A Model for Deliberation or Obstruction:

Madison’s Thoughts about the Senate

Jack Rakove
Stanford University

Among the current “vices of the political system of the U. States”—to borrow a famous phrase from James Madison—few if any rank higher than the working rules and habits that have turned the United States Senate into a parody of legislative incapacity.¹ The juxtaposition of this evil with a Madisonian notion of political vice becomes even more striking when one realizes how much of his constitutional thinking in the 1780s was inspired by and devoted to the misdeeds of American legislatures. By experience and principle, Madison was first and foremost a deliberative legislator. The preparation of his agenda of constitutional reform in the mid-1780s was largely shaped by his analysis of the defects of legislative assemblies and the procedural aspects of framing legislation. Within that assessment, Madison had high aspirations for the role that the upper legislative house should play in restoring “wisdom and stability” to republican government.² Some of those aspirations were quickly frustrated by the actions of the Federal Convention, particularly its decisions giving each state an equal vote in the Senate and allowing the state legislatures to elect senators. Yet Madison’s conviction that a well-constructed upper

¹ By incapacity, one should distinguish the political impulses on which either House or Senate may act from the procedural constraints that impair any action. The former may provide countless cases of misjudgment, but the latter deal with institutional impairments to action, which is a better example of incapacity.

house had an essential republican role to play in tempering impulsive legislation and improving the quality of legislative deliberation survived these setbacks.

How one could reconcile Madison’s aspirations for improvement and deliberation with the mechanisms of obstruction and impasse that now dominate the Senate is a fair question. Madison was never an enthusiast for thoughtless or impulsive legislation. There was indeed a quasi-libertarian strain in the items criticizing state lawmaking in his 1787 memorandum on the “Vices of the Political System of the U. States”: “As far as laws are necessary, to mark with precision the duties of those who are to obey them, and to take from those who administer them a discretion, which might be abused, their number is the price of liberty,” he wrote. “As far as the laws exceed this limit, they are a nuisance,” he added, “a nuisance of the most pestilent kind.”

Yet Madison did not approach the task of lawmaking simply as a project to discourage legislatures from acting or to multiply the number of veto points within government. He also cared deeply about improving the quality of legislative deliberation and the technical aspects of framing legislation. Equally important, his opposition to the equal state vote in the Senate rested on the conviction that this crucial decision—which he treated as a “compromise” only in retrospect, and never defended on its merits—was a sufficient protection for the purported rights of political minorities. The idea that this rule needed further elaboration and reinforcement through the adoption of further anti-majoritarian procedures was a position he was most unlikely to champion.

The various charges that comprise the current indictment of the Senate are easily stated. One obvious line of complaint lies against the mess in the appointments process, which has now

3 Vices of the Political System of the United States, April 1787, ibid., 74-75.
moved beyond judicial nominations, the original site of infection, to contaminate appointments to other administrative positions. In some cases delays in filling vacancies in executive agencies have effectively paralyzed their operations. More important are the basic rules that threaten the completion of any legislation. One device, arguably the more important in fact, is the quorum call requirement that permits any senator, under any pretext, to halt the work of the Senate as members abandon their committees, hike or ride the subway to the floor, and register their presence. Given the shortness of the senatorial work week, which could generously be described as a three-day cycle that might embarrass even the French with its brevity, this threat acts as a powerful deterrent against any responsible floor leader who is aware of what absolutely needs to be done. More controversial, and constitutionally far more significant, is the escalating use of the putative threat of the filibuster to retard and obstruct legislation. This threat is often deployed to delay decisions that wind up being entirely non-controversial, not because there is any need for further deliberation on the issue at hand, but simply to retard other Senate business. But beyond this further impediment to serious deliberation, the current use of the threat of a filibuster raises a far more disturbing question: whether the Senate has effectively added a new super-majoritarian rule to the Constitution, supplementing the specific occasions on which super-majorities are textually required with a procedural rule that has the same result.

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4 As it happened, on the day I flew east to attend the conference at Montpelier related to the preparation of this volume, the “nuclear option” relating to judicial appointments exploded in the Senate, yet somehow the Republic still stands.

