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Institutional Ambition and the Decline of Congress

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In Federalist 51, James Madison explained the American political system's primary mechanism to prevent one branch of government from absorbing the powers and authorities of another. He wrote, "Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place."¹ In other words, the members of each branch of government need to have a strong interest in protecting their constitutional prerogatives. If all three branches of government jealously protect their power, then they will inevitably counter each other and the proper balance between them will be maintained. As a matter of pure theory, Madison's argument here makes perfect sense. However, American political history has not been kind to Madison's faith in institutional ambition, at least in the sense that he meant it. Clearly, members remain ambitious by some standards. Average congressional terms are longer than ever and interpretations of Congress' policy making power under Article One have grown considerably broader.² Still, contemporary Congresses have been less willing to take ownership of their legislative duties. Authorities that were traditionally in Congress's domain, such as the war power and various forms of oversight power, have been claimed by the executive branch and Congress has done little to fight back. Moreover, modern congressional acquiescence presents a serious challenge to Madison's theory, and this paper seeks to explain this through a broad historical study of congressional decline.

I will begin by analyzing Madison's *Federalist* essays on the separation of powers as well as the Anti-Federalist criticisms of his theory, and then discuss Tocqueville's concerns about

¹ James Madison, "No. 51," in *The Federalist* (New York, NY: Barnes & Noble Books, 2006), 288.

² Ernie Siepel, "Hey Congress: Keep Your Day Job," NPR, December 28, 2010, <https://www.npr.org/2010/12/28/132294306/hey-congress-dont-keep-your-day-jobs>.

centralization and the nature of democratic citizenship. Furthermore, I will also address modern explanations for the legislature's decline with a particular focus on work that deals with polarization. Finally, by detailing the weakening of Congress throughout American history with an emphasis on twentieth century politics, I will argue that the informal breakdown of constitutional norms, along the weakness of modern citizenship and partisan polarization, have rendered Madison's ambition theory ineffective.

Madison's Theory of Separated Powers

One of the primary criticisms of the proposed government's structure following the Constitutional Convention of 1787 was that it allowed the separate branches of government to mix excessively.³ Many feared that this would lead to the consolidation of federal power, and eventually despotic rule. For example, prominent Anti-Federalist George Mason argued that the new Constitution "mixed too much the Legislative and Executive," and that this would eventually result in one dominating the other.⁴ This concern was a staple in Anti-Federalist rhetoric throughout the convention and during ratification debates.⁵ Madison's best theoretical responses to these arguments can be found in Federalist 47 through 51, where he addressed the separation of powers concept explicitly and articulated his theory of institutional behavior based on man's tendency towards self interested "ambition."⁶

In these essays, Madison is quick to endorse the idea "that the legislative, executive, and judiciary departments, ought to be separate and distinct."⁷ He points to Montesquieu's theory of

³ James Madison, "No. 47," in *The Federalist* (New York, NY: Barnes & Noble Books, 2006), 268.

⁴ George Mason, "Opposition to the Constitution," ed. Ralph Ketchum, in *The Anti-Federalist Papers* (New York, NY: Signet Classics, 1986), 166.

⁵ Mason, 166-171 and Madison, 268.

⁶ James Madison, "No. 51," in *The Federalist* (New York, NY: Barnes & Noble Books, 2006), 288.

⁷ Madison, 268.

government as justification for this concept, and makes clear that he is sympathetic to the sentiment being expressed by critics of the proposed Constitution. Still, he pointed out that their assessments of the document were flawed. Madison wrote that, in terms of explicit grants of authority, the ability of each branch to interfere with the affairs of the others was limited to checking excesses and preventing arbitrary action. In other words, no branch could perform the duties of another on its own accord.⁸ Congress could not initiate executive action, the Supreme Court could enforce no law, and the President could not legislate. Furthermore, each of the state constitutions allowed for a degree of collaboration between the separate branches, and many of them permitted far more than the proposed federal Constitution did.

All of this being said, Madison made clear that these mere “parchment barriers,” no matter how strong, were not enough to prevent one branch of government from absorbing the powers of another over time.⁹ His solution to this problem, as mentioned in the introduction, was to rely on the members of each branch to be devoted enough to the power and legitimacy of their institution to use their ample constitutional authorities to defend against usurpation. The efforts of Congressmen and Senators to maximize their own power would actually ensure a proper distribution of authority within the federal government. This is the “ambition must be made to counteract ambition” concept.¹⁰ Ironically, Madison was far more concerned about the legislative branch becoming the dominant force in American government, particularly at the expense of the executive. He argued that in a republican system of government with no monarch, the possibility of “legislative usurpation” should be the primary concern.¹¹ This is of course hard to reconcile

⁸ Madison, 270.

⁹ James Madison, "No. 48," in *The Federalist* (New York, NY: Barnes & Noble Books, 2006), 275.

¹⁰ Madison, 288.

¹¹ Madison, 276.

with the contemporary state of American government, where Congress has been more than willing to cede its power to the President and to bureaucratic agencies in the executive branch. Given the obvious tension between Madison's theory and Congress's gradual decline in power, a number of scholars and writers have sought to tackle the question of whether or not Madison's understanding of institutional ambition as a defense against consolidation still has, or ever did have, merit as a way to understand interbranch relations. Furthermore, discerning the answer to this question is a crucial part of understanding the future of American government, and more specifically Congress's ability to fulfill its constitutional role going forward.

Critiques of Madison's Theory: Past and Present

An early, but poignant, criticism of Madison's theory can be found in the Anti-Federalist essays of Centinel, which were probably authored by Samuel Bryan of Pennsylvania.¹² While Centinel's work actually predates the publication of the *Federalist*, it still provides a clear counterargument to the political theory of Federalist 51. Centinel's essay was actually written in response to John Adams, who had published an article arguing in favor of a prototypical version of Madison's ambition theory.¹³ Moreover, Centinel's arguments foreshadow future criticisms of Madisonian political thought and demonstrate skepticism towards the virtue of self-interest in republican government. Centinel's key assertion was that a government with three branches and considerable authority could not be reasonably expected to direct "ambition...to the prejudice of the public good."¹⁴ Centinel thought that it was beyond the capacity of fallible human beings to balance authority between the three branches well enough so that one branch would not become

¹² James R. Rogers, "Centinel's Criticism of Checks and Balances," *Law and Liberty*, December 4, 2018.

¹³ Samuel Bryan, "'Centinel,' Number 1," in *The Anti-Federalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketchum (New York, NY: Signet Classics, 1986), 235.

