The Gospel According to Madison: Constitutionalism, Infallibility, and the Noble Interest

Kyle C. James

INTRODUCTION

American constitutionalism is both a system of national values and an evolutionary process. Traditionally, scholars have viewed constitutionalism as a developmental phenomenon born alongside the many uncertainties and tribulations of the founding era. These debates often paired the theories of constitutional "originalism" against those of the "living Constitution." Within the last few decades, scholars have abandoned this exclusionary dichotomy and have instead chosen to analyze how constitutional principles affect the societal pursuit of human rights, political representation, economic equality, and the common good, questions that have spawned a variety of contentious academic responses.[1] This new approach to constitutionalism focuses primarily on political outcomes and the behaviors that produce them. As a matter of analysis, Professor Herbert Johnson argues that more attention should be given to the "experiential influence[s]" that shape constitutional history and attitudes.[2] Here, the overarching goal is to consider the constitutional experience in both its theoretical and real forms. Even within this framework, incorporating the merits of revolutionary and early republican political thought evokes strong resistance. Citing the Framers' as political theorists is often condemned as a tactic of "civil religion" that ignores the Constitution's responsive attributes."[3] Yet a reinvention of the now moribund values-based approach to constitutional studies may be appropriate, allowing us to study whether early republican constitutional thought is still admired in the twenty-first century realm of idealism. Amidst growing civic apathy and perceived democratic backsliding, there is a demonstrable need for these sorts of examinations as new sources of constitutional disfunction and uncertainty emerge. A synthesis of political theory and historical perspectives can effectively assess the durability of our constitutional system as the nation grapples with norm-defying ideologies and increasingly radical sympathies in the modern age.

---

[1] *See* Conor Casey and Adrian Vermeule. "Myths of Common Good Constitutionalism," *Harvard Journal of Law & Public Policy,* 45, no.1 (2022): 104; Lawrence B. Solum. "Flourishing, Virtue, and Common Good Constitutionalism," *Harvard Journal of Law & Public Policy*, 46, no. 3 (2023): 1149-1150.

[2] Herbert Johnson. "Constitutionalism and the War for Independence," *Early American Studies* 14, no.1 (2016): 141.

[3] Johnathan Gienapp. "History, Law, and Constitutional Rupture," *Boston University Law Review,* 104, no.5 (2024): 1356-1357; citing Jack Balkin *Memory and Authority* (Yale University Press, 2024): 69, ("the Framers' world is not our world."); Mugambi Jouet. "Projecting the Past into the Future of Constitutionalism: History, Atemporality, and American Society," *University of Pennsylvania Law Review Online*, 173, no.79 (2025): 85.

George Thomas and Wayne Moore describe Madisonian constitutionalism as the governmental response to political plurality, a process that mediates interactions between branches of government and interactions between government and the public. "The key to constitutional maintenance for Madison is the very structure the written constitution calls forth" and the mechanisms designed to thwart "the physical and political force of the nation."[4] Madisonian constitutionalism aims to regulate the political passions of the public and the passions of government itself, all while encouraging a universal fidelity to the constitutional order. Whether this fidelity endures among citizens today is a difficult question to answer and is likely to feature numerous interpretations as social and political identities become increasingly diverse. This article presents various perspectives to aid in explaining how the Constitution continues to survive as the canon of American government despite episodes of politically inflicted duress, both past and present. While constitutional strain can be found in every epoch of national history and is often correlated with ideological developments, grave constitutional threats tend to be incalculable and sporadic; assessing their damage is a muti-decade exercise in retrospect. In order to foster stable governance, the Constitution seeks refuge in the status-quo, elevating the role of institutions when political activities decry or deface the nation's foundational character, a complex array of values and sympathies found in the revolutionary cause of classical liberalism. While the term infallibility tends to carry a religious and theological connotation, I will aim to demonstrate that it belongs in the civic realm, helping to better illuminate the uniquely sturdy character of American government. Infallibility, in a constitutional sense, refers to a system that is free from misguidance, ineptitude, and perceived error, where preservation takes primacy over substantive outcomes. Given Madison's personal disdain for state-sponsored religion, it is ironic to discuss the constitutional system as a semi-deistic creation. Rather, I make this comparison symbolically, hoping to enhance the multi-disciplinary dialogue of constitutional studies, placing theory in its relevant historical context. Figuratively and functionally, the constitutional system is analogous to an ecclesiastical body that outlasts internal schism and corruptive threats to its authority while still continuing to evolve. In response to various historical events that have sought to challenge or displace the constitutional order, a spirit of durability and perpetuity emerges, revealing a Constitution that is infallible to time, immutable to ambition, and inherently self-protective.

Part I of this article will address how constitutional structures, both theoretical and institutional, sustain the constitutional order during periods of national adversity, division, and uncertainty, paying particular attention to the status of constitutional rights during wartime. Part II will discuss the role of political philosophy in promoting constitutional allegiance and continuity as a response to domestic hazards, incorporating both Enlightenment and early republic thought. As students of classical antiquity, the Framers

[4] George Thomas. "Recovering the Political Constitution: The Madisonian Vision," *The Review of Politics* 66, no. 2 (2004): 237-238.

regarded concepts of faction and liberty to be highly uniform and predictable within democracies, making it easier to identify and anticipate the maneuvers of anti-constitutional causes. For this reason, authoritarian movements in the United States suffer from the inherent pitfalls of their own coalitions and are unable to encroach upon individual freedoms without facing generalized public backlash.

While abstract, atypical, and largely unexplored as a matter of research, Part III will delve into the Madisonian theory of "the noble interest," a subtle but potent aspect of values-based constitutionalism that offers additional protection to the constitutional system beyond that of structures or behavioral philosophy. The noble interest, a well-documented product of republican spirit and rational solace, is the strongest constitutional protection historically, emerging only as a response to acute instances of political violence and insurrection.

I. STRUCTURAL CONSTITUTIONALISM: THEORY AND INSTITUTIONAL BEHAVIOR

The desire to connect the Constitution with the people is inherently Madisonian. While multiple strands of early constitutionalism permeated the Convention of 1787, it was James Madison's framework that emboldened the Federalist cause during the debates on ratification. Historical context largely explains the *how* and *why* of Madison's public writings; they reveal a strategic and astute politician who tailored the content and delivery of his messages in response to certain issues.[5] Yet, Madison's constitutional theory is the totality of his intellectual productions, a combination of narratives, persuasives, and expositions. The sources herein are designed to communicate Madison's attraction to the constitutional order he helped create, a reverence severable from the political discourse of late-eighteenth century early America. A preoccupation with historical context can mask this attraction, casting aside the substance and enduring legacy of Madisonian theory. However, it remains true that "history and tradition can serve as its own modality of constitutional argument" when supplementing theoretical arguments.[6] Hence, this article cites episodes of constitutional hardship to justify the merits of infallibility but prioritizes theoretical scrutiny and application over full contextualization.[7]

---

[5] *See* Jack N. Rakove. *A Politician Thinking*: *The Creative Mind of James Madison* (University of Oklahoma Press, 2017).

[6] Randy E. Barnett. "Just What Are You Trying to Prove? The Relevance of History to Constitutional Theory and Practice," *Boston University Law Review*, 104, no. 5 (2024): 1413.

[7] *See* Joshua Foa Dienstag. "The Example of History and the History of Examples in Political Theory," *New Literary History*, 48, no. 3 (2017): 483-502, arguing that the use of historical examples in works of political theory has fluctuated overtime with recent developments suggesting that factual accounts and historicity have been sidelined in the discipline.

In praising the establishment of the new constitutional government, Madison envisioned a genuine "happiness" among the citizenry, a feeling "perpetuated by a system of administration corresponding with the purity of [constitutional] theory."[8] Such a sentiment amounted to more than a declaration of confidence in the infant constitution; it acknowledged a type of enchantment whereby Americans would come to relish the institutions of the new nation, an early form of constitutionalism. Madison's praise for the Constitution's structure arose from an attitude of astonishment following the Convention. If a seemingly original and well-reasoned form of government could be derived from a precarious abode of competing states, the new constitution, according to Madison, was not only principally sound but cognizant of "extraneous considerations" that may, in the future, jeopardize the system itself.[9] Yet because constitutional structures themselves are subject to the motivations of the actors within them, institutions can provide only a finite amount of protection. Nonetheless, as Madison recognizes in *Federalist No. 51*, structures provide an essential line of defense against political ambition by keeping individuals "in their proper places."[10] Whether structures in and of themselves can adequately fortify constitutionalism is the first element of evaluating constitutional durability and infallibility.

To combat the arbitrary exercise of government power by individuals and factions, the Framers lauded separation of powers and checks and balances as structural doctrines. In the eighteenth century, both principles were viewed as critical to a new republic seeking to distinguish itself from the executive and legislative duality of the British Parliament. James Wilson, the father of the American judiciary, spoke regularly of the need to "balance" both the textual and pragmatic power of the branches. The Convention's moderates, led by Roger Sherman and Gouverneur Morris, warned against "corruption" residing within particular parts of government with a specifically pronounced fear of "legislative tyranny."[11] While the Framers intended to establish a deterrent against concentrated power, evidenced by the text of Articles I through III, their objectives rested upon the institutional developments that would inevitably follow ratification, lasting beyond the Constitution's experimental phase. The most notable of these innovations,

---

[8] James Madison. "Spirit of Governments," *National Gazette*, February 20, 1792, from Papers of James Madison, University of Virginia, Charlottesville, VA, para. 6. https://classicliberal.tripod.com/madison/spirit.html.

[9] THE FEDERALIST NO. 37: *Concerning the Difficulties of the Convention in Devising a Proper Form of Government* (James Madison), January 11, 1788, The Avalon Project: Yale Law School, 2008, para. 15.

[10] THE FEDERALIST NO. 51: *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments* (James Madison), February 8, 1788, The Avalon Project: Yale Law School, 2008, para. 1.

[11] Louis J. Sirico Jr. "How the Separation of Powers Doctrine Shaped the Executive," Working Paper Series, Villanova Charles Widger School of Law, 2008, 19; Christopher S. Yoo. "James Wilson as the Architect of the American Presidency," *The Georgetown Journal of Law & Public Policy* 17, no. 1 (2019): 66.

judicial review, enjoys flexibility in its application subject to the determination of judges bound by the Madisonian obligation of constitutional adherence.[12]

Michael Klarman provides one take on the relationship between constitutional structures and constitutionalism itself, arguing that separation of powers is largely ineffectual due to the willingness of Congress to concede power to the executive branch and the high degree of judicial deference towards legislative and executive pronouncements.[13] To Klarman, adherence and respect for a fixed type of constitutionalism is thus a difficult attitude to adopt as constitutional structures adapt, change, or reinvent themselves, especially in response to interbranch power struggles. Yet, this narrowly tailored focus does not account for the many instances where branches, particularly the judiciary, have been overtly independent or even antagonistic towards the aggressive exercise of power by other branches, demonstrating a highly intuitive regard for their constitutional roles.[14] This inclination towards constitutional "functionalism" presumes that the "cumulative power of the branches" is an ongoing zero-sum game where "equipoise between the branches… [is] measured."[15] Consequently, the actor-based mediating role of structural constitutionalism is often overlooked as politically motivated institutional developments are easier to observe and explain. Conversely, throughout the nation's history, institutional actors have relied upon the integrity of foundational structures

---

[12] David E. Engdahl. "John Marshall's 'Jeffersonian' Concept of Judicial Review," *Duke Law Journal*, 42, no.1 (1992): 295; THE FEDERALIST NO. 78: *The Judiciary Department* (Alexander Hamilton), May 28, 1788, The Avalon Project: Yale Law School, 2008, para. 16-17. Hamilton argued:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

[13] Michael Klarman. "What's So Great About Constitutionalism?" *Princeton Readings in American Politics* (Princeton University Press: 2009), 91, citing the creation of the non-delegation doctrine and judicial decisions involving the Commerce Clause of Article I as evidence of a deferential judiciary, notwithstanding the availability of judicial review as a structural check. Klarman's objections to judicially enforced constitutionalism are posited on concerns about "elitist" social policy and counter-majoritarianism; nonetheless, the article's discussion of checks and balances remains relevant to the constitutional durability question.

