

MADISON'S REPUBLIC
AN EVALUATION OF POLITICAL LIBERTY AND SECURITY IN THE
UNITED STATES

by

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fulfillment of the requirements for the Honors Degree in Philosophy with Distinction

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ABSTRACT

In American political philosophy, a highly contested topic is whether or not the United States government is adhering to the principles set forth by the Founding Fathers. While James Madison has appropriately been given the title, ‘Father of the Constitution,’ what principles and meanings did he actually incorporate into his draft and proposals to the Constitution? Looking to Madison’s writings reveals the parallels to Charles-Louis de Secondat, Baron de La Brède et de Montesquieu’s work, *The Spirit of the Laws*. In this work, I will outline the plans and contributions Madison made to establish the new republic and connect them to the writings of Montesquieu. Once the common principles and tenets have been established, I will examine the role they have played in multiple Supreme Court cases to determine whether the federal government that the Constitution established has been able to adhere to the principles Madison sought to instill in the document despite any discrepancies with Montesquieu’s treatise. Through the lens of *The Spirit of the Laws*, I will demonstrate that the Supreme Court has made several decisions that have worked to ensure that the federal government continues to uphold the main tenets of the republican government, namely political liberty and security.

Chapter 1

CREATING THE CONSTITUTION

After winning the war for independence from England, the Founding Fathers sought to create a new nation and a new government. The distaste they developed for monarchy led them to evaluate other forms of government, some of which dated back to ancient times. Ultimately, the Founding Fathers agreed to focus on establishing a republican style of government. Their meetings to discuss the details of the new government, however, were filled with disagreements. Representatives from different states fought for their state's interests which threatened the ratification of the constitution the Founders drafted. The process of ratifying and implementing the Constitution would take many years, but through the efforts of James Madison, a fervent supporter of the Constitution, the republic of the United States of America was established.

The early meetings of the Constitutional Convention began in May 1787 and were meant to address the failings and weaknesses of the Articles of Confederation, a document that was agreed on by every colony to serve as a temporary constitution immediately following the American Revolution. Eventually it became clear that "a thorough investigation into the defects of the confederation and the development of a plan for remedying those defects" was needed, so the Constitutional Convention was

initiated “for the sole and express purpose of revising the Articles of Confederation.”¹ The Articles were failing to sustain the developing nation and needed to be amended. While finances and trade were two of the most apparent issues with the Articles, the power of individual states proved to be the most difficult and daunting task. Although the states were considered to have autonomy, they attempted to exert power over the other states “which involved not merely trespassing by the states upon one another’s rights, but even directly disregarding the articles of confederation.”² The Convention realized that the issue of sovereignty and accountability had to be addressed in their revision so that states could maintain their independence, but not at the expense of other states. Part of the resolution was to develop a stronger central government that would have the power to legislate in order to keep the states in check. The worry for many was that such a central government would become too powerful and threaten the states’ self-preservation.

One representative who played a crucial role in the Convention was James Madison. Throughout the Convention, Madison took notes and journaled the discussions and debates that were held between all of the delegates. His dedication to create an in-depth account of the proceedings was reflected when he noted

“I chose a seat in front of the presiding member, with the other members on my right and left hand. In this favorable position for hearing all that passed, I noted in terms legible and in abbreviations and marks intelligible to myself, what was read from the Chair or spoken by the members; and losing not a moment unnecessarily between the adjournment and reassembling of the Convention, I was enabled to

¹ Farrand, Max. *The Framing of the Constitution of the United States*. New Haven: Yale UP, 1913. Print. P. 42.

² Ibid., P. 45-47.

write out my daily notes during the session, or within a few finishing days after its close.”³

He documented each of the proceedings and agreements that ensued during the meetings at which he was present in order to process all of the information and ideas that were being offered while the Convention was in session. Madison’s note-keeping allowed him to synthesize the different ideas that were offered, which he took into account in the many proposals that he made.

One of the earliest propositions offered by Madison eventually helped end one of the lengthiest debates regarding the central government. Once it was decided that states would elect representatives to sit in Congress, the argument over the number of representatives began. Large states wanted representation based on population, but smaller states disapproved in the fear of being doomed to always follow the will of larger states. Madison suggested what would become known as the Virginia Plan, and while “internal evidence shows much of Madison’s handiwork informing these resolutions ... they were presented Randolph [and] they were commonly referred to as the Randolph Resolutions.”⁴

The Virginia Plan was proposed on May 29, 1787, and was overall a great departure from the Articles of Confederation and would eventually lead toward a new constitution, but the plan did call for a strong federal government capable of holding states accountable while still respecting their autonomy. According to this plan which set up a strong central lawmaking body, the resolution included “that a republican

³ Farrand, op. cit., P. 60.

⁴ Ibid., P. 60.

government ... ought to be guaranteed by the United States to each state.”⁵ This resolution was added to ensure that the states would still have power over local affairs and that the central government would be tasked with protecting that power. The lawmaking body of this plan “was to consist of two houses, of which the first branch was to be elected by the people of the several states, [and] the second branch was to be chosen by the first out of persons nominated by the state legislatures.”⁶ The Plan detailed the nature of the legislative branch and determined

“that the national Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the confederation — and moreover to legislate in all cases to which the separate States are incompetent: or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the national Legislature, the articles of union, or any treaties subsisting under the authority of the union.”⁷

Although Madison was greatly in favor of the direct election of members from both houses, “the sentiment in favor of electing the other house by the state legislatures was so strong in spite of the opposition of Wilson and Madison it was passed unanimously.”⁸ Although this is what they ultimately decided, a future amendment to their new constitution would allow for the direct election of both houses.

⁵ Elliot, Jonathan. *Debates on the Adoption of the Federal Constitution*. Philadelphia: J.B. Lippincott, 1859. Print.

⁶ Farrand, op. cit., P. 60.

⁷ Elliot, op. cit., P. 144.

⁸ Farrand, op. cit. P. 76.

Along with a resolution to the representation and autonomy issues, the Virginia Plan also suggested three separate and supreme branches: the executive, legislative, and judicial. The proposal of these branches included a system of checks and balances. This proposal was extremely favorable to the members of the Convention who highly respected the writings of the political philosopher, Montesquieu. Montesquieu “had shown the absolute necessity of separating the legislative, executive, and judicial powers” and giving each branch enumerated powers to act within.⁹ The Convention unanimously agreed to establish a national judiciary that would be the highest appellate court for state courts and inferior federal courts created by the legislative branch. The executive would be elected by the legislative branch and was equipped with the power to veto legislation, but could be subject to impeachment.¹⁰ After discussing and making minor revisions, the Constitutional Convention ultimately agreed to the fundamentals of the Virginia Plan and the idea of expanding their mission beyond revising the Articles of Confederation. Although several changes and revisions were made to the Virginia Plan, Madison accepted the decisions and compromises made by various committees and the essence of his framework survived.

With a separation of powers and a system of checks and balances in place, the time now came to present the states with what the Convention had drafted. Copies of the new constitution were sent to each state where several delegates were selected to discuss the draft and decide whether or not their state would ratify the document and

⁹ Farrand, *op. cit.*, P. 49-50.

¹⁰ *Ibid.*, P. 79.

join the new nation. Madison was even asked by his home state of Virginia to run for election as a delegate candidate, but he declined because of his opinion “that the final decision [on the Constitution] thereon should proceed from men who had no hand in preparing and proposing it.”¹¹ Instead of returning home, Madison remained in New York to take on a different, although significant, role in the ratification process. Madison worked from October 1787 to August 1788 with two other representatives from the Constitutional Convention, Alexander Hamilton and John Jay, under the collective pseudonym Publius to publish what became known as *The Federalist Papers*. Each author focused on different subjects, but ultimately they meant to explain to the public what certain elements of the draft meant and why it would be in their best interest to ratify it as it had been proposed. In total, *The Federalist Papers* consisted of eighty-eight essays that were printed to explain certain aspects of the draft to the people of each state in order to rally support during the ratification process.

Of the twenty-six essays that Madison authored and added to *The Federalist Papers*, the most crucial and noteworthy were Essays 10, 52, and 62. In each of these essays, Madison discussed the notions that he believed were crucial to political liberty and explained how the proposed constitution would establish a republican government capable of preserving the peoples’ interests. Essay 10 was Madison’s first contribution and one of his most highly regarded writings in favor of a republican government. In this essay, he commented on the threat of factions which Hamilton introduced and described in Essay 9 as groups of citizens who join together to work against the welfare of the nation. Madison defined a faction as a “majority or a

¹¹ Labunski, Richard E. *James Madison and the Struggle for the Bill of Rights*. Oxford: Oxford UP, 2006. Print. P. 30.

minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.”¹² With such a threat being likely in a democratic system where the people hold the power, the new government had to be capable of responding to factions and preventing their harmful effects. Madison explained that a government could either take away the cause of factions or control its effects. The two ways to remove the cause of a faction he noted were “one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.”¹³

Since the first option was detrimental in itself to the society they wanted to create and the second option was practically impossible, the only resort the new government had would be to control the effects of factions. With the new style of government, the most obvious response to the threat of factions involved noting that “a faction consists of less than a majority, [so] relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.”¹⁴ The real problem, he explained, is when the passions and impulses of factions reach a majority of the whole. Rather than a pure democracy where the majority feels this factional impulse, Madison explained that a safer form of government was a representative democracy. The first crucial difference between a pure democracy and

¹² Hamilton, Alexander, John Jay, and James Madison. *The Federalist*. N.p.: George Macy Companies, 1945. Print. P. 55.