5 My understanding of this issue was much improved by a lunch with former Senator Jeff Bingaman and a public discussion at Stanford Law School in which he participated along with former Senator Russ Feingold and Professor Burt Neuborne of the NYU School of Law.

The question of the constitutional legitimacy of the filibuster *cum* cloture procedures of the Senate deserves more attention—one might say, stricter scrutiny—than it has received. There are, of course, other ways to approach this issue. One can readily identify a short-list of substantive reforms that would preserve the general existence of the filibuster while eliminating its worst abuses—e.g., limit the opportunity to filibuster to one attempt per bill, as opposed to allowing it on amendments and procedural motions as well.\(^7\) But rather than elaborating the nuances of senatorial rules, it might be helpful to consider the filibuster from the vantage point of 1787 and underlying norms of constitutional design. Here two significant objections immediately emerge, one textual, the other historical. Independent of whatever power each house of Congress derives from its Art. I, §5 authority to “determine the Rules of its Proceedings,” the collapse of the distinction between a preparatory rule of deliberation and a final rule of decision, allowing the former to supplant the latter, effectively destroys the principle of majority rule in the Senate. But the text of the Constitution is quite explicit about the circumstances when simple majorities are insufficient (treaty ratification, veto overrides, constitutional amendments, and impeachment convictions), and under the conventional legal doctrine (well known to the Founders), *expressio unius est exclusio alterius*, an attempt to create an effective super-majoritarian rule for ordinary legislation or appointments to office is presumptively unconstitutional. Second, the idea that the rule-making authority of either house of Congress could trump the rules laid down in the text plainly defies the tenor and substance of the constitutional debates of 1787-1788. It would come as a remarkable surprise to the framers of the Constitution, who knowingly debated when super-majorities should and should not apply, that they had left a backdoor open for their creation

\(^7\) See the proposals discussed in Mann and Ornstein, *It’s Even Worse than You Think*, 166-172.
through procedural rules of debate. No one, I believe, would be more surprised by this outcome than James Madison, who had very different expectations for the role the Senate should play.

Madison’s interest in the construction of a proper senate—of a deliberative chamber capable of acting senatorially—was an early subject of interest in the development of his constitutional thinking. In fact, it was the original point he raised in the letter that scholars regard as the first sustained expression of his ideas about republican institutions. This was his August 23, 1785 letter to his college classmate Caleb Wallace, who had written him to solicit advice about the constitution Kentucky should write when it separated from Virginia. Wallace had wondered whether the initial constitution for under-populated Kentucky should even include a senate; Madison answered affirmatively that it should. “The Legislative department ought by all means, as I think to include a Senate constituted on such principles as will give wisdom and steadiness to legislation,” Madison responded. “The want of these qualities is the grievance complained of in all our republics.” The original cause of this grievance, Madison suggested, lay in the colonists’ natural tendency in 1776 to against the abuses they had suffered from the misuse of executive power under the British crown, and therefore to fail to anticipate that the proper regulation of legislative authority would pose the problems they would hereafter face.

Madison’s approach to bicameralism rested on conventional principles that were deeply fortified by his experience in the Virginia House of Delegates. “Not a single Session passes,” he observed, “without instances of sudden resolutions by the latter [the lower house] of which they

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9 Madison to Wallace, August 23, 1785, ibid., 8: 350-351.
repent in time to intercede privately with the Senate for their negative.” His abiding fear was that a numerous body composed of amateur lawmakers would often act impulsively. It absolutely needed a smaller, more deliberate upper house to check these impulses, even if that body was as badly designed as the Virginia senate. (“[A] worse could hardly have been substituted,” he grumbled, “& yet bad as it is, it is often a useful bitt in the mouth of the house of Delegates.”) Although Madison was increasingly concerned with securing the rights of property, he did not regard the upper house as a bastion of a propertied elite. There were different schemes for selecting an upper house, and Madison liked the model adopted in neighboring Maryland. But he did not regard the mode of election or the class status of senators as providing an adequate basis for the checking capacity of an upper house. In Madison’s view, the decisive fact of republican politics was that paramount advantage would fall to whichever institution enjoyed the closest connections with the people. That would clearly work to the benefit of the lower house. Unlike John Adams, Madison was not looking for some American version of mixed government, in which one could recruit a legally identifiable elite to offset the people’s elected representatives. Whatever advantage a senate enjoyed would derive from its institutional qualities and the character of its deliberations, not from its social standing.