[14] Gerald N. Rosenberg. "Judicial Independence and the Reality of Political Power," *The Review of Politics*, 54, no. 3 (1992): 394-395. (rejects the judicial independence hypothesis yet identifies several examples of such independence throughout American history. Judicial independence is most prominent when public "opposition to the Court is not immensely felt". However, on a governmental level, the executive and legislative branches have responded with equal hostility to unfavorable court decisions which they deem intrusive or archaic. Congress has altered the jurisdiction of federal courts and delegated quasi-judicial functions to executive agencies to concentrate authority within the political branches.)

[15] Shalev Gad Roisman. "Balancing Interests in the Separation of Powers," *The University of Chicago Law Review*, 91, no. 5 (2024): 1361.

to impede the pursuit of illegal and unconstitutional political power absent partisan considerations. But structural defenses may not always be permanently active. While political power is a constant push and pull between branches, anti-constitutional threats follow an irregular pattern and are often unpredictable or temporarily silent, waiting for a conducive opportunity to reveal themselves. Such pursuits tend to arise from a circumstantially emboldened executive branch while the successful application of constitutional checks is most often product of congressional and judicial action whether coordinated or exclusive. Structural constitutionalism is omnipresent in American politics even if it remains dormant for an extended period of time.

Concerning constitutional interpretation, the Madisonian perspective is largely determinate and institutional. Distinct from originalism, it is a product of early republican thought that, even into modernity, gives meaning and purpose to constitutional government. At the turn of the 21st century, scholars began to study constitutional interpretation on a grassroots level, hypothesizing that institutional workings are secondary and ultimately responsive to public opinion and civic affairs. In multiple landmark books and articles, Professor Larry Kramer argued in favor of "popular constitutionalism," an arrangement in which the people are "responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there … not some abstract 'people' who spoke once, two hundred years ago, and then disappeared."[16] This normative approach, according to Kramer, accurately portrays American constitutional development up until the 1980's, a decade of highly pronounced judicial interventionism marked by concealment and inconsistency.[17] While seemingly contradictory given its focus on the founding era, Madisonian constitutionalism analyzes events in conjunction with popular constitutionalism, maintaining that the public holds a deep philosophical affection for republicanism and responsive government. Constitutional interpretation must therefore always involve some extent of public input and cannot be considered purely systematic. By and large, constitutional structures embody this relationship when confronted with political upheaval.

Constitutionalism, the Civil War, and Reconstruction

Throughout the 1860's, the federal government endured a great deal of internal discord much to the dismay of its overarching political goal. Following the end of the Civil War in 1865, national reunification and reconstruction required a strong manifestation of unified constitutionalism. Hindsight reveals that the actions of various

---

[16] Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2005), 253; *see also* Kramer. "The Supreme Court, 2000 Term—Forward: We the Court," *Harvard Law Review*, 115, no.1 (2001): 13; Kramer, "Popular Constitutionalism, circa 2004," *California Law Review*, 92, no.1 (2004): 959.

[17] Robert Post and Reva Siegel. "Popular Constitutionalism, Departmentalism, and Judicial Supremacy," *California Law Review*, 97, no.1 (2004): 1028 (summarizing Kramer's empirical and prescriptive view of popular constitutionalism historically, noting its contrast to the prevailing trend of "judicial supremacy.")

federal branches, acting in accordance with Madisonian structural theory, were able to preserve constitutional loyalty within the Union and bolster long term constitutional durability despite a highly turbulent national political environment. The War years showcased the veracity of foundational constitutional structures even as new amendments aimed to rectify the issue of slavery on a substantive legal basis. Throughout the conflict, courts were forced to balance the Union's pragmatic political interests against federal constitutional supremacy, elevating the gravity of the controversies before them. This atmosphere of uncertainty forced the creation of new legal doctrines, adding depth to the still relatively young Constitution.

The extent to which President Abraham Lincoln is deemed a friend or enemy of constitutionalism is a long-debated proposition ripe with ideological sympathies. However, the manner in which Lincoln exercised presidential power was considered then, at a minimum, controversially audacious and legally novel.[18] From 1861 to 1868, the demands of wartime and post-war governance provided enough political incentive for actors of all stripes and all loyalties to bypass constitutional limits, dramatically increasing the likelihood of a full-fledged authoritative crisis. Federal law enforcement, acting under directives from the executive, engaged in robust activities to suppress anti-Union dissent, quash press criticizing the Administration, and expand the realm of extra-judicial prosecutions.[19]

The supremacy of law above civilian or military executive power was fundamental to 19th century constitutionalism and continues to hold significant weight in contemporary political thought. At the time, appreciation for the rule of law helped distinguish American government from the Napoleonic empire of Europe. While much has been written on the legal basis for Lincoln's unilateral suspension of *habeas corpus* in 1861, little has been done to reconcile how this form of executive fiat may have threatened constitutionalism at such a moment in time.[20] If Lincoln's actions represented an extralegal form of law enforcement and usurped Congress of an exclusive legislative power, Chief Justice Taney's ruling in *Ex Parte Merryman* offered an adequate structural defense capable of quelling a constitutional calamity that could have, but ultimately, did not occur. The opinion in *Merryman* rests on a crucial premise: the interpretive power of the judiciary is a structural permanency that exists unbeknown to national emergencies or political crises. While such an assertion is undoubtedly bold and potentially divisive

---

[18] Phillip Shaw Paludan. "'Dictator Lincoln': Surveying Lincoln and the Constitution," *OAH Magazine of History* (January 2007): 8-9.

[19] For a detailed evaluation of Lincoln's policies towards anti-war northern newspapers, *see* Harold Holzer, *Lincoln and the Power of the Press* (Simon & Schuster, 2014).

[20] Nonaquiescence is a political posture where a federal branch ignores or deliberately obstructs the pronouncements of other branches, disturbing the ideal of structural separation of powers. It is often a residual of frayed executive-judicial relations. *See* Michael Paulsen. "The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation," *Cardozo Law Review*, 15, no.1 (1993): 81–112.

depending on the context in which it is stated, it reflects Madisonian structuralism's belief in the primacy of separation of powers. In context, the structural role of the judicial branch under the Constitution remains solidified despite any conditions of war or militancy which the Union may face, thereby preventing the executive from assuming additional powers which are not constitutionally granted to it in times of civil peace.

Fundamentally, individuals and governmental entities may seek reprieve in federal courts when alleging unconstitutional conduct by the executive. In resolving these controversies, judicial remedies are often subject to intense levels of political scrutiny. Taney makes this assertion in the nineteenth paragraph of the opinion, noting that when the President seeks to exert power which belongs exclusively or predominately to Congress, the President is "subordinate to judicial authority." In these circumstances, the judicial power is at its height and provides the strongest structural check against executive action, regardless of the authority a president might seek to claim or the circumstances in which such authority may be sought.[21] For Taney, this public declaration was a difficult personal and ideological position to reconcile given his well-established disdain for intrusive courts. In an 1832 letter addressed to President and political confidant Andrew Jackson, Taney warned of a judiciary that "selects… the powers necessary in order to enable the agents of government to perform effectually their duty," fearing a court that treads on legislative and executive realms.[22] Yet in a feat of judicial independence and acuity for the elastic nature of judicial review, Taney choose not to rest the substantive legal conclusion of the *Merryman* case on the interpretive word of the court alone. Instead, the decision provides Congress with a legislative means to resolve the impediment regarding *habeas corpus* suspension, and in doing so, alleviates any potential for executive or legislative rebuke of the judiciary. Applying an English legal rationale found in *Blackstone's Commentaries*, Taney maintains that Congress' power to suspend the Great Writ entitles it to judge under what conditions it should be restored.[23] Through such logic, the court demonstrated that "judicial sovereignty had not atrophied" in rectifying interbranch disputes even as it presented the executive with an alternative remedy.[24] Lincoln was implicitly offered a way to legitimize executive policy through congressional collaboration, a path that reinforces legislative power and avoids nonaquiesence. Thus, whether Lincoln's policy was in fact unconstitutional becomes a secondary historical question; structurally, the administration was able to proceed with its wartime governance of the Union without compromising the integrity of the courts. The decision of the 37th Congress to continue the suspension of the Writ and delegate such

---

[21] *Ex Parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861)
[22] Roger Taney to Andrew Jackson, June 27, 1832, The Papers of Roger Brooke Taney, Massachusetts Historical Society, Boston, MA, Primary Source Cooperative, para. 27 https://www.primarysourcecoop.org/publications/rbt/document/RBT01360?navmode=searchresults&doci=0&ss=constitutionally
[23] *Merryman*. at 154.
[24] Robert G. McCloskey. *The American Supreme Court* (The University of Chicago Press, 2016), 65.

authority to the President is evidence of an enduring constitutional fidelity despite a potent application of judicial review. While Taney may have intended to politically obstruct Lincoln and congressional Republicans, the crux of the Court's ruling was institutional, not personal; it was a stern endorsement of constitutional adjudication featuring a narrowly constructed exit ramp. Given the unlikelihood of successfully dissuading Congress from reauthorizing the suspension, Taney's true impact lied in the safeguarding of his office and the rule of law. Attitudinally, both political branches respected the *Merryman* decision without harboring protracted feelings of hostility towards the judiciary.[25]

The judgment in the *Merryman* case protracted an attitude of constitutionalism within the federal government notwithstanding high levels of divisiveness and distrust, resulting in a substantive outcome which all three branches shaped according to their institutional and political interests. By not conceding the structural role of the judiciary, Taney influenced the Supreme Court's approach in future *habeas corpus* cases of equal gravity. One year later, Justice Davis followed a similar template in *Ex Parte Milligan* when ruling against the concurrent use of federal military and civilian courts. Similar to *Merryman,* the *Milligan* holding was situated on the enduring supremacy of judicial interpretation in determining the constitutional meaning, aided by the opinion's strategic reference to "courts ordained and established by Congress…composed of judges appointed during good behavior," the determinative clause of Article III.[26] Davis proceeded to condemn the procedures of extralegal military courts, noting that Congress never authorized their establishment, and even in doing so, would be constitutionally prevented from denying Milligan, or any other civilian defendant, a trial by jury.[27] However, in what can be deemed an act of implicit judicial deference, the Court was attuned to the critical role military tribunals would soon play in southern reconstruction efforts, they being the only institutions capable of fairly facilitating the constitutional rights of formerly emancipated slaves. Thus, Davis concludes the *Milligan* ruling seeking to avoid alienation between the courts and the political branches responsible for executing Reconstruction writing, "in a great crisis like the one we have just passed through, there should be a power somewhere of suspending the [Writ]," likewise "there are occasions when martial rule can be properly applied."[28] As a result of this dual approach, judicial review maintained its status as a prized structural tenet even as the

---

[25] Habeas Corpus Suspension Act, 12 Stat. 755 (1863). The absence of congressional contempt for the federal judiciary is best illustrated by Sections 3 & 4 of the Act which affirm a Defendant's right of jurisdictional removal from state court to federal circuit court; *see* Michael Les Benedict. "Constitutional Politics in the Gilded Age," *Journal of the Gilded Age and Progressive Era*, 9, no.1 (2010): 34 (arguing that "during the late 1800's, discussion in Congress and elsewhere regularly included assertions that the Supreme Court is the final expositor of constitutional law.")