¹³ Ibid., P. 55.

¹⁴ Ibid., P. 58.

a representative democracy was that the representatives would be able to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”¹⁵ A large republican system would be necessary to ensure that it would be composed of a majority of “men who possess the most attractive merit and the most diffusive and established characters” that were needed to handle the effects of factions.¹⁶ The new constitution sought to establish such a republic where officials would be elected and held accountable by the people. This essay would go on to be one of Madison’s most famous works because of the development of a new theory that explained how a republic as large as the United States would be able to function and survive.

In one of his follow-up essays, Federalist Number 52, Madison discussed in more detail the house of the legislature that would serve the role of representing the people, the House of Representatives. Working from the same inspiration that crafted the Virginia Plan, Madison discussed how Representatives would be elected and how the people retained power even after their election. For this essay, Madison stressed the importance of the role people had in maintaining the welfare of their nation. While the people would rely on the government for liberty, Madison explained that “it is particularly essential that the [legislative] branch ... under consideration should have an immediate dependence on, and an intimate sympathy with, the people.

¹⁵ Hamilton, op. cit. P. 60.

¹⁶ Ibid., P. 61.

Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.”¹⁷ To achieve this essential feature, the proposed House of Representatives would consist of members from every state who would be subject to a term limit of just two years. Madison felt two years was an acceptable amount of time to prevent corruption and the effects of factions. Having frequent elections would pressure Representatives to stay true to the interests of their constituents or face losing their next election. The responsibility then was on the people to stay informed and make sure their Representatives were working for the good of the country. By depicting the power and responsibility of politics as being in the hands of the people, Madison hoped the people would be assured that their government would be working for them.

Madison continued his explanation of the proposed congress in Federalist Number 62 which focused on the second house, the Senate. The Senate requirements differed from those of the House of Representatives in that eligible members had to be at least 30 years old and were nominated by state legislatures instead of being directly elected by the people. Different requirements were meant to be a backup, as Madison writes, to some of the aspects of the House. “The propriety of these distinctions,” Madison wrote, “is explained by the nature of the senatorial trust, which, requiring greater extent of information and stability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages.”¹⁸ While the conjunction of this house, composed of older and more

¹⁷ Hamilton, op. cit., P. 354.

¹⁸ Ibid., P. 414.

sophisticated citizens, could lead to gridlock with the other house, Madison explained that the benefit to a bicameral legislature was that “no law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States.”¹⁹ Madison also attempted to appease the leaders of the states, claiming that the Senate would help balance the powers of the federal government and the states because “the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty”²⁰ Through its setup, the Senate connected the states to the national government achieving the Framers’ goal of balancing federalism and state autonomy. Even though the people were not directly involved in this house, Madison was able to once again show the benefits the people reaped from the setup of the new bicameral legislature the constitution proposed.

Along with writing essays for the public, the Constitutional Convention had a copy of the completed draft sent to every state for publication and distribution starting in September 1787. With no accompanying documents or record of what the Framers intended or discussed, rumors spread widely. Anti-Federalists, members of a party opposed to Madison and his fellow colleagues of the Federalist party, told the public that “the new Constitution would create a government that betrayed the principles of the Declaration of Independence and would trample personal liberties.”²¹ Those who opposed this draft of the constitution baited people into rejecting it by pointing out that

¹⁹ Hamilton, op. cit., P. 416.

²⁰ Ibid., P. 416.

²¹ Labunski, op. cit., P. 22.

the draft did not specify any rights that were guaranteed to the people. People were concerned that there was no clear outline of what the constitution would mean for them. With the worry of approving a government that would take advantage of a constitution with unspecified individual rights, ratification in several states began to seem unlikely.

Once again Madison was on the defensive by trying to find a way to convince the people that their rights were still protected under the constitution he helped create. Several states had included a bill of rights in their constitutions which was what many citizens were accustomed to. Part of the issue with the new constitution was that “citizens who might have had difficulty understanding the intricacies of the proposed plan had no problem recognizing the absence of ... specific protection for individual liberty.”²² Soon it became clear to the members of the Convention that a bill of rights was necessary for the ratification of the Constitution to be a success in several states. Madison was strongly against adding a bill of rights for several reasons. He believed that the rights people wanted to see listed were already implicitly contained in the draft of the Constitution through its recognition of individual state constitutions and the freedoms that they guaranteed to their citizens. He was most concerned with Congress wasting time analyzing the many amendments each state was proposing to add to the constitution. Madison did not want to see the amendments change the document he had worked so hard to create. He continued to insist that a bill of rights was not necessary, but with the threat of losing several states in the ratification process, including his home state of Virginia, Madison eventually acknowledged that adding certain amendments would be essential for ratification of the constitution.

²² Labunksi, op. cit., P. 25.

Adding what would be known as the Bill of Rights was a lengthy process for Congress, and particularly for Madison who from the beginning was against the idea of adding it. He faced great opposition in his home state where Anti-Federalists were claiming that every citizen's personal liberty was at stake without a bill of rights. Madison and other Federalists were worried about losing Virginia because of the crucial geographical and trade role it already played for the collection of states. Virginia was by far the largest state geographically and its agriculture production balanced out the manufacturing industry of the northern states.²³ Its potential contributions would be essential to the longevity and early prosperity of the new union. Once again, Madison was asked by his colleagues to run for a delegate spot in Virginia. Madison finally caved and said, "I shall not decline the representation of the County if I should be honoured with its appointment;" partially due to the fact that several delegates from the Convention were serving as delegates in their home states.²⁴

The lengthy debate that ensued at the Virginia delegation began on June, 2, 1789, and consisted of intense arguments between the Anti-Federalists and the Federalists. Many of the Federalist delegates who Madison considered to be allies agreed that a list of individual rights should be included. The fear states had of losing powers they currently possessed, backed by the public outcry for a detailed list rights, was becoming too much for the Federalists. Madison continued to insist that "powers are not given to any set of men [but that] they are in the hands of the people –

²³ Labunski, op. cit., P. 28.

²⁴ Ibid., P. 30.

delegated to their representatives chosen for short terms.”²⁵ It was Madison’s belief that a proper republic’s power was vested in the people. He fought for short term limits and direct elections at the Constitutional Convention so that the people would be in control of their government. In his opinion, a representative would not work against the people’s rights and interests because that representative would face reelection where the people could and should dispel any officials that were oppressing rights and not working towards the nation’s best interest. Despite his efforts, a majority of the delegation voted in favor of including amendments.

The next vote for the delegation would be to decide if Virginia would ratify the constitution contingent on the addition of amendments. Madison, who was still anxious to join the Union as soon as possible, worked against this proposition because of the time it would take. During the delegation the Anti-Federalists had proposed over forty amendments which would result in an even longer debate that would delay Virginia from ratifying the constitution. Madison and other Federalists realized what was at stake and agreed that they would work to add amendments containing rights to prevent government encroachment, after the ratification of the constitution as it was originally drafted. After the arguments from each side were heard, it went to a vote that resulted in a small win for the Federalists. The Virginia delegation “approved the ratification motion with amendments recommended but not required as a condition of the convention’s [joining the Union].”²⁶ Although this meant Virginia would join the nation, the delegation that voted in support of ratification upon the inclusion of

²⁵ Labunski, op. cit., P. 91.

²⁶ Ibid., P. 113.

amendments looked to the Federalists and Anti-Federalists to uphold their promise of creating a list of protected liberties and freedoms.