This concern with improving the quality of legislative deliberation formed a crucial element in Madison’s thinking in the period prior to the Federal Convention. It was manifested, for example, in other points he developed in his 1785 letter to Wallace. Madison liked the novel institution established in the New York constitution of 1777, the joint executive-judicial council of revision armed with a limited negative over legislation. The advantage of empowering judges to join the task of framing legislation outweighed any injury this might inflict on a strict principle
of separated powers. This was a trade-off in which the prevention of improper legislation would
be far more valuable than the later correction of difficulties. Madison also favored creating “a
standing commit[tee] composed of a few select & skilful individuals” with the dual power “to
prepare bills on all subjects which they may judge proper to be submitted to the Legislature at
their meetings & to draw bills for them during their Sessions.” To compensate for the additional
power this committee would enjoy, its members might be barred from “holding any other
Office” in any department of government. The greater influence they would gain would thus be
limited by a check on their ambitions. They would act, in a sense, as professional lawgivers, not
on the Enlightenment model that worshiped the wisdom of Solon or Lycurgus or Moses, but as
experienced lawmakers trained to the technical duties of drawing legislation. Madison’s desire to
give legislators terms of two or three years similarly rested less on a desire to insulate them from
their constituents than on the recognition that the newcomers who stocked most assemblies and
regularly served only a term or two would need time in office to learn their trade.10

It is not news, of course, to note that Madison believed deeply in the idea that a sound
process of republican elections should operate “to refine and enlarge the public views,” helping
to recruit a class of legislators who would be better able to recognize the public good than “the
people themselves.” Some of that superiority would arise, he hypothesized, through elections
that would weed out “unworthy candidates,” cunning adepts at “the vicious arts, by which
elections are too often carried.” Somehow the electoral process would operate to identify and
favor “men who possess the most attractive merit.”11 But to Madison’s way of thinking, that
merit was not limited to visible marks of personal “character,” that word that resonated so deeply

10 This was the manifest theme of Federalist 53.
11 Federalist 10, in Madison: Writings, 165.
in the revolutionary vocabulary. Nearly four years of service in the Continental Congress (1780-1783) and another three in the Virginia House of Delegates (1784-1786) had taught a set of lessons about the nature of collective debate and deliberation. Experience as well as character had turned Madison into a legislative statesman, someone who prepared for discussion by thinking through the issues, by recording notes of previous debates, by grasping the importance of seizing the agenda, by demonstrating the mastery that others necessarily respected, even if his earnestness sometimes exhausted his colleagues.

These observations merit emphasis to establish what might otherwise seem an obvious point. Madison grasped what few if any of his contemporaries saw as fully as he did. With the effective evisceration of executive power in the republican constitutions of 1776, the locus of political decision-making had effectively shifted to the legislature. In the British model of statehood, the confirmation of legislative supremacy with the Glorious Revolution did not erode the crown’s leading role in governance. Policies still emanated from the crown and its ministries, although active parliamentary review of the workings of government contributed significantly to the public confidence that made the British state so effective.12

In the American situation after 1776, however, the executive largely lost its political influence and the capacity to influence legislative deliberations. The notable exceptions to this were New York and Massachusetts, the two states that drafted their constitutions after 1776. These texts started the revival of executive power by allowing the people, not the assemblies, to elect the governors. It was not by chance that George Clinton and John Hancock became the two most potent governors of the states. In Virginia, by contrast, making Patrick Henry governor was

12 This is a major theme, for example, in John Brewer’s important book, *The Sinews of Power: War, Money, and the English State, 1688-1783* (London, 1988).
the best way to minimize, not enhance, his influence over the legislature. A legislator by experience, Madison expected American governance to develop along another vector. In his view, as a matter both of principle and politics, the legislature should and would be the dominant branch of government. And the institution that spoke most directly for the people, or more specifically, for the dominant interests into which the people would form and divide, would exert the greatest influence on politics. The legislature would be the forum where these interests were resolved. Its capacity to secure the two main objectives of Madison’s political science, securing the public good and protecting private rights, would depend on the deliberative qualities of its members.