[26] *Ex Parte Milligan* 71 U.S. 2, 122 (1866)(referencing the constitutional language of Article III.)

[27] *Milligan*.

[28] *Milligan*. at 125, 127.

political branches were given an tacit green light to pursue martial law throughout the south in the years to come.

Notably in an era that saw the nation's first presidential impeachment, the first three articles of the Constitution emerged from this period textually and philosophically unaltered, with doctrines such as separation of powers solidified, and perhaps strengthened by the judiciary's *modus operandi*. Both during and after the war, constitutional structures faced a gargantuan test of fortitude less than eighty years following ratification. The institutional response to this test sought to keep the federal balance of power compartmentalized while ensuring that neither the president nor Congress saw fit to exercise arbitrary authority so familiar to human political tendency. The *Merryman* and *Milligan* cases offer the most thorough case studies because they implicate a multitude of constitutional structures (e.g., enumerated powers, trial by jury, judicial review) and constitutional attitudes (e.g., judicial independence/subservience, nonaquiesence, majoritarianism) in their outcomes. Behaviorally, both courts functioned as self-protective agents, protecting their own unique authority under the Constitution whilst not disturbing the political realities and ambitions of the era. Structural constitutionalism, in a purely Madisonian sense, was neither significantly changed nor damaged despite the challenges of a severed nation.

Still, there is cause for many to challenge whether a fixed and undisturbed version of structural constitutionalism did in fact emerge after the war, typically from those who view Reconstruction as a period of significant political change rather than simply an assertion of pre-existing federal power granted by the Framers. Constitutional infallibility would not deny that Reconstruction resulted in change. The Thirteenth, Fourteenth, and Fifteenth amendments established a series of new substantive and procedural constitutional rights supported by an expansion of congressional power and the reinforcement of judicial review over federal and state law.[29] Respecting these admirable outcomes, it is worth noting that the creation of new constitutional rights, administered through supplemental federal law and judicial oversight, can also be explained in the context of changing public opinion and institutional priorities friendly to abolition and progressivism. Neither institutional pronouncements nor public discourse indicate that the rejection of antebellum constitutionalism played a part in securing the end of slavery or the enfranchisement of African Americans.[30] The real-time political currents of the 1860's

---

[29] See *Cooper v. Aaron* 38 U.S. 1 (1958) (holding that federal court orders apply to state governments and that states possess no interpretive authority to reject federal court orders); *South Carolina v. Katzenbach* 383 U.S. 301 (1966) (upholding congressional oversight of federal elections in instances of racial discrimination and disenfranchisement within states); *City of Boerne v. Flores* 521 U.S. 507 (1997) (qualifying the power of Congress to enact legislation enforcing Sections 1-4 of the 14th Amendment when such legislation establishes new substantive rights, a power that lies only with the Court).

[30] Louis M.A. Heiny "Radical Abolitionist Influence on Federalism and the Fourteenth Amendment," *Temple Political & Civil Rights Law Review* 17, no. 1 (2007): 167 (noting the disagreement within the Republican Party on the need for constitutional change to secure the abolition of slavery. Amendment

did not serve as a substitute for foundational American political thought; new ideologies, sympathies, and behaviors supportive of racial integration and equality pursued a controlled modification of original constitutional structures but never displacement of them. Even as the rise of Jim Crow reflected the pragmatic shortcomings of Reconstruction, the legitimacy and recognition of newly textualized civil rights rested on the application of privileges and immunities, procedural due process, and federal supremacy, structures whose lineage is traceable to Convention of 1787. Likewise, statutes such as the Civil Rights Act of 1964 and the Voting Rights of 1965 owe their enforceability to legal doctrines that echo the Framer's understanding of federal and state power.[31] The multi-decade willingness to build on rather than supplant constitutional structures amounts to an endorsement of their effectiveness. Never was the Constitution perceived as a source of misguidance or fallacy.

Contemporary Structural Constitutionalism

Historians such as Arthur Schlesinger and Andrew Preston have questioned the extent to which constitutional structures still function according to the Framers' original intent and whether they continue to promote constitutionalism. The growth of presidential foreign policy responsibilities and the willingness of Congress to abdicate constitutional war powers has led many observers to question the viability of checks and balances in the contemporary age. Schlesinger, Preston, and others dispute the existence of a "constitutional equilibrium" that regulates excessive political power, however they acknowledge that the growth of internationalism and interventionism throughout the 20th century was itself the likely catalyst for the imperial presidency, rather than any structural weakness in the original constitution.[32] Ultimately, the institutional developments which resulted in congressional capitulation arose out of historical context and necessity; the demands of postwar alliances, peacekeeping, and national security required a responsive and centralized foreign policy decision-making process which only the executive branch could offer. In this sense, structures were not forced to defend the constitutional system; globalism, a worldly phenomenon, was not purposefully engineered to attack American values or norms. The executive's assumption of additional powers speaks more to rational evolution than it does intentional hostility. Therefore, the real impact of the imperial presidency on constitutional structures is case specific, continuing to unfold on a daily basis.

---

proposals based on the idea of creating "a new responsibility" that would position the federal government as the primary instrument of racial equality stalled in Congress.)

[31] For a thorough discussion of federal supremacy and federalism in civil rights law, see "Theories of Federalism and Civil Rights," *The Yale Law Journal*, 75, no. 6 (1966): 1007-1052.

[32] Andrew Preston. "The Emperor is Dead—Long Live the Empire: The Enduring Legacy of the Imperial Presidency," *Modern American History*, 6, no. 1 (2023): 263.

Unlike in the Cold War and Vietnam eras, the fear of constitutional usurpation in the 21st century involves a variety of new realms. Presidents of vastly differing ideologies have challenged the limits of executive power to justify pre-conceived policy objectives, most of which concern domestic affairs. Many administrations are keen to govern on the fringes of legislative authority while seeking an expanded interpretation of Article II's Vesting Clause. This embrace of loose constructionism has invited a great deal of structural resistance. In the midst of the War on Terror, the George W. Bush Administration faced judicial pushback for limiting the procedural rights of military detainees, culminating in the 2008 case of *Boumediene v. Bush*. Then regarded as a dubious assertion of judicial independence, the Supreme Court's ruling allowed Guantanamo Bay defendants to pursue concurrent due process claims in district court, preserving the integrity of territorial jurisdiction, *de facto* sovereignty, and 5th Amendment rights for all accused persons including non-citizens.[33] Such a vigorous pronouncement largely alleviated the need for Congress to pass legislation refuting the Administration's position even as many oversight and investigative tools remained available. Furthermore, in response to the Bush Administration's arbitrary use of states secret privilege, many legal scholars implored courts to defer to Congress on matters best resolved through legislative means, opening up the possibility of new statutes regulating classified information, departmental spending reductions, and even cabinet-level impeachments.[34] At the time, Congress was hesitant to initiate these plans. Yet as executive-congressional rifts intensified during the Obama Administration, this reluctance quickly faded. In 2012, Congress passed a resolution holding Attorney General Eric Holder in contempt for failing to turn over documents to the House Committee on Government Oversight and Reform, citing the rule of law as a motivation.[35] While the practical effect of contempt is typically minimal, theoretically, Congress is equipped to pursue criminal charges in order to enforce a subpoena, a legislative privilege that predates the Constitution. These examples reveal the admirable fortitude of checks and balances and selective judicial intervention, structures that tend to be discounted or viewed entirely through a partisan political lens. While these interbranch disruptions are relatively mild, the Framers' understanding of structural resolution continues to prevail, perhaps indicative of infallibility. No single branch "can pretend to an exclusive or superior right of settling boundaries"; thus, is it not the case that the executive is guaranteed to perpetually increase its share of federal power.[36] Within the last decade, the rise of populism and the election of Donald Trump has spawned new constitutional

---

[33] *Boumediene v. Bush* 553 U.S. 723 (2004), 765.
[34] Amanda Frost. "The State Secrets Privilege and Separation of Powers," *Fordham Law Review*, 75, no.4 (2007): 1959.
[35] John Bresnahan and Seung Min Kim. "Holder Held in Contempt," *POLITICO*, June 28, 2012, https://www.politico.com/story/2012/06/holder-held-in-contempt-of-congress-077988.
[36] THE FEDERALIST NO. 49: *Method of Guarding Against the Encroachments of Any one Department of Government by Appealing to the People Through a Convention* (James Madison), February 5, 1788, The Avalon Project: Yale Law School, 2008, para. 2.

vulnerabilities concerning the abuse of public office. These fears are especially pronounced in light of the investigations, impeachments, and indictments which surrounded the first Trump Administration since 2017 and which are likely to emerge again in the midst of a second, nonconsecutive Trump presidency. Disguised as ministerial exercises, acts of perceived impropriety or illegality have generated scrutiny from the media, government watchdogs, and coordinate branches of government.[37] In addition, prominent legal scholars have raised caution about the rise of authoritarian tendencies within the executive branch as the administrative state continues to grow in size and scope and legislative and judicial remedies become scarce.[38]

Assessing how structures have responded to this modern concern is difficult. Evidence is limited; the political environment in the last twenty-five years has produced few domestic threats to the constitutional system, most of which are the result of the Trump Administration's unbounded conception of executive power. While the judiciary has signaled a willingness to issue national injunctions against perceived unconstitutional orders and directives, the extent to which the judiciary will tolerate executive obstruction of federal courts is uncertain.[39] Given that these structural protections have yet to reveal themselves, the status of constitutionalism is equally precarious. However, it is apparent from the many political "controversies" and "crises" of the past decade that the Trump Administration offers an abundance of subject matter to determine whether constitutional infallibility is a perspective worth considering. Thus far, recent scholarship has converged around a singular outlook: because constitutional meaning is not "fixed", there is no possibility that structures can recover from repeated abuse. Instead, partisan "hardball" countermeasures pinning branches against one another becomes the new norm, a tactic that is "not necessarily owed any constitutional respect" especially when based on originalist thinking.[40] Likewise, legal scholar Stephen M. Griffin has argued that an infallible and self-protective constitution is a fallacy of both logic and reality. Given that threats and indiscretions arise from the "highly dangerous and volatile set of circumstances" within the system itself, the Constitution is not capable of curbing

---

[37] Corey Brettschneider and Aidan G. Calvelli. "The U.S. Presidency: Power and Constraint," *Annual Review of Political Science* 27, no.1 (2024): 214. In the last several years, political scientists have framed discussions on the American presidency in terms of "constraint", focusing on the structures capable of protecting American institutions from a criminally motivated executive, a concern the authors note was raised by Anti-Federalists during the ratification debates.

[38] Kathryn E. Kovacs. "From Presidential Administration to Bureaucratic Dictatorship," Center for the Study of the Administrative State Working Paper 21-41, *Presidential Administration in a Polarized Era*, October 1, 2021, 7. The author highlights the increasing use of "presidential direct action," an evolved regulatory mechanism in which presidents can bypass congressionally issued statutory authorizations.

[39] See *Trump et al., v. J.D.D., et al.* 1:25-cv-00766-JEB (D.C. Cir., March 17, 2025) (ruling that the Trump Administration's defiance of a federal district court order exposes the Administration to contempt proceedings, subject to appeal of the underlying order.)

