

## The American State – symposium

Laurence E. Lynn

### Explaining the Riddle of America: What Europeans Should Know about Madisonian Democracy

#### Abstract

Long a puzzle to both its admirers and detractors across the world, the United States of America has, in the second decade of the twenty-first century, become more puzzling than ever. A variety of explanations has been proposed for America's paradoxical combination of apparent "statelessness" and its capability to produce positive policy outcomes. This essay will argue that, properly understood, the structural features of America's constitutional scheme of governance, largely credited to founder James Madison, provide a necessary *but insufficient* explanation of the "riddle of America". The success of America's "compound republic" (in Madison's words), was intended to depend not only on the capacities of its basic governing structures – separation of powers, checks and balances, federalism, and pluralism – but, *in extremis*, on the inherent fairness of "the people", both of which have been achieved in American history but neither of which can be guaranteed. The source of authority and, of equal importance, the legitimacy of American governing institutions and their outcomes is the faith placed in them by citizens, elected officials, and judges, requiring a sense of responsibility on the part of all to the principles that protect all. That the sense of responsibility on the part of some, as America's recent political crises demonstrates, can fail, jeopardizes not only domestic liberty and justice but threatens the well being of peoples far distant.

*Key words:* James Madison, checks and balances, structures of governance, U.S. Government

#### 1. Introduction

Consider the following facts about the United States of America:

- Thirteen colonies defeated Great Britain in a war for independence organized as a confederacy of "states" barely capable of unified action.
- Its founders adopted a republican constitution of "separated powers", "checks and balances", and federalism; drafted in four months, it has been amended only twenty-six times in 220 years and is now the oldest constitution in the world continuously in force.
- The "Union" won a divisive war against secessionist states with consequences which still echo in American culture and politics.
- In its second century, the U.S. national government allocated its rapidly increasing economic and political capacities toward victories in two world wars begun in Europe, the reconstruction of former enemies and allies, and the creation of new alliances warranting the twentieth-century sobriquet "the American Century".

- Along the way, American government has abolished slavery, established universal suffrage and public education, made significant reductions in poverty and income inequality, and codified a dramatic expansion of civil rights.

Yet, beginning in 2008, America's regulatory policies and financial institutions led the world into a deep, prolonged financial and economic crisis from which full recovery remains in doubt. Then, in 2011, less than two years after the enactment of a historic reform of its health care system, an ideological faction of Congressional Republicans was able, in effect, to veto pragmatic long-term solutions to the crisis crafted by leaders of both parties and favored by a majority of Americans, yielding only when an expedient that postponed solving the underlying problems was the only feasible action. Defaulting on its financial obligations to its creditors was averted only on the brink of chaos, producing a first ever downgrade of its credit rating. A nation whose "manifest destiny" on the North American continent was fulfilled by immigrants was subjecting them to harassment and persecution. Its foreign and national security policies, on which the free world once depended, had become uncertain and confusing. Only one fourth of American citizens trusted their national government to "do the right thing" all or most of the time, and eighty percent disapproved of Congress.

Long a puzzle to both its admirers and detractors across the world, the United States of America has, in the second decade of the twenty-first century, become more puzzling than ever at home and abroad. How are we to account for what Eric Foner termed "the riddle of America" (Foner 1984, 57).

Over a long period, students of American political development and American exceptionalism have adduced an evolving variety of explanations for America's paradoxical combination of apparent "statelessness" and its capability to produce positive policy outcomes. Explanations range from the inherent weakness of its institutions to its distinctive anti-statist ideology to "the state of society" (King/Lieberman 2008; cf. Schuck/Wilson 2008). Desmond King and Robert Lieberman have added to the list of possible explanations still unresolved issues associated with race and the tendency of American's regulatory style of government to promote "comparatively distinctive state-society associational patterns" (2008, 378).

Many in America believe that, whatever might have been its virtues in the past, the American political system is now broken. The debt crisis of 2011 "revealed a number of weaknesses in the political system," said conservative *Washington Post* columnist Michael Gerson, whose views were widely shared (Gerson 2011). The presidency was weakened when one party took "a routine procedure – the debt-limit increase – and [turned] it into a powerful policy lever." That party had come to be dominated by an intransigent faction that attained a virtual veto over pragmatic solutions to the crisis. The resulting policy would hurt the poor and the unemployed the most, make the revival of a struggling economy much more difficult, and presage rising debt levels due to higher interest costs on existing Federal debt. Public opinion polls revealed extraordinary anger among people who expected better from their leaders. Ideological polarization of the two political parties made serious discussion of the most important issues of taxation and entitlements literally impossible. "[A]fter this spectacle," Gerson asked, "why would a credit rating agency, a foreign investor or an American voter have confidence in the ability of the American political system to confront" those issues?

