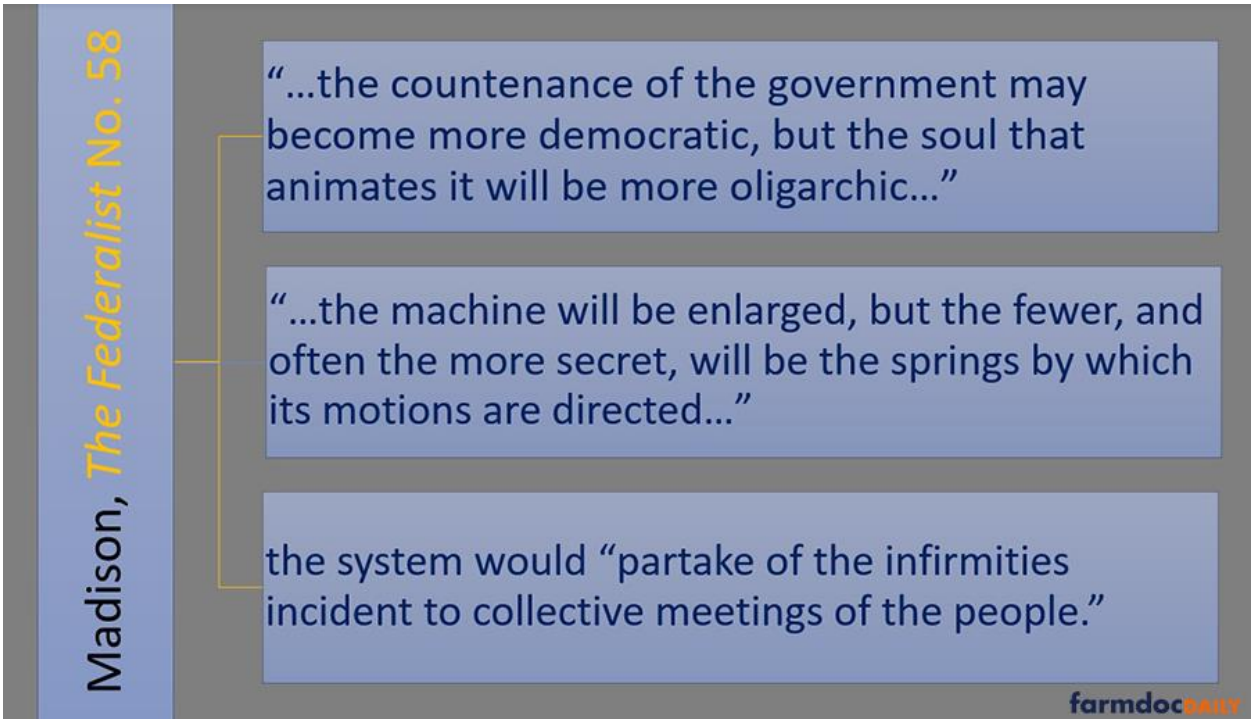
The key was not just the size of the nation or the population but rather the extent of it: a more diverse and larger variety of interests widespread across a large geographic area. "Extend the sphere," Madison wrote, and the system would "take in a greater variety of parties and interests" (Madison, *The Federalist* No. 10). He contrasted this with a smaller, more homogeneous society or State in which it would be easier for a faction to form and exercise its power in the government. A large, diverse and widely dispersed society would produce a variety of factional interests, none of which would not be able to use the government to oppress other interests. Figure 4 highlights the contrasts Madison drew in his argument.

Figure 4. Madison Further Explaining the Extended Republic



On the surface, this concept of enlargement or an extended republic does not offer much upon which to design a government. Complicating matters further, Madison appears to contradict it when he discussed the size of the legislature. The greater the number of representatives, he wrote, "the fewer will be the men who will in fact direct their proceedings" and the "greater will be the proportion of members of limited information and of weak capacities" (Madison, *The Federalist* No. 58). A legislature with too many representatives would suffer some of the same problems as a direct or Athenian democracy and be controlled by factions within it, as highlighted in Figure 5.