The shortcomings of legislative deliberation and enactments at the state level formed the final three (or putatively four) items in Madison’s pre-Convention analysis of the “Vices of the Political System of the U. States.” Here he indicted and assessed the “multiplicity,” “mutability,” and worst, the “injustice” of state legislation, while leaving unexamined a final heading on the “impotence of the laws of the states.” Madison’s indictment assumed that the impulse to legislate could not be explained wholly in terms of wartime pressures to mobilize for the struggle against Britain. Laws were “repealed or superseded” before the population even knew of their existence and “before any trial can have been made of their merits.” More important, Madison worried that this impulsive and mutable legislation had called “into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.”

Madison’s answer to this challenge, however, was not to question the republican premise—not to impugn the principle of majority rule.

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13 Vices of the Political System, in Madison: Writings, 74-75.
per se—but to ask how majorities could be properly formed.

Madison located the *causes* of these vices “1. in the Representative bodies. 2. in the people themselves.” His ensuing analysis paid much more attention to the second, and it was there that he articulated his first exposition of the popular sources of faction as the great evil threatening republics. His treatment of the shortcomings of legislators was much more concise. Yet it still identifies basic elements of Madison’s concern. “Ambition” and “private interest,” he noted, rather than concern for the “public good,” were the prevalent motives driving legislators into office. The lawmakers who felt these motives, “particularly, the second,” proved “the most industrious, and most successful in pursuing their object. The voters might be expected to reject these faithless servants. But in fact, the miscreants could use crass appeals to the “pretexts of public good and apparent expediency” to mask their motives. So, too, “the honest but unenlightened representative”—presumably the type of lawmaker Madison desired—would fall sway to “the sophistical arguments” of “a favorite leader.”

Madison hoped that the large electoral districts necessary for a national legislature would produce a better quality of lawmaker. Local demagogues would somehow cancel each other out, allowing a superior class of representative to be chosen. Still, he understood this was more a hypothesis than a concrete prediction. Nor did it abate his concern that a popularly elected house in the national legislature would still be prey to interested pressures from below—that is, from constituents.

Thus going into the convention, Madison’s great institutional concern continued to lie with the upper house. That was the one institution that proved most controversial throughout the

14 Ibid., 75-76.
convention. By contrast, the character of the lower house did not perplex the framers very much. True, there was some early disagreement over whether the people or the state legislatures should elect members of the lower house. But that disagreement ended quickly, and the framers generally agreed with the proposition set down by John Adams in *Thoughts on Government* (1776), that the popular house of a legislature should be “in miniature an exact portrait of the people at large.”

It was altogether different with the upper house. Its character was the subject of sharp and sometimes bitter debate from the opening week of deliberations down to the misnamed “compromise” of July 16 giving each state an equal vote in the Senate. That decision passed only because the Massachusetts delegation split, effectively costing the state its vote, enabling the critical decision to squeak through five states to four, with populous Massachusetts divided. Yet even after that decision was taken, the Senate remained a source of controversy. In the closing weeks of the convention, a set of decisions that were in part a reaction to the vote of July 16 worked to the net advantage of the presidency, the one institution the framers collectively found most puzzling.

Madison wanted the Senate to be constituted on some rule that would conform to the principle of proportional representation, rather than the equal state vote used under the Articles of Confederation. His formula for how this would be done was not fully articulated. Article 5 of the Virginia Plan provided “that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures.” The article did not require each state to receive a senator. State

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legislatures would nominate candidates, without the assurance that one of their nominees must be elected, while the principle of proportional representation would be respected by having the lower voice make the choice. Convention delegates from the small states might naturally surmise that their nominees would be less likely of election than candidates from the more populous states, but this begged the question of the basis on which members of the lower house would actually vote.16 As Madison and his allies repeatedly argued, the size (or more specifically, the populousness) of a state would never provide an adequate or useful explanation of how its representatives would behave. Size was an interest worthy of recognition only when one was voting on rules of voting. On all other occasions, a different calculus of issues would apply.