This essay will argue that, properly understood, the structural features of America's constitutional scheme of governance, largely credited to founder *James Madison*, provide

a necessary *but insufficient* explanation of why America can both supply “the defects of better motives”, in *Madison’s* words,<sup>1</sup> while also demonstrating the failings of baser motives.<sup>2</sup> These failings – on near-fatal display as Abraham Lincoln was gaining the presidency on the eve of the Civil War – were on conspicuous display again during America’s 2011 “debt/spending/deficit crisis”. But most readings of the words of the founders, and especially of *Madison*, have neglect passages that add essential qualifications to their most famous statements which emphasize the structures of government. These qualifications make it clear that the success of America’s “compound republic” (in *Madison’s* words), was intended to depend not only on the capacities of its basic governing structures but, *in extremis*, on the inherent fairness of “the people”, both of which have been achieved in American history but neither of which can be guaranteed.

## 2. “The Political Hand”: *Madison’s* Institutional Design

In *The Federalist*, Nos. 47 and 51, *Madison* explains the institutional design incorporated in the then-draft Constitution. In *Federalist* 47, he examined “the particular structure of this government, and the distribution of . . . power among its constituent parts”, that is, among its three “departments”: legislative, executive, and judicial (312).<sup>3</sup> His objective was mainly to counter the criticism that the powers of the three branches were overlapping, not strictly separate. His argument that none of the colonies, nor the government of Great Britain, featured such strict separation, nor did *Montesquieu*, author of the tripartite scheme, required such separation.

### Checks and Balances

It is in *the Federalist* No. 51, “The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments”, that *Madison* explains the structural key to understanding American democracy (*Lynn* forthcoming). In that famous essay, *Madison* addresses the question: How shall the separation of powers be maintained in practice? His argument is both a passionate defense of liberty and an elegantly reasoned argument for the structures in the draft Constitution, his analysis both a splendid polemic and a sophisticated example of institutional design. A balance of power will be secured by an “interior structure” (336) of checks and balances between the separate departments (branches) of the government.

*Madison’s* argument proceeds from the premise that “each department should have a will of its own” (336). While that principle might be secured by giving each department an entirely independent base of power among the people, practical considerations – ensuring a qualified judiciary and an executive with sufficient authority and resources to act – dictate that “some deviations . . . must be admitted” (336). Argues *Madison*, “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . [A]mbition must be made to counteract ambition” (337).

*Madison’s* combination of separated powers and checks and balances is why *Dwight Waldo* and other seminal scholars of American public administration, many with intellec-

tual roots in European universities, believed that European administrative thought and practice were inappropriate for the emerging American administrative state. It explains, too, why *Walter Kickert* and other Europeans argue that American administrative thought and practice are not automatically transferable to European and other non-American contexts (Lynn 2008).

### Madison and Adam Smith

A significant exception to the American aversion to foreign doctrines was *Adam Smith*. The resemblance between *Madison's* institutional design and the ideas of *Smith* concerning the virtues of collective action, in his case markets, guided by a competition of interests is no accident. *Madison* and other American Founders were familiar with *Smith's The Wealth of Nations* and shared his liberal values. As a consequence, according to *David Prindle* (2004, 223), “*Madison* believed that in politics as in commerce, market competition among self-interested participants, if correctly structured, could produce republican virtue.” *Prindle* continues:

“*Madison* is a philosopher of regulated conflict, but he is not an advocate of amoral struggle [as some have contended];<sup>4</sup> he intends the competition his system creates to force self-interested individuals to become partisans of public virtue. As with *Smith*, it turns out that given the right sort of social order the evident tendency of men to pursue their own interest is a boon, not a problem” (234).

In the light of financial and fiscal crises beginning in 2008, the truth of that proposition is, as already noted, far from clear, however.

### Checks and Balances in Practice

The checks and balances in the Constitution itself are enumerated in Figure 1. They are familiar to all students of American government and will not be further explained.

*Madison*, also made reference in *The Federalist* 51 to “subordinate distributions of power” (337):

“This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other -- that the private interest of every individual may be a sentinel over the public rights” (337).