¹⁴ Bryan, 235.

too powerful at the expense of the others. If Madison's assumption that public officials will be intensely self interested is correct, then Centinel's concern here becomes even more relevant.¹⁵

Moreover, even if the Framers were able to create a perfect balance between each branch, Centinel argued that this would be insufficient to prevent the consolidation of federal power on its own. A public willing to maintain a watchful eye over the government would also be necessary, and the "views and interests" of each branch would have to be diverse enough to prevent "a coalition of any two of them for the destruction of the third."¹⁶ While nothing like this has exactly happened, partisan coalitions between members of Congress and the president have prevented Congress from defending its institutional interests on numerous occasions.¹⁷ Furthermore, it is not controversial to assert that the American public has been a fairly unattentive watchdog in the modern era.¹⁸ Centinel would likely blame this failure of citizenship, at least in part, on the complexity of the federal system. He argued that the Constitution's structural intention to pit ambition against ambition makes it harder for citizens to determine exactly who is responsible for the government's failings, and thus harder for them to hold certain actors accountable.¹⁹ In theory, this would leave the door open for one part of the federal government to aggrandize itself far more easily.

To bring this work into the context of modern congressional weakness, Centinel's arguments have some merit as well as some shortcomings. Throughout American history, the way that certain provisions of the Constitution have been interpreted has changed considerably.

¹⁵ Bryan, 235-236.

¹⁶ Bryan, 235.

¹⁷ Margaret Taylor, "Declaring an Emergency to Build a Border Wall: The Statutory Arguments," *LawFare*, January 7, 2019.

¹⁸ Ilya Somin, "The Problem of Political Ignorance," *The Regulatory Review*, February 3, 2014.

¹⁹ Bryan, 236.

While congressional authority under the Commerce Clause and the Elastic Clause has expanded, so has presidential power under Article Two. While drafting a constitution that balances authority between the branches properly is hard enough on its own, as Centinel points out, it becomes impossible when interpretations of this authority are constantly changing.²⁰ Furthermore, this is a big part of why the informal changes that took place in American government during the early 20th century resulted in the legislature's subordination to the executive branch. Madison's implicit checks were unable to prevent this, and Centinel's work goes far in explaining why.

That said, Centinel seems to overestimate the ability of the citizenry to limit the government.²¹ In the essay, Centinel is trying to persuade the public not to support a more powerful central government in pursuit of economic well being. At the same time, he is arguing that the public is capable of keeping one branch of government from infringing on the authority of the others.²² These things do not seem to fit together. Encouraging institutional competition among elites in government is quite obviously not foolproof. Still, it is more likely to resist the consolidation of federal power than a public that is more concerned with the substance of government action than with the process by which it occurs. Public demand for federal intervention into economic affairs provided Congress with a strong incentive to delegate power to regulatory agencies throughout the 20th century, and it seems that Centinel's more democratic model likely would have expedited this process.

²⁰ Bryan, 235.

²¹ Bryan, 237.

²² Bryan, 236-37.

Another early observer of American politics, Alexis de Tocqueville, shared a number of Centinel's concerns. However, because Tocqueville intended to be an observer, unlike Centinel, who was an advocate, Tocqueville's arguments are more nuanced. Moreover, Tocqueville also had the advantage of writing several decades after the Constitution was ratified, which meant he had far more to work with in assessing how American government actually functioned. While never addressing Madison's theory directly, Tocqueville seemed to take issue with Madison's view of ambition in republican societies.²³ Tocqueville argued that, in monarchies and aristocracies, there is a natural urge among members of the ruling class to pursue glory and power.²⁴ In self-governing societies, however, he asserted that this sentiment is far less common, especially long term.²⁵ While this certainly comes with considerable benefits, for example peaceful transitions of power, it also presents a problem for Madison's theory. Tocqueville argues that as conditions become more equal and government becomes more democratic, "lofty ambition" tends to die out.²⁶ If this is correct, then it means that the bedrock of separated powers in American government is founded on a fleeting sentiment. Tocqueville indicates that whatever ambition does remain in the public becomes geared towards physical gratification and economic prosperity, and concern over republican principles tend to take a backseat.²⁷

Furthermore, Tocqueville's view of democratic ambition ties in directly with his concerns about centralization and democratic citizenship. Tocqueville wrote that "the intellect of democratic nations is peculiarly open to simple and general notions...its favorite conception is

²³ Alexis De Tocqueville, *Democracy in America*, trans. Henry Reeve (New York, NY: Barnes & Noble, 2003), 615.

²⁴ Tocqueville, 615-618.

²⁵ Tocqueville, 615-618.

²⁶ Tocqueville, 615.

²⁷ Tocqueville, 618-620.

that of a great nation...governed by a single power.”²⁸ This appears to be a symptom of the sort of narrow and individualistic ambition that Tocqueville accurately attributes to democratic societies. If this is true, then a self-governing nation will tend to centralize its politics at every level possible despite the existence of constitutional guardrails, or as Madison would call them, “parchment barriers.”²⁹ Essentially, this means the consolidation of federal authority. Moreover, with the President being the only nationally elected official in the federal government, it makes sense that the democratic push for simplicity would empower the executive branch at the expense of others. Furthermore, Tocqueville’s understanding of ambition goes far in explaining the unraveling of Madison’s theory in the early 20th century, and is crucial to consider when looking at congressional decline in that era.

While most modern approaches to the question of congressional weakness have had more to do with the structure of government and institutional behavior, a few others have sought to analyze Madison’s assumptions about self interest and ambition to explain this phenomenon, and these are most relevant to this project. For example, in Jeffrey Becker’s *Ambition in America*, he takes a critical look at Federalist 51 in the context of modern citizenship and makes Tocquevillian arguments.³⁰ Becker argues that if the public is willing to meaningfully engage with politics, then this “ambition strengthens both the formal institutions of government, as well as the reciprocal relationships at the heart of democratic politics.”³¹ This is important, as the legislative branch is generally regarded as the most democratic of the three, and the House of

²⁸ Tocqueville, 661.

²⁹ Madison, 275.

³⁰ Jeffrey A. Becker, *Ambition in America: Political Power and the Collapse of Citizenship*. (University Press of Kentucky, 2014), 39-59.

³¹ Becker, 40.

Representatives as the most democratic institution. Because of this, the character of Congress is reflective of the public, at least to some extent. According to Becker's logic, if the citizenry is ambitious, then the sort of ambition that Madison thought vital will likely be exemplified by members of Congress and his system, which is reliant on competing interests, could work. However, if citizens become unengaged and uninterested in all public affairs aside from elections, then Congress takes on this character as well. This leaves a power vacuum between the branches that inevitably gets filled. This is essentially Tocqueville's argument, Becker simply has more historical evidence to support it.³²

Much like Centinel, moreover, Becker voices concern over the role of self-interested ambition in republican government.³³ This becomes magnified when the amount of ambition between branches or institutions is unequal. Again, if the citizenry becomes careless about the actual workings of politics, as Tocqueville feared they would and many scholars would argue they have, then the kind of republican ambition that Madison envisioned is likely to take on a much different form. While the Framers were under no impression that self-interested individuals with a will to power would not exist, they assumed that enough of them would be around to counter each other. An inattentive public combined with a lack of ambitious public officials leaves only the "parchment barriers" that Madison himself admitted were insufficient.³⁴ Furthermore, while Becker's work does not focus specifically on the decline of Congress at the expense of the executive branch, it gives significant insight into the reasons why this has

³² Becker, 39-59.

³³ Becker, 54.

³⁴ Madison, 275.

happened and largely aligns with the criticisms of Madison forwarded by Tocqueville and Centinel.