Madison's next role in seeing the Constitution approved and gaining state support came in the House of Representatives. Although reluctant to add amendments, Representative Madison took a prominent role in their addition to ensure that the amendments did not tamper with the intent of the Constitution. With so many states looking to add amendments and individual rights to the Constitution, Madison decided to write his own list of rights to quell the uproar from the Anti-Federalists and to protect the project of the Constitutional Convention. He joined the effort out of the fear that "if the freshly framed plan were to be opened to amendments, as it must be to add a bill of rights, then no one could predict what the final result of such tampering would be."²⁷ His efforts had the support of a long-time ally from the Convention, George Washington. Washington had been unanimously elected President of the new nation and was immensely respected by the states and citizens. As Labunski notes, Washington

"relied heavily on his fellow Virginian (Madison) ... for advice on many important subjects, including matters of presidential style and etiquette, the president's relations with the Senate, and appointments to public office. Madison was so influential that some have described him as 'prime minister' during the first six months of the administration."²⁸

In return for his advisement, Washington allowed Madison to insert into the first presidential address to Congress a plea to drafting "amendments that would

²⁷ Morgan, Robert J. *James Madison on the Constitution and the Bill of Rights*. New York: Greenwood, 1988. Print. P. 132.

²⁸ Labunski, op. cit., P. 187.

enhance personal liberty but leave untouched the basic structure of [the] government,” that Madison and the Federalists were so inclined to keep.²⁹

With President Washington’s support, Madison began working on synthesizing the amendments proposed by different states by eliminating repetitious suggestions and amendments that would be contradictory to what was contained in the Constitution. After he completed the tedious task of sorting through each recommendation, Madison completed a draft of nine amendments on June 8, 1789, that he was prepared to defend before the entire House of Representatives. Madison was confident he would be able to gain the required number of votes with more ease if he was able to control the debate and the floor in order to convince representatives that his amendments were a sufficient answer to the wants of their constituents. Once again, Madison did not get his way, and the House instead decided to create a committee of eleven representatives, consisting of one from each state, to discuss Madison’s draft before submitting it to a vote by the entire House.³⁰

Fortunately, Madison was selected to represent Virginia on the committee which would at least give him a chance to defend his amendments and the rights he felt were important and did not threaten what was already contained in the Constitution. Of all the amendments he had drafted, Madison placed the most importance on the amendment that would guarantee that “the people shall not be deprived or abridged of their right to speak, to write or to publish their sentiments” and that

²⁹ Labunksi, op. cit., P. 188.

³⁰ Ibid., P. 214-216.

“in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and the nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.”³¹

Madison considered these two aspects to be crucial to the survival of a republic as well as the most significant rights for people to be guaranteed. The committee worked with Madison to change the wording and order of several of his amendments and gained the approval of the entire House.³² Madison was pleased with the project because the intent of his amendments, including that of his most prized amendment, was still present in the seventeen amendments that the House sent to the Senate for a vote.

By September 15, the Senate had voted and approved twelve amendments. They too edited the language and placement of certain amendments to shorten the list, but much to Madison’s dismay, their revisions included “the removal of Madison’s most favored amendments, the one that prohibited the states from infringing upon freedom of speech, the press, and religion and guaranteed trial by jury.”³³ Despite his disappointment, Congress amended the Constitution and added to it a new document, the Bill of Rights. The states that had held out on ratifying the document all approved of the Constitution by December 15, 1791, now that their concern for a satisfying list of rights had been met. Madison had served a prominent role in the creation and protection of the Constitution. He would go on to defend the principles and values he had worked so hard to implement through his future roles in the House and as President of the United States.

³¹ Labunski. *op. cit.*, P. 228, 266-267.

³² *Ibid.*, P. 217.

³³ *Ibid.*, P. 237.

Chapter 2

THE INSPIRATION

Though the Framers who met at the Constitutional Convention sought to establish a new nation with the drafting of a constitution unlike any other, they were not the first to attempt a republican form of government. The ideas of liberty, individual freedoms, and representation were all notions that existed long before the Framers decided to meet. Prior to playing one of the most significant roles in the founding of the United States, James Madison was a student at the College of New Jersey where, among other subjects, he studied political philosophy. Madison would continue his academic pursuits throughout his political career, but kept a focus on one extremely prominent political philosopher, Charles-Louis de Secondat, Baron de La Brède et de Montesquieu.

Montesquieu was a prominent French lawyer with an extensive background in historical philosophy. He spent a great deal of his professional life studying the successes and failures of governments throughout history. Through his studies, Montesquieu paired his knowledge of past nations with his political theories to develop his most famous work, *The Spirit of the Laws*, which was published in 1748. Within this work, Montesquieu outlined the nature of republics, monarchies, and despotic governments. He discussed several aspects of political life and how they function under each type of government. Montesquieu paid special attention to the nature of republican governments and what he found to be necessary for a republic to survive. His detailed account of republican governments served as an inspiration and

as a background for the Framers, especially Madison, to use throughout the drafting and ratification of the Constitution.

Montesquieu's commentary on republics begins with his notion of virtue and the necessary role it plays as the principle of a republican government. Virtue is best defined in his work as the people's love for the republic. Citizens who operate with high morals and adopt good maxims are acting with this virtue. The absence of such citizens would lead to "ambition [invading] the minds of those who are disposed to receive it, and avarice possesses the whole community."³⁴ If the people were not dedicated to their own government and the general welfare, the republic would ultimately fail. When citizens act with selfish interests in mind, their role of electing representatives who will work towards the benefit of the nation goes unfulfilled.³⁵

To further explain his notion of virtue, Montesquieu contrasts its role in a republic with its absence in the monarchy style of government. He writes that "it is clear that in a monarchy, where he who commands the execution of the laws generally thinks himself above them, there is less need of virtue than in a popular government."³⁶ The opposite holds true for a republic where an elected official is "sensible of his being subject to their direction."³⁷ Since a republic requires elections and monarchies do not, Montesquieu explains that the role of virtue rests not in the

³⁴ Montesquieu, Charles De Secondat. *The Spirit of the Laws*. Trans. Thomas Nugent. New York: Hafner Pub., 1949. Print. P. 21.

³⁵ Ibid., P. 21.

³⁶ Ibid., P. 20.

³⁷ Ibid., P. 20.

lawmakers or leaders, but in the people themselves. While it is possible for monarchs to be virtuous rulers, it is almost impossible to consider that the people underneath them act with virtue. Instead, they operate with honor within their system of government hoping that the monarch will look upon them with favor and reward their loyalty to him rather than acting out of love for their nation, which would be acting with virtue.³⁸

While republics need the people in order to derive power and their main principle of government, the people are also compensated for their contribution to the system. Another crucial aspect of Montesquieu's political theory involved his notion of political liberty. In his work, Montesquieu expresses the difference between independence, where an actor is free from any control, and liberty. In his discussion of liberty, he observes that "in democracies, the people seem to act as they please; but political liberty does not consist in an unlimited freedom. In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will."³⁹ A proper government then will create laws that are based on virtue to encourage citizens to follow them because "if a citizen could do what they forbid, he would be no longer possessed of liberty, because all his fellow-citizens would have the same power."⁴⁰ Liberties are of the greatest value to the people because they are what a republican government will protect in exchange for the peoples' love and dedication to the nation.

³⁸ Montesquieu, *op. cit.*, P. 23.

³⁹ *Ibid.*, P. 150.

⁴⁰ *Ibid.*, P. 150.

For liberty to be a factor in a republican government, Montesquieu notes, there are two requirements to ensure that the government is not infringing the liberty it should be protecting. The first of these two requirements involves the political doctrine of the separation of powers. In any government, there are three powers: the executive, legislative, and judicial. Each power involves specific duties in a functioning nation, but liberty is corrupted when the same individuals carry out duties from multiple powers. He explains that

“when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”⁴¹

To prevent such a travesty, Montesquieu says that a republic needs to keep the powers separated; meaning those who are a member of one body of political power should not be a member of another. Montesquieu again uses the idea of a monarchy where often the monarch, or the executive, enacts laws and regulations, which is a power meant for the legislative body.⁴² If the same political actors are involved within different branches, violations are sure to occur resulting in the loss of the political liberty.

⁴¹ Montesquieu, *op. cit.*, P. 151-152.

⁴² *Ibid.*, P. 152.

While members from one body should not have power in another, Montesquieu does insist that the different bodies have some form of influence over each other to ensure that one branch is not working against the interest of the people and nation.⁴³ Montesquieu writes that the legislative body should pass legislation, but the executive branch needs to be able to prevent any encroachments of the legislature which would turn the republic despotic. He suggests the executive branch, therefore, should have the power to reject legislation, but that the legislative branch should be the sole body to propose legislation and conduct public debates. The judiciary's role, according to Montesquieu, is to be a passive body that only speaks to the letter of the law. Judges then should not take active positions on issues and legislate from the bench, but simply evaluate laws under the context of the constitution they are operating within. The legislature balances out the powers by being the sole body to create laws, control public funds, and amend constitutions.⁴⁴ A further check on legislative power that Montesquieu suggests is having a legislature that is itself composed of two bodies that would each have the ability to reject each other's proposals. Although the separation of powers was requisite for establishing a government that preserved liberty, Montesquieu further argues that to prevent one body from oppressing the people, each body need to be equipped with the powers that will allow them to check another body's actions to balance the control of government.