[40] Joseph Fishkin and David E. Pozen. "Asymmetric Constitutional Hardball," *Columbia Law Review*, 118, no. 3, (2018): 967.

hostility to its own disposition.[41] Yet, as the political tumults of the 19th century revealed, structural defenses are not beholden to political conditions; they are free to behave independently of politics and of one another. Structures promote infallibility in so far as they rebuke the pursuit of unconstitutional action after it commences; they are not always anticipatory. However, what is largely absent from this new literature are the many alternative measures that guard constitutionalism beyond that of structures. The security of the constitutional system during the Trump years and throughout American history is owed in large part to philosophical and spiritual elements that operate within the Madisonian fabric. When it comes to securing a resilient form of government, structures are the beginning, not the end.

II. PHILOSOPHICAL CONSTITUTIONALISM: FACTIONS, INTERESTS, AND LIBERTIES

Enlightenment thought acknowledges that philosophical principles can motivate but also inhibit the human pursuit of political power.[42] It follows that constitutional constraints against political ambition need not always be tangible or physical to accomplish their ends. Speaking to the New York State Ratifying Convention in June of 1788, Alexander Hamilton engaged opponents of the new Constitution in debate, asking, "has philosophy suggested—has experience taught… when you connect the virtue of your rulers with their interest…you must [have] confidence [in government]."[43] Hamilton's statement implies two crucial tenants of human behavior, first that obedience to virtue is not natural in politics, and second that political interests can be disarmed when virtue is elevated above power. The importance of philosophical constitutionalism, while at the forefront of the Framers' minds, is not overtly evident in the Constitution's text despite being crucial to the cause of ratification. Madison and Hamilton invoke these theories throughout the *Federalist Papers* making note of how such concepts can be applied in a defensive posture should the need arise. Over the course of American history, philosophical beliefs, convictions, and tendencies have interceded to calm various governmental and authoritative crises, helping to make a case for constitutional infallibility.

Factions, Coalitions, and Power

---

[41] Stephen M. Griffin. "Trump, Trust, and the Future of the Constitutional Order," *Maryland Law Review*, 77, no.1, (2017): 175.

[42] *See* Thomas Hobbes. "Leviathan" in *Political Philosophy: The Essential Texts* ed. Steven M. Cahn (Oxford University Press: 2011): 285- 342.

[43] Alexander Hamilton. "New York Ratifying Convention Remarks (Francis Childs Version)," June 27, 1788, *Founders Online,* National Archives, Washington D.C., para 2, https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0034.

In democratic governments, factions are inevitable as human priorities and interests diverge. Translating this reality into a stable governmental system was a task of enormous fortitude as outlined in the ingenious philosophical prose of *Federalist No. 10.* The tension between political interests and natural rights constitutes the basis of factions. As Madison points out, "some common impulse of passion" is the vehicle of violations to fundamental rights and to constitutional government; yet, only their effects, not their causes can be rectified.[44] The innate manner in which factions emerge, develop, and cease is in itself a protection against threats to the constitutional system from within institutions and among the broader populace. As a matter of defense, the federalist foundation of the Constitution builds a wall which disarms the factional pursuit of power, stunting the growth of malignant coalitions. The size of the federal republic and its varying sources of governance "may clog the administration…convulse the society [but render factions] unable to execute and mask [their] violence."[45] When factions mobilize, their unimpeded quest for political power is thwarted by two mechanisms. First, factions which constitute the minority are defeated through structural means including regular elections, bicameralism, and democratic principles of utility. Second, factions which constitute either the majority or minority are composed a variety of diverging identities and interests; all factions therefore possess internal sub-factions. Because power is conditioned upon effective prioritization, various identities and groups, even if a part of the governing faction, are neglected or even harmed when their interests fail to be considered or advanced. This philosophical protection is strongest when the faction threatening the constitutional order is the governing faction. As Madison illustrates in the 20th paragraph, "where there is consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary."[46] When applying this principle on a second-degree level, a malicious majority faction, no matter its capacity, can attack itself in the natural process of governance. Correspondingly, an opposition faction will manifest its own version of "distrust" in the first-degree.

The extent to which this factional philosophy reveals a sense of infallibility is quite significant. Abusive or threatening factions have existed throughout American history, oftentimes with the intention of disturbing or voiding constitutional principles and rights. The Nullification Crisis of the 1830's was a culmination of anti-federalist and pro-agrarian viewpoints, a faction that was familiar to the Framers throughout the 1780's. *Brutus I* and the self-proclaimed "Pennsylvania Minority" argued that the national government was incapable of considering "the local condition and want of the different districts" and that such powers "must be lodged and exercised in every state, in the hands

---

[44] THE FEDERALIST NO. 10: *The Union As A Safeguard Against Domestic Faction and Insurrection* (James Madison), November 23, 1787, The Avalon Project: Yale Law School, 2008, para. 2-4.
[45] THE FEDERALIST NO. 10, para. 11.
[46] THE FEDERALIST NO. 10, para. 20.

of a few."[47] The only proper correction, according to the Anti-Federalists, was legislative devolution, a force that sought to dismantle federal supremacy and national representation. Some fifty years later, following uproar over the Tariff of Abominations, the cause of nullification was formalized via a series of state pronouncements. Certain states were willing to resist federal enforcement of congressionally enacted law, if necessary, through militancy. However, nullification's ultimate failure to change constitutional doctrine is attributed to the nation's shifting attention towards slavery in the western territories. In the face of legally authorized state conventions designed to curb federal authority and assert state dominion over commercial policy, the pro-nullification faction had become heavily divided due to these changing priorities and a hesitancy by Alabama and Mississippi to endorse South Carolina's obstructionist actions. Historian William J. Cooper cites the remarks of leaders who began viewing the slavery issue as a more pressing concern socially, economically, and politically; others even questioned whether Jacksonian ideals still represented southern interests.[48] Decades before its disintegration, Madison foresaw the self-inflicted fate of the nullification coalition knowing that the Constitution would complicate and divide the motives of disruptive factions who must confront dilemmas of prioritization and political resourcefulness. The scope of U.S. federalism insulated the Constitution from state-initiated abuse particularly whether federal courts are entitled to "abridge" a state's preexisting and self-reserved sovereignty. In part because of these failings, many of which were not resolved until the civil rights era, modern state's rights activists generally decline to label themselves as "nullifiers" and instead advocate for a compartmentalized version of state power known as "dual" or "layer-cake" federalism.

Because radical factions must prioritize their objectives and avoid discord, coalitions are never anchored within a particular political cohort. For example, if a party organization no longer espouses or advances the goals of the coalition, the coalition is likely to seek refuge in a different party or state. The obstacles that confront malicious factions are much the same; their need to relocate harms their ability to form a majority coalition capable of displacing the existing governmental structure. Quoting Montesquieu in *Federalist No. 9*, Hamilton notes that "should abuses creep into one part, they are reformed by those that remain sound."[49] A faction can therefore weaken its own influence by changing where it resides. Following the Hayes-Tilden Compromise of 1877, segregationist dissenters within the Republican Party began to compete for the white southern vote, challenging the Democratic Party's grip on state governments. The "Lilly-White Movement" of Republicans promised to purge black voter rolls and enact new Jim

---

[47] BRUTUS I (Robert Yates), December 1787, Anti-Federalist Papers, The Founders Constitution, University of Chicago, para. 13 https://press-pubs.uchicago.edu/founders/documents/v1ch4s14.html.
[48] William J. Cooper. *The South and the Politics of Slavery, 1828-56* (Louisiana State University Press: 1979), 53-65.
[49] THE FEDERALIST NO. 9: *The Union As A Safeguard Against Domestic Faction and Insurrection* (Alexander Hamilton), November 21, 1787, The Avalon Project: Yale Law School, 2008, para. 12

Crow laws. This newfound competition led to dissention within the national Republican Party and increased party polarization in southern elections, a dynamic largely unfamiliar to the electorate. Throughout the 20th century administrations of Harry Truman and Lyndon Johnson, the Democratic Party was incentivized to restructure its coalition as an appeal to these displaced African American voters, a decision rooted in strategy as opposed to genuine progressive inclination. Simultaneously, the Republican Party struggled for ideological grounding during the same era and suffered a pronounced trend of poor electoral performance between 1932 and 1970 with the exception of the Eisenhower presidency.[50] Here, the Lilly-White anti-constitutional coalition intent on defying the Reconstruction Amendments faltered throughout the south while its opposition enjoyed a series of national political victories, changing the composition of federal civil rights law and partisan approaches towards racial issues. In terms of law and political representation, anti-black sentiment follows an evolutionary understanding of constitutionalism and must confront the natural migration of coalitions. From a Madisonian perspective, malicious factions' intent on preserving an orthodox political culture face difficulty penetrating the complex and ever-maturing landscape of the federal republic, a testament to the Framers' prudence and foresight in crafting the constitutional system.

Notwithstanding their ideological and organizational mobility, factions concentrated within a particular state are not guaranteed to permeate their influence throughout the nation. Given that state and federal governments establish and fortify constitutional liberties through their own distinguishable means, the Framers created a dual layer of defense which malicious factions have difficulty navigating. Writing in both public and private correspondence, Hamilton dismissed Anti-Federalist calls for the prohibition of standing armies in the proposed Constitution, arguing that their existence could only stem from the "dissolution of the 'Confederacy,'" something unimaginable in a federal constitutional system where power is not concentrated in one organ of the national government.[51] *Federalist No. 8* anticipated the rise of standing armies under the flaccid Articles of Confederation and did not view interstate rivalries as a threat to tranquility under the new Constitution, underscoring the belief that political factions within states do not possess enough resources to dismantle opposing factions within other states without disturbing a constitutionally implicated set of liberties. At a glance, it is easy to envision why state governments may desire to protect different liberties than those of the national government depending on the interests of their population. Because states retain their own unique sovereignty and power, the federal Constitution encourages states to "give greater protection to their citizens," creating new expectations of freedom

---

[50] Michael K. Fauntroy. "Republicans and the Black Vote," *Huffington Post*, January 4, 2007, para. 5-9. https://www.huffpost.com/entry/republicans-and-the-black_b_37731

[51] THE FEDERALIST NO. 8: *The Consequences of Hostilities Between the States* (Alexander Hamilton), November 20, 1787, The Avalon Project: Yale Law School, 2008, para. 5.

that may help quash malignant impulses.[52] Almost immediately following ratification, states were "proud to emulate the example of the union & to shew their sovereignty by a parade of institutions like those of the nation."[53] As the country expanded westward, new states did not depart from this pattern, choosing to institute structural protections and enumerated rights in their own constitutions.

This is not to say that state governments are an impenetrable shield against malicious factions. For much of the 19th and 20th century, issues of race, religion, and economics have plagued various states, proving an opportune breeding ground for anti-constitutional radicalism aimed at achieving nihilist or subversive political outcomes.[54] While these disruptive factions may gain a foothold in state governments through the democratic process, they are unable to separate liberty from the protective sphere of federalism. Even as certain political coalitions may suggest otherwise, a state's desire and obligation to protect the liberty of its inhabitants can never exist independently from the national obligation of the same. The Constitution administers this philosophical symbiosis effectively, maintaining a systematic harmony which state governments continue to view as dogmatic.