Scholarship on Congressional Decline, Executive Growth, and Administrative Control

A number of contemporary scholars have sought to explain congressional weakness as a consequence of member behavior rather than as a result of theoretical flaws in the institution's design. While few of these works directly reference Madison's ambition theory, they still go far in explaining its flaws as they have materialized throughout American history. For example, political scientist Yuval Levin succinctly argues that "Congress is weak because its members want it to be."³⁵ While the increasing power of the presidency and the bureaucracy are often cited as reasons for the recession of congressional influence, Levin points out that Congress began to empower the executive branch on its own accord early in the twentieth century.³⁶ Therefore, Congress has not been the victim of executive power, but rather an architect of it. According to Levin, modern members of Congress have been just as complicit in their institution's steady decline, despite the frequent partisan complaints of a few members.³⁷ While more geared towards a general audience, his work is useful for understanding the broad pattern of institutional decline within Congress.

Other scholars, for example Norman Ornstein and Thomas E. Mann, have attributed the House and Senate's "decline in institutional identity" and both institutions' general "resistance" to meaningful reform as crucial factors contributing to congressional decline in the modern era.³⁸

³⁵ Yuval Levin, "Congress Is Weak Because Its Members Want It to Be Weak," *Commentary*, June 2018, 1.

³⁶ Levin, 1.

³⁷ Levin, 1.

³⁸ Thomas E. Mann, and Norman J. Ornstein, *The Broken Branch: How Congress is Failing America and How to Get It Back on Track*, (Oxford University Press, 2006), 54.

For example, members of the House of Representatives have traditionally had an almost jealous pride in their institution because it is considered to be the lower house, and less prestigious than the Senate.³⁹ No matter how frivolous this may seem on the surface, Ornstein and Mann point out that this was a critical component of the House's will to protect its institutional powers.⁴⁰ While their approach differs, Ornstein and Mann's argument is similar to Becker and Tocqueville's. If the public provides Congress with no incentive to display institutional pride or strength, then they will not.

Some more recent literature attributes congressional dysfunction to the increase of elite polarization along party lines. Kathryn Pearson writes that in contemporary politics, "the two parties have grown increasingly competitive and polarized."⁴¹ This assertion is supported by a plethora of evidence, and a considerable amount of research has been performed in an effort to explain it.⁴² While not all of this research is relevant here, it is an unavoidable fact that polarization has had significant consequences for the ability of Congress to perform its constitutional functions and express institutional ambition. If members of Congress concern themselves primarily with partisan divisions, then they will be less capable of uniting to defend their institutional interests when necessary.⁴³ This results in a warped incentive structure, where delegating power to the President or the bureaucracy can be more fitting with the ambitions of individual members of Congress than pursuing policy objectives through the legislative process.

³⁹ Mann and Ornstein, 141.

⁴⁰ Mann and Ornstein, 141.

⁴¹ Kathryn Pearson, "The Constitution and Congressional Leadership," In *Is Congress Broken?: The Virtues and Defects of Partisanship, Polarization, and Gridlock*, (Washington, D.C.:Brookings Institution Press, 2017), 152.

⁴² Seth J. Hill and Chris Tausanovitch, "A Disconnect in Representation? Comparison of Trends in Congressional and Public Polarization," *The Journal of Politics* 77, no. 4 (2015), 1058.

⁴³ Sean M. Theriault, *Party Polarization in Congress* (New York, NY: Cambridge University Press, 2008), 7-8.

⁴⁴ For example, a recent congressional effort to reclaim the war power fell flat because a number of Republican members were unwilling to prioritize their branch over their party.⁴⁵

Furthermore, while polarization can certainly explain some of the issues with modern Congress, the history of congressional decline goes back much further than the partisan divide of recent decades. For example, legal scholar Cass Sunstein writes about Congress's delegation of legislative power to the administrative state during the 1930's when government was entirely unified.⁴⁶ While this was a time of economic crisis, Congress still willingly gave up its authority over various areas of policy. Furthermore, as Louis Fisher points out, Congress also began to abdicate its role in the war-making process and foreign policy in the early 1950s, when President Truman went to war in Korea without approval or consequences.⁴⁷ Again, there were no notable polarizing forces in Congress that caused this inaction, members just did not want to cross the President. Therefore, while concerns over the impact on increased partisan polarization are entirely legitimate, they do not fully explain Congress's initial willingness to delegate away its constitutional authority.

Some writers have pointed to the expanding domain of the judiciary, particularly since the 1960's, as a culprit in the decline of Congress. For example, Raoul Berger wrote in 1977 that the Supreme Court, and especially the Warren Court, had stretched out the meaning of the Fourteenth Amendment so far as to assume legislative power for itself.⁴⁸ Mark Tushnet, another legal scholar, makes similar arguments in his criticisms of the modern Court, asserting that the

⁴⁴ Gillian E. Metzger, "Agencies, Polarization, and The States," *Columbia Law Review* 115, no. 7 (2015), 1739.

⁴⁵ Erich Beech, "Trump Vetoes Congressional Resolution to End U.S. Involvement in Yemen War," *Reuters*, April 16, 2019.

⁴⁶ Cass R. Sunstein, "Constitutionalism After the New Deal," *Harvard Law Review* (1987), 421.

⁴⁷ Louis Fisher, *Presidential War Power*, (Lawrence: University Press of Kansas, 2013), 80.

⁴⁸ Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 2nd ed. (Indianapolis, IN: Liberty Fund, 1977), 18.

growth of judicial review throughout the twentieth century weakened congressional legitimacy.⁴⁹ More recently, political scientist Amanda Hollis-Brusky argues that the Courts have assumed a much stronger role in the policymaking process in recent years, and that this exercise of quasi-legislative authority inevitably results in a weaker Congress.⁵⁰ As Eugene Hickock points out, however, this is largely the fault of Congress, as they have plenty of constitutional authority to bend the Court to its will.⁵¹ This was intentional in the design of the judiciary, and contemporaries of the Framers were far more concerned that the Court would be abused by the legislature.⁵² However, Congress has not demonstrated the political will to exercise these powers and, absent of consequence, the Court has naturally become more active in certain policy areas. Hollis-Brusky writes that, “individuals and organized interest groups are increasingly looking to the judicial branch to carry out their policy agendas.”⁵³ While it is true that the modern Supreme Court has played a significant role in shaping policy debates, for example those regarding abortion and campaign finance, Congress has done little to assert its institutional authority to resist these decisions. Therefore, while the increasing influence of the Supreme Court in policymaking is a consequence of congressional decline, it is not a legitimate cause of it.

Literature about the increase of executive power is also important to consider in this context, as this increase has come at the expense of Congress. This work often looks at the drastic changes that took place in government as a result of the Industrial Revolution, but also

⁴⁹ Mark Tushnet, *Taking the Constitution Away From the Courts*, (Princeton University Press, 2000), 7.

⁵⁰ Amanda Hollis-Brusky, "An Activist's Court: Political Polarization and the Roberts Court," In *Parchment Barriers: Political Polarization and the Limits of Constitutional Order*, (Lawrence, Kansas: University Press of Kansas, 2018), 81.

