

## **“To adjust these clashing interests”**

### ***Negotiation and compromise as core constitutional values***

By Larry Kramer  
President of the William and Flora Hewlett Foundation

*This lecture was delivered at the University of Pennsylvania Law School in 2015 as part of its Owen J. Roberts Memorial Lecture in Constitutional Law series.*

Let me begin by expressing my appreciation to the dean and faculty of Penn Law School (and anyone else who had a say in it) for the invitation to give this lecture.

It’s even more gratifying given the prestigious stature of this lecture and of those who have given it before me. I confess that when I looked up past Roberts lecturers, I experienced an unsettling “Sesame Street moment” putting my name alongside the names of my predecessors. You know: “which of these things is not like the others . . . .”

For me personally, however, this is an opportunity to connect work I did while a full time scholar with work we are doing at the Hewlett Foundation today—work that was, in fact, a big part of the reason I took your leave to join the foundation in the first place.

Given our location, I want to frame this lecture around two stories about Philadelphia’s favorite, favorite son, a founder of this institution and of our nation. I mean, of course, Ben Franklin.

As you probably know, Franklin was born and raised in Boston. While still young, he was apprenticed as a printer to his brother, James—a job he hated, not least because James bullied and physically beat him. Franklin eventually contrived a clever, if slightly unethical, way to pressure James to release him. James acquiesced, but out of spite made sure that no other printer in Boston would hire Ben. So Franklin left Boston for New York, but finding no work there, went on to Philadelphia, where he hoped to join another young printer named Andrew Bradford.

It took Franklin several days to make a trip that today takes less than two hours. He arrived in Philadelphia early on a Sunday morning, exhausted and hungry. He describes the scene in his autobiography:

Then I walked up the street, gazing about till near the market-house I met with a boy with bread. I had made many a meal on bread, and, inquiring where he got it, I went immediately to the baker’s he directed me to, in Second-street, and ask’d for bisket, intending such as we had in Boston; but they, it seems were not made in Philadelphia. Then I asked for a three-penny loaf, and was told they had none such. So not considering or knowing the difference of money, and the greater cheapness nor the names of his bread, I bad him give me three-penny worth of any sort. He gave me, accordingly, three puffy rolls. I was surpriz’d at the quantity, but took it, and, having no room in my pockets, walk’d off with a roll

under each arm, and eating the other. Thus I went up Market-street as far as Fourth-street, passing by the door of Mr. Read, my future wife's father; when she, standing at the door, saw me, and thought I made, as I certainly did, a most awkward, ridiculous appearance.

Some of you may be familiar with this “puffy rolls” incident. I've always loved the image of a slightly muddled Franklin, finding it difficult to communicate with the baker because the money is different, the bread is different, the names for bread are different, the prices are different; ending up with more bread than he imagined; wandering down the street munching on one huge loaf, two others tucked under his arms; wearing clothes that look outlandish; not quite sure where he is or where he's going.

I love the story because it feels so familiar. Isn't that exactly how you felt the first time you traveled to a foreign country? Because that's how different the colonies were from each other. Like foreign countries: with different language, clothing, currency, food, customs, and so forth.

I think the profound foreignness of the American settlements to each other is lost on most contemporary commentators, even historians.

We all know, abstractly, that there were important differences among the colonies. But we whiggishly imagine them as an embryonic country in the making: different, yet sharing cultural and political affinities that were pressing insistently toward peoplehood, making the emergence of a single nation an almost foregone conclusion.

In fact, nothing could be further from the truth. There were profound differences among the colonies, and nationhood was anything but inevitable.

The colonies were not, as John Jay disingenuously asserted in Federalist 2, “one united country” and “one united people.” They were, in fact, a polyglot population of English, Indians, Africans, Scots, Germans, Swiss, Swedes, and French. At the time of the Revolution, more than 40 percent of the population had non-English roots, and the diversity of customs and manners, beliefs and experiences was wholly unprecedented, even then.

So how did these people view their identities? Interestingly, even those from non-English backgrounds mostly saw themselves, first and foremost, as Englishmen (and women), a fact of which they were immensely proud. They were, as well, colonials: playing an important role securing the greatness of the British Empire by contributing to its global expansion, wealth, and power.

By the beginning of the Revolutionary period, say 1760, it's fair to say the colonies had each also developed a strong and stable self-identify—meaning residents saw themselves as “Virginians” or “New Yorkers” or “Pennsylvanians.”

There was not yet a distinct American identity, however, and a colonial Virginian had no more reason to identify with his counterparts in New York or New Hampshire than in Bermuda, Barbados, or Newfoundland.

What changed this and began the process of uniting the disparate colonies into a single nation with a shared identity as “Americans” was, of course, the Revolution.

I won't here rehearse the complicated causes and conditions that underlay and helped motivate the American Revolution. For now, suffice it to say, that while Revolution was by no means inevitable, various conditions of colonial life intersected with new British policies in the 1760s to bring to the surface tensions that had long been building but were still latent.

Moreover, because England's new policies affected all the colonies equally, they provided the first sufficiently urgent impetus for them to unite—beginning a process whereby colonials who had felt immense pride in being English began to reconstitute their identities: abandoning their Britishness and, for the first time, becoming “Americans.”

This did not happen right away or all at once, of course, and it was not something anyone set out self-consciously to do. What the rebellious colonies perceived as essential, and so did set out self-consciously to do, was to create a political union or alliance, initially to push back against England, then subsequently to ensure the survival of each of them.

But political union is not the same as nationhood, much less peoplehood, and Americans in the late eighteenth and early nineteenth century ended up doing more than just form a political system. Along the way, intentionally or not, they created a new identity for themselves.

It's not too much, I think, to say that the emergence of this “American” identity is one of the most remarkable things about the period, because it departed so dramatically and unexpectedly from the normal processes of national identity formation.

Yehoshua Arieli has argued, rightly in my view that the United States offers the first example in history where political self-determination preceded, and to a large extent drove, the process of national identification and the creation of a national identity.

People who did not see themselves as “a people” formed a government, and, having done so, only then became one: became, that is, “We, the People of the United States.”

As remarkable, the development of this identity took place with astonishing rapidity in the early years of the Republic. By the time the War of 1812 ended, the disparate British colonies of the 1760s—as we have seen, virtually foreign nations to each other—had completed a profound transformation in the way they perceived themselves and the world around them.

Tocqueville marveled at this fact, describing to a friend the puzzle that would frame his analysis of America:

Picture to yourself . . . if you can, a society which comprises all the nations of the world . . . people differing from one another in language, in beliefs, in opinions; in a word