The key point, for Madison, was that the Senate should not follow the precedents of the Confederation. Eliminating the equal state vote was essential. Not only was the rule unjust in itself; it would also risk doom ing a completed constitution to rejection in the large states, whose preferences, he believed, must ultimately prevail.17 It was equally desirable to keep the right of electing senators away from the state legislatures. Their deficiencies, particularly on matters relating to the national public good, were a recurring motif in Madison’s analysis of “the vices of the political system.”

But the decisive consideration in establishing the Senate, Madison thought, was that it

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16 Since the authors’ November 2013 conference at Montpelier, I have had additional correspondence with Lynn Uzzell, scholar in residence there, about the exact meaning and thrust of Madison’s intentions and the language of the Virginia Plan. Without replicating our rather detailed exchanges, suffice it to say that the possibility that the small states might be wholly excluded from possessing seats in a senate kept as small as Madison hoped it might be was a genuine possibility (or even threat) that the delegates had to consider.

17 See, for example, his letter to Washington of April 16, 1787, in Madison: Writings, 80-81. I discuss this in greater detail in Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (New York, 1996), 54-55.
should be much less a representative institution than a deliberative one. This became evident in the critical debate of June 7, when John Dickinson introduced a motion to have the state legislatures elect the Senate. Madison roundly rejected this idea. “If the motion should be agreed to,” Madison recorded himself saying,

we must either depart from the doctrine of proportional representation; or admit into the Senate a very large number of members. The first is inadmissible, being evidently unjust. The second is inexpedient. The use of the Senate is to consist in its proceeding with more coolness, with more system, & with more wisdom, than the popular branch. Enlarge their number and you communicate to them the vices which they are meant to correct.\18

Strictly speaking, election by the state legislatures did not preclude a proportional scheme of allocating seats among the states. But because all legislatures were institutionally equal to each other, the adoption of this rule would imply an equality among the states as well. It was, however, the “inexpediency” of Dickinson’s motion that lay closer to Madison’s substantive concern. Dickinson alleged that the Senate would gain weight with numbers. Make it more numerous, and it would prove more able to counteract the impulsive lower house. Madison disagreed. He, too, reasoned arithmetically about the deliberative character of institutions, but with a theorem that ran inversely to Dickinson’s. Larger bodies were more impulsive, more vulnerable to being swept away by the passions of the moment as each member felt less responsible for the outcome, Madison held. A smaller body would increase the sense of responsibility each member would feel, while facilitating the capacity for serious deliberation. The strength of the Senate would derive from the quality of its deliberations. Madison was

equally skeptical that the Senate would gain authority if it could be constituted, as Dickinson proposed, to represent great families. More important, Madison reasoned, “If an election by the people, or thro' any other channel than the State Legislatures promised as uncorrupt & impartial a preference of merit, there could surely be no necessity for an appointment by those Legislatures.”[19]

Madison and James Wilson, his closest ally on this point, lost this question decisively right away, when the committee of the whole approved Dickinson’s motion, ten states to none, on June 7. This was an adverse development, but it did not stop Madison from thinking that the senate remained a vital institution. The next day, when Madison’s proposed negative on state laws was under discussion, he suggested that it “might be very properly lodged in the senate alone.”[20] On June 11, Madison declared that a seven-year term for senators was “by no means too long.” His main goal “was to give to the Govt. that stability which was every where called for, and which the enemies of the Republican form alleged to be inconsistent with its nature.”[21] This comment directly echoed his letter to Caleb Wallace two years earlier. Madison coupled this concern with the senate with a corresponding desire to improve the deliberative quality of members of the lower house, the institution he still worried “would be too great an overmatch” for the upper house. A three-year term for ordinary representatives would be essential, he noted on June 12, simply for members “to form any knowledge of the various interests” of other

[19] Ibid., 154.
[20] Ibid., 168.
[21] Ibid., 218.
states. That point was reinforced by the likelihood that successive congresses would bring “a large proportion” of newcomers, who would need “to acquire that knowledge of the affairs of the States in general without which their trust could not be usefully discharged.”