⁵¹ Eugene Hickock, "Congress, the Court, and the Constitution: Has Congress Abdicated Its Constitutional Responsibilities?" *Heritage Foundation Report*, November 29, 1990, 1.

⁵² Alexander Hamilton, "No. 78," In *The Federalist*, 427-35, (New York, NY: Barnes & Noble Books, 2006), 427.

⁵³ Hollis-Brusky, 87.

because of shifts in global politics and American demographics during the early twentieth century. The need for these changes were encouraged early on, in 1885 to be exact, by political scientist and future President Woodrow Wilson. In his famous book *Congressional Government*, Wilson was highly critical of a rigid understanding of separated powers and voiced admiration for the British Parliament which was based on party, rather than committee, and was led by the Prime Minister, a figure with executive power.⁵⁴ Wilson was also supportive of European models of the administrative state and believed such systems were necessary to meeting public needs at the turn of the century.⁵⁵ He carried these views into his presidency, and his emphasis on executive leadership in policymaking and a strong bureaucracy had a lasting impact on American government that will be examined further in the analysis section of this paper.

Furthermore, there is a growing body of modern literature on executive power that builds on the foundation of Wilsonian political thought and that is particularly worth examining in the context of congressional weakness, as this work is crucial to determining the relevance of Madison's institutional design in contemporary politics. Dino Christenson and Douglas Kriner sum up the recent scholarship on the relationship between the president and Congress well when they write that "the legislature appears institutionally all but powerless to stop" presidential and bureaucratic action.⁵⁶ This is, of course, despite the legislature's dominant legal powers. The primary issue is, again, that the necessary institutional ambition does not exist, according to Christenson and Kriner. Eric Posner and Adrian Vermeule's *The Executive Unbound: After the*

⁵⁴ Woodrow Wilson, *Congressional Government: A Study in American Politics*, (Boston, Houghton, 1885), 242.

⁵⁵ Ronald J. Pestritto, "The Progressive Origins of The Administrative State: Wilson, Goodnow, and Landis," *Social Philosophy and Policy* 24, no. 1 (2007), 16.

⁵⁶ Dino P. Christensen and Douglas L. Kriner, "Constitutional Qualms or Politics as Usual? The Factors Shaping Public Support for Unilateral Action," *American Journal of Political Science* 61, no. 2 (2017), 335.

Madisonian Republic also casts serious doubt on the sustainability of Madison's vision and gives insight into the Progressive political thinking that brought about a weaker Congress.⁵⁷ Posner and Vermeule's embracement of government by a president-led administrative state is Wilsonian to its core, and also confirms the fears of political thinkers like Tocqueville. Christopher DeMuth provides a counter-argument to the case by Posner and Vermeule, however he recognizes that Congress has become weak for many of the same reasons they cite.⁵⁸ Because of this consensus on the trend of executive supremacy at the expense of Congress, both works are important to reference.

Theory

The evidence that Congress has gotten progressively weaker over the last century is overwhelming and obvious, and a scholarly consensus on this issue clearly exists. Furthermore, a number of the factors addressed by political scientists and historians play some role in modern Congress's failure to perform its constitutional duties. The work of Pearson, Metzger, and Theriault provides important insight into the nature of polarization in Congress, and their theories are helpful for understanding Congress's failure to prevent executive overreach during both the Obama and Trump presidencies.⁵⁹ Posner, Vermeule, and DeMuth's emphasis on the early Progressive era as a key period for congressional decline is also significant, as is Sunstein's analysis of the birth of the administrative state during the New Deal.⁶⁰

⁵⁷ Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, (Oxford University Press, 2011), 3-4.

⁵⁸ Christopher DeMuth, "Can the Administrative State be Tamed?," *Journal of Legal Analysis* 8, no. 1 (2016), 121.

⁵⁹ Pearson, 152. Metzger, 7-8. Theriault, 8.

⁶⁰ Posner and Vermeule, 3-4.

Moreover, it seems that the key to understanding the root of congressional decline, and thus the failure of Madison's ambition theory, lies not in an analysis of the institution's current rules and procedures. Rather, the answer appears to lie in understanding the political response to several transformative events that have taken place throughout American history and which gave birth to these rules and procedures. These include the Industrial Revolution and the Great Depression, as both fundamentally altered the expectations and demands of the public. The changes that took place as a result of both of these events significantly lowered the incentive for members of Congress to express ambition in the sense that Madison and the Framers intended them to. Madison's theory of institutional ambition was always flawed in some ways, as Tocqueville aptly demonstrated, and reliant on certain political circumstances to function properly. That said, a detailed study of Congress and interbranch relations until the early twentieth century provides some support for the merits of Madison's theory. What has rendered Madison's theory obsolete in contemporary politics has been the combination of informal and formal changes that were made to the Constitution starting in the Progressive era and that continue into the present day.

Another factor worth mentioning with regards to congressional decline is the growing allegiance to party over institution in contemporary politics and the role that partisan polarization plays in stifling institutional pride and ambition. For example, if a Republican President takes unilateral action that is a usurpation of legislative authority, a Republican Congress is unlikely to do anything about it because of both partisan loyalty and individual members' primary interest in reelection.⁶¹ The growth of the administrative state in the 20th century and the legislative

⁶¹ Levin, 1.

gridlock that has come as a result of polarization means that the bureaucracy is now the primary mechanism through which public policy is made. In fact, it is now common for legislators to lobby executive agencies rather than draft and introduce bills in their respective institutions.⁶² This is dangerous, and clearly demonstrates that the sort of ambition that Madison anticipated in public officials has been warped, and this is now preventing the federal government from functioning according to its constitutional mandate. The analysis section of this paper will take a historical and developmental approach to make these arguments. I will start with briefly analyzing the behavior of early Congresses in the late 18th and early 19th centuries with a particular focus on the differences in the representative-constituent relationship that were present during that era, and how this influences Congress's' ability to express ambition. Then, I will look at the legislative decline and the growth of the executive branch that came as a result several transformative events that took place during first half of the 20th century. Through the lens of Federalist 51, I will contend that the political responses to these events and problems with modern citizenship form the basis for current congressional weakness. Finally, I will conclude with a reflection on partisan polarization in Congress and the future of Madisonian government.

The Early Madisonian Congress

In order to properly explain and analyze the decline of Congress, it is necessary to first look at how the legislative branch functioned in the decades following the Constitution's ratification. As noted in the literature review, most observers of American politics at the time were far more concerned with the possibility of legislative tyranny, and executive overreach was

⁶² Levin, 1.

something of an afterthought.⁶³ This was likely a reflection of the Articles of Confederation's unreasonable emphasis on legislative supremacy, as well as public concern over the number of elite figures who would inhabit Congress. Furthermore, it was widely understood that the legislative branch possessed the exclusive ability to make law, and thus had significant control over what the new federal government could actually do.

