



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
 Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 3: The Founding Era – Separation of Powers

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James Madison, **The Federalist No. 49** (1788) ¹

The Federalist No. 49 is one of a series in which Madison examined how the constitutional separation of powers is best preserved over time against the tendency of each branch of government to encroach on the functions and authority of the others. In this essay Madison considers a proposal that had been made by Thomas Jefferson in his *Notes on the State of Virginia* which would have allowed two of the three branches to call a constitutional convention either to change the constitution or to correct violations of it. In rejecting this proposal as ineffective for protecting the separation of powers, Madison also laid out a more general argument against frequent constitutional change and too frequent appeals to the people in their sovereign capacity. Like the conservative British thinker Edmund Burke, Madison here argued that the stability of government required the emotional attachment of the people to it; it required veneration and reverence. The experience of 1787 was not one to be repeated.

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As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government; but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers; and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance?

There is certainly great force in this reasoning, and it must be allowed to prove that a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions. But there appear to be insuperable objections against the proposed recurrence to the people, as a provision in all cases for keeping the several departments of power within their constitutional limits.

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... [I]t may be considered as an objection inherent in the principle that as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability. If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it is associated. When the examples which fortify opinion are *ancient* as well as *numerous*, they are known to have a double effect. In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most

¹ Excerpt taken from *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed Upon by the Federal Convention, September 17, 1787, in two volumes* (New York: J. and A. McLean, 1788).



rational government will not find it a superfluous advantage to have the prejudices of the community on its side.

The danger of disturbing the public tranquility by interesting too strongly the public passions is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society. Notwithstanding the success which has attended the revisions of our established forms of government and which does so much honor to the virtue and intelligence of the people of America, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed do not present any equivalent security against the danger which is apprehended.

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