Individual Liberties

Whereas political factions must constantly traverse the systematic safeguarding of constitutional liberties, individual political actors are equally preoccupied with defending their liberty at a personal level. Isaiah Berlin captured the theoretical roots of negative liberty in 1958, a classification that complements the initial motivation for the Constitution and the broader revolutionary experience. Philosophically and within the context of natural society, individuals are given the potential to act without obstruction by others, yet with respect to the state, individuals are given the potential to act without obstruction to their natural rights on account of government.[55] As a result, in relation to the individual, government may not infringe upon these natural rights and must establish mechanisms in which to protect them, as addressed previously. The fact that individuals are conscious of liberties which must remain free from state interference is a unique characteristic of American civic culture, a sentiment capable of quelling hostile state

---

[52] Robert K. Fitzpatrick. "Neither Icarus nor Ostrich: State Constitutions As An Independent Source of Individual Rights," *N.Y.U. Law Review* 79, no.1 (2004): 1835, citing *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (judicial acknowledgement that state constitutions may provide greater protections and establish new sources of individual liberties beyond that of the federal Constitution.)

[53] Fisher Ames to Alexander Hamilton, July 31, 1791, *Founders Online*, National Archives, Washington D.C, para. 8. https://founders.archives.gov/documents/Hamilton/01-08-02-0533.

[54] For a discussion on "Massive Resistance" in Virginia as an orchestrated response to federal judicial authority following *Brown v. Board of Education* 347 U.S. 483 (1954), *see* Les Shaver, "Crossing the Divide," *Arlington Magazine* (November/December 2013), 65-66.

[55] Isaiah Berlin. "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford University Press, 1969), 15-29.

regulation.[56] On many historical occasions, repeated invocations of this theory have forced the federal government to either change the object it seeks to regulate or abandon its ambition altogether, a reflexive behavior that showcases the Framers' conception of liberty but does not fault the constitutional order. The American citizenry keeps close watch over "liberty" in general, characteristic of Madisonian and popular constitutionalism. For the purpose of evaluating perceived constitutional infallibility, this attitude's origins are traceable to the experiences of colonists in the 18th century; they predate independence and are transformative only to the extent that they built upon the more theoretical notions of liberty found in the English constitution.[57] Public regard for the Constitution is most demonstrable when institutions reflect at least a basic semblance of negative liberty while governing, employing the people to utilize constitutional processes to correct institutional overreach.

This behavioral script played out precisely during the Whiskey Rebellion of 1791, a critical episode that tested the endurance of revolutionary principles against the aims of the new national government. Both the language and behavior of the rebellion's participants revealed an intense philosophical concern for individual liberties, namely in the realm of property and economic security. The resistance tactics of rural distillers varied in scope and intensity, ranging from obedient political petitions to premeditated rioting and targeted insurrection against excise officials.[58] Following ratification, Pennsylvania farmers opposed to the Federalist economic platform viewed the Constitution as the sole determiner of legitimate political power. Such a function was only possible if the constitutional system was checked on a popular level through voluntary associations. These groups were typically made up of prominent local citizens tasked with assessing the state of individual liberties as governments enacted policy at all jurisdictional levels. For those in the backcountry who had endured great hardship in the prior decades, an unyielding supply of public engagement was necessary to mobilize opposition to federal policy. Whether resistance would be expressed through peaceful or violent means was a matter for individual discernment. Yet no matter how arbitrary or specific their concerns, a community rooted in the republican tradition was not expected to endorse a law that infringed upon an individual's domain or livelihood. Such attitudes were prominent in rural regions of the colonial Mid-Atlantic and Upper South with a heritage of disdain for tax collectors and corrupted bureaucrats.[59] However, this

---

[56] Robin West. "Reconstructing Liberty," *Tennessee Law Review* 59, no.1. (1992): 443, (discussing the concept of "ordered liberty," as developed by the Supreme Court in the 1930s and descriptively illustrated in the 1960s case *Poe v. Ullman* 367 U.S. 497, 541 (1961) (Harlan J., dissenting)).
[57] *See* Gordon S. Wood. *The Radicalism of the American Revolution* (New York: Vintage Books, 1993), 7.
[58] Kyler Burd. "The Revolutionary Language and Behavior of the Whiskey Rebels," *Journal of the American Revolution*, Critical Thinking, December 10, 2020, para. 14-19.
[59] For a discussion on the various attitudes and responses to the Currency Act of 1764 in colonial North Carolina, *see* Robert M. Weir. "North Carolina's Reaction to the Currency Act of 1764," *The North Carolina Historical Review*, 40, no.2 (1963): 187-188.

prevailing concern for liberty and instinct towards association speaks more to the benevolent procedures used to protest the whiskey tax than it does the infamous riots of the Mingo Creek militia who besieged the home of excise officer John Neville. Still, the Washington Administration was quick to blame the "democratic societies" who opposed the Federalist economic platform of spreading "seditious rhetoric," a label that the societies themselves would have staunchly rejected. In hindsight, historiography rightly separates the rebellion's violent features from the intellectual exercises that occurred within frontier associations, both of which were viewed as permissible manifestations of public grievance.[60]

Effectually, the Whiskey Rebellion highlighted two very significant but distinct aspects of American constitutionalism and constitutional government. In rural Pennsylvania, a strong public regard for negative liberty emboldened the constitutional order in both the short and long term. To the extent that liberty in the early republic is associated with an impression of infallibility, the whiskey tax as a matter of policy was only the material object of a broader philosophical concern for liberty in the infant nation. Throughout rural communities which decried the whiskey tax, the Constitution was seen as a particularly strong source of negative liberty following adoption of the Bill of Rights. This strength depended on popular reinforcement where individuals could express their mutual interests to federal representatives through regular communication and civic organization, a tool that distinguished loyal opposition from reactionary sedition. Once disdain for the tax became apparent, association members made this premise clear in their correspondence with the Federalist administration. Hugh Henry Brackenridge, a well-respected political ally of western farmers in the Allegheny, transformed these complex political thoughts into practical conversations. Writing to Assistant Secretary of the Treasury Tench Coxe, Brackenridge expressed faith that a new session of Congress would be willing to amend or repeal the whiskey once the gravity of frontier resistance became apparent, a "favorable issue to the negotiation… a suspension of the excise law." In the fall of 1794, Brackenridge mediated alongside agricultural associations to suspend the tax's enforcement and prevent a military operation, arguing that "the President cannot be called out to reduce opposition…a branch of the funding system detested and abhorred by all the philosophic men."[61] Liberty's place in the American civic mind was secure despite the political ambition of the federal government.

William Findley, one of the rebellion's chief coordinators, vigorously defended the protests as an experiment in negative liberty. To many of Findley's contemporaries,

---

[60] Johann N. Neem. "Freedom of Association in the Early Republic: The Republican Party, the Whiskey Rebellion, and the Philadelphia and New York Cordwainers' Cases," *The Pennsylvania Magazine of History and Biography* 127, no.3. (July 2003): 263-265.

[61] Hugh Henry Brackenridge to Tench Coxe, August 8, 1794 in *Incidents of the Insurrection in the Western Parts of Pennsylvania, In the Year 1794* (1795), University of Michigan Library Digital Collections, 129-130 http://name.umdl.umich.edu/N21549.0001.001

the nuanced social and economic interests of rural America would be tested against a seemingly concentrated system of federal authority. The longevity of the Constitution and the preservation of free political discourse required "a knowledge of the diseases that shake the political frame" where "stability and prosperity of which depend so much on the confidence of the citizens at large."[62] Allegorically, Findley questioned whether the constitutional order could overcome the diseases of opposition that inevitably infect all forms of government. In doing so, he hoped to see not only the end of the whiskey tax but the preservation of free discourse and dissent as tolerable instruments of democracy. As to the first priority, the tax was repealed in 1801 during the Jefferson Administration as agrarian communities garnered electoral success in the Democratic-Republic Party. Yet even as federal forces quashed the rebellion's infamous militancy, frontier associations reaffirmed the status of liberty in American political thought, a predisposed skepticism towards pervasive governmental action. Community surgeries, town halls, political parties, and in some cases, vigilante mobs became new tools of political coordination and scrutiny. Within these forums, liberty serves as the frontal cortex of the national psyche.

Yet as constitutional government continues to mature, it is equally true that the Framers provided mechanisms to ensure the development of positive liberty as time and circumstance warrant. While the Framers considered the substantive benefits of positive liberty in crafting the Constitution, they did so ultimately within the confines of negative liberty, the Lockean principle upon which the revolutionary story was built. A 21st century perspective suggests that if the constitutional system elevates individual liberty at the expense of arbitrary governmental power, it cannot "fulfill positive rights for its citizens," meaning that natural political development is somehow incompatible with constitutional norms as they existed in 1787.[63] Indeed, the Framers held a strong affinity for both versions of liberty, albeit without the binary classifications that have emerged in modern political theory. In the early republic, the task facing public officeholders and the citizenry was to produce a government that was both limited and stable. This objective necessitated that negative liberty be the primary judge of constitutional adherence. Happiness and prosperity would constitute the residual benefits of a well-functioning system. By asserting that political outcomes may lie opposed to individual liberty and natural rights, the founding generation established a lineage of thought which has informed contemporary debates over the Constitution's protective features.

---

[62] William Findley. *A History of Insurrection in the Four Western Counties of Pennsylvania in the Year 1794* (Samuel Harrison Smith Philadelphia, 1796), University of Pittsburgh Library, Historic Pittsburgh Book Collection, ix. https://digital.library.pitt.edu/islandora/object/pitt:00age9473m

[63] Jason M. Chahyadi. "Divergence or Destiny?: Comparing the Modern Conception of Positive Rights to the Founder's Conception of Individual Rights," Liberty University, Helms School of Government Public Policy Conference 2023, 8-9, citing "Virginia Bill of Rights" in Silas Downer *The American Republic*: *Primary Sources* (Liberty Fund, 2002), 157.

Consistent references to negative liberty point to an infallible constitutional order capable of withstanding transformative political movements. In the first year of the second Trump Administration, public protests against perceived violations of federal due process have featured 18th century rhetoric and symbolism, a public display of loyalty for Fifth Amendment rights and the integrity of judicial process.[64] While constitutional guarantees such as birthright citizenship are undoubtedly jeopardized in the short term, the extent to which President Trump or his political cohort seek to disturb constitutionalism, ignore constraints on executive power, or knowingly reject established legal doctrine is not the determinative question of present-day constitutional viability. The success of defensive mechanisms, not the political abuses themselves, are the true indicators of constitutional strength or strain. A deeply embedded and mature sympathy for negative liberty, universal within the current American body politic, continues to be a crucial defense against the radical forces which pay no regard to constitutional customs or limitations. A public "attached to the same principles of government… have nobly established general liberty and independence", remaining "no less attached to union than enamored of liberty."[65]

Philosophical enforcements of this nature can change government policy at a surprisingly quick rate as all majority factions possess at least some regard for individual liberties. All political factions are reflective of civil society and therefore help to determine "the fate of liberty"; this includes malicious factions with anti-constitutional ambitions.[66] Robust immigration enforcement, detainment, and deportation has been a hallmark of Trump's domestic agenda, a platform of executive orders and directives that have empowered Immigration and Customs Enforcement at the expense of federal prosecutors. Following a critical Supreme Court ruling, the Administration's decision to return Kilmar Abrego Garcia to the United States indicates an awareness for negative liberty that is not apparent at the surface level, but one that nonetheless exists within the President's base of support.[67] The MAGA movement places the individual and the center of political gratification and sees liberty not as a collective constitutional principle but rather as a wholly personal experience. Theoretically then, it is difficult to justify denying liberty to an entire group of individuals; a tolerability threshold must therefore apply to

---

[64] John Nichols. "The No Kings! Movement Trumped Trump," *The Nation*, June 16, 2025, para. 4 https://www.thenation.com/article/activism/no-kings-protest-recap/.

[65] THE FEDERALIST NO. 2: *Concerning Dangers from Foreign Force and Influence* (John Jay), October 31, 1787, The Avalon Project: Yale Law School, 2008, para. 5, 9. Many Federalists in the Convention feared that unity between the states under the new Constitution would be compromised by foreign influences. Jay assertively argues that liberty is a general defense against constitutional intrusion, protecting the people and the government from internal and external deficiencies.