Although not often interpreted as such (or at all), the concept of subordinate distributions of power can be construed as depicting a system of what may be termed “subordinate checks and balances” created pursuant to the exercise of constitutional authority and resulting in what has been called “the diffusion of sovereignty” (*Price* 1965).<sup>5</sup> These subordinate checks and balances are defined, for example in statutes or other rules that have the force of law as well as in conventions of governance, such as the standing rules of the Senate and the House and the nominating practices of political parties (*Hill/Lynn* 2009).

Figure 1: Checks and Balances in U.S. Constitution

Legislative Branch	Executive Branch
<ul style="list-style-type: none"> <li>• <b>Checks on the Executive</b> <ul style="list-style-type: none"> <li>• Impeachment power (House)</li> <li>• Trial of impeachments (Senate)</li> <li>• Selection of the President (House) and Vice President (Senate) in the case of no majority of electoral votes</li> <li>• May override Presidential vetoes</li> <li>• Senate approves departmental appointments</li> <li>• Senate approves treaties and ambassadors</li> <li>• Approval of replacement Vice President</li> <li>• Power to declare war</li> <li>• Power to enact taxes and allocate funds</li> <li>• President must, from time-to-time, deliver a State of the Union address</li> </ul> </li> <li>• <b>Checks on the Judiciary</b> <ul style="list-style-type: none"> <li>• Senate approves federal judges</li> <li>• Impeachment power (House)</li> <li>• Trial of impeachments (Senate)</li> <li>• Power to initiate constitutional amendments</li> <li>• Power to set courts inferior to the Supreme Court</li> <li>• Power to set jurisdiction of courts</li> <li>• Power to alter the size of the Supreme Court</li> </ul> </li> <li>• <b>Checks on the Legislature – because it is bicameral, the Legislative branch has a degree of self-checking</b> <ul style="list-style-type: none"> <li>• Bills must be passed by both houses of Congress</li> <li>• House must originate revenue bills</li> <li>• Neither house may adjourn for more than three days without the consent of the other house</li> <li>• All journals are to be published</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>Checks on the Legislature</b> <ul style="list-style-type: none"> <li>• Veto power</li> <li>• Vice President is President of the Senate</li> <li>• Commander in chief of the military</li> <li>• Recess appointments</li> <li>• Emergency calling into session of one or both houses of Congress</li> <li>• May force adjournment when both houses cannot agree on adjournment</li> <li>• Compensation cannot be diminished Power to set jurisdiction of courts</li> </ul> </li> <li>• <b>Checks on the Judiciary</b> <ul style="list-style-type: none"> <li>• Power to appoint judges</li> <li>• Pardon power</li> </ul> </li> <li>• <b>Checks on the Executive</b> <ul style="list-style-type: none"> <li>• Vice President and Cabinet can vote that the President is unable to discharge his duties</li> </ul> </li> </ul>
	Judicial Branch
	<ul style="list-style-type: none"> <li>• <b>Checks on the Legislature</b> <ul style="list-style-type: none"> <li>• Judicial review</li> <li>• Seats are held on good behavior</li> <li>• Compensation cannot be diminished</li> </ul> </li> <li>• <b>Checks on the Executive</b> <ul style="list-style-type: none"> <li>• Judicial review</li> <li>• Chief Justice sits as President of the Senate during presidential impeachment</li> </ul> </li> </ul>

Source: “U.S. Constitution on Line” at: [http://www.usconstitution.net/consttop\\_cnb.html](http://www.usconstitution.net/consttop_cnb.html).

Four categories of subordinate checks and balances encompass a wide swath of what *Madison* called “the whole system of human affairs” (examples of which are enumerated in Figure 2): checks by one branch on another; checks that operate within the branches of government; checks by “the people”, that is by private citizens and organizations, on the branches of government; and lawful delegations to or acknowledgements of power and influence of private individuals or organized entities (*Lynn* forthcoming). These sorts of checks have a pervasive influence on the character and extent of government’s capacity to deliberate, decide upon, and implement how the manifold expression of public interests will be determined and fulfilled.