Some of the most significant figures in early American politics, for example Thomas Jefferson and John Adams, recognized Congress as a sort of "natural aristocracy."⁶⁴ Almost all of its members were wealthy, learned elites who carried enormous influence within their home states and districts. While this might appear as a meaningless product of a less democratic era on its face, Pasley points out that this meant Congressmen, and especially Senators, had little incentive to pander to their constituencies.⁶⁵ This inevitably changes the behavior of individual members, and thus the nature of the institution itself. Because there were fewer meaningful electoral reasons for members to shirk responsibility or delegate authority than there are now, the sort of ambition that Madison sought to channel was far more prevalent within the institution. Despite the lower house's inherently democratic character, election to the House of Representatives did not mean that members were expected to simply act as a microphone for the preferences of their constituents.⁶⁶ Rather, as Madison indicated in Federalist 57, they were expected to use their presumed wisdom "to pursue the common good of society" and to maintain constitutional boundaries.⁶⁷ If they failed to do so, then they could of course still be held

⁶³ Judith A. Best, "Legislative Tyranny and the Liberation of the Executive: A View from the Founding." *Presidential Studies Quarterly* 17, no. 4 (1987), 697-709.

⁶⁴ Jeffrey L. Pasley, "Democracy, Gentility, and Lobbying in the Early U.S. Congress," in *The American Congress: The Building of Democracy*, ed. Julian Zelizer (Boston, MA: Houghton Mifflin Harcourt, 2004).

⁶⁵ Pasley, 38.

⁶⁶ Pasley, 38.

⁶⁷ Bryan, 239.

accountable on election day. However, as Pasley points out, Congressmen of this era were far less concerned with the day to day and week to week responses of constituents, which in turn allowed members to focus on institutional strength.⁶⁸ While Senators were nominated by state legislatures at the time, and therefore had an obligation to represent state interests, their longer terms provided them with plenty of insulation to defend the institutional interests of their chamber. Furthermore, although all members of Congress were elected directly or indirectly and subject to democratic constraints, these were relatively weak.

An important consequence of this more distant representative-constituent relationship was that the sort of ambition that Tocqueville recognized in aristocratic nations could be, at least to an extent, exemplified in Congress. A clear ruling elite existed in American politics and many of its members were in Congress. Moreover, while Congress could not do as much policy-wise as it can now, it took far greater ownership of the duties and prerogatives it did possess. The two most clear examples of this can be seen in Congress's handling of "its war and spending powers" throughout the late 18th and 19th centuries.⁶⁹ Substantive control over both of these areas belongs to the executive branch in contemporary politics, however, it was not always this way. As Fisher notes, until the 20th century, every single American military engagement was authorized by Congress either by formal declaration or by statute.⁷⁰ Even in the face of ambitious presidents like Jefferson and Polk, Congress took full ownership of its war powers and, as a result, was able to successfully defend them. Furthermore, Congress handled its spending authority in a similar fashion. Keeping "the power of the purse" lodged in the legislature was a

⁶⁸ Pasley, 40.

⁶⁹ Louis Fisher, *Congressional Abdication on War and Spending Power* (College Station, TX: Texas A&M University Press, 2000).

⁷⁰ Fisher, 16.

crucial part of the Framers' design and also provided Congress with a powerful tool to defend its institutional interests against the executive branch whenever necessary.⁷¹ Early Congresses recognized this, and defended their authority over taxing and spending against executive efforts at usurpation throughout the 19th century.⁷² While modern Congress still has a great deal of control over spending, it exercises nowhere near the amount of control over the budget that earlier Congresses did and much of this authority has been delegated to the president.⁷³ Furthermore, these two areas provide clear examples of early congressional strength and modern congressional decline.

The Decline of Legislative Strength

To preface this section, it is necessary to point out that there were plenty of examples of executive overreach that Congress either ignored, supported, or was unable to stop prior to the 20th century. For example, Jefferson agreed to spend a large sum of money on the Louisiana territory without congressional approval, Andrew Jackson was a notoriously strong president who was called "King Andrew" by his political opponents, and Lincoln's aggressive unilateral actions during the Civil War were well-documented. The reason that this section is rooted in the early 20th century rather than any of these periods is that it was not until then that American government began to make the lasting and fundamental changes that have left the federal system in its contemporary, executive-dominated form.

As mentioned earlier, the Industrial Revolution brought about a number of changes in American society that significantly altered the way many citizens thought about the state and its

⁷¹ Fisher, 24.

⁷² Fisher, 15-16.

⁷³ Fisher, 26-28.

role in their daily lives. The skepticism of powerful, centralized government which had animated American political thought since before the Declaration of Independence was replaced by concerns born out of more modern trends. These included the growth of cities, the decline of American agriculture, increases in immigration, and the new labor situation that came as a result of industrialization.⁷⁴ The political manifestation of this sentiment took its form in the early Progressive movement. As Pestritto points out, Progressives emphasized efficiency, responsiveness, and “expertise” over the values of deliberation, restraint, and institutional competition that informed the political thought of Madison and the Framers and that are reflected in the Constitution.⁷⁵ According to the Progressive movement’s intellectual leaders, for example Woodrow Wilson and John Dewey, classical republican values had become antiquated and a system based on them could not properly serve its citizens. In his lengthy tract on comparative government, *The State*, Wilson argued that modern government should be a tool to help citizens actively pursue personal well-being.⁷⁶ This was a shift from the traditional liberal view that the fundamental purpose of government was to secure liberties that predated the state, and therefore the Progressive vision would require meaningful changes in the structure of the American system to be executed.

Progressive ideas naturally appealed to a number of people who were threatened by the economic and cultural changes brought on by the Industrial Revolution. As a result, numerous Progressives were lifted into positions of influence. Politically, strains of Progressive ideology ran through both major parties by the early 20th century. For example, Republican President

⁷⁴ Ronald Pestritto, "The Birth of the Administrative State: Where It Came From and What It Means for Limited Government," *Heritage Foundation Policy Analysis*, November 20, 2007.

⁷⁵ Pestritto, 1.

⁷⁶ Woodrow Wilson, *The State: Elements of Historical and Practical Politics* (Boston, MA: D.C. Heath, 1904), 633.

Teddy Roosevelt worked extensively to enact reforms that increased the federal government's role in economic activity. Although Roosevelt was succeeded by fellow Republican William Howard Taft, Taft was far more mild in his Progressive crusading and generally stuck to Antitrust enforcement.⁷⁷ President Taft's modest approach to the presidency resulted in a 1912 challenge from Roosevelt, who was discontent with Taft's first term. After failing to recapture the Republican nomination, Roosevelt started a third party, which was called the Progressive "Bull Moose" party.⁷⁸ Roosevelt's efforts resulted in a split between Progressive Republicans, who flocked to the third party, and traditional Republicans, who stuck with Taft. This allowed Woodrow Wilson, the Democratic candidate, to ascend to the White House on a platform even more fundamentally Progressive than Roosevelt's.

Furthermore, in the 20 years from 1901 to 1921, presidents from both major parties who were decidedly Progressive governed during 16 of them. While the presidencies of both Roosevelt and Wilson more or less contributed to the weakening of the legislature, it remains true that Congress, which was also heavily influenced by the Progressive wave, was willing to cede its own authority during this era and did so on numerous occasions.

