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From The Constitution and America's Destiny

"Politicians, not philosophers, political scientists, or plundering speculators": that is how Professor David Brian Robertson describes the framers of the Constitution. They understood how compromises were made. Robertson takes us into the minds of the framers—or at least into what we think they were thinking. We learn about James Madison, in particular, and the pragmatic approach he took toward creating a document that all delegates could accept. In explaining Madison's strategy, Robertson mentions some of the key features of the Constitution that are basic to an understanding of American government. National and state governmental power, the roles of the House and the Senate, the power of the executive, the authority of the courts are all delicately balanced. The result, observes Robertson, is a system that is "hard to use." That was the plan. Only through the skillful use of the Constitution's many impediments and ambiguities can results be achieved. Many different groups must be brought together and kept together for any action to take place. Throughout American history, and today, smart politicians have known how to do this. That was the plan.

[T]here can be no doubt but that the result [of the Constitutional Convention] will in some way or other have a powerful effect on our destiny.

—JAMES MADISON to Thomas Jefferson, June 6, 1787

WHAT PROBLEMS WERE THE U.S. CONSTITUTION'S authors trying to solve? How did they imagine their Constitution would answer these problems? We know the framers intended to change America's destiny, and we know they succeeded. But how did they intend to transform the way American government uses its power and the way Americans use their government? What kinds of politics were the delegates to the Constitutional Convention trying to make—and what kinds of politics *did* their design make? For all that has been written about the Constitution, we do not have satisfactory answers to these questions.

Practicing politicians wrote the Constitution, and they expected politicians to use it. To understand the enduring effects of the Constitution on America's destiny, we need to know what its designers thought they were doing. We need to understand the circumstances that convinced these

politicians that they could and should reconstitute the nation's government. We need to understand precisely how these circumstances shaped their strategies for building a new government. We need to reconstruct how these politicians used such strategies to design their Constitution, provision by provision. Better answers to these questions can help us better understand how Americans have used the government they have inherited. . . .

The delegates who made the Constitution were first and foremost politicians, not philosophers, political scientists, or plundering speculators. These politicians had helped nurture a dozen infant state republics through a devastating war and the turbulence of economic depression. Circumstances forced them to learn the art of sustaining political support while conducting any government's most unpopular activities, such as collecting taxes. These republican politicians had mastered the skills of using policy to balance conflicting demands placed on government. A given set of economic policies could accommodate voters, pacify them, divide them, and selectively mobilize them. At the same time, economic policies could stabilize and grow state economies and secure the support of economic elites. These politicians fully understood that public policy makes politics, and the two are inseparable. Those who seek public office must promise to use government in some beneficial way and deliver on these promises, while those who seek public policy depend on those who win and hold government office.

These politicians set out to change the path of American politics, to alter the nation's destiny. They ultimately succeeded by changing the process for selecting national policy makers, by expanding national government authority, and by building a new process for using that authority. They succeeded, first, because pressing political and economic problems made it an opportune moment to reconstitute the national government. The convention met in a political climate that provided some intense but vague and unfocused support for change. Second, they succeeded because the convention's leaders drew on their own diagnosis of the national situation to propose remedies for these problems. These remedies provided a malleable starting point for deliberating constitutional design. Third, they succeeded because most were willing to come to acceptable political compromises about that design, even though none anticipated the final Constitution or found it fully satisfactory.

At the convention, these delegates behaved like republican legislators because most of them *were* legislators. Even though the convention lacked the features of an established legislature today, the delegates employed familiar legislative scripts to develop the Constitution as they would a ma-

major change of law: they agreed to rules for debate and voting, used a Committee of the Whole to facilitate the initial consideration of the agenda, took hundreds of votes on substance and procedure, created special committees to deal with difficult issues, and relied on a Committee of Detail to develop a provisional draft. Although they understood that a constitution had to be different from ordinary legislation, they conducted the process for crafting the Constitution much the way they had made public policy in Congress or in state legislatures. The Constitutional Convention, then, can be studied with the analytical tools used to analyze other pathbreaking American policy developments, such as Reconstruction, the Sherman Anti-Trust Act of 1890, the Clayton Act of 1914, the National Industrial Recovery Act of 1933, the Social Security Act of 1935, the Civil Rights Act of 1964, the Clean Air Act of 1970, or other "super-statutes." Like legislators today, some delegates attempted to manipulate the terms of the debates and the scope of conflict, and adjusted provisions to enlarge their political support. Through persuasion, bargaining, threats, and evasion, the delegates built coalitions, undermined others, and produced a series of interdependent, politically satisfactory decisions. The Constitutional Convention, of course, was no ordinary legislative process. The stakes were higher. The Constitution affected a virtually unlimited range of politically significant issues, and the final product necessarily would be more general than a statute law.