*Figure 2: Subordinate Checks and Balances*

<p style="text-align: center;"><b>Between the branches of government</b></p> <ul style="list-style-type: none"> <li>• Legislative authority to compel executive branch officials to testify under oath concerning their actions</li> <li>• Judicial authority to issue, and enforce consent decrees and injunctions</li> <li>• Government Accountability Office, Congressional Budget Office, and state equivalents</li> <li>• Foreign Intelligence Surveillance Act</li> <li>• Legislative and legislatively-authorized oversight and investigation</li> <li>• "Sunset" laws</li> </ul>
<p style="text-align: center;"><b>Within the branches of government</b></p> <ul style="list-style-type: none"> <li>• Inspectors general</li> <li>• U.S. Office of the Special Counsel</li> <li>• Whistleblower and other public employee protections</li> <li>• Separation of legislative authorization and appropriation processes</li> <li>• Multi-tiered judiciary</li> <li>• Overhead offices (personnel, budget, audit, general counsel)</li> <li>• Professional advisory panels, state laboratories</li> </ul>
<p style="text-align: center;"><b>Outside the branches of government</b></p> <ul style="list-style-type: none"> <li>• Administrative Procedure Act</li> <li>• Freedom-of-information, government-in-the-sunshine acts; WTO disclosure rules</li> <li>• Office of the IRS Taxpayer Advocate, ombudsmen</li> <li>• Laws at all levels of government authorizing "citizens petitions"</li> <li>• "Watchdog" groups organized under federal and state laws as nonprofit organizations</li> </ul>
<p style="text-align: center;"><b>Other</b></p> <ul style="list-style-type: none"> <li>• National Academy of Sciences/Institute of Medicine</li> <li>• Federal False Claims Act</li> <li>• The professions (auditors, actuaries, statisticians, intelligence analysts, scientists) and their codes of conduct.</li> <li>• Negotiated and private standard-setting and rulemaking (Government Accounting Standards Board, Underwriters Laboratories)</li> </ul>

Source: Based on Hill and Lynn (2009)

The first category of subordinate checks and balances adds to the original capabilities of each branch to check the others. It includes, for example, such diverse mechanisms as the authority of the courts to approve, monitor, and enforce consent decrees in lawsuits in which the government is a defendant; the activities of the Government Accountability Office and the Congressional Budget Office, both of which are agencies of the U.S. Congress, to provide audits, analyses, research, and evaluations which often contain alternative perspectives to those of the executive branch on public policy and management issues and, therefore, provide a check on executive or legislative branch rationalizations of issues and events;<sup>6</sup> and the authority of legislatures to oversee, monitor, and investigate the activities of public officers and agencies and to authorize independent investigations for such purposes in which witnesses may be subpoenaed.

The second category of subordinate checks and balances operates within the branches of government. Within the executive branch, for example, it includes inspectors general, whose independent investigations influence the content and direction of public policy, protections afforded whistleblowers and other employee rights (including the right to sue their employers), and overhead offices that perform functions such as review of agency budget requests and budget execution, set and administer or implement human resources policies, and internal audit of agency accounts. Within the judicial branch, this category

includes the multiple levels of review of the decisions of trial courts. Within the legislative branch, the category includes, for example, the separation of the authorization and the appropriations processes and a wide variety of rules that allocate authority and balance competing interests of legislative committees and subcommittees.

The third category of subordinate checks and balances concerns the power of private citizens and groups with respect to the three branches of government. This category includes various transparency measures such as labor relations acts, freedom of information acts, administrative procedure acts, acts authorizing citizens' petitions, and "government in the sunshine" and open meetings acts (some of which are actually written into the constitutions of individual states), which provide citizens with opportunities to question the exercise of government authority, with the attendant political consequences, or even, usually on an ad hoc basis, to share power over decisions affecting local interests. This category also includes watchdog groups which enjoy the privileges of formal non-for-profit status, such as tax exemption and the right to receive tax-exempt contributions and engage in virtually constant surveillance of public agency activity and actively engage in litigation on behalf of their constituencies.

The final category of subordinate checks and balances includes the variety of ways by which power and influence are distributed among individuals or among entities created or allowed to exercise it in the pursuit of a public interest and in lieu of, but often in conjunction with, government agencies. This category includes, for example, Congressional chartering of such entities as the National Academy of Sciences and the Institute of Medicine, which are often commissioned by the executive branch and Congress to produce authoritative analyses of controversial public policy issues (such as dietary standards and the nature and extent of global climate change); the power inherent in the independent professional status of public employees such as actuaries, scientists, lawyers, physicians, and statisticians, many of which have enforceable codes of ethics; the Federal False Claims Act, which entitles employees of private firms under contract to the government who report deliberate waste of public funds to a share of any funds that are recovered through legal action; and government's reliance on what are termed negotiated and private rulemaking and on self-regulation (such as that of the Government Accounting Standards Board and Underwriters Laboratories).