The other necessary factor that needs to be involved in a republican government for people to retain their liberty is security. Montesquieu explains how

⁴³ Montesquieu, *op. cit.* P. 150.

⁴⁴ *Ibid.*, P. 159.

important it is for a government to ensure security by stating “in order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.”⁴⁵ By this he meant that it was the government’s responsibility to ensure that laws were in place to reassure the people that their rights and interests were safe. If people believe they will be entering into a system that cannot protect them from other members who mean to do them harm or take advantage of them, then they will not wish to be a member of that system. If citizens do not join the system then the republic lacks virtue. It is therefore in the government’s interest to establish a code of criminal and civil laws that deter violations of security.

While the legislature then is tasked with creating deterrents, Montesquieu insists that a legislator should be “more attentive to inspire good morals than inflict penalties.”⁴⁶ For this to be achieved, Montesquieu asserted that laws that instilled punishments should be derived from the essence of the crime. Punishments needed to be monetary and corporeal to act as a deterrent, but also to ensure that people felt offenses would be dealt with appropriately if they did occur. Along with the rights of victims, Montesquieu also placed great emphasis on the rights of those who were accused. Montesquieu believed that for all criminal accusations and trials, the accused should be judged by those “of the same rank as the accused, or, in other words, his peers; to the end, that he may not imagine he is fallen into the hands of persons inclined to treat him with rigour.”⁴⁷ Without a collection of laws aimed to protect

⁴⁵ Montesquieu, *op. cit.*, P. 151.

⁴⁶ *Ibid.*, P. 81.

⁴⁷ *Ibid.*, P. 153.

every individual's security and protect those who are accused, security would be absent and people would be unwilling to contribute virtue to the republic.

The Spirit of the Laws was an excellent treatise on political history and philosophy. Montesquieu accomplished a great task by looking throughout history at the different forms of government and assessing their strengths and weaknesses. For each form of government, he outlined exactly what was needed for each government to achieve its goals and preservation. Of the different forms of government, it was clear that Montesquieu admired the republics for their ability to foster political liberty, security, and the people's love for their government. Republics were able to offer features of political life that were close to impossible in monarchies and despotic systems. By outlining the necessary factors and potential obstacles of maintaining a republican government, Montesquieu's work operates as a framework for establishing or maintaining the ideals of a republic; a framework that was highly regarded by James Madison.

Chapter 3

MADISON'S TAKE ON MONTESQUIEU

An analysis of *The Spirit of the Laws* reveals the direct influence that Montesquieu had on Madison through the drafting and ratifying processes of the Constitution. Many of the principles that Montesquieu claimed were necessary for a republic are apparent in the writings and ideas of Madison. From his work on the Virginia Plan to the drafting of his own list of amendments, Madison sought to establish a republic based on the framework outlined in *The Spirit of the Laws*. Madison, however, did not follow every one of Montesquieu's suggestions for an ideal republic. His avoidance of certain topics was received with pressure and disdain from certain Anti-Federalists who felt his ideas needed to be more aligned with Montesquieu's. Through different writings, Madison attempted to reconcile the several factors of the major work that he had failed to incorporate while responding to the needs of the new nation. Despite having to compromise on several aspects of Montesquieu's work, Madison still worked to develop a republic that was founded on and required the core concepts Montesquieu expressed.

One of the most significant aspects that Madison did not incorporate was the size of the republic. Compared to past republics, the combination of all thirteen states was larger, and Madison estimated that the population and territory of the nation would continue to grow. Large and diversely populated nations could not make effective republics according to Montesquieu. He explained the issue by pointing out that "in an extensive republic the public good is sacrificed to a thousand private views;

it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent, and, of course, are less protected.”⁴⁸ Montesquieu, however, was basing his analysis on prior republics which were inferior in size or spread out across great distances. While the United States was larger than previous republics, the states were all connected and relied on one another for success. Along with its larger size, the states were certainly not of one mind and did not hold homogenous opinions. Those who came to the colonies were from different countries with different customs, religions, and governmental institutions. It was implausible for anyone to assert that a population of citizen who all held the same vision would ever come to exist. These are just a few of the reasons why the Anti-Federalists disagreed with Madison. They felt he was straying too far from the ideals of a true republic for it to ever work, which is why they preferred connected confederacies over a united republic.

While it is true that Madison did not adhere to every single aspect of a republic that Montesquieu outlined, Madison was hoping to improve upon Montesquieu’s ideas with new theories of his own while making the best of his situation. As far as size was concerned, it was extremely unlikely that any state would volunteer to relinquish part of its territory to allow for a more efficient republic. It should be noted that the Convention was called, after all, to fix the problems of the confederate republic that was currently in place. With no centralized system, there was difficulty fostering trade between states which had different currencies and exchange rates. Madison worried

⁴⁸ Montesquieu, *op. cit.*, P. 120.

about how potential allies would view the disorganized nation if a confederacy was to continue. Instead, Madison worked to develop a system that would connect the states and help them prosper while still guaranteeing each of them their own constitution and republican governments.

It was also true that the citizens of the new nation would never be of one mind and hold the same opinions because of the diverse ways of thinking they had brought with them to the continent. With so many opinions, Madison was worried that some views and opinions would be detrimental to the general welfare and seek to further selfish interests, which Montesquieu condemned in his writing. Like Montesquieu, Madison's plan also relied on the virtue of the people. Although the people would have different opinions, Madison needed them to evaluate the performance of elected officials to ensure they were serving the well-being of the entire nation and not individual interests. Rather than risking the chance of unpopular and dangerous opinions winning a majority by force or corruption, as he discussed in Federalist Paper 10, Madison wanted to establish a large representative system in order to avoid this downfall.

After declaring war on a monarchical form of government and showing no desire for a despotic system, the Framers began working toward establishing a republican style of government. The current confederate republics were unstable and insufficient, and it was unlikely for the nation to survive by maintaining that status. The aspects Madison and the Federalists were criticized for were already an impossible goal for the new nation. Madison did have to make concessions from the idealistic republic described in *The Spirit of the Laws*, but in doing so he created a new republican government and political theory that had not yet been tested. Madison

sought to reconcile the issues he faced while still incorporating the main tenets of Montesquieu's work that were deemed by its author to be essential for republics.

Madison's earliest efforts to replicate the essence of Montesquieu's republican ideals can be found in the Virginia Plan. Through this plan, Madison incorporated two essential features of a republic. First, as Montesquieu writes, the power of a republican government has to come from the power of the people. With the direct election of representatives to the House, the people were able to give power to governmental officials by electing them. Montesquieu also noted that the elected officials needed to create laws based on virtue. Madison's objective was to work toward this ideal by securing "rulers who have enough wisdom to perceive the common good and virtue to remain faithful to it while they are in office," and if they did not adhere to the common good, voters should elect new officials.⁴⁹ The best way to prevent representatives from ignoring the public good was "a limited term which makes them accountable to the voters who will consist of the great body of the people. Those whom they elect will be the candidates whose merits justify this honor in the voters' judgment."⁵⁰ The reason Madison argued for short term limits in the House was because "frequent elections ... make representatives habitually conscious of their 'dependence on the voters'."⁵¹ This would mean, however, that for the republic to function properly the people would have to be invested in their government and its officials to ensure they were serving the interests of the nation. Although the

⁴⁹ Morgan, *op. cit.*, P. 63.

⁵⁰ *Ibid.*, P. 63.

⁵¹ *Ibid.*, P. 64.

population was large, the proportion and accountability of representatives was still established by the Constitution to ensure that virtue was at the core of the republic.

Having a bicameral legislature was also an idea that is directly stated in *The Spirit of the Laws* as being necessary so that the two houses could check each other. Madison's exact reason for enacting and fighting for a bicameral legislature was that the Senate would be able to prevent the passing of frivolous and unnecessary laws and that the House would be the direct link between Congress and the people. It was argued that because of the size and diversity of state populations representatives would not be capable of learning their constituents' interests. While this was a factor of each state, that does not speak to the essence contained within Montesquieu's work. Throughout the entire treatise Montesquieu insists that private interests need to be set aside to make room for what was best for the republic. Madison called for the same attitude from voters to ensure that the system would work properly and that the republic would flourish.

Madison also looked to Montesquieu when the idea of three separate powers was developing at the Convention. The Constitution called for three different branches each with its own set of responsibilities. Through the Constitution a system of checks and balances was established that seemed to stray slightly from *The Spirit of the Laws*. Rather than only having checks established as Montesquieu argued for, the Framers also developed balances to distribute powers in the hopes of avoiding one branch controlling too much of the government. Some argued that this was the opposite of Montesquieu's intention which was to have no government overlap, but there was a "failure to observe that Montesquieu's doctrine was operational rather than

structural.”⁵² His examples of the separation of powers doctrine failed involved rulers who fully attained powers from more than one branch. According to the Constitution, the judiciary and the executive did not pass laws, but the judiciary would review legislation by the letter of the law to avoid arbitrary decisions. The executive was able to veto legislation which Montesquieu favored when he said the executive needs the power of rejecting. The checks system in *The Spirit of the Laws* was meant to avoid allowing an individual or group to control an entire enumerated power of government, which was not the case in the United States Constitution.