The Constitution's design resulted from a series of compromises about substantive issues, policy making procedures, and the control of policy makers. The goals of the Constitution are the collective goals of the thirty-nine individuals willing to sign the final product. The central analytical problem for this book is to describe that zone of acceptable compromise and to explain how the Constitution's provisions together satisfied the framers' goals. . . .

The delegates' strategies matter so much because the framers did not and could not write into the Constitution "directly and unerringly" the interests of the nation's propertied elites. The most influential delegates—particularly James Madison—were rebuilding the American state to make it stable and powerful enough to pursue the nation's long-term interests. Their government had to nurture the nation's prosperity long into the future. These state builders took it for granted that private property, free markets, and commercial expansion were essential for future prosperity, and they appreciated that propertied elites were key agents for expanding markets and driving economic development. But many framers viewed the interests of these elites as too narrow, short-term, uninformed, and conflicted to provide much reliable guidance for redesigning the nation's

basic political structure and recasting long-term policy. The framers were trying to balance the government's basic needs (especially for revenue), their own ambitions for the nation's destiny, the clashing claims of different economic interests, and the demands of the more numerous citizens of modest means. Even when they were inclined to implement propertied elites' preferences, policy makers had to balance economic development against the demands of the nation's emerging democracy. Legislators needed a broader constituency to win elections to office. They had to show some responsiveness to the grievances of those with modest means. At the very least, elected policy makers had to make any program of market-driven economic development acceptable and legitimate for a majority of the constituents to whom their political fates were tethered.

In any case, it is impossible to enter the mind of an individual delegate to determine how he balanced principles and interests when he took a position on an issue of constitutional design. Jack Rakove observed that "[w]hat is elusive is the interplay between ideas and interests" in the Constitution's design. A delegate's idealistic argument for strong national powers may have concealed a driving ambition to elevate his state or to seek the personal prestige and power of national office. Another delegate's defense of state prerogatives may have reflected sincere dedication to the principle of constituent representation and a deeply held belief in the superiority of the social, economic, and political order of his state. We can never know for certain. What is certain is that the delegates used ideas as rhetorical weapons to defend positions that closely matched their political interests. Political calculations shaped delegates' views of the stakes in most of the choices about the Constitution's design. Political calculations and negotiations, not just abstract ideas, settled the disputes these choices engendered. By expanding the concept of interest beyond personal pecuniary gain and selfish parochialism to include political interests, it is much easier to see how closely the delegates' ideas and interests aligned with one another in their policy strategies.

James Madison's policy strategy requires an especially careful analysis because Madison's ideas set the convention's agenda and shaped its politics. Madison's Virginia Plan sought to establish a national policy-making system independent of the state governments and armed with most of the authority to govern the national economy. The national government would assume full authority to manage economic development for the interest of the republic as a whole. Even after the defeat of provisions crucial to his agenda, Madison and his allies fought to inject this strategy into national government powers and institutions such as the presidency. Understanding the politics of the Constitution requires a careful understand-

ing of the way Madison defined the nation's problems and the way his plan would mitigate them. . . .

James Madison was in a superb position to shape the convention's initial agenda. Already an experienced politician though barely thirty-six years old, Madison was a knowledgeable and respected authority on American politics and public policy. He had helped write Virginia's Constitution of 1776, served in the state's House of Delegates, and represented Virginia in the Continental Congress. In Congress, he served on many key committees and worked behind the scenes to broker coalitions supportive of extending Congress's powers. He played a major role in initiating the Annapolis Convention of 1786.