Comments like these illustrate how deeply legislative experience shaped Madison’s perception of good governance. Yet Madison never converted this concern with improving the quality of deliberation—including conceiving the senate as a check to an impulsive lower house—into a formula for obstruction. Madison at the convention was a majoritarian, not an advocate for special interests deserving extra recognition or the adoption of rules and procedures designed to clog decision-making by enabling individual delegates to thwart the flow of discussion.

His critical remark on this subject came on June 30, as the convention nearing its impasse on the rule of voting in the senate. The occasion for this debate was the Connecticut delegate Oliver Ellsworth’s motion to balance the acceptance of proportional representation in the lower house with an equal state vote in the senate. The lower house would represent the people as individual citizens of one nation, Ellsworth argued, while the senate would embody the states “as equal political Societies.” Ellsworth necessarily stumbled in explaining exactly when or how states with interests as diverse as Virginia, Pennsylvania, and Massachusetts would conspire against their respective near-neighbors Maryland, New Jersey, and Rhode Island or Connecticut. “Altho’ no particular abuses could be foreseen by him, the possibility of them would be sufficient to alarm him.” That was as low a threshold as one could set, when the concern was to

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22 Ibid., 214.
23 Ibid., 361.
24 Ibid., 468-469.
ensure that “The power is given to the few to save them from being destroyed by the many” without having to specify what plausible motive would produce this result, or what form the destruction would take, or why this “few” deserved special protection. Madison and his allies had argued that the large states had divergent interests, and unless they formed some utterly corrupt bargain, they could never coalesce into one coherent interest. But Ellsworth’s position, at bottom, was simply that the small states could not allow themselves to be governed by rules of proportional voting in both houses of the new congress.

Madison answered this claim directly on June 30, after his ally James Wilson and Ellsworth had both spoken at length. His remarks (in his own summary, of course) are worth citing at length:

It was urged, he said, continually that an equality of votes in the 2d. branch was not only necessary to secure the small, but would be perfectly safe to the large ones whose majority in the 1st. branch was an effectual bulwark. But notwithstanding this apparent defence, the majority of States might still injure the majority of people. 1. they could obstruct the wishes and interests of the majority. 2. they could extort measures repugnant to the wishes & interest of the Majority. 3. they could impose measures adverse thereto; as the 2d. branch will probably exercise some great powers, in which the 1st. will not participate.

Obstruction, extortion, and imposition were not markers of the improved deliberation that Madison desired, but prices and penalties to be paid for contributing to the unwarranted demands of a numerical minority. Madison did concede that “every particular interest whether in any class

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25 Ibid., 484.
of citizens, or any description of States, ought to be secured as far as possible.” But that interest had to be secured to some true social interest, not the artificial claims of the small states. The best way to pursue this thought, Madison then noted, was to realize that the true differences of interest within the Union “did not lie between the large & small States: it lay between the Northern & Southern,” tied initially to differences in climate, “but principally from the effects of their having or not having slaves.” In theory, one might substitute two rules of representation tied to that difference, counting total population (slaves included) in one house and free people alone in the other. This remained problematic, however, because the two houses would possess somewhat different powers, thereby destroying any symmetry between the two rules.

Madison’s position remained majoritarian in both cases. It only conceived that majorities could be constituted in two different ways, one predicated on counting slaves as a major source of property, the other on denying slaves political existence because they possessed absolutely no claims to the rights of citizenship. Yet both kinds of majorities still responded to real, definable interests, not the putative, imaginary fears that delegates from the small states imputed would be at risk. Madison saw the debate over the senate as a test of the basic principle of majority rule. If “the Convention was reduced to the alternative of either departing from justice in order to conciliate the smaller States, and the minority of the people of the U.S. or of displeasing these by justly gratifying the larger states and the majority of the people,” he declared on July 5, after the compromise committee had reported, “He could not himself hesitate as to the option he ought to make.”