## Veto Players

The implications of this complex system of checks and balances is illuminated by a simple veto player analysis (*Tsebelis* 2002). A veto player is a political actor with the power to prevent an action from being taken or a policy from being adopted. The U.S. Constitution establishes three *institutional* veto players in the legislative process: the Senate, the House of Representatives, and the President; any one of them can prevent ("veto") the enactment of a law. In the event of a legal challenge to the constitutionality of a law or its provisions, the Supreme Court is also an institutional veto player.

Additional veto players, termed *partisan* veto players, may be generated by the political process itself, including the process of formally making or informally acknowledging subordinate distributions of power. As was demonstrated in the 2011 American debt crisis, it wasn't the House of Representatives as an institution but the Republican Party as the majority party within the House that could veto action on debt ceiling legislation. Not only that, a

cohesive faction within the Republican Party, the so-called “Tea-Party conservatives”, was large enough and sufficiently cohesive to exercise a de facto veto over the Republican Party’s position on various debt ceiling relief proposals. In the Senate, in contrast, the Democratic Party held the majority and was a partisan veto player in that body.

The situation is even more complex in the Senate, however. That body has adopted a rule that, to pass, significant legislation requires 60 (of the 100 possible) votes, i.e., a supermajority. Thus any block of 41 senators can become a partisan veto player on a given legislative proposal. Further, any senator may, on a given occasion, become a partisan veto player by positioning him- or herself as the “41<sup>st</sup> senator” holding out for a particular provision or “deal”. In general, any faction that acquires sufficient influence to block action by an institutional veto player becomes a partisan veto player. The identity of such powerful factions can vary widely from issue to issue and from one Congress to the next (as the dramatic shift of legislative power from Democrats to Republicans between 2009 and 2011 illustrates).

A revealing example of how this system of checks and balances works is provided by the attempt by the Clinton administration to implement an administrative reform adopted in Great Britain, the so-called “Next Steps” reform. This reform mimicked corporate management by creating individual agencies headed by chief executive officers (CEOs) to handle distinct governmental activities on behalf of ministries, each within a regulatory framework that included features such as performance measures and targets. Although the CEOs were civil servants, their pay was to be based on meeting targets, and removal for poor performance was possible in principle. The Clinton administration called its version of such agencies, operating under cabinet-level departments, *performance based organizations* (PBOs). The idea was to have performance agreements that required the administration to commit to provide specific budgets for the period of years covered by the agreements and allow the CEOs considerable latitude in how to use them.

In Great Britain, the prime minister could authorize the creation of such agencies in a message to parliament. In the United States, however, *Madison’s* checks and balances immediately created obstacles to the creation of PBOs. For example, future Congresses cannot be legally bound by the decisions of a sitting Congress. Because power can change hands from one Congress to the next, an agreement with the CEO of a PBO was legally in force for a maximum of two years. An additional constitutional problem was the inclusion of terms preventing the termination of CEO appointments for other than performance-related reasons. As *Andrew Graham* and *Alasdair Roberts* have shown (2004), America’s formal separation of powers allowed Congress to complicate negotiations over the content of annual performance agreements. At the same time, in the U.S. system of governance, Congress “may not limit the ability of the President to remove appointees, unless those appointees exercise quasi-legislative or quasi-judicial functions that require some independence from the administration.” As a consequence of checks and balances, only three PBOs were ultimately created, and they were denied significant flexibilities essential to the PBO concept and were but a ghostly reflection of the British model.

In general, management strategies available to governments without a separation of powers and with extensive checks and balances (such as the United Kingdom) or to corporate executives in the private sector with unchecked authority over internal organization are available only in highly attenuated form to public administrators in the U.S., with its separation of powers and extensive checks and balances, not to mention constitutionally-prescribed federalism, and, thus, its numerous institutional and partisan veto players.



## The Goal: Equilibrium

*Madison* and the other Founders believed that their exceptional scheme of governance would tend toward balance, in effect an equilibrium, among its myriad factions and interests. And so it has, surviving a potentially mortal threat to its unity to become the most durable written constitution in the world, adjusting the balance among rival interests as necessary to meet ordinary and extraordinary circumstances. When the political branches of government have been in the hands of different political parties, the resulting gridlocks have tended to reflect divisions among the people themselves: ideological and interest-based conflicts that remain until a greater clarity and sense of direction emerges.

