Back to the Future

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Robert L. Jones, *Lessons from a Lost Constitution*, 27 **J.L. & Pol.** 459 (2012), available at SSRN.

Ian Ayres and Joe Bankman begin one of their articles with a Dilbert cartoon (reproduced below). They use the cartoon to show that firm insiders may use nonpublic information to trade not only their own company stock, but the stock of competitors, rivals, and suppliers. Ayres and Bankman ultimately conclude that insider trading of such stock substitutes is inefficient and should be prohibited, but they acknowledge the argument that insider trading may "produce more accurate stock prices." Presumably one could learn a lot about a company by paying attention to how its insiders treat substitutes for the company's stock.

Robert L. Jones has written an excellent article that examines one insider's views of a substitute for judicial review under the Constitution–James Madison, who is arguably the "father" of the Constitution. (P. 5.) The substitute was a proposed Council of Revision, endorsed by Madison as part of the Virginia Plan. It was ultimately rejected at the Constitutional Convention, but Jones argues that one can learn a great deal about our current practice of judicial review by examining the reasons Madison preferred it over the type of judicial review we have today.

As proposed, the Council of Revision granted a qualified veto over all legislation passed by Congress to the President and "a convenient number of the National Judiciary," who would all come from the Supreme Court. (P. 28.) The veto was qualified because a supermajority of Congress could override it. A Council of Revision was by no means unprecedented. New York had established one at the time of the Convention, and the proposed Council was most likely modeled on the British Privy Council. (P. 28 n.105.) The proposed Council was not limited to reviewing the constitutionality of enacted legislation; as Jones makes clear, Madison contemplated that it would veto legislation on both policy and constitutional grounds.

Why did Madison prefer a Council of Revision to judicial review? Here Jones notes the distinction that Madison made between "democratic legitimacy on the one hand and rationality and deliberation on the other." (P. 20.) Like his contemporaries, Madison was concerned with the costs of rule by popular sentiment. In his view, the main defect of the Articles of Confederation was that it allowed the states to engage in conduct that, while popular, produced self-defeating results. Thus, he included and endorsed features in the Constitution that checked popular sentiment, such as establishing a representative government where the representatives would, ideally, "lead and shape, rather than simply slavishly follow, popular sentiment." (*Id.*) Moreover, and as made famous by Federalist No. 10, Madison believed that the vast extent of the United States would make it hard for any one faction to come to power and subordinate the interests of others.

Nevertheless, Madison was concerned with the "vortex" of power that Congress could become, and he was skeptical that a veto by the president alone would ever be exercised. He thus concluded that granting a qualified veto to two branches – the executive and some portion of the judiciary – would make it easier for both together to wield a veto that would be seen as legitimate by the people.

When the Constitutional Convention ultimately rejected the Council, Madison threw his support behind a Bill of Rights to supplement judicial review. This seems odd because Madison had previously opposed a Bill of Rights out of a fear

that the Rights would be unduly narrowed through judicial interpretation.

Why did he change his mind? There are a number of cynical reasons proposed by historians – to circumvent more radical changes proposed by the antifederalists or to win a Congressional seat. But Jones argues that Madison saw the Bill of Rights as a way to lend popular support to judicial review. Madison surmised that a Bill of Rights would be internalized by the people, who would then view the judiciary as "the guardian of those rights." (P. 99.) Although Madison did not believe that judicial review coupled with a Bill of Rights would gain the same popular support as a Council of Revision, he was enough of a pragmatist to realize that it was the best he could do.

This is a wonderful article and a joy to read. Its best feature, in my view, is how Jones uses this history of Madison's failed attempt to enact a Council of Revision. One could imagine a legal scholar using this history to support an originalist argument about the nature of judicial review. But Jones avoids this trap, perhaps recognizing that the view of one founding father (no matter how important) is probably too slender a reed to rest any inferences about what all the founding fathers intended.

Instead, Jones considers the normative lessons of Madison's failed attempt. Jones suggests that we could learn a great deal from Madison's pragmatic concerns about democracy. The biggest lesson is that we should not equate democracy with majoritarian rule. Madison's proposed Council of Revision, which would have been able to veto legislation on policy grounds, demonstrates that Madison did not view the judiciary as providing an antidemocratic check. Instead, he viewed the judiciary as performing a crucial democratic function by introducing deliberation and rationality to lawmaking, separated from the passions that drive normal politics. The judiciary was the superego to the legislature's id. In fact, Madison envisioned that the id still could trump the superego because the Council's veto could be overturned by a supermajority in Congress.

Moreover, and as Jones discusses, Madison's proposal suggests that the countermajoritarian difficulty should mean something different entirely. Madison did not believe that the judiciary lacked a democratic justification to make decisions that countered the majority because, again, he did not equate democracy with majoritarian rule. Instead, he was concerned with the all-too-human side of judging – that a judge will be too weak-willed to stand up to public sentiment, no matter how wrongheaded that sentiment may be. For Madison, the difficulty was setting up a governmental structure in which the majority will not riot when judges do their job. This difficulty is not unlike the difficulty of getting yourself to stick to a diet when confronted with a donut. Self-governance, both at an individual level and at a societal level, requires one to think of clever ways to get oneself to do the right thing.

Certainly some of Madison's views have not survived the test of time. Congress is the least popular branch, not the most popular. But Madison was probably right about the problem of getting the American people to eat their vegetables , so to speak, and it would be wise for us to take these concerns more seriously. If anything, Jones' article reminds us of the importance of listening to our elders. They know a thing or two.

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