Montesquieu’s next condition for a republic involved civil and criminal laws where the punishments were derived from the essence of a crime and a process where criminal trials would involve a fair trial by a jury of peers. Looking to the Bill of Rights, it is clear under the Eighth Amendment cruel and unusual punishments are forbidden. The earliest draft of Madison’s bill of rights contained his favorite amendment which included the right to quick public trials, knowledge of the accusations against oneself, and a jury on all criminal trials. The Sixth Amendment ensured all of these rights and the Equal Protection Clause passed in 1868 made sure no state could deny a citizen these rights. Madison fighting for both of these amendments exemplifies his commitment to ensuring the foundational requirements that Montesquieu required to establish a republic were satisfied.

Throughout his essays in *The Federalist Papers*, Madison presented the ideas behind the Constitution which aligned with the republic principles contained in *The Spirit of the Laws*. In Essay 10, he discussed his fear of factions which could develop

⁵² Morgan, op. cit., P. 71.

out of the diverse population and how he planned the structure of the legislature to avoid that issue. By setting up a representative system, which he outlined in Essay 52, the power was guaranteed to stay in the hands of the people and not enter into the hands of mob rule. Since a pure democracy was avoided, those who were making the decisions were a safeguard to factions and were able to work toward what was best for the nation.

Without the possibility of achieving every standard Montesquieu set forth, the project that Madison and the other Framers took on was a difficult one. They did not have the opportunity to establish a homogenous and small nation. A division in backgrounds and economic markets made it a necessity that all states join the republic. Madison did the best he could to compensate for the aspects he missed by developing a new type of republic. Though some of Montesquieu's republic ideals were accomplished and others were not, the Constitution did establish a republican government that relied on the essentials of *The Spirit of the Laws*. Madison's inventive application of Montesquieu's work would be a test to see if the central government of a large and diverse nation could maintain republican principles. A current evaluation can be done to see if the factors that were missed have affected the current state of the republic and if Supreme Court precedent and new legislation have altered Madison's approach to developing a nation based on the republican principles of political liberty and security.

Chapter 4

THE SUPREME COURT AND POLITICAL LIBERTY

Over two hundred years have passed since the original thirteen states ratified the Constitution. Since then, the United States has been subject to years of new legislation, constitutional amendments, and judicial precedents which have had a significant impact on the state of the republic that exists today. Along with the massive expansion of the country, the United States went on to guarantee universal suffrage and amended the constitution to allow for the direct election of both houses of Congress. The executive and legislative bodies of government have grown due to the increased population and evolving interpretations of the Constitution which has granted them new powers and responsibilities.

The Framers incorporated an amendment process because they did not know what the future would hold for the nation. Rather than having to develop an entirely new document, amendments and legislation would allow for Congress to respond to the changing needs of the nation. There have been many attempts to evaluate the current state of the United States republic due to over two-hundred years of changes, implicit powers, and new amendments. By referring to the framework of Montesquieu and the applications made by Madison, an analysis of the republic is possible through the decisions and reasoning of Supreme Court cases. The Supreme Court is the proper judicial body to be evaluated because it is the court that deals with the issues of federalism that Madison established through his contributions to the Constitution. Looking at several major decisions that involved each of the essentials outlined in *The*

Spirit of the Laws and utilized in Madison's arguments and writings allows us to determine if the United States is a republic capable of protecting political liberty and security in the sense that Montesquieu and Madison envisioned it. In order to select the proper cases, I looked to the areas of government that Madison and Montesquieu both commented on. The cases where both thinkers expressed their ideology on political liberty involve the separation of powers, representation, and elections. Instead of tracing the Court's history on each of these topics and highlighting mistakes that the Court has made over the years, the relevant cases chosen are the most recent landmark cases that created the current precedent in these areas.

When evaluating the status of legislation within the context of the Constitution, the reasoning contained in Supreme Court decisions is the most effective tool to determine whether the nation is currently upholding the same ideals of political liberty and security. The Court assumed its current prominent role beginning in 1801 with the landmark case *Marbury v. Madison*. The case involved the appointment of an official near the end of John Adams's presidency which was not completely finalized when Thomas Jefferson's administration took over. Once the Court established "that the [President] conferred on him a legal right to the office,"⁵³ they had to determine if the Court had the ability to evaluate actions taken by the other two bodies. Chief Justice Marshall argued in his majority opinion that the Court did under a principle of judicial review. Marshall explained that the essence of the Supreme Court's judicial duty meant the "courts are to regard the Constitution, and the Constitution is superior

⁵³ Stone, Geoffrey R., Louis Seidman, Cass Sunstein, Mark Tushnet, and Pamela Karlan. *Constitutional Law*. Seventh ed. New York: Wolters Kluwer Law & Business, 2013. Print. P. 27.

to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.”⁵⁴ Since the Constitution was fundamentally the supreme law of the nation, laws are to be judged within the Constitution’s context. As Marshall wrote, “the judicial power of the United States [therefore] is extended to all cases arising under the Constitution.”⁵⁵ The precedent Marshall set forth in this opinion meant that any issue or piece of legislation enacted by the states or Congress was liable to be judged by the Supreme Court based on its constitutionality.

Since the *Marbury* decision, the Court’s checking power of judicial review has decided many cases involving the essential tenets of a republic and the ideas of political liberty and security. With issues arising that the Framers did not anticipate, the legislative and executive branches would sometimes test their limits and overstep their boundaries. In some cases, a slight overstep was allowed under implicit powers, but in others the Court condemned the breach of the separation of powers doctrine. One such case, *Clinton v. City of New York* (1998), involved a lawsuit initiated by New York City against an act of Congress. Congress had passed the Line Veto Act that would allow the president, who at that time was William Clinton, to use his veto power on provisions of legislation instead of the entire bill. After President Clinton used this new power on the Balanced Budget Act of 1997, several organizations from New York sued, and the Supreme Court determined they had been wronged. Justice Stevens in his opinion wrote there was “no provision in the Constitution that

⁵⁴ Stone, op. cit., P. 31.

⁵⁵ Ibid., P. 31.

authorizes the President to enact, to amend, or to repeal statutes.”⁵⁶ The Court referenced the Presentment Clause of the Constitution which outlines how a bill becomes a law and determined that the President had the power to only accept or reject a bill in its entirety.

Through this decision, the Court upheld two of Montesquieu’s ideals about the separation of powers. One, that the executive check should be the power of rejecting and not editing legislation. Second, by having the ability to remove only certain sections of a bill, the president was in effect creating a new piece of legislation and altering it from its original intent. Since creating legislation is specifically a power reserved for the legislature, the Supreme Court made the appropriate decision for the republic. This case is just one example of the Court adhering to the ideal that the power should remain with the people and not with one leader to do whatever they please with it.

While the President does not have the ability to alter legislation, the President is given the authority to create treaties with other nations under his enumerated powers in the Constitution. Although the President can make an agreement with a foreign power, he cannot create an agreement that alters or creates a law in the United States. In *Medellin v. Texas* (2008) the Supreme Court confronted the issue of foreign agreements and the effects they had on United States legislation. In this case, Jose Medellin, a Mexican national, was sentenced to death for the gang rape and murder of two teenage girls in Houston. He cited Article 36 of the Vienna Convention which gives any foreign national detained for a crime the right to contact his consulate.

⁵⁶ Stone, op. cit., P. 427-428.

Since the President of the United States signed this treaty, he argued that the courts had to follow its terms.⁵⁷ His claim was denied despite the President's instruction to state courts to follow this part of the Vienna Convention. Medellín claimed that the President's powers to enact foreign agreements allowed the President to ensure that the states were upholding those national agreements. Texas argued that the Convention did not consider the procedural rights of each state and that the President was not granted the ability to enforce national agreements because it would essentially be a law-making power. The Supreme Court affirmed Texas's response and determined that the President did not have the capabilities claimed by Medellín. In their decision, the Court explained how a signed treaty was not self-executing, meaning that it was "ratified with the understanding that it is not to have domestic effect of its own force."⁵⁸ To affect domestic legislation, Congress would have to enact it into law, which they had not done with the agreements of the Vienna Convention. While the Court did concede that Congress is permitted in some cases to defer legislative power to the President, they noted how "a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers" had never been acquiesced by Congress.⁵⁹ In the absence of such a precedent, the Court affirmed the separation of powers and stated that "the responsibility for transforming an international obligation arising from a non-self-

⁵⁷ Stone, *op. cit.*, P. 386.