[66] David D. Cole. "Lecture-Defending Liberty in the Trump Era: Reflections From the Front," *Boston University Law Review*, 100, no.1 (2020): 2416.

[67] *See* Rebecca Beitsch and Zach Schonfeld. "Abrego Garcia to return to US to face charges," *The Hill*, June 6, 2025 https://thehill.com/regulation/court-battles/5337485-trump-administration-returns-deported-migrant/.

each affected person whose liberty is infringed upon. Garcia likely surpassed this threshold. Some scholars have acknowledged that the positive-negative dichotomy of liberty may not fully apply in 21st century terms, a view that has satisfied many skeptics of originalism. Instead, a personal type of liberty, "achieved in different realms by diverse means," may better reflect the polarizing ideologies of the last few years.[68] It is no surprise that right-wing populism endorses this type of selective liberty, highly dependent on political identities and priorities. Yet on the constitutionally meaningful question of immigrant due process, negative liberty has shown itself to be a worthy obstacle that the Trump inner-circle has had difficulty avoiding.

Republicanism

From 1760 to 1776, British America was plagued with uncertainty and volatility, requiring colonial leaders to adapt their governing philosophies in real time. In their own right, declaring independence and ratifying the Constitution did little to steady the ship or quell the underlying discords within late eighteenth-century society. Professor Robert Shalhope notes that the founding generation blended various notions of republicanism to fill the fickle voids that accompanied the new constitutional order. He dismisses the "static" nature of republicanism that can be defined in a few simple words, traits, or works of political theory.[69] Alternatively, republicanism was an art that the Framers utilized to their benefit for many decades. In its purest philosophical terms, the American government was republican because it recognized the existence of diverse public opinion and, most of all, enjoyed some semblance of legitimacy with little ambiguity as to where sovereignty lied. These aspects of republicanism are systematic and describe the duties of the governmental structure as opposed to other individual prerogatives, notably civic virtue, which are exercises in personal obligation. Nondomination and accountability are firmly situated in American constitutional thought, reflecting two modes of republicanism used to repudiate anti-constitutional motivations throughout the nation's complex political history. Bernard Bailyn famously spoke of republican rhetoric as a masterclass of construction, persuasion, and "crudeness", an unmatched strength in the fight against tyranny.[70] Since the revolutionary era, this strength has not been depleted nor is it any less impactful in the present day. When structural defenses fail to check governmental abuses in the immediacy, republicanism produces reflexes in the body politic that, like liberty, exist across all ideological frames while creating an internal motivation capable of displacing a malicious faction which holds government power or an opposition faction

---

[68] John Lawrence Hill. "A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought," *UC Law Constitutional Quarterly*, 29, no. 2 (2002): 135.
[69] Robert E. Shalhope. "Republicanism and Early American Historiography," *William and Mary Quarterly*, 39, no. 2 (1982): 335; Shalhope, "Republicanism, Liberalism, and Democracy: Political Culture in the Early Republic," Proceedings of the American Antiquarian Society (1992), 101-102.
[70] Bernard Bailyn. *The Ideological Origins of the American Revolution* (Cambridge, Massachusetts: Belknap Press 1967): 19.

with a corruptive minority. In spite of any self-proclaimed democratic mandate, a majority malicious faction cannot govern without self-imposed limitations or public legitimacy. Electoral victory or mandate is by itself, insufficient. This legitimacy must exist across the citizenry, a faith in the government's ability to exercise power according to process, custom, and established law. A governing faction that cannot explain the means through which it will govern can be deemed illegitimate oftentimes by its own collaborators as it has a destination but no roadmap to get there. Just as the realities of political coalitions and negative liberty do not escape the broad swath of civic culture, republicanism was viewed by the Framers as the most formidable philosophic barrier against government despotism. In "behold[ing] a republican remedy for the diseases most incident to republican government," Madison concludes *Federalist No. 10* with a keen awareness that republicanism as a constitutional protection is distinguishable from the structures of the republican Constitution itself. Because republicanism is historically engrained, flexible, and applicable to a number of different political contexts, the constitutional order is less likely to be seen as deceptive to the true character of American government.

As the Constitution was put in the hands of state-ratifying conventions, the success of its republican components remained theoretical and untested. Madison was tasked with addressing hypothetical political activities which might threaten both constitutional ideals and institutions at some point in the future. Along with many of the Constitution's structural certainties, its republican fortifications were premised on the diverse array of political interests amongst states and within the federal government. Legitimacy, defined as a measure of constitutional adherence and respect, is compromised when a governing interest assumes it possesses the power to act outside the boundaries of constitutional law. Madison identifies that liberty and self-determination predominate in human beings, making them politically "fallible" and inclined to adopt a number of different opinions, even those that are harmful to constitutional government. Logically, republican remedies cannot also be perceived as fallible or erroneous for they will otherwise malfunction. In writing that "the diversities in the faculties of man… is not less an insuperable obstacle to the uniformity of interests," Madison and the Framers crafted the republican interest to operate outside the realm of raw political impulses, a dogma that seems to fly in the face of democracy but one that prevents the deterioration of natural rights and heavily reduces the prospect of tyranny.[71] As the famous axiom states, a large republic where government legitimacy is continuously scrutinized must take into account the largest variety of political interests possible. Through this method, all interested citizens are given the opportunity to expose anti-constitutional political aims.

---

[71] THE FEDERALIST NO. 10, para. 6.

However, Professor Lawrence Solum argues that republicanism defends the Constitution only to the extent that individual political actors exhibit virtue, claiming in general that "even the most perfect republican constitution will go off the tracks if the high courts are populated with ideologues or cowards."[72] This perspective suggests that the mere holding of political office equips individuals or entire factions with the means to destruct the constitutional system. Mechanically, institutions consist of too many political actors for each branch of government to attack the Constitution in an emulative and consistent manner. Since the 1940's, courts have been afforded ample opportunity to obstruct the political branches given the increasing size and scope of the administrative state and the complexities of federal appellate procedure.[73] While courts are a crucial structural defense against executive or legislative domineering, judges alone would struggle to initiate a perverted political agenda. Courts are reactionary and the guardrails of judicial self-restraint provide few opportunities to turn narrow legal questions into poisonous schemes.[74] Unique amongst other founding philosophies, Madison's republican remedy is predestined in the federal branches and across public political culture, and unlike other structural defenses, remains eternally invoked so long as there continues to be a diversity of political opinion in the United States. Where political interests diverge, scrutiny as to the constitutional legitimacy of government can always be found. The multitude of interests at the Convention would foreshadow the inalterable future of American politics, a future where constitutional preservation can surmount even the most egregious "partial interests" and "new experiments."[75] Polarization fortifies the republican remedy; it does not weaken it.

The Watergate Scandal of the 1970's captures the republican remedy at its full vigor. Collectively, federal institutions chose to preserve the rule of law and separation of powers at the expense of a sitting president, a striking display of constitutionalism untainted by partisan stripes. As soon as the fall of 1974, legal scholars from Yale Law School concluded with confidence that Watergate amounted to individual malfeasance and was not a fault of the legal or constitutional system itself. Institutions responded "adequately" to the crisis even in the absence of comprehensive federal law defining the

---

[72] Lawrence B. Solum. "Republican Constitutionalism," *Constitutional Commentary*, 32, no.1 (2017): 186.
[73] For a concise history of judicial review of executive agency decisions and an overview of the *Administrative Procedures Act* Pub. L. 79-304, 60 Stat. 237, *see* "Judicial Review of Executive Agency Actions," Federal Judicial Center, https://www.fjc.gov/history/administration/judicial-review-executive-agency-actions
[74] *See* Archibald Cox. "The Role of the Supreme Court: Judicial Activism or Self-Restraint?" *Maryland Law Review*, 47, no.1. (1987): 122. Cox summarizes his view on the relationship between judicial self-restraint and constitutional legitimacy. He argues that judicial restraint prioritizes "an accumulated body of wisdom" not "the individual views of one judge or even a majority of nine Justices."
[75] THE FEDERALIST NO. 37, para. 16.

role of special counsels in the Department of Justice.[76] Post-Watergate, it became clearer that congressional Republicans and constitutional experts were grappling with the question of legitimacy. While reform was considered necessary to prevent future crises of this sort, a passionate sense of republicanism ultimately ejected President Nixon from power.

The republican remedy that led to Nixon's resignation developed from two separate perceptions of illegitimacy. First, following initial arrests in the summer of 1972, Nixon asserted that the political calamities of the prior decade warranted "individuals and groups… the right to take the law in their own hands" as a response to left-wing instigators.[77] This narrative formed the basis of the opposition interest which began to develop over a year before the appointment of Archibald Cox as special prosecutor. The subsequent congressional investigation, however, destroyed any remaining sympathy Nixon enjoyed from members of his own party. In a letter to House Judiciary Committee Chairman Peter Rodino, the White House claimed it was enduring "a massive invasion into the confidentiality of Presidential conversations," and thus would not comply with additional subpoenas.[78] The second of these arguments was a fundamental bauk to separation of powers, a "governing" interest that required judicial resolution but was intent on concealing political activity from a coordinate branch of government. By rejecting the constitutionally-defined realm of legislative investigation, Nixon caused the republican interest of his supporters to emerge in its authentic and politically dispassionate form. Following the Supreme Court's declaration that "the doctrine of separation of powers… cannot sustain an absolute, unqualified Presidential immunity from judicial process," the republican interest was vindicated against any remaining political and anti-constitutional allegiance to Nixon who, less than a month later, stepped down under pressure from his own coalition.[79]

Watergate underscores how structural defenses can supplement the republican remedy. This is not to say, however, that republicanism requires structures in order to be effective or compelling. Since the Bush presidency, maximalist theories of executive power have continued to develop and have reached a climax in the midst of the second Trump Administration. These interpretations, regardless of their constitutional validity, are unlikely to quiet themselves given the Court's recent holding that presidents enjoy

---

[76] Stanley I. Kutler. "In the Shadow of Watergate: Legal, Political, and Cultural Implications," *Nova Law Review*, 18, no.3 (1994): 1748, citing Ralph Winter Jr. *Watergate and the Law: Political Campaigns and Presidential Power* (American Enterprise Institute Press: Washington, DC 1974): 1-4, 83-85.
[77] President Nixon's Second Watergate Address, August 15, 1973, http://watergate.info/1973 /08/15/nixon-second-watergate-speech.html
[78] Richard Nixon to Peter Rodino, May 22, 1974, History, Art, & Archives, United States House of Representatives, Committee on the Judiciary, https://history.house.gov/Records-and-Research/Featured-Content/Watergate/
[79] *U.S. v. Nixon* 418 U.S. 683, 706 (1974)

presumptive immunity for all official acts.[80] In addition, Trump is currently asserting his legal authority to terminate federal civil servants and impound congressionally appropriated funds.[81] If courts do enable the unrestricted growth of presidential power over the next few years, the republican remedy will be featured in its solitary configuration and cannot necessarily depend on support from other federal branches. Any further analysis of its impact occurs at the individual level. For private citizens in the 21st century, new technologies provide more incentive for individuals to question the legitimacy of controversial executive policies. In 1980, prior to the advent of social media and the 24-hour news cycle, Dr. Michael Lienesch argued that constitutional republicanism benefits from an informed and advancing society, thereby eliminating "the possibility of generational declension." Whereas "social uniformity" was prioritized during the early republic, the Framers acknowledged that United States would inevitably face future "backsliding" requiring an active and engaged supply of new citizens.[82] Leinesch's thesis remains tried and true, bolstering the republican remedy as constitutional uncertainty mounts in the Trump era. New mediums of communication, dissemination, and governmental scrutiny will create new impressions of illegitimacy that previously escaped public discourse. Demonstrations of grievance will reflect the intensity of the revolutionary period with strategic press leaks, protests, and civil disobedience taking on unprecedented orientations.[83] Technological advancements seem logically poised to benefit the republican remedy in the near term, perhaps an indication that constitutionalism will successfully weather the storm of modernity.