The extent to which *Madison's* argument on behalf of the equilibrating mechanism, checks and balances, depends on the overall structure of what *Madison* terms “the compound republic of America” (339) cannot be overemphasized, however. Both federalism – all those state and local governments (so long, *Madison* insists, as they are of adequate size) and pluralism – all those “parts, interests, and classes of citizens” (so long, *Madison* says, as no one faction can dominate the others) – and a federal, state, and local judiciary to ensure the rule of law and the just redress of grievances at all levels, are, in the Madisonian system, essential to effective republican governance characterized by liberty and justice. It is the entire scheme, not just a few constitutional formalities, which will ensure “that the rights of individuals, or of the minority, will be in little danger from the interested combinations [comprising] the majority” (339).

## 3. Will Structures Alone Secure Liberty and Justice?

Yet it is *Madison's* scheme which, as we have already noted, produces so many puzzles, in the minds of Americans as well as of observers elsewhere, nurturing the impression of statelessness. Whenever the American political system appears to be “out of equilibrium”, as has arguably been the case in recent years, citizens may become restive and express a lack of trust in their governing institutions.<sup>7</sup> In the absence of trust and approval, governments have fewer resources – of loyalty, skill, forbearance, and funds – to govern. Does the Federal government’s chronic failure to address its long-run fiscal imbalances demonstrate that *Madison's* finely wrought handiwork is failing? Great Britain’s more unified system was able to muster the political will to embrace austerity. Without judging the wisdom of its policies, it is evident that a scheme of governance less encumbered with veto players produced a decisive outcome where one appeared to be called for. America’s government could not do that.

## The Defect of Base Motives

The problems of governability, accountability, responsiveness, and legitimacy that have been piling up make an eighteenth century system of structural checks and balances seem to many to be obsolete. According to its critics, Madisonian governance cannot be trusted to produce either the procedural fairness that legitimizes its outcomes or socially just outcomes that legitimize its procedures.<sup>8</sup> But short of a Jacobin revolution, whose only con-

temporary avatar appears to be the “primitive libertarian philistines” (Fox’s term) of many in the Tea Party movement. It is not clear how radical structural reforms might eventuate as either a “whole-of-government” reform or as a revolution.

Whatever one’s ideology on the virtues or vices of the American republic, the conundrum noted by *Madison* himself cannot be avoided: not enough controls on power allows for abuse and arbitrariness, too many checks and balances unduly restricts government’s capacity to act to realize policies. How, then, are the problems of the American republican democracy to be addressed? Should Americans remain resolved to confront such problems using the scheme devised by *Madison* and his colleagues for just such purposes, as has been done to confront the crises that began in 2008? It is not an academic question: the possibility of global depression has, after all, been willfully avoided, with unacceptable consequences.

But the issue is deeper and more difficult. The reality is that public policy at all levels of government now requires countless specific decisions that are both arcane and consequential for “the people” in their many categories and groups, for politics, and for public administration. While the jugular of major legislation attracts the lion’s share of public attention – the individual mandate in the Patient Protection and Affordable Care Act of 2010 – the capillaries – the minimum loss ratio provisions of that Act – inscribed in specific authorities, appropriations, regulations, and guidelines, and the “rent-seeking” that is associated with them, is of vast but much less well understood importance and is closely monitored by specific interest groups.

The following detailed example illustrates the point. In the summer of 2011, the Federal Aviation Administration, was forced to shut down, leading to the immediate unemployment, on furlough, of 74,000 employees of the agency and its contractors. The reason was a disagreement between the Senate and the House on certain provisions in legislation, passed in 2007, that would provide long-term authorization for the funding of FAA operations. Pending a resolution of this difference, the FAA operated under a series of short-term “continuing resolutions” that ensured continuation of existing funding levels. Two constitutional checks and balances come into play here. First, all appropriations laws must originate in the House. Second, both houses must agree on the text of a law for it to be sent to the President for signature.