On July 7, according to Rufus King, Madison again complained that the equal state

26 Ibid., 527-528. Madison originally wrote “delusion” in his notes, then replaced it at some later point with “alternative.”
vote “will enable a minority to hold the Majority–they will compel the majority to submit to their particular Interest or they will withhold their assent to essential & necessary measures.”

And in his final speech of July 14, Madison reiterated his fundamental objections against the equal state vote on the same majoritarian grounds, adding only one new point: “the evil instead of being cured by time, would increase with every new State that should be admitted, as they must all be admitted on the principle of equality.”


Two days later, by the narrowest margin possible, the equal state vote in the senate carried the day. Over the next two months, the delegates learned to think of it as a compromise, not in its political origin but in rhetorical retrospect. Two days before it adjourned, the convention locked the equal state vote into the Constitution as the one rule not subject to Article V amendment. Originally the delegates had rejected Roger Sherman’s motion prohibiting any state, without its consent, from being “affected in its internal police, or deprived of its equal suffrage in the Senate.” “Begin with these special provisos,” Madison had warned, “and every State will insist upon them.” But after the motion failed, “the circulating murmurs of the small States” led Gouverneur Morris to rescue the second part of Sherman’s motion.

The rest is history, and the modern Senate, in some distant fashion, is its result.

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27 Ibid., 554. Madison’s notes of his own remarks for this date do not make this point, but William Paterson’s notes confirm King’s summary. Ibid., 555-556.

28 Ibid., II, 9-10.

29 Ibid., 630-631. After his original motion failed, Sherman proposed eliminating Article V entirely, which would make the equal state vote and every other clause unamendable.
Of course, it would be absurd to trace the stagnant rules of our Senate solely to the fateful error of July 16. The key inference to be derived about Madison’s views is different. The grudging acceptance of the equal state vote and its rewarding of the claims of an arbitrary minority of states whose real interests would never correspond to their size marked the sufficient departure from the majoritarian principles Madison favored. It is difficult or indeed (in my view) impossible to imagine Madison the framer ever endorsing the development of an institutional culture that would treat the decision of July 16 as a legitimating starting point for the array of obstructive procedures that now bedevil the Senate. The perceived necessity of accepting the equal state vote was as far as he was willing to go. The alternative to the decision of July 16, after all, was a potential break-up of the convention if either the large states or small states decided to bolt, a risk that Madison finally proved unwilling to take. But the idea that the equal state vote was only a foundation or threshold for elaborating rules designed not to improve deliberation but to obstruct decision was a lesson Madison would never have drawn. He had had experiences of that kind in the Continental Congress, particularly when David Howell doggedly represented Rhode Island during the debates over the impost in 1782-1783. The idea of allowing lone individuals to obstruct action was not his model of senatorial deliberation, as comments recorded by Rufus King on July 7 make clear.30

30 “I have known one man where his State was represented by only two & were divided oppose Six States in Cong. on an import[ant] occasion for 3 days, and finally compelled ym. to gratify his Caprice in order to obtain his suffrage.” Ibid., I, 554. I have not worked out when this might have been. On David Howell’s disruptive role, see Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress (New York, 1979), 313-
Madison’s lack of enthusiasm for the convention’s key decisions on the Senate were well illustrated in the two essays of *The Federalist* that he dedicated to the upper house. *Federalist* 62 devoted all of three perfunctory sentences to the legislative election of senators. The next point, the equal state vote, received lengthier treatment—three paragraphs rather than three sentences—yet one hardly needs to be a votary of the esoteric reading techniques of high Straussians to detect Madison’s persisting qualms. It would not have been very difficult, after all, for Madison to borrow the arguments made by delegates like William Paterson, Oliver Ellsworth, and John Dickinson to justify the equal state vote in far more robust terms than he managed to muster. Instead, Madison simply noted that “it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be the result, not of theory, but ‘of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable.’” Similarly, Madison could not mention the dual security Americans would receive from requiring successful legislation to represent a majority of the people and the states without insinuating other doubts about the rationality of this norm. There would be times, he noted, when “this complicated check on legislation” might prove “injurious as well as beneficial.” More important, “the peculiar deference which it involves in favor of the smaller States, would be more rational, if any interests common to them, and distinct from those of the other States, would otherwise be exposed to peculiar danger.” But of course Madison’s whole theory of faction presupposed that the size of a state would never define its interests. Thus it was, he concluded, that “it is not impossible that this part of the Constitution may be more convenient in practice than it appears to many in contemplation.