Many policies favored by Progressives, most of which involved heavy federal regulation of economic activity, could not be feasibly enacted by Congress itself.⁷⁹ For one, extensive regulatory activity by Congress would be extremely time consuming and require a level of specific policy knowledge that most members simply did not possess. Therefore, the execution of Progressive policy preferences at the federal level all but required Congress to delegate some

⁷⁷ Peri E. Arnold, *Remaking the Presidency: Roosevelt, Taft, and Wilson, 1901-1916* (Topeka, KS: University Press of Kansas, 2009), 71.

⁷⁸ Arnold, 2-21.

⁷⁹ Pestritto, 1.

authority to administrative agencies and the president. There were numerous pieces of legislation passed by Congress during this era that either formed new administrative agencies or gave existing ones more policymaking authority. For example, the Interstate Commerce Commission, or ICC, was established in 1887 during the early stages of the Progressive movement.⁸⁰ In 1906, Congress passed the Hepburn Act, which strengthened the ICC considerably by giving it the ability to fix railroad rates.⁸¹ Four years later, the Mann-Elkins Act was enacted. This gave the ICC the authority to regulate other public accommodations in a similar fashion to railroads.⁸² Again, this is significant because this is not Congress assuming expansive powers for itself, but rather delegating its explicit constitutional ability to “regulate Commerce...among the several states” to a bureaucratic regulatory agency.⁸³ While such a move could be considered ambitious in the sense that it expanded federal authority, it comes into direct conflict with Madison’s explanation of institutional ambition in Federalist 51 and fits better with Tocqueville’s understanding of the concept and its relationship with centralization.

Although a reasonable argument can be made that legislation like the Hepburn Act and Mann-Elkins Act were a necessary response to the economic situation brought about by the Industrial Revolution, this abdication of legislative duty was constitutionally questionable, to put it mildly, and continues to have serious ramifications for current American politics. Moreover, if Congress would have expressed ambition in the Madisonian sense during this era, then it would have attempted to exercise as much control over policy as possible. Instead, it gave control to a

⁸⁰ Scott Mall, "Flashback: The Story Behind the Once Mighty Interstate Commerce Commission," *FreightWaves*, January 25, 2019.

⁸¹ Mall, 1.

⁸² Mall, 1.

⁸³ Article 1, Section 8, Clause 3 of the Constitution.

regulatory agency. Congress took similar action with the 1914 Federal Trade Commission Act, which established the FTC and provided it with considerable authority over the regulation of big business and consumer products.⁸⁴ Like the Hepburn and Manns-Elkins legislation, this was a significant example of congressional abdication.

Furthermore, it would a crime to discuss the impact of the early Progressive movement on the institutional nature of Congress without at least touching on the 17th Amendment to the Constitution. Ratified in 1913, the 17th Amendment took the authority to elect Senators away from state legislatures and required popular elections for the Senate in each state. This massive shift in electoral incentives naturally influences the behavior of Senators, and recent scholarship has confirmed this. For example, Bernhard and Sala found that Senators became far more concerned with reelection following the amendment's ratification and that this resulted in a measurable difference in Senate voting patterns, especially close to election day.⁸⁵ Furthermore, the work of Crook and Hibbing produced similar results, as they argue that the 17th Amendment essentially transformed the Senate in a smaller version of the House of Representatives.⁸⁶ This dilutes the Senate's ability to play its intended, deliberative role and thus prevents Senators from properly expressing the sort of ambition that Madison thought necessary to preserving the right balance of authority between the three branches.⁸⁷

The political success of the Progressives during this era resulted not in the overhaul of the Madisonian Constitution, but rather the bastardization of it. With the exception of the 17th

⁸⁴ Pestritto, 1.

⁸⁵ William Bernhard and Brian R. Sala, "The Remaking of an American Senate: The 17th Amendment and Ideological Responsiveness," *The Journal of Politics* (68, no. 2 2006), 345.

⁸⁶ Sara Brandes Crook and John R. Hibbing, "A Not-so-distant Mirror: The 17th Amendment and Congressional Change," *The American Political Science Review* 91,(no. 4 (1997), 852-3.

⁸⁷ James Madison, "No. 63," in *The Federalist* (New York, NY: Barnes & Noble Books, 2006), 349-350.

Amendment, the fundamental structure of the Constitution had been left untouched. Still, the operation of American government had changed significantly in practice. This had serious ramifications for Congress's will and ability to defend Article One prerogatives, and this became even more apparent throughout the rest of 20th century.

Public distaste with the Wilson presidency and U.S. involvement in World War I proved to be the undoing of the Progressive era. Republican Warren G. Harding was elected president in 1920 promising a "return to normalcy," and his successor, Calvin Coolidge, is most famous for his modest style of governing.⁸⁸ While it is true that some of the intense economic restrictions of the Wilson and Roosevelt years were rolled back during the Harding and Coolidge presidencies, no reversion to 19th century norms ever took place. For example, the Harding administration strongly supported the Budget and Accounting Act of 1921, which gave the executive branch the formal authority to draft the initial budget.⁸⁹ Although Congress did retain final say over the budget, this law still gave the President a major role in what had historically been a strictly legislative matter.⁹⁰

Furthermore, while the trends of congressional delegation and executive aggrandizement slowed down throughout the 1920s, they certainly did not stop and were reignited as soon as the decade came to a close. The emergence of the Great Depression in 1929 spurred a public demand for government intervention that was far more amplified than the similar sentiment that came out of the Industrial Revolution and the Progressive era. Furthermore, Progressive influence was

⁸⁸ Amity Shales, *Coolidge* (New York, NY: Harper Perennial, 2014), 188.

⁸⁹ Fisher, 24-26.

⁹⁰ Fisher, 26.

obvious in the construction of President Franklin Roosevelt's New Deal, which Congress began enacting at rapid pace after his inauguration in 1933.

While a lengthy book could be written about the degree to which Congress delegated away its authority during the 1930s, I seek here to cover only the aggregate impact and to make an attempt to explain this in the context of Madison's theory of ambition. Oddly enough, quite a few members of Congress were extremely ambitious in terms of their willingness to engage in the technical parts of the legislative process during the early and mid 1930s. While the widespread suffering brought about by the depression made some sort of government action inevitable and FDR was an active executive by any measure, some of the earlier bills that were part of the New Deal package were the exclusive handiwork of Congress and, to some extent, demonstrated legislative strength.⁹¹

Still, a vast majority of the legislation that came out of this period served to do at least one of two things: aggrandize the president or delegate legislative authority to regulatory agencies. Most of the economic policies favored by FDR and his Democratic allies in Congress involved heavy intervention into market activity. Again, these sorts of policies require far too much oversight and expertise to be handled exclusively by Congress at the federal level and the public demand for action was too great for the naturally deliberative and slow-moving legislative process. Thus, delegation ensued.⁹² Congress began creating numerous administrative agencies that had significant control over various policy areas and that could be directed by the president with a simple stroke of his pen. These included the Federal Works Agency, the Civilian

⁹¹ Patrick J. Maney, "The Rise and Fall of the New Deal Congress, 1933," *OAH Magazine of History* 12, no. 4 (1998), 14.