⁵⁸ *Ibid.*, P. 387.

⁵⁹ *Ibid.*, P. 388.

executing treaty in domestic law falls to Congress.”⁶⁰ Without Congressional acquiescence, the President’s attempt to have the states follow the agreement was unconstitutional. By ruling against the President’s actions, the Supreme Court made sure to close a backdoor method for the President to enact laws, which is a power the President was never meant to have.

While the Court has made efforts to prevent the President from usurping any of the powers reserved for the legislature, there is also a history of the Court ensuring that Congress does not infringe or nullify powers specifically reserved for the President. In one major case, *Immigration and Nationalization Service v. Chadha* (1983), the Court evaluated the constitutionality of the Immigration and Nationality Act, a law enacted by Congress which gave either house the ability to invalidate and suspend the deportation rulings of the Attorney General. Chadha had remained in the United States longer than his visa allowed, but the Attorney General granted Chadha permanent citizenship in accordance with a power that Congress granted to the executive branch. Without taking any record of a debate, the House of Representatives voted to deport Chadha, effectively vetoing the executive action of the Attorney General. Once the Supreme Court stepped in, it determined the one house veto to be unconstitutional because “Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”⁶¹ The Court affirmed that the only circumstances in which one house could work alone was outlined explicitly and unambiguously in the Constitution, and immigration

⁶⁰ Stone, op. cit., P. 387.

⁶¹ Ibid., P. 431.

procedures were not among those circumstances. Since Congress had not yet revoked the power it granted to the Executive, and therefore the Attorney General, they were forbidden from using the one house veto to regulate what is technically an executive power.

The Supreme Court has a long history of ensuring that the other two branches do not overstep their boundaries, and it has also made attempts to be self-editing to make sure that the Court does not violate the powers guaranteed to them. One way that the Court avoids usurping the roles of the other branches is by refusing to answer political questions. This maneuver was first applied in *Luther v. Borden* (1849) where the Court established the political question doctrine. In this case, the Court determined that it only had the ability to hear legal questions that arose under the provisions of the Constitution and that political questions were to be answered by either Congress or the President. In this case, the political question at hand was deciding which of Rhode Island's two governments was to be recognized as the official republican government of the state. The government that was established by the state's charter restricted electorate eligibility based on property ownership, and a rebellion formed to create what was believed to be a more republican government by omitting such a restriction. Under the Guarantee Clause of the Constitution, which ensured every state the right to a republican form of government, the Court determined that Congress held the power to resolve the dispute and recognize the ensured and protected form of government for the state of Rhode Island. The Court left the decision to Congress because "when the senators and representatives of a State are admitted into the councils of the Union, the authority of government under which they are appointed, as well as its republican character, is recognized by the proper

constitutional authority.”⁶² Since Congress would effectively recognize a state government by allowing its members to take part in Congressional proceedings, it was their duty to decide which government was the official one. After determining that the power was vested in Congress, the Court noted that the “decision [between the governments] is binding on every other department of the government, and could not be questioned in a judicial tribunal.”⁶³ Once the Court determined it was not the proper authority on the subject, it remanded the decision to Congress, thus expressing its respect for its own boundaries.

From this judgment which was entered in 1849 up until the latest political doctrine question answered in *Nixon v. United States* in 1993, the Court has identified several political questions which that have directed to Congress or the President. Two cases involving significant Constitutional topics were *Coleman v. Miller* in 1939 and *Goldwater v. Carter* in 1979. *Coleman* addressed an issue of the constitutional amendment ratification process. The Framers of the Constitution did not specify how long a state had to act on a proposed amendment. When the Court was presented with the issue of Congress’s ability to impose a deadline on the states, the Court expressed that there was no legal criteria upon which it could base a judgment. Several justices expressed agreement that the question at hand was also political because of the “great variety of relevant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice.”⁶⁴

⁶² Stone, op. cit., P. 137.

⁶³ Ibid., P. 137.

⁶⁴ Ibid., P. 135.

Since there are many considerations and factors that must be evaluated for the ratification of an amendment, the Court determined that a political body was the one best suited to research these conditions and move forward with the process. The Court once again exhibited its ability to recognize and respect the boundaries of power by refusing to answer a political question that would have given them a part in Congress's power to legislate and amend the Constitution.

In *Goldwater v. Carter* the Supreme Court evaluated the President's ability to nullify a treaty with a foreign nation. While the Court had asserted that the President has the right to enact treaties, Congress argued in this case that President Carter overstepped this power by nullifying an agreement with the Republic of China in order to make a new agreement with the People's Republic of China without approval of the Senate. The Court once again left the decision to the President, realizing it was not to implicate new laws on foreign policy that were not outlined in the Constitution. Noting that "while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty."⁶⁵ Without a clear answer in the Constitution, the Court once again recognized the issue did not warrant a judicial review. While no clear decision has been made regarding the President's ability to nullify treaties, *Goldwater* is still a great example of the Court avoiding issues that are outside of its power.

Along with ensuring the separation of powers, another aspect of political liberty involves representation and electoral procedures. In several of the previously mentioned cases, the Supreme Court entered judgments that ensured lawmaking

⁶⁵ Stone, op. cit., P. 130.

powers were reserved for Congress because that is how power is kept in the hands of the people. Representation and election law is a vast field due to states having different governmental structures and varying electoral procedures. Several fundamental issues related to both topics have reached the Supreme Court, which has made efforts to ensure that in a changing nation state governments and elections are maintaining the essence of the republican processes set forth by Madison.

Ever since the ratification of the Constitution, there have been various attempts to restrict who is able to vote and therefore be represented. Great efforts were made by Congress to protect representation by extending the right to vote to people of all races and to women as well. Other state statutes, however, have been used to target minorities or certain classes of people to prevent them from voting. One of the most prominent cases that deals with discriminatory practices in a state election was *Harper v. Virginia* in 1967. Virginia required payment of a poll tax in order for a citizen to be eligible to vote. The poll tax was used to run the elections and did cost a minimal fee, but some still felt burdened by the expense. The Supreme Court also had an issue with the tax and struck down Virginia's practice. Making an argument under the essence of the Equal Protection Clause, the Court deemed that "wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."⁶⁶ Deeming affluence and the payment of a tax to be irrelevant factors, the judgment of the Court ensured that those who are less affluent and in a lower class would still be able to voice their opinions and seek representation.

⁶⁶ Stone, op. cit., P. 781.

Despite the passing of the Equal Protection Clause and the 15th Amendment, states would continue to implement new methods that attempted to discriminate against minorities and their access to voting and representation. One such case that involved a state's attempt to avoid representing their minority citizens was *Hunter v. Erickson* in 1969. Akron, Ohio amended their city charter to require that "ordinances regulating real estate transactions 'on the basis of race, color, religion, national origin or ancestry' had to be approved by the voters before taking effect."⁶⁷ Although the amendment seemed not to discriminate against any specific class of people, the Court pointed out that even though "the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that."⁶⁸ Recognizing the referendum amendment had no compelling governmental purpose, the Court struck it down because it "disadvantages those who would benefit from law barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor."⁶⁹ This case shows how the Court goes beyond the explicit aspects of a bill and looks to its application to see if political liberty is at stake.

The Supreme Court has weighed in on many issues involving the elections of officials and voting rights, but it has also passed judgments to make sure that once

⁶⁷ Stone, op. cit. P. 537.

⁶⁸ Ibid., P. 538.

⁶⁹ Ibid., P. 538.

elections have been conducted the citizens are represented by those they have chosen. One case in which the Court ensured the peoples' elected officials remained in power was *Powell v. McCormack* (1969). Representative Adam Powell was reelected to his seat in the House of Representatives, but his colleagues sought to exclude him after discovering that he was inappropriately using House funds. After his reelection, the House passed a resolution to prevent Powell from taking his seat in the House. He raised the issue before the Supreme Court who affirmed that while either house can expel members, they do not possess the power to exclude members under Article 1, section 5, of the Constitution which outlines the requirements for membership in the House. The Court agreed with Powell's argument and after evaluation determined "that the Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all of the requirements for membership expressly prescribed in the Constitution."⁷⁰ While Powell did have a questionable character, this case shows the Supreme Court protecting elected representatives. If either house had the ability to exclude members then elected officials could move to exclude their ideological opponents and silence their opinions. This case ensures that once the people have spoken and have properly elected an official, their voice is protected.