III. SPIRITUAL CONSTITUTIONALISM: THE NOBLE INTEREST

The philosophical protections of the constitutional order are numerous, and their impact has not diminished as a result of time's passage. Factional politics within democracies are highly formulaic while liberty and republicanism are firmly fixed components of American political behavior. Despite their historical credibility, structures and philosophy self-admittedly respond to constitutional crises that emerge slowly, irregularly, and with some level of notice and anticipation. Typically, these crises become visible in radical political activities that ebb and flow across electoral cycles or

---

[80] *Trump v. U.S.* 603 U.S. 593, 607 (2023)
[81] See *Trump v. Wilcox, et al.* No. 25-5057 (D.C. Circuit 2025); *National Endowment for Democracy v. U.S., et al.* 1:25-cv-00648 (D.D.C. 2025); Jack Goldsmith. "The President's Favorite Decision: The Influence of *Trump v. U.S.* in Trump 2.0, *Lawfare*, February 10, 2025, https://www.lawfaremedia.org/article/the-president-s-favorite-decision--the-influence-of-trump-v.-u.s.-in-trump-2.0
[82] Michael Lienesch. "The Constitutional Tradition: History, Political Action, and Progress in American Political Thought 1787-1793," *The Journal of Politics*, 42, no. 1 (1980): 21-22.
[83] *See* Giselle Ruhiyyih Ewing. "Trump administration threats CNN with prosecution," *Politico*, July 1, 2025, https://www.politico.com/news/2025/07/01/kristi-noem-cnn-prosecution-00435445

ideological fads. But not all constitutional threats emerge in this manner. As a testament to democratic will and pragmatism, plots to overthrow sovereign governments can take shape alarmingly fast. Although variations do exist, violent insurrection may take only days or hours to displace established authority even in constitutionally governed nations. The United States is no stranger to this type of physical sedition. Throughout history, various factions have sought to displace officeholders from government buildings and indefinitely prevent the execution of constitutional processes, paralyzing federal and state institutions and establishing absolutism in its place. In order for the Constitution to defend itself against acute threats of maximum and immediate pressure, protection must involve some type of spiritual mechanism that causes perpetrators to question or regret their conduct in the immediacy. A constitutional order that can avoid protracted crises but cannot survive a sudden toppling is not infallible or immutable; instead, its defenses are contingent upon the aggressor's method of choice.

Conversely, the American Constitution is equipped with the means to disarm abrupt insurrection, an arrangement I refer to here as "the noble interest." It consists of two central aspects. Political science is built substantially on utilitarianism and rational choice theory with a "long and continuing dominance in economic analysis… deeply attached to the principles of government policy making."[84] The noble interest, as a constitutional safeguard, considers the individual as the primary political actor in a physical rebellion. Owing to this premise, while committing the insurgency, the individual is faced with a series of choices of whether to persist or cease their involvement or participation in seditious activity. Secondly, the individual will make these choices according to a cost-benefit paradigm where the inadequacy of the constitutional system is weighed against an alternative governmental structure that advances the unqualified political interests of the perpetrator and their cohort. Therefore, the moment at which the noble interest manifests is often precipitous to the individual. Behaviorally, the noble interest is present when the individual forfeits their participation in an insurrection upon conceding that the security of the existing Constitution is more valuable than the uncertain void that would otherwise be left once the Constitution is dismantled.

The "Spirit"

Not all political interests are created equal. The noble interest is spiritual phenomenon that is partially removed from the bounds of logic but no less pivotal to the endurance of constitutional government. Constructed from the bones of Madisonian constitutionalism, the noble interest is a declaration of confidence in the constitutional order, existing unbeknown to an individual's environment. It is an affirmation of loyalty,

[84] Johnathan Levin and Paul Milgrom. "Introduction to Choice Theory," Working Paper Series, Stanford University (2004): 2.

an unconscious but observable disclosure. When physicality terrorizes the levers of power, the noble interest emerges as the final application of constitutional self-defense.

"Spirit" and its relationship to law, politics, and society has been featured in political commentary since the nation's inception. While the Framer's do not mention the operative function of the noble interest specifically, their writings suggest that constitutional self-preservation relies heavily on the presence of spirit. Madison, when addressing the ideal size of the House of Representatives in *Federalist No. 55*, argues that members of Congress will be hesitant to turn against their constituents and damage the preexisting "trust" that may thwart their future electoral prospects. As the country matures in size, corresponding anti-constitutional attitudes cannot be foreshadowed or mitigated except by a "prophetic spirit" unbeknown to Madison.[85] Similarly, as new questions on the security of the Union emerged in New York's Federalist circle, Hamilton concludes that constitutional governance will ultimately depend on public convictions, a demonstrable "spirit and integrity" that structures will conform and be accountable to.[86] These remarks make clear that the constitutional spirit is intangible with no particularized features or elements; it is personal, mercurial, and irregular in response to constitutional emergencies. Madison and Hamilton mention the spirit as an abstraction that exists alongside the Constitution's many innovative structures.

Given their selective purpose and intended audience, *The Federalist Papers* present limitations in deducing the depth of Madisonian political thought and are assuredly a display of rhetorical theatre. Known to elucidate his intellectual reasoning through public editorials, "A Candid State of Parties" provides a genealogical survey of colonial and early republican coalitions as Madison grapples with the prospect of constitutional usurpation. In witnessing the germination of the newly founded Democratic-Republican Party, Madison predicts that Federalist political fortunes will be made up of "prejudices… that may prevent or disturb a general coalition of sentiments." By ratifying the Constitution according to the terms of Article VII, government would be administered both in "spirit" and "form," indelible to context or conflict and with fidelity to its revolutionary origins. In affixing itself to the spirit of constitutionalism, American republican government will enjoy a perpetual longevity.[87] While many historians continue to debate Madison's theoretical consistency and the subtleties of his political frame, his writings point to an unwavering optimism and vigor for the Constitution in its

---

[85] THE FEDERALIST NO. 55: *The Total Number of the House of Representatives* (James Madison), February 15, 1788, The Avalon Project: Yale Law School, 2008, para. 5.
[86] THE FEDERALIST NO. 85: *Concluding Remarks* (Alexander Hamilton), August 13-16, 1788, The Avalon Project: Yale Law School, 2008, para. 13.
[87] James Madison. "A Candid State of Parties," For the *National Gazette*, September 22, 1792, *The Papers of James Madison*, vol. 14, *6 April 1791–16 March 1793*, ed. Robert A. Rutland and Thomas A. Mason. Charlottesville: University Press of Virginia, 1983, pp. 370–372.

three critical phases of development: as a piecemeal proposal, as a product of the Convention, and as a new instrument of government.

Contemporary scholarship has examined the historical significance of constitutional spirit and its jurisprudential qualities. When textual legal sources are insufficient to justify a judge's individual discretion, legal researchers have generally found evidence of a pliable spirit that can accommodate a variety of different constitutional interpretations. Questions about the judiciary's proper role or the breadth of certain individual rights can invite new formulations of spirit.[88] Generally, spirit is considered to be particularly relevant when provisions of a federal statute are in dispute and no interpretive approach is concretely sound.

Beyond this purely legal lens, the spirit is interwoven with modern constitutional criticisms. Jack Balkin points out the cyclical qualities of constitutional "rot and renewal," a pattern that regularly exposes unexpected vulnerabilities. Balkin argues that this "durability… prevents a lot of valuable change" that might be needed to prevent the Constitution's "undoing."[89] Erwin Chemerinsky cites the atmosphere of compromise in the Convention as a faulty series of maneuvers which lead to a "document with serious flaws…profoundly anti-democratic, and, in many ways, from the outset a bad blueprint."[90] Yet, this literature by no means exists in isolation. Referencing the abiding words of Edmund Randolph, Saikrishna Prakash notes how the spirit is a powerful ally of constitutionalism with a relevance that increases over time. "On balance, it might seem that spirit should have greater sway when it comes to our terse Constitution, as we are quite removed from the era and the concerns that gave birth to it."[91] There is a general consensus that the spirit initiated during the founding generations exists in an immaterial form and remains a significant part of long-lasting and principally unaltered constitutional order. Objections to constitutional structures and their functional capabilities are not objections to the Constitution's spirit. The noble interest is operable even if government institutions become vegetative and unresponsive to a dominate political faction.

The Battle of Liberty Place

At the height of Reconstruction in Louisiana, Republican William Pitt Kellogg was elected Governor in the 1872 statewide election in the midst of a widespread political crisis. In 1867, the state's new constitution granted African Americans the right to vote, a

---

[88] *See* Louis D. Bilionis. "On the Significance of Constitutional Spirit," *North Carolina Law Review*, 70, no. 6 (1992): 1813.
[89] Jack Balkin. "How To Do Constitutional Theory While Your House Burns Down," *Boston University Law Review*, 101, no. 5 (2021): 1757.
[90] Erwin Chemerinsky. *No Democracy Lasts Forever: How the Constitution Threatens the United States* (Liveright Press: 2024): 11.
[91] Saikrishna Bangalore Prakash. "Spirit," *University of Pennsylvania Law Review*, 173, no. 4 (2025): 1005.

disturbing reality for segregationists who wished to preserve a monolithic electoral climate. Allied with the state Democratic Party, the White League of Crescent City convened a series of local militias and paramilitary forces to occupy the state capitol building in New Orleans, prevent Kellogg from taking office, and establish a provisional state government controlled by former Confederate sympathizers. The riot, organized in part with the aid of former General James Longstreet, fought an outnumbered group of metropolitan police and successfully entered state buildings, preventing a transfer of the state's executive power. Kellogg, whose election was validified by President Ulysses S. Grant, sought the intervention of federal forces to quash the insurrection. Three days after the initial siege, federal forces began their journey to Louisiana to enforce Kellogg's claim to office. Historians generally attribute the eventual defeat of the White League to the volume of federal forces that would make the continued occupation of state buildings an improbable task notwithstanding the relatively high levels of support for the riot within the city.[92]

However, following the fraudulent attempt to swear in Democratic candidates into statewide positions, there are few sources that detail the specific "trappings" of government created by the White League. Historians from the Louisiana Encyclopedia *64 Parishes* now posit that the insurrectionists capitulated to legitimate authority "not wishing conflict with the federal government," cognizant of their reestablished position in the federal constitutional order.[93] This approach reflects both a spiritual awakening and a cost-benefit analysis, the two conceptual components of the noble interest. Notwithstanding their militant success, the White League and their political collaborators would have been forced to govern Louisiana while denying federal constitutional authority, essentially continuing the cause of southern secession, nullification, and ignorance to newly enumerated constitutional rights. The political benefit of a state government which resisted Reconstruction was miniscule in comparison to the legal, political, and military resources that would need to be expended in order to resist the federal Constitution. It is impossible to determine whether a conflict between state militia and federal forces would have resulted in a White League victory, thus any physical justification for the rioter's surrender cannot be measured in hindsight and is purely speculative. The Battle of Liberty Place featured the emergence of a "noble" political interest, noble for its rationality towards and attraction to constitutional security. Unlike a deeply held philosophical belief, the noble interest is not an intellectual response but an emotional one that can halt unlicensed violence against the state. Discovering the precise

---

[92] For a historiographical summary of the Battle of Liberty to date, *see* Lee Facincani, "The Liberty of the Nation is in Jeopardy: Views on the Battle of Liberty Place From Beyond Dixie," University of New Orleans, Theses and Dissertations, May 15, 2015, https://scholarworks.uno.edu/cgi/viewcontent.cgi?article=3102&context=td

[93] Justin A. Nystrom. "Battle of Liberty Place," *64 Parishes*, Louisiana Encyclopedia, January 3, 2011, para. 12 https://64parishes.org/entry/battle-of-liberty-place; *see* Dennis C. Rousey. *Policing the Southern City: New Orleans, 1805–1889* (Baton Rouge: Louisiana State University Press, 1996).

moment "when" the noble interest becomes a visible political acquiescence is case-specific. Throughout this conflict, the associated costs did not become apparent until after the mob had taken control of the state capitol. While the physical component of the riot had been accomplished, the plan for governmental usurpation remained unrealized.