⁹²John Yoo, "Franklin Roosevelt and Presidential Power," *Chapman Law Review* 21, no. 1 (February 14, 2018), 206.

Conservation Corps, and National Recovery Administration, among a plethora of others. Although the roots of the modern administrative state were laid in the Progressive era, most scholars recognize the New Deal as its formal birth.⁹³

Initially, the Supreme Court tried to put a stop to the Executive branch's exercise of legislative power. For example, in *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down executive action under the National Industrial Recovery Act, with the majority arguing in *Schechter* that Congress had provided President Roosevelt with near "unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade and industry," and that this was constitutionally impermissible.⁹⁴ The Courts, however, could only prevent the legislature from giving away its authority for so long, and 1935 was the last time the Nondelegation doctrine was employed in a majority opinion.⁹⁵ After this, the Court became far less willing to interfere in these types of questions, especially if they involved economic policy. This was due, at least in part, to public backlash against the Court, but also to the threat of FDR's infamous Court Packing Scheme.⁹⁶ Essentially, Roosevelt wanted Congress to pass a law that would allow him to load the Court with Justices who shared his ideological views. While there was considerable backlash against this and the proposal never became law, the threat was sufficient to thwart the legal roadblocks of the Nondelegation doctrine and Substantive Economic Due Process.⁹⁷

⁹³ Pestrutto, 1.

⁹⁴ *ALA Schechter Poultry Corporation v. United States*, 295 U.S. 495 (May 27, 1935).

⁹⁵ Keith E. Whittington and Jason Iuliano, "The Myth of the Non-Delegation Doctrine," *Pennsylvania Law Review* 165, no. 379 (2017), 385.

⁹⁶ Yoo, 206.

⁹⁷ Stephen Wermiel, "SCOTUS for Law Students: Non-delegation Doctrine Returns After Long Hiatus," *SCOTUSblog*, December 4, 2014.

To bring this back into the context of Madison's Federalist 51, there are a few important things to point out. Members of Congress during this era could be called ambitious in the sense that they assumed a broad swath of power under provisions of the Constitution that had previously been interpreted far more modestly, namely the Commerce Clause and the Elastic Clause. In pursuit of this kind of ambition, however, Congress failed to defend its institutional prerogatives and ultimately subordinated itself to a powerful executive branch that the members had designed themselves through years of legislation that expanded both the powers of the presidency and the size of the bureaucracy. Furthermore, when Congress did eventually attempt to push back against President Roosevelt in the late 1930s, the legislature found its ability to do so hampered.⁹⁸ They could certainly stifle the White House's formal legislative efforts, but they could not effectively slow down the president's capacity to use the administrative state to his benefit.⁹⁹ In other words, Congress had created a quasi-branch of government outside of the Madisonian design, and the implicit restraints of the Madisonian system did not neatly apply to it.

To be clear, the problems of limited expertise and efficiency that fueled congressional delegation during the Progressive era were multiplied by the complexities of the Great Depression. The oncoming of World War II added to this significantly, and national security concerns resulted in even more power being shifted to the executive branch.¹⁰⁰ It is important to reemphasize that during national emergencies before the Great Depression and World War II, the president had assumed great powers before. As mentioned in the introduction to this section,

⁹⁸ Maney, 17.

⁹⁹ Maney, 17.

¹⁰⁰ Yoo, 208.

President Lincoln took a number of sweeping unilateral actions to direct the Union during the Civil War, among these the suspension of Habeas Corpus and reinstating the draft.¹⁰¹ Still, after the war had ended, Congress retained its position as the dominant branch. No such thing happened after World War II.¹⁰² A fundamental transformation had taken place in American Politics, and the president was the primary benefactor. This was not only because of the large bureaucracy that was now at the disposal of the executive, but also because a dramatic shift in public attitudes had occurred. While it had been trending this way in the years prior, after the attack on Pearl Harbor it was clear that “the presidency was in, and Congress was out.”¹⁰³

Although both President Roosevelt and Congress enjoyed similarly high approval rates during Roosevelt’s first two terms, Maney points out that congressional popularity began to decline significantly following the outbreak of war.¹⁰⁴ This only added to the other ambitious inhibiting obstacles that Congress had created through its statutory delegation of authority to the executive branch. While congressional popularity has varied since then, it is consistently low in contemporary politics and is useful to explaining the institution’s inability to properly defend itself now.¹⁰⁵ This also fits with Tocqueville’s predictions regarding centralization. As he pointed out numerous times, democratic citizens care primarily about their own economic self-interest and, over time, tend to push political authority towards a single institution.¹⁰⁶ The public nature of FDR’s presidency, combined with the circumstances of war and economic struggle, made strong executive leadership alluring. Aside from the difficulties it had created for itself through

¹⁰¹ David H. Donald, *Lincoln Reconsidered* (New York, NY: Vintage Books, 2001), 56.

¹⁰² Fisher, 15-16.

¹⁰³ Maney, 17.

¹⁰⁴ Maney, 17.

¹⁰⁵ Jeffrey M. Jones, "Trump, Congress Job Approval Mostly Steady Amid Shutdown," *Gallup News*, January 15, 2019.

¹⁰⁶ Tocqueville, 665.

New Deal legislation, Congress also had little incentive to attempt to reclaim its former strength, as the public had accepted the legislature as a political actor subordinate to the president.¹⁰⁷

Furthermore, this trend continued past World War II, and the lack of institutional ambition in modern Congress has never been more clear than it was in 1953, when President Truman unilaterally committed troops to Korea without consequence. As discussed in earlier sections, the authority to declare war had always belonged to and been exercised by Congress rather uncontroversially.¹⁰⁸ However, Truman was able to assume this power for himself with little meaningful pushback and every president since has exercised the war power similarly.¹⁰⁹ Although there have always been a few members of Congress who at least pay lip service to the idea that this is an example of executive overreach whenever it happens, no effective action has been taken to curb presidential war powers.¹¹⁰ The institutional will to reclaim this authority in any meaningful way simply does not exist, as this would require an assumption of great responsibility by members of Congress that would likely complicate electoral goals. On top of this, there is little public interest in this issue and most of the debate over it is left to constitutional scholars and lawyers. This speaks to Tocqueville's concerns about ambition and democratic citizenship.¹¹¹ When a political issue comes across as abstract or distant, an unengaged public will tend to ignore it even if it is of vital significance. As Becker would argue, this results in a Congress that mimics this attitude, especially as the aristocratic elements of the institution decay.¹¹² As a result, control is consolidated in the branch with the most ambitious

¹⁰⁷ Maney, 17.

¹⁰⁸ Fisher, 80.

¹⁰⁹ Fisher, 15-16.

¹¹⁰ Fisher, 144-150.

¹¹¹ Tocqueville, 615-620.