Madison, a natural political strategist, had mastered the arts of republican politics and policy making. He was proficient at manipulating agendas, locating points of policy compromise, and building coalitions. He understood how procedural motions could be used tactically to gain leverage in the legislative process. He instinctively appreciated that he could advance his agenda by breaking apart legislative proposals (or by combining them). He creatively coupled problems and solutions to win allies for policy measures he favored. Just three months before the convention, for example, he used national security concerns to justify Confederation aid to Massachusetts for suppressing Shays's Rebellion.* Madison conceded that although "there might be no particular evidence" of British interference, "there was sufficient ground for a general suspicion of readiness in [Great Britain] to take advantage of events in this Country, to warrant precautions ag[ain]st her." He worked behind the scenes to cultivate allies in state legislatures and other political bodies where he had no direct influence. Madison was patient and tenacious in policy combat, displaying a doggedness that may have worn even on his allies. And when his efforts produced results that fell short of his goals, he repeatedly accepted half a loaf rather than none, "much disposed to concur in any expedient not inconsistent with fundamental principles."

Madison was not chiefly a political philosopher but rather a policy strategist, adept at using broad theoretical ideas to advance his goals. It is difficult to read Madison's writings without appreciating his gift for ab-

*In the western part of Massachusetts in 1786, Daniel Shays, a Revolutionary War veteran, organized a group of poor farmers whose farms were being foreclosed due to their inability to pay the debts they owed. The mob was angry at judges and bankers who represented the propertied elite. Shays and his followers showed up in Springfield where they tried to attack the armory to seize weapons. Massachusetts was not able to control the mob effectively, causing American political leaders to question the ability of the Articles of Confederation to maintain property rights and leading them to call a convention in 1787 to form a new constitution with a stronger national government.—Eds.

straction and generalization, his tendency to develop theory and then apply its logic to sort through facts, his propensity to use lists of general reasons to justify his claims, and his willingness to use global abstractions to combat adversaries. An opponent at the convention, William Paterson, may well have had Madison's style in mind when he noted that "A little practicable Virtue [is] preferable to Theory." . . .

The Constitutional Convention used no predetermined blueprint to lay out the national policy process. Republican principles demanded only that the powers to legislate, to execute the law, and to judge legal disputes be separated in some way. Practical experience encouraged a bicameral legislature, an executive with veto power, and courts divorced from the play of politics. The delegates assumed that skilled republican politicians would use the process to advantage themselves and their constituents. Beyond these indefinite guidelines, the convention built the policy process piece by piece. Decisions about the policy process were pushed along by an evolving web of agreements about whom each branch would represent, what powers the national government would have, and what role each institution would play in using this process.

As the delegates grew less certain about the consequences of their choices, political logic dictated that they should arm their favored agents with the will and ability to stop policies threatening to their vital interests. They could not agree on the exact boundaries of national authority, but they could agree that by building separate defenses for their favored institutions, they could reduce the danger that the national government would use its authority to take advantage of their constituents. Their choices in turn forced them to adjust the powers and independence of these institutions to one another. The Senate gained extraordinary powers to ratify treaties, confirm presidential appointees, and try impeachments. The House gained nominal authority to initiate revenue measures. The president gained influence over the policy agenda, major appointments, and foreign affairs. Courts gained more autonomy to interpret state and national laws. The convention rejected efforts to build institutional collaboration into national policy making, including proposals to require the joint exercise of veto power by the president and the Supreme Court, the creation of a privy council, and the eligibility of sitting members of Congress to serve in executive offices.

When their work was done, the delegates found that they had created a policy-making process with more complexity and rivalry of purpose than any of them originally anticipated. They had infused each institution with a different perspective on the nation's interests. They had given each institution the power to block the use of government. By doing so, they

made it difficult and costly to make effective national public policy; that is, to use the government for any purpose. Public policy would succeed only if it survived a gauntlet of institutions, each deliberately anchored by different constituencies, calendars, and powers.

Members of Congress would be tied to distinct geographical constituencies, and the interests of these constituents would shape their perception of national interests. Most U.S. representatives would concern themselves primarily with the welfare of regions smaller than a state. U.S. senators would act on behalf of the state governments and statewide constituencies. Representatives and senators could pursue reelection. Each Congress would have a two-year frame of reference, because the political dynamics in each house could change after every national election. Veto points would abound: the Senate and House effectively could veto each other, and the president could veto any bill on which they could agree. It would be relatively easy for one institution to exercise its independent power to stop legislation, but it would be relatively difficult to engineer the institutional cooperation required to enact laws. On the other hand, it would be difficult, costly, and time-consuming for representatives of existing regional interests to construct the political majorities necessary for lawmaking. Only an extraordinarily large geographical majority could win concurrent House and Senate approval for any public policy measure. For example, no law could be passed in the first Congress without, at a bare minimum, the consent of representatives of 55 percent of the American population. No treaty or major appointment could be made without the assent of senators representing nine of the thirteen states.