Insurrection of January 6th, 2021

Unique in stature, the aftermath of the 2020 Presidential Election evolved as a constitutional crisis consisting of both acute and chronic symptoms. The Trump Administration's institutional response to the election results existed separately from the kinesthetic effort to prevent Congress from certifying the results of the Electoral College on January 6th, 2021. The initial effort was a substantive effort to cast doubt on the electoral process, a fiat of engineered political narratives and outcomes. At this stage, constitutional structures played their protective role sufficiently. The robust chain of command at the Justice Department prevented the politization of election certification and court orders mandated that Trump officials release General Services Administration funds set aside for the post-election transition.[94] Simultaneously however, the later effort was a much more organic undertaking, taking shape on fringe social media websites and secluded internet forums. The actual demonstrations of January 6th were led by a series of self-proclaimed militia groups who "played conspicuous roles" orchestrating the riots targeting the House and Senate chambers.[95] When the rioters broke into the U.S. Capitol at roughly 2:00pm, structural and philosophical defenses became obsolete to the Constitution's survival. Any peaceful recognition and transfer of executive power depended on when and how the noble interest would reveal itself. In order for the building to be evacuated and the Joint Session to reconvene, an abrupt change in the rioters' behavior was necessary.

Congress's constitutional obligation "to count electoral votes on January 6th was an 'official proceeding' in the eyes of the law.[96] By failing to carry out this process according to a legally mandated timeline, the Constitution risked losing its legitimacy at the hands of a conspiratorial political mob; America's capacity for limited government, republican representation, and rule of law would be indistinguishable from the fragile democracies of the ancient and modern world. In the midst of their violent attempt to overturn Joe Biden's victory, each perpetrator faced the inevitable choice of autocracy and political gratification vs liberty and political security. Over an extended period,

---

[94] *See generally* James P. Pfiffner. "Donald Trump and the Norms of the Presidency," *Presidential Studies Quarerly*, 51, no. 1 (2021): 105.
[95] House of Representatives, United States Congress. "Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol" Government Publishing Office, December 21, 2022, 653 https://www.govinfo.gov/app/details/GPO-J6-REPORT
[96] House of Representatives, "Final Report of the Select Committee," 103.

satisfying the demands of the Trump Administration was a task of enormous cost and uncertainty that, in the moment, became too much for individual protestors to bear.

The first sign of the noble interest emerged at roughly 2:30pm on the steps outside the Senate chamber and the Vice President's ceremonial office where Mike Pence, Senator Mitt Romney, and a number of congressional staffers were hiding. Capitol Police Officer Eugene Goodman lured a group of armed rioters up the stairs and through an opposite corridor, baiting them with vile language and physical contact. According to reporter Igor Bobic, "if they had gone right instead of left," lawmakers may have faced serious bodily danger.[97] Yet once the group of roughly twenty were forced into a large reception room with Goodman and two other officers, the lead rioter, identified as Q-Anon theorist Doug Jensen, halted their advance with members of the group throwing up their hands in abject submission.[98] The now infamous video conveys a visible change in behavior over the course of roughly 30 seconds. Throughout other areas of the Capitol, protestors abandoned their ambitions, lying down on the floor as the discomforting uncertainty and futility of their mission become apparent.[99]

Professor Farah Peterson insightfully suggests that January 6th may indicate a nuanced form of popular constitutionalism where force "is a dominant mechanism of change." In building this argument, Peterson does not see the constitutional order as a "static" collection of "neo-Whig" theory, deferring to present day animosity towards the Constitution that did not exist for much of the 20th century.[100] Yet if the rioters sought constitutional validity in their action, violence would have likely been the last, not the first challenge to the 2020 election.[101] The militia groups that populated the Capitol openly expressed their dissatisfaction of courts who ruled against the Trump Administration's lawsuits and expressed dismay towards Republican members of Congress for their perceived "disloyalty." If popular constitutionalism, whether known or not, was a central motive of the rioters, there would have been little incentive to change behavior over the course of the day. Furthermore, if the constitutional order was at least semi-elastic, there would be no deducible pattern of conduct between the insurrections at Liberty Place and January 6th a century and a half apart. Instead, the noble interest

---

[97] Rebecca Tan. "A Black officer faced down a mostly White mob at the Capitol. Meet Eugene Goodman," *Washington Post*, January 14, 2021, para. 21 https://www.washingtonpost.com/local/public-safety/goodman-capitol-police-video/2021/01/13/08ab3eb6-546b-11eb-a931-5b162d0d033d_story.html

[98] Kirk Birkhalter. "Former NYPD detective examines Capitol Police officer Eugene Goodman's actions to divert rioters," Filmed 2021. *Washington Post*, 1:20 https://www.youtube.com/watch?v=QyWuw205um0

[99] Andrew Harnik. *US Capitol Police hold protestors at gun-point inside the US Capitol on Wednesday, January 6th, 2021*, Associated Press, https://res.cloudinary.com/graham-media-group/image/upload/f_auto/q_auto/c_scale,w_900/v1/media/gmg/OGONVOK4DRB5FG4NH33WLXV2N4.jpg?_a=DAJHqpE+ZAAA.

[100] Farah Peterson. "Our Constitutionalism of Force," *Columbia Law Review*, 122, no. 6 (2022): 1542-1544.

[101] Matthew Kriner and Jon Lewis. "Pride and Prejudice: The Violent Evolution of the Proud Boys," *CTC Sentinel*, 14, no. 6 (2021): para 26 https://ctc.westpoint.edu/pride-prejudice-the-violent-evolution-of-the-proud-boys/

reflects a constitutional order that is "disinterested," promoting public duty and adherence to uniform standard of government even when election outcomes are disputed, or the peaceful transfer of political power is interrupted.[102] Recent literature is quick to dismiss the radical nature of the Constitution's adoption in favor of modern political perceptions of power and influence. These studies suggest that individuals will view a partisan cohort as favorable if, while in government, the cohort exerts tangible benefits onto the individual, a modified version of utility theory for an increasingly materialistic and globalized nation.[103] Realist thinkers have noted a rise in anti-establishment ideologies prior to 2019 which correlate with increasing levels of political violence, tribalism, and alienation towards the constitutional system.[104] However, in rejecting the universality of constitutional authority, the pro-Trump agitators supplied their own understanding of constitutionalism following the 2020 election outcome, a perspective that disregards their unconscious fidelity to constitutional processes. Absent the foundations of republican government and the freedom to petition and protest, January 6th would not have been mechanically plausible as an exertion of political grievance. American citizens wander astray when constitutional guardrails are sacrificed in favor of unchecked ambition. The continued want of a governing alternative does not mask this omniscience.

CONCLUSION

The U.S. Constitution is facing a perilous decade. Public trust in American government is below 25%, a low that has not been reached since the mid-1990s.[105] As historians grapple with the state of constitutionalism, there is a pronounced need to survey American history for signs of perseverance. At its core, the Constitution is a rare source of stability in a tumultuous political environment. The Framers were highly attuned to the benefits of constitutional security, utilizing a masterclass of theory, experimentation, and rhetoric to build a governing system that defends itself intrinsically. Constitutional structures represent the first layer of self-protection, encompassing the textually established branches of the federal government and the principles such as federalism, judicial review, and separation of powers. Structures are called upon as political interests clash in the day-to-day administration of government. Philosophical components of faction, liberty, and republicanism are the secondary layer of constitutional protection tasked with regulating human political desire and power. As targeted remedies, they reach into the public sphere to fill gaps, inconsistencies, or

---

[102] Gordon S. Wood. *The Radicalism of the American Revolution*, 99, 106.
[103] *See generally* Piotr Michalski, et al. "When Politics Affect the Self: High Political Influence Perception Predicts Civic and Political Participation," *Journal of Social and Political Psychology*, 11, no. 2 (2023); 516-533.
[104] Joseph E. Uscinski, et al. "American Politics in Two Dimensions: Partisan and Ideological Identities versus Anti-Establishment Orientations," *American Journal of Political Science*, 65, no. 4 (2021): 880.
[105] Pew Research Center. "Public Trust in Government: 1958-2024," published June 24, 2024 https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/

hazards in the constitutional order. Yet when constitutional abuse becomes violent and immediate, the noble interest constitutes the final barrier against infringement and seizure, respecting the maxim that a state persists so long as it "upholds a claim to the monopoly of the legitimate use of physical force."[106]

Scholars generally foresee a pessimistic future for the Constitution. They also fear the widespread abandonment of liberal democracy. These two positions, while interconnected, are exclusive to one another. It is entirely plausible that the "standard criteria for liberal democracy" breakdown in the next few years, failing the idealistic model of "fairness" and "freedom" in politics as authoritarianism creeps into popular discourse.[107] Inevitably, scoring the health of liberal democracy is subjective depending on the relative status of an individual or group. Whereas different conclusions may be drawn on the perils facing American democracy, the constitutional order is either extant or extinct; its downfall would be unambiguous. Even if the Constitution lacks a strong semblance of public "veneration," there is agreement that its endurance "was the goal from the beginning."[108] Political harassment, cooptation, and weaponization have complicated constitutional endurance but have yet to stop it.

In light of new approaches and methodologies in constitutional studies, the founding generation remains the best source of empiricism and idealism. The early republican record, an impassioned collection of writings and speeches, reveals the complexities of American political thought at a time of great uncertainty. Within this abode, James Madison birthed a uniform constitutionalism where allegiance would be paramount to a healthy republican government. As popular media and the academy continue to debate whether the Constitution will live through the afflictions of today, it is worth noting the tribulations that it has already overcome. Historical events reveal a remarkable durability that is easily overshadowed by the polarization, conflicts, and tragedies of U.S. politics, residual wounds that have permanently affected the operation of government. Infallibility is therefore a useful rubric for describing constitutional evolution. It accounts for the substantive changes to civil rights, electoral process, and presidential power but does not dismiss the systematic ingredients which have remained unaltered since the summer of 1787. In evaluating constitutionalism going forward, incorporating symbolism of this nature can enhance understanding of American political development and reveal a new set of temporal continuities previously overlooked.

---

[106] Max Weber. *Economy and Society* (Berkeley: University of California Press, 1978): 54
[107] Steven Levitsky and Lucan A. Way. "The Path to American Authoritarianism: What Comes After the Democratic Breakdown," *Foreign Affairs*, 104, no. 2 (2025): 38.
[108] Richard Albert. "How Constitutions Die," *Florida Law Review*, 77, no. 1 (forthcoming 2025), The University of Texas at Austin School of Law, Legal Studies Research Paper, 24. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5140635