¹¹² Becker, 40-41.

actors, which in this case has been the executive. Furthermore, the war powers issue perfectly exemplifies the current relationship between the president and Congress and how it has developed since the middle of the 20th century.

Although there was some effort to push back against the abuse of presidential war powers and presidential supremacy more generally around the time of the Watergate Scandal in the 1970s, this effort was fleeting and ineffectual in the long-term. The War Powers Resolution of 1973 was passed over President Nixon's veto, however if anything it made executive war powers more formidable by statutorily legitimizing presidential claims that he could move first in committing troops without prior legislative approval.¹¹³ Recent presidents, including Obama and Trump, have even been able to get away with ignoring the limited requirements of the War Powers Resolution altogether.¹¹⁴

If Madison's theory of ambition were to function properly in any of these examples, then Congress would have used any number of the considerable tools granted to it in Article One of the Constitution to prevent its subordination to the president as an institution. Clearly, however, it has not done so. Throughout both the transformative Progressive and New Deal eras, Congress sought to expand the scope of its actual policy authority to respond to new complexities in American social and economic life. This effort required both policy expertise and a willingness to micromanage, and Congress possessed neither. This, combined with Progressive hostility towards key facets of the Madisonian system and the public desire for immediate action, led to the rise of the administrative state and serious increases in presidential power.

¹¹³ Fisher, 144-150.

¹¹⁴ Jacob Sullum, "Congress Grows a Spine," *Reason*, March 20, 2019.

Initially, a strong argument could be made that congressional delegation was fueled by ambition. Congress sought to gain control over areas of policy that previously belonged to state governments throughout the Progressive and New Deal eras, and it did so successfully. Still, this was not the sort of ambition that Madison's theory relies on, which involves keeping constitutional authorities "in their proper places."¹¹⁵ If Congress had exhibited Madisonian ambition, it would have shouldered as much of the burden as possible, or at least delegated power to actors that it could easily control. This, however, is not what happened. As more actual legislative authority has been given away and incentive structures have changed, members of Congress continue to lack the sort of institutional pride that once played an important stabilizing role in early interbranch relations and that Madison had great faith in. Furthermore, the long-term consequence of this has been a weak and ineffectual Congress in the 21st century and the rise of increasingly ambitious executives.

The State of Modern Congress and Conclusion

While these problems with Congress stemming out of the 20th century have continued in contemporary politics, the more recent trend of intense partisan polarization is worth discussing in terms of legislative decline. As I touched on briefly in the literature review, a number of scholars have identified polarization as a barrier that Congress has been unable to overcome in its efforts to counter presidential power. For example, if a president takes constitutionally problematic unilateral action, it is very unlikely that his partisan allies in Congress would be willing to stand it against it so long as it goes with their policy preferences. Because the modern president is also undoubtedly the leader of his party, partisan members of Congress might see

¹¹⁵ Madison, 287.

their electoral fate as being inexorably tied to the president.¹¹⁶ This provides a powerful incentive to fall in line, especially for members of the party establishment.

The congressional response to President Trump's recent emergency declaration concerning border security provides a perfect example of this. After a lengthy government shutdown in which the White House failed to sway the Democrat controlled House of Representatives to provide it with 5.7 billion dollars to begin construction on a wall along the U.S.-Mexico, Trump decided to claim this money unilaterally from funds that were allocated to the Pentagon.¹¹⁷ Despite this being an emergency declaration, Trump seemed to downplay this part of it, stating that he "didn't need to do this" and that he "just wanted to get it done faster."¹¹⁸ In other words, the president found himself frustrated with the legislative process, and decided to circumvent it. While some Republican members of Congress expressed concerns about the constitutionality of Trump's declaration and a bill that would have overturned it passed through both the House and Senate, Trump was able to use his veto power knowing that Congress lacked the will to override it and prevent the usurpation of its legislative authority.¹¹⁹ Similar events took place during Obama's presidency when he issued Executive Orders that essentially rewrote immigration law, however on that occasion it was Democrats in Congress who were unwilling to cross the president.¹²⁰

If Madison's theory of ambition was still relevant in contemporary politics, it is hard to imagine that either of these things could have happened. A crucial part of the ambition theory is

¹¹⁶ Daniel P. Klinghard, "Grover Cleveland, William McKinley, and the Emergence of the President as Party Leader," *Presidential Studies Quarterly* 35, no. 4 (2005), 736-760.

¹¹⁷ Taylor, 1.

¹¹⁸ Donald J. Trump, "National Emergency Declaration" (speech, Washington, D.C., February 15, 2019).

¹¹⁹ Erica Werner, "House Fails to Override Trump Veto on Southern Border Emergency," *Washington Post*, March 26, 2019.

¹²⁰ Elizabeth Slattery, "Obama Can't Rewrite the Law," *Washington Post*, January 13, 2016.

the stipulation that “the interest of the man must be connected with the constitutional rights of the place.”¹²¹ In other words, allegiance to institution or branch must outweigh allegiance to party in order for the separation of powers to be truly secure. Modern polarization, especially as it exists in Congress, significantly undermines this. Particularly in the 21st century, most congressional efforts to curb presidential power and reclaim legislative authority have been fueled by partisan animus rather than by genuine concern over the weakness of their own institutions. As a result, all that is left to prevent the concentration of political power in the executive branch and the administrative state are the “parchment barriers” that Madison himself argued were insufficient.¹²²

While Madison’s theory was always fragile, it proved effective for a long period of time. Its true undoing only came about when Congress sought to modernize and expand its reach through delegation. Congressional expressions of institutional ambition in the early 20th century took the shape of interpreting Article One extremely broadly and then passing the ability to make policy under this expanded definition to some other actor in the federal government. In a perfect Madisonian world, members of Congress would have assumed as much responsibility as possible so that they could maximize their power within constitutional limits. Although the aforementioned complexities that came along with the Industrial Revolution and the New Deal were admittedly significant, this does not act as a justification for Congress’s steady abdication of its constitutional responsibilities. As the 19th century Congresses demonstrated, power can naturally ebb and flow between the executive and legislative branches depending on the political situation, however Congress must be capable of assuming its rightful place in the Madisonian

¹²¹ Madison, 288.

¹²² Madison, 275.

system after times of crisis or rapid change are over. Contemporary Congresses have been unable to do this, and as a result the administrative state remains a powerful policymaking agent and presidents can get away with murder when it comes to unilateral action.

In order to understand the current state of separated powers, it is more helpful to look through the lens of Tocqueville than Madison. The sort of elite ambition that Madison assumed would keep one branch of government from usurping the authority of the others is nowhere to be found, however the trends of centralization and weak citizenship that Tocqueville foresaw are overwhelming in current American politics. There is no indication that either of these things will change anytime soon, and it seems safe to say that Madison's theory of ambition is no longer a useful way to understand interbranch relations. It would be extremely healthy for the Republic if Congress were able to demonstrate a degree of institutional ambition and take back control over things like the war power and commercial regulation. However, the lack of widespread public concern over this and the informal changes to the American Constitution stemming out of the Progressive era and the New Deal make it likely that members of Congress will continue expressing their ambition electorally, and nowhere else.

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