In the summer of 2011, however, the Chair of the House Transportation and Infrastructure Committee slipped into the short-term funding bill a provision that cut funds for the Essential Air Service program, which subsidizes the operations of rural airports that otherwise cannot continue to operate. He also added a provision that would reverse a regulatory ruling that airline workers can form a union if a majority of ballots favor it, the same rule that governs most workplaces. This had the effect of restoring the status quo in which employees not voting were counted as “no” votes. Other provisions seemed directed at the interests of particular Democratic Senators. The Senate refused to accept – vetoed – these changes to the continuing resolution, forcing a shutdown of the agency.

A *Washington Post* reporter subsequently reported as follows.<sup>9</sup>

Congressman John Mica, the Florida Republican blamed for single-handedly shutting down the Federal Aviation Administration, sounded like a beaten man when he called me Thursday evening. The usually biting chairman of the House transportation committee spoke with remorse about the standoff, which put 74,000 people on furlough or out of work, caused delays to airport-safety projects, and cost hundreds of millions of taxpayer dollars.

“I’ve had a brutal week, getting beat up by everybody,” Mica told me, minutes after Senate Majority Leader Harry Reid announced a deal that would end the shutdown and avoid the cuts to regional air service that Mica wanted. I didn’t know it would cause this much consternation,” Mica said. . . . “So I don’t know what to do, what to say.”

As the *Post* reporter, *Dana Milbank*, put it: “With no goodwill between the two parties, or the two chambers, ordinary disagreements mushroom into governing crises, with unpredictable results.”

The extraordinary, often deeply divisive, and continuously increasing complexity of the issues facing American policy makers helps explain both the growing significance of constitutional checks and balances and the proliferation of the kinds of subordinate checks and balances enumerated in Figure 2.

### The Madisonian Solution: Add Virtue

That the current volatile array of groups and categories of Americans, each pursuing its own interests, has led to deep fractures in the popular will is, however, neither a valid argument against *Madison’s* scheme nor a reason for its amendment in any particular way. The solutions to the contemporary ills of American democracy must come from within the constitutional system itself.

For example the extent to which the outcomes of American democracy reflect how the nation’s income and wealth are distributed among “the people”, including business corporations whose spending on election campaigns now enjoys the free-speech protection of the First Amendment, remains an urgent question: can a democracy with seriously imbalanced income and wealth ensure social justice? To an increasing extent, American democracy’s most basic processes, political communication, deliberation, and election, are fueled by money, and its concentration distorts these processes. Wealthy individuals and corporations can speak much more loudly and often to politicians needing funding for their election campaigns than can other individuals.

This is a political, not a structural, question, however. One suggestion is that the growing perception of capitalism’s weaknesses might finally supersede *Warner Sombart’s* question, Why is there no socialism in America? “[T]he current economic crisis”, wrote *Miguel Requena* in 2009, “puts Sombart’s essay on the table for discussion today, a hundred years after it was written.” He speculated about the renewed interest in social democracy in the United States in the light of the impact Americans were suffering as its recession deepened. The reaction of conservative populists to greed on Wall Street and of liberals to the consequences of deregulation and the lack of transparency suggest at least the possibility of eventual political realignments favoring the left, notwithstanding the clamor for reductions in spending, debt, and deficits. Stagnant wages, prolonged joblessness, and rising income inequality and its visible symbols were having their effects, too.

But *Madison* wouldn’t flinch at this issue or its prospective solutions. In addressing it and the many other problems of our democracy, *Madison’s* checks and balances have served in the past to assist in dramatic reductions in American poverty and income inequality, and they can do so again. But something must be added: virtue among the people. *Madison’s* own argument in *The Federalist* No. 51 is dispositive:

“Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of

which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, *to wish for a government which will protect all parties, the weaker as well as the more powerful* (340, italics added).

Madison thus comprehended here, and elsewhere in *The Federalist*, that, even within the constitutional scheme in the draft Constitution, liberty might be lost and anarchy reign unless the stronger parties submit to a government that protects all parties, the weaker as well as themselves.

Alexander Hamilton concurred. Among his most famous utterances in *The Federalist* No. 70, is that: "Energy in the Executive is a leading character in the definition of good government". This sentence has led many to suppose that America is an executive-oriented, managerialist state (Lynn 2008). This supposition, however, overlooks another, equally important Hamiltonian precept. To ensure that citizens enjoy "safety" from tyranny of the sort that had led to the Declaration of Independence, administration must, said Hamilton, exhibit a "*due dependence on the people [and] a due responsibility [in a republican sense]*." In other words, the new nation must not tolerate the recreation of European-style central institutions that the Founders saw as threatening liberty and property.