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“More rational” and “not impossible” were hardly the words of a committed advocate. Yet when Madison moved past the decisions that he still resented to consider the “purposes” of the institution, his comments remained faithful to the concerns he had been expressing since at least 1785. The remaining paragraphs of Federalist 62 and Federalist 63 strongly echo, in terms readily recognizable to Madison scholars, dominant themes of his constitutional analysis. Here Madison expresses familiar concerns: with the impulsive nature of popular legislatures; with the lack of acquaintance amateur lawmakers have with public affairs; with the embarrassing task of “repealing, explaining, and amending laws, which fill and disgrace our voluminous codes”; with the harmful effects of “a mutable government” and “a mutable policy.” Within this situation, Madison observes at the close of Federalist 62, it is possible that an “unreasonable advantage” will fall “to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people.” The task of establishing “a due sense of national character,” which will be so essential to relations with foreign nations, can never be discharged “by a numerous and changeable body.” It could only be done by a small durable chamber, composed of individual members who may expect to gather personal credit for the success of national measures, and who will feel as well a sense of “pride and consequence” tied to the “reputation and prosperity of the community.” Such a body would also feel a connection to “a succession of well-chosen and well-connected measures,” the cumulative effects of which could be felt only over time. Members who came and went with every new congress, as Madison rightly expected would be the case, would rarely acquire this ambition; but senators might. Madison closed Federalist 63 by moving beyond the role the senate would play in balancing the misdeeds of the people’s representatives to argue that it would also provide “a defence to the people against their
own temporary errors and delusions.”

A Madisonian constitution thus required a bicameral legislature. Even with the vices of an equal state vote and the legislative election of senators, Madison remained firmly committed to the value of a sober and prudently deliberative upper house. The same concern appears in his October 1788 comments on the revised constitution that Jefferson had drafted for Virginia back in the early 1780s. As in his August 1785 letter to Caleb Wallace, Madison made the character of the senate his point of departure. Madison opened his comments by criticizing Jefferson’s proposal to give senators a mere two-year term. More revealingly, he disliked the idea of having senators elected by districts, preferring a statewide electoral system “making them the choice of the whole Society, each citizen voting for every Senator.”31 Once again, the representative basis of an upper house was secondary to its deliberative duties.

Yet Madison’s continued attachment to the institutional value of the federal Senate rested on his recognition that it would necessarily be the weaker of the two houses. “Against the force of the immediate representatives,” he wrote in his very last sentence as Publius, “nothing will be able to maintain even the constitutional authority of the senate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legislature, the affections and support of the entire body of the people themselves.” At first glance, this sentence corroborates the image of the Senate as a checkpoint against the impulsive temptations and tendencies of the lower house, the true “impetuous vortex” of the Constitution. But that check would be provided, not by parliamentary devices that took the unjust principle of the equal state

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vote as a foundation for additional procedural rules that would further enlarge the ways in which minorities of senators or individual members could thwart the conduct of business. Madison’s constitutional theory conceived the Senate not as the bulwark of obstruction it has become but as a superior model of deliberation. Its political strength would rest on the manifest evidence of the quality of its deliberations, not the maddening excesses of its anti-majoritarian rules. To assert that all the procedural mechanisms that individual senators can now deploy somehow represent the fulfillment of Madison’s view of deliberation requires standing the devastating response that he delivered to Oliver Ellsworth on June 30, 1787, on its head. If one could clearly distinguish rules designed to foster deliberation from those determining a final rule of decision, Madison’s position might appear sympathetic to some possibility of delay. But as that distinction collapses, the modern Senate would seem to betray, not fulfill, his vision.