Compared with Congress, the president and his appointees to the national courts would serve much larger constituencies, and their constituencies would greatly broaden their perception of national interests. The president would represent at least a large number of voters in many parts of the nation. Given a four-year term, the president would serve during two Congresses. The possibility of reelection to additional terms further lengthened his time horizon. The president's agenda-setting, administrative, and foreign-policy powers armed the office with the power to change the path of public policy. Presidents could frame policy agendas aimed at directing policy outcomes and building political support well into the future, and so would define the national interest in terms of prospective achievements that cultivate a chosen national constituency. Presidents could be expected to build new national political orders or to articulate existing ones. The president would tend to pursue national interests more proactively than Congress, more coherently, and for longer time horizons. While the Senate embodied [Roger] Sherman's aspiration

to protect the interests of the states, the office of the president embodied Madison's ambition to instill in national policy makers the means and motive to pursue national interests, independent of the states.

No institution would view public policy in a longer time horizon than the national judiciary, whose judges would not have to cultivate voters to stay in office. Compared with Congress, and like the president, the national judiciary would have more latitude to define national interests broadly. But judges would lack the policy tools necessary for fine-tuning a future policy agenda. Judges' tools were reactive. They could only respond to disputes about actions already authorized by other institutions. Judges could settle disputes about existing national law and strike down laws inconsistent with the Constitution. Together, these powers would allow judges to defend existing political arrangements rather than to fashion new ones. Judges would have incentives to interpret national interest in the context of the political order in which they had been appointed. The national judiciary would tend to frame national interests more coherently than Congress but more reactively than the president.

The delegates' compromises, in short, produced a policy-making system that would be hard to use. Different institutions with different perspectives on national interest would share responsibility for major steps in the policy process, from setting the policy agenda to implementing law...

The Constitution gave American politicians extraordinary responsibilities, while at the same time made it extraordinarily hard for them to fulfill these responsibilities. It gave the Congress the duty to make laws for the entire nation, but has encouraged its members to view public policy primarily through the lens of the short-term, parochial interests of their local constituents. It gave the president a duty to formulate plans for achieving future national interests, but limited his capacity to pursue these interests. It gave the courts the duty to ensure the supremacy of federal law, but insulated courts so they can only react to individual conflicts about public policy long after the policy's initiation. Founded on the principle of rule by the people, the Constitution tacitly gave unelected judges the duty of rising above politics to protect established national interests. Founded on the principle of majority rule, the Constitution has obstructed and complicated the construction of majorities.

While Americans revere their Constitution, its paradoxes have fostered frustration and cynicism about their government. These frustrations are rooted in the way the framers answered the agonizing questions they confronted: how can a popularly controlled government promote national well-being without also being a threat? James Madison, Roger Sher-

man, and the other delegates who wrote the Constitution understood this question just as well—and even better—than we do now. These politicians crafted an answer that suited both their ideals and their vital political interests. Politicians designed the United States Constitution. Ingenious politicians use it. Altering the U.S. Constitution therefore can offer no panacea for curing America's political frustrations. Changing the Constitution is hard, and the results are unpredictable. There are no guarantees that any politically feasible change in the Constitution today would do more good than harm. No one who reflects on presidents' struggle for power in the past forty years, for example, can be confident that making it easier for presidents to get their way would unambiguously benefit the nation.

Instead of changing their Constitution, Americans must learn to use it better. To repeat: making this national policy process work requires very broad-based political coalitions and sustained, concerted effort. To use this government, Americans must engage in politics. They must build and sustain the large political coalitions necessary to align the House, the Senate, the presidency, the courts, and a large number of states. Building coalitions requires understanding the interests of many different kinds of people, forging an understanding of the common interests of these people, locating a common set of objectives that can motivate their continuing cooperation, and working constantly to anticipate and remedy the endless, inevitable conflicts that threaten their cooperative effort. American history abounds with ingenious, tough-minded leaders who have constructed politics in this way. These leaders have spotted opportunities in the Constitution's structural constraints, and they have learned to mold the ambiguities of American politics into new possibilities for political cooperation.