One factor that was not as prominent during the time of the Founders was the establishment and power of political parties, specifically the Democratic and Republican Parties. While a great deal of the population identifies with one of these major parties, not every citizen does, and often third party or independent candidates

⁷⁰ Stone, op. cit., P. 129.

are elected due to their significant support. The Supreme Court in *Anderson v. Celebrezze* (1983) sought to ensure that non-major parties were given the same protection as the major parties so that the people would be able to vote for the representative who they identified with. This case involved a practice in the state of Ohio that set a deadline for independent candidates to register for the ballot before major party candidates were required to do so. At the outset of their decision, the Court expressed its “primary concern [was] with the tendency of ballot access restrictions to ‘limit the field of candidates from which voters might choose.’”⁷¹ The Court commented on how during elections

“various candidates rise and fall in popularity; domestic and international developments bring new issues to center stage and may affect voters' assessments of national problems. Such developments will certainly affect the strategies of candidates who have already entered the race; they may also create opportunities for new candidates.”⁷²

Along with election cycles, the Court noted how major parties in Ohio would still have an additional five months to determine their nominee and plan a strategy for moving forward. Independent candidates would not be able to respond to major party campaigns or take advantage of any dips in popularity, despite a history of independents emerging victorious after major parties had designated their nominees. The Court shifted its emphasis on the candidates later in its opinion and focused on the burden the Ohio practice placed on voters. The Court ultimately struck down the statute by noting

⁷¹ Gardner, James A., and Guy-Uriel E. Charles. *Election Law in the American Political System*. New York: Wolters Kluwer Law & Business, 2012. Print. P. 468.

⁷² *Ibid.*, P. 469.

“A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and - of particular importance - against those voters whose political preferences lie outside the existing political parties.”⁷³

The cost the state placed on voters and their rights of association and political speech was too great to justify. By striking down this practice, the Court made an effort to ensure that states are not working against smaller parties to limit competition and stifle the voices of a group of voters. This new precedent enhanced the idea that there are voices outside of the major parties, so all potential candidates should be afforded the same rights and opportunities.

While the Court in the previous case demonstrated a respect for political speech and its role in the election process, it has made decisions to note that such speech is not absolute. In *Burson v. Freeman* (1992) the Court demonstrated that political speech can be restricted in order to protect the integrity of the entire electoral process. In this case, the state of Tennessee enacted a statute that prohibited the solicitation of votes within 100 feet of a polling place. While the statute worked against the dissemination of ideas and political communication, the Supreme Court allowed this restriction because of the legitimate state interest it served. The Court examined the history of the ballot casting process in the United States and determined that there were “two persistent evils: voter intimidation and election fraud” and therefore agreed that “this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the State’s compelling interests in preventing [those evils].”⁷⁴ The Court decided that election fraud is often difficult to

⁷³ Gardner, op. cit., P. 470.

⁷⁴ Ibid., P. 589.

detect, so the restrictive area created by the 100 foot barrier was suitable for serving the state's interest. By prohibiting campaigning and vote solicitation near the polling place, the state was trying to protect voters from negative pressures and influences, similar to Madison's worry of factions. The Supreme Court is extremely cautious when it comes to restricting speech, but the benefits of this restriction helped to ensure the efficient and free elections that a republic requires.

Chapter 5

THE SUPREME COURT AND SECURITY

While there is a vast precedent concerning political liberty, many cases involving security take place at the state level. Montesquieu stated that extensive and detailed civil and criminal codes were necessary so that citizens would be aware of their rights and how offenders would be treated. These codes do exist, but at the state level. Even though the states are tasked with establishing their own individual civil and criminal procedures, there have been several landmark Supreme Court cases which dealt with Montesquieu's idea of security. Rather than evaluating each state's criminal and civil codes in this work, the focus of this section will be whether the federal government has respected Montesquieu and Madison's shared ideas on punishment, the peoples' right to evaluate the judicial process, rights of the accused, and national security. The Court over time has made several rulings in these areas, but the cases included have established the current precedent that is followed today and will again focus on Montesquieu's ideas and what Madison fought to include in the Constitution.

The most extreme criminal violation in any state is murder. For Montesquieu this is a difficult topic because there is no way to compensate the victim of that crime. To ensure citizens that there will be justice for victims of a crime like murder, criminal codes should outline murder punishments in a way that acts as a deterrent and results in an appropriate penalty. Capital punishment is still a highly debated issue in several states, but Montesquieu had a clear answer when it came to his feelings on the death

penalty in society. In *The Spirit of the Laws* he discusses the ultimate threat to security and its punishment by claiming that

“the punishments inflicted upon the latter crimes are such as are properly distinguished by that name. They are a kind of retaliation, by which the society refuses security to a member who has actually or intentionally deprived another of his security. These punishments are derived from the nature of the thing, founded on reason, and drawn from the very source of good and evil. A man deserves death when he has violated the security of the subject so far as to deprive, or attempt to deprive, another man of his life. This punishment of death is the remedy, as it were, of a sick society.”⁷⁵

The Supreme Court held a similar position which was detailed in their decision in *Gregg v. Georgia* (1976). In this case, several states were dealing with the issue of the death penalty and how it applied to the Eighth Amendment, which bans cruel and unusual punishments. The Court first looked to the Framers and noted that “the existence of capital punishment was accepted by the Framers [because] at the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State.”⁷⁶ Although it allowed the punishment in this case, the Court was careful to make sure its language was tailored to situations of deliberate murder. In future cases, the Court would continue to use restrictive language to make sure the death penalty would not apply to cases of rape or mentally-handicapped offenders. The Court also looked to citizen responses to the death penalty and found that a large population was in favor of the death penalty in murder cases. In their opinion, the Court reiterated Montesquieu’s feelings on the punishment by stating

⁷⁵ Montesquieu, op. cit., P. 187.

⁷⁶ Schubert, Frank A. *Introduction to Law and the Legal System*. Tenth ed. Boston: Wadsworth, 2012. Print. P. 52.

“the death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders. In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”⁷⁷

While Montesquieu does state that death is a permissible sentence in murder cases, the Court could have insisted on a different punishment, such as incarceration for life. According to Montesquieu, a punishment is effective when people trust that it will deter crime and includes the government returning the liberty that was taken away. In the republics that Montesquieu studied, it is possible that public executions or cruel sentences were used as a deterrent, but such punishments are not present in American society today. If the people of a state accepted a punishment other than death, it would still align with the principle behind Montesquieu's writing. By allowing the most severe punishment for the most severe infringement of one's security, the Court aligned itself with the principle Montesquieu set forth by allowing a penalty that citizens feel protects their security and brings justice to a victim's case, but in today's society another punishment may be appropriate instead of capital punishment.

A topic intimately related to Montesquieu's criminal and civil law requirements for security is the notion of fair trials. Without fairness throughout the trial system, the public will mistrust the judiciary which then creates a threat to security. Citizens will be apprehensive to cooperate with a system they feel is corrupt and not providing the assurance that their rights will be recognized and protected. In

⁷⁷ Schubert, op. cit., P. 53.

Richmond Newspaper Inc. v. Virginia (1980), the Supreme Court heard a case where a Virginia judge closed a murder trial to the public. Although both the prosecution and the defense agreed to the closure, two reporters from a local newspaper filed suit for being excluded from the trial. The Court ultimately decided that closing the trial to the public was impermissible because of the benefits that a public trial would afford society. The main benefits being “giving assurance that the proceedings were conducted fairly to all concerned and discouraging perjury, the misconduct of participants, or decisions based on secret bias or partiality” and the therapeutic benefit to society.⁷⁸ The Court acknowledged that “when a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. To work effectively, it is important that society's criminal process ‘satisfy the appearance of justice.’”⁷⁹ The Court also went on to make a First Amendment argument by stating that “free speech carries with it some freedom to listen.”⁸⁰ From the arguments the Court evaluated, it determined that closing trials without satisfying a compelling interest violated an individual’s First Amendment rights in a place of permitted assembly where the public had a vested interest of ensuring justice is carried out in court. This ruling helped to maintain peace of mind for citizens who had an interest or a worry in how criminal or civil codes were being handled by the judiciary.

⁷⁸ Stone, op. cit., P. 1429.

⁷⁹ Ibid., P. 1429.

⁸⁰ Ibid., P. 1430.

In other cases, the Court has ensured that citizens have access to information to be able to follow cases of high interest to evaluate the results of the judicial system. *Cox Broadcasting Corp. v. Cohn* (1975) involved the case of a rape victim who was killed. The information, including the victim's name, was reported on a local television news station which violated a state statute that granted privacy to rape victims. While the Supreme Court recognized that individuals are guaranteed a zone of privacy, they determined that the benefits the public receives from the reporting of such information outweighs the cost to privacy. The Court sided with the public by accepting that "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."⁸¹ Specifically, they noted that "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."⁸² By preventing the press from publishing the information, the state was removing a channel of information that the public uses to check their judiciary. The names of victims and the facts of a case are crucial elements that a citizen would need in order to follow the case throughout the system. Once again, the Court stuck to the ideals of *The Spirit of the Laws* by allowing the people the chance to evaluate their criminal and civil justice system by providing them with the necessary means.