Appeals to Madison's evident respect for Adam Smith's "invisible hand" to supply the defect of better motives, moreover, will not defeat the appeal to virtue. In *The Wealth of Nations*, Smith suggested not only the prospect of economic transformation and dramatic enhancements of national wealth but, as well, the necessity of regulating the agents of such transformation for the preservation of civil rights and for the just distribution of its benefits. Smith cautioned, that "civil government, so far as it is instituted for the security of property, is in reality instituted for the defense of the rich against the poor, or of those who have some property against those who have none at all."<sup>10</sup> He acknowledges that "regulations may, no doubt, be considered as in some respects a violation of natural liberty. But these exertions of the natural liberty of a few individuals, which might endanger the security of the whole society, are, and ought to be, restrained by the laws of all governments."<sup>11</sup>

It is ironic, but true, that the legitimacy of American political institutions, sustained as they are by the rule of law, depends on an unwritten and unenforceable faith in law and lawful institutions. Legal scholar Michael Mullane puts it this way:

"When you get right down to it, the rule of law only exists because enough of us believe in it and insist that everyone, even the nonbelievers, behave as if it exists. The minute enough of us stop believing, stop insisting that the law protect us all, and that every single one of us is accountable to the law – in that moment, the rule of law will be gone. So I cling to my belief in the rule of law. It is probably the single greatest achievement of our society. It is our bulwark against both mob rule and the overweening power of the modern state. It is the rule of law that governs us, that protects each one of us when we stand alone against those who disagree with us, or fear us, or do not like us because we are different. It is the strongbox that keeps all our other values safe".

The riddle of America, then, is explained this way: the authority and, of equal importance, the legitimacy of American governing institutions and their outcomes is the faith placed in them by citizens, elected officials, and judges, requiring a sense of responsibility on the part of all to the principles that protect all. That sense of responsibility on the

part of some, as America's recent political crises demonstrates, can fail, jeopardizing not only domestic liberty and justice but threatening the well being of peoples far distant. Alas, republican democracy can be like that.

## Notes

- 1 The "defects" of better motives refers to the private interests of office holders which, because they are constituted to be "rival and opposite", supplement "the people" as a check on tyranny by checking each other. See (Allen/Cloonan 2009, 248-249).
- 2 This essay draws on, and adapts material from, Bertelli/Lynn 2006, Hill/Lynn 2009, and Lynn 2008, 2009, forthcoming).
- 3 All quotations re from *The Federalist*, Modern Library College Editions (softcover), published by Random House, n/d.
- 4 As Prindle (2004) analyzes it, the argument is between those who privilege Madison's views concerning the tendency of his political scheme to generate virtuous officials and Madison's mechanistic/Smithian view that "ambition must be made to counter ambition".
- 5 For an elaboration of this idea, see Hill/Lynn (2008), pp. 101-115.
- 6 Independent estimates by the Congressional Budget Office of the amount of deficit reduction that would be accomplished by rival plans to cut spending during the 2011 debt crisis had significant political impacts. This was also the case during the 2009 debates over the Obama Administration's proposed health care reforms.
- 7 Immediately following the legislative agreement that ended the debt crisis in August 2011, 82 percent of respondents in a popular public opinion poll said that they disapproved of how Congress was doing its job, the highest disapproval rate on record (*New York Times*/CBS News Poll, August 2-3, 2011; at: [http://www.nytimes.com/interactive/2011/08/05/us/politics/20110805\\_Poll-docs.html?ref=politics](http://www.nytimes.com/interactive/2011/08/05/us/politics/20110805_Poll-docs.html?ref=politics)).
- 8 The concept of an "equilibrium" to depict Madisonian outcomes may be un insightful. A netter conceptual framework might be provided by repeated game theory and the folk theorem, according to which any outcome can be a feasible solution if certain conditions are satisfied.
- 9 Dana Milbank. 2011. "The FAA and the New Rules of Washington." *Washington Post* 5 August.
- 10 A contemporary source for this quote is Spiegel (1991, 236).
- 11 A contemporary source for this quote is Cassidy (2009, 35).

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*Anschrift des Autors:*

Laurence E. Lynn, Jr., Sid Richardson Research Professor, LBJ School of Public Affairs,  
University of Texas at Austin, 100 Monarch Lane, Austin, TX 78737  
E-Mail: llynnjr@gmail.com