Figure 5. Concerns About Too Many Representatives



(3) Structure and Competition Complete the Remedy

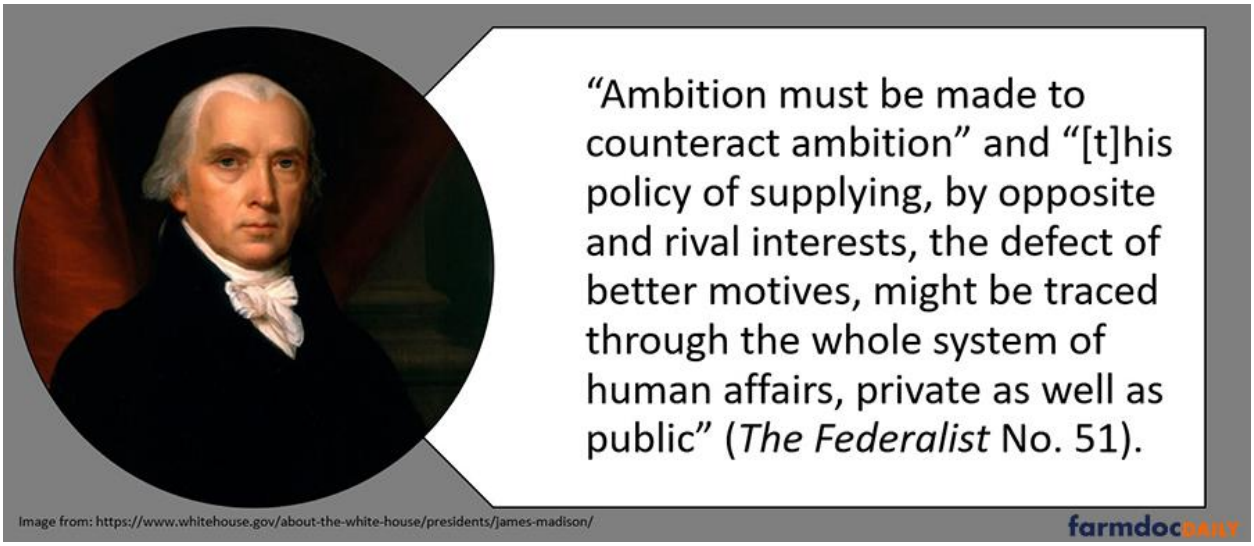
Government by representation provided a medium through which to channel society's many voices and allowed for a larger, more extended society to be governed, but the structure of the system ultimately completed the republican remedy. That structure had to be carefully designed to control the effects of faction or the negative outcomes of factional power. On this, Madison's theoretical argument appears to stumble as it struggles with profound complications and complexities. If nothing else, it is this issue through which we can witness an example of the monumental challenges inherent in designing a new system of government.

In operation, the basic republican principle was that a majority can always vote down a minority factional interest or defeat problematic interests by regular voting. The much greater challenge, however, was dealing with a faction that either consisted of a majority or was included in a majority. Madison called this the "great desideratum" for the Framers' effort, because preventing the "existence of the same passion or interest in a majority at the same time" would require methods to control the causes of faction, which could not be accomplished in a system of self-government (Madison, *The Federalist* No. 10). He repeatedly emphasized this issue. For example, the "great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part" and if a "majority be united by a common interest, the rights of the minority will be insecure" (Madison, *The Federalist* No. 51). For the theory of the design, it is notable that Madison was particularly focused on how to prevent the potential for a majority to oppress minority interests. He wrote that "the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression" (Madison, *The Federalist* No. 10).

Modern analysis has often referred to the "countermajoritarian difficulty" with the Constitutional design (see e.g., Graber, 2008). The intent to counter majorities comes through clear in Madison's argument and raises further questions about the design. It is counterintuitive to see problems with majority rule in a representative system of self-government if the goal was to enact legislation for the public interest. One way to sort this out is to return to the concept of an extended republic, because the value Madison finds in it is more important than the concept itself.

An extended republic provides for "greater security" through a "greater variety of parties" that work "against the event of any one party being able to outnumber and oppress the rest" and the greater the extent of parties or interests the more security is provided (Madison, *The Federalist* No. 10). In the extended republic, any "improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State." (Madison, *The Federalist* No. 10). Why did this matter? Because it fostered competition among factions and interests; the more interests competing against each other, the less any individual interest could prevail on its own and the more likely the result would be in the greater public interest. Political factional competition was the heart of Madison's theory behind the design for Congress and the federal government. Nowhere does he state this more clearly or eloquently than in *The Federalist* No. 51, highlighted in Figure 6.

Figure 6. Madison's Theory of Factional Competition



Through competition in a system of representation, the ambitions of factions were expected to check each other. This point about competition adds much to the arguments for an extended or enlarged republic, and bolsters confidence in the outcomes of elections. Hamilton concurred in this view, again by quoting Montesquieu for the idea of checks and balances through competition among competing interests. Should any interest "have too great influence" over other interests or the government, "this would alarm the rest" and they would work to oppose or defeat that interest; if any interest were to "subdue a part, that which would still remain free might oppose him with forces independent of those which he had usurped and overpower him before he could be settled in his usurpation" (Hamilton, *The Federalist* No. 9, quoting Montesquieu, 1748, Vol. I, Book IX, Chap. I).

Concluding Thoughts

The theory of a republican remedy to the mortal disease of faction was that factional competition in a system of representation would provide an internal method for controlling the worst effects or consequences resulting from factional power. Moreover, competition and representation would allow for governing an extended republic, enlargement of which would improve competition and representation. This theory was most directly applied to the design of Congress. As Joseph Bessette has observed, "[n]o institution, it is argued, better recreates the conflict of interests present in American society or is more suited for the peaceful resolution of this conflict through bargaining than the U.S. Congress" (Bessette, at 57-58). The theory begs further questions, however, that are magnified by lived experience and history. If competition was the heart of the theory, then much would depend on how that competition operated and whether it was fair, open, functional, and effective. Joanne Freeman, for example, recently reminded us that "[i]f Congress's checkered past teaches us anything on this score, it teaches this: A dysfunctional Congress can close off a vital arena for national dialogue, leaving us vulnerable in ways that we haven't yet begun to fathom" (Freeman, September 7, 2018). The events consuming the start of the 118th Congress are confirming those concerns as the design and its theories have not prevented a small faction from disrupting the work of Congress. Working from this understanding of the theory, future articles in this series will delve deeper into the structural design of Congress.

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