⁸¹ Stone, op. cit., P. 1157.

⁸² Ibid., P. 1157.

Along with the public having access to trials and criminal and civil proceedings, the rights of the accused are also a concern for a community evaluating judicial integrity. As Montesquieu wrote, the accused in a trial has a right to be tried by a body of people who are not predisposed to convicting him. This right was protected in the Supreme Court's decision in *Strauder v. West Virginia* (1880). The accused in this case was an African American man who was tried by a jury consisting of only white citizens in accordance with a state statute. The Court struck down this statute under the Fourteenth Amendment claiming that not allowing African Americans to serve on a jury was an "impediment to securing to individuals of race that equal justice which the law aims to secure to all others."⁸³ Along with the unconstitutionality of barring a race from the civic opportunities of others, the Court recognized "it is well known that prejudices often exist against particular classes in the community which sway the judgment of jurors and which therefore operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."⁸⁴ Ultimately the Court determined that it was "hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State."⁸⁵ By enforcing the Equal Protection Clause and asserting the right of racial minorities to serve on juries, the Court took a step in protecting accused individuals from those who may not hear their case fairly.

⁸³ Stone, op. cit., P. 522.

⁸⁴ Ibid., P. 522.

⁸⁵ Ibid., P. 522.

The Court has also protected the right of an accused to select representation for their case. *United States v. Gonzalez-Lopez* (2006) involved a federal level criminal case where the court denied the accused, Cuauhtémoc Gonzalez-Lopez, to be represented by the attorney he had chosen and paid. Gonzales-Lopez lost his trial, but appealed because he was initially denied the right to select his counsel. The lower court claimed the attorney he had chosen had broken a court rule in a previous trial unrelated to Gonzalez-Lopez and, therefore, could not represent Gonzalez-Lopez in his case. The appeal reached the Supreme Court which ultimately defended an accused's right to select their counsel. In attempting to assess the effect the court's denial had on the defendant, the Supreme Court noted how different attorneys will take different approaches to every aspect of the trial and any other procedures that take place. Justice Scalia in his majority opinion explained that "the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides to go to trial. It is impossible to know what different choices the rejected counsel would have made."⁸⁶ Since the harm could not be measured and evaluated, the Court determined that the denial to chosen counsel was an egregious structural error on the part of the lower court. This error had such an impact on the defendant's case that the Court deemed the lower court's actions were an unconstitutional infringement of an accused's right to representation.

The security of individuals comes not only from criminal and civil laws, but from the defense of the nation which is a responsibility of the both Congress and the President. With the powers to declare war and deploy troops respectively, they are

⁸⁶ Schubert, op. cit., P. 288.

both tasked with ensuring the nation's security from foreign powers. One case that involved the powers of war and the idea of security was decided in response to the attacks on Pearl Harbor and the resulting war with Japan. In *Korematsu v. United States* (1944), the Court evaluated certain procedures the military took with Congress's graces. Congress approved of military actions that called for the detainment of American citizens of Japanese descent living in the West on the basis of national defense and the risk of espionage. It was clear that the rights and liberties of Japanese American citizens were being violated. They were taken from their homes and were given curfew hours that prevented them from being outside after a certain time at night. The Court, however, determined that the military actions were not hostilities against this race. In the majority opinion, the Court determined that Korematsu was

“excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders-as inevitably it must-determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot- by availing ourselves of the calm perspective of hindsight- now say that at that time these actions were unjustified.”⁸⁷

While those of Japanese descent had their liberties and freedoms taken away, other citizens felt safer now that action was being taken after the attack. The Court

⁸⁷ Stone, op. cit., P. 524.

recognized that their liberty was being suspended, but reasoned that the welfare of the nation took precedence.

While this decision may seem surprising, it does reflect Montesquieu's notions of the powers of government and security. In *The Spirit of the Laws*, he writes that if

“the legislature think itself in danger of secret conspiracy against the state, or by correspondence with a foreign enemy, it might authorize the executive power, for a short and limited time, to imprison suspected persons, who in that case would lose their liberty only for a while to preserve it forever.”⁸⁸

Montesquieu recognizes that in times when espionage and foreign powers threatened the well-being of the nation, the legislature is able to approve of executive actions that could suspend a suspect class of people to protect the nation. The issue with this case is that the executive branch determined which citizens should have their rights taken away without the legislature discovering an actual threat. Without basing their suspicions on anything factual, the President and the military did take inappropriate measures in this case. The military action was also underinclusive because it did not question the loyalty of citizens that descended from the other Axis Powers that were allies with the Japanese Empire. The citizens who had their rights suspended did not do anything that would bring their loyalty to the United States into question. The action taken by the executive of sending an entire group of people to internment camps without due process or an acknowledgment for their liberty was an inappropriate measure even in wartime.

Although the result of Court's decision seems to align with Montesquieu's writings on security, it is contradictory to his writings on political liberty.

⁸⁸ Montesquieu, op. cit., P. 154.

Montesquieu's writings allow for the imprisonment of individuals that are found by the legislature to be conspiring against the republic. The executive, instead, deemed an entire race of people to be conspirators. While the Court accepted the idea that a citizen's rights could be suspended to protect the liberty of all, Montesquieu would have disagreed that the application of this principle in *Korematsu* was appropriate because of the lack of due process and evidence against any individual citizen.

Chapter 6

CONCLUSION

Throughout this work, it has been demonstrated that Madison's plans and ideas are still in effect today. Although he is highly credited with helping to create and develop the United States Constitution, he had many critics during his time. The Anti-Federalists were outraged by Madison's new republic and proclaimed that it was their ideals that were in accordance with Montesquieu, not his. However, looking to the motivation and ideas fueling the plans Madison wanted to instill in the Constitution shows that he relied heavily on Montesquieu's core principles. For a republic to survive, it needs virtue which is only attained when people accomplish their civic duty for the common good. By developing a plan that required direct elections with the focus on short term limits to result in frequent elections, Madison was creating a government that would have to listen to the people and respect the common good. Though his outline did not precisely follow Montesquieu's, the functional separation of powers and his fight for the right to trial by jury in all cases reflects Madison's steadfast attempts throughout the drafting and ratification processes to keep the essence of Montesquieu's political philosophy.

Since the ratification of the Constitution, the Supreme Court has heard many cases and entered judgments relevant to the two necessary tenets of a republic, political liberty and security. In its decisions, it has often upheld major aspects of both tenets. Over time, the Court has ensured that citizens have access to their right to vote and are able support the candidates of their choosing, effectively keeping the power in

the hands of the people. It has affirmed the boundaries between itself, Congress, and the President to avoid one branch from acquiring a level of power that Montesquieu expressed was detrimental to a republic.

While criminal and civil codes fall under the police powers of the states, the Supreme Court has heard several cases that have continued to protect the liberty of victims and the accused. By making several declarations that the supreme law of the land insists on access to trial information, the Court has allowed the public the ability to evaluate their judicial system to determine if their rights are being protected. The Court has also made efforts to ensure that Madison's principle of access to fair trials and juries has been protected. In cases of national security, the Court has shown it is willing to take extreme measures by aligning with Montesquieu's notion of security in order to guarantee liberty will prevail.

This study revealed that the government is capable of protecting the principles of a republic, although it is an incomplete assessment of the republic. In order to truly evaluate the nature of the current United States republic, additional research is needed to determine the current status of virtue in the republic that Montesquieu detailed in his work and that Madison relied on when setting up the structure of the federal government. Since virtue is the other necessary pillar of a republic along with the government's role of providing political liberty and security, a complete evaluation of any republic would have to include research on the people as well. A study focused on virtue would have to examine voter turnout rates, the influence of money in elections, and the knowledge of voters on issues pertinent to the well-being of the republic. The criminal and civil codes of every state republican government would also have to be assessed to see if every aspect of security is being protected. This

study, however, has showed that the federal government that Madison established is capable of accomplishing its role in a republic. Even when the government fails or an issue is handled incorrectly, the Supreme Court and the people have the power to work toward correcting those mistakes by establishing new case law and electing officials who are willing to do what is best for the republic.

Not every aspect of Madison's plan was a reflection of Montesquieu's work, but he resolved the differences between the nature of previous republics and of the United States at the time of the Constitutional Convention. His improvisations resolved the issues of the struggling new nation, protected state and individual rights, and relied upon the same elements Montesquieu defined in *The Spirit of the Laws*. Though it took many years and multiple decisions to arrive at correct results, the Supreme Court has made efforts to keep the principles of political liberty and security present in the United States republic. While many believed that Madison's government strayed too far from the ideal republic, the Supreme Court cases presented in this work demonstrate that the government established by the Constitution is capable of maintaining political liberty and security and has made efforts to continue working towards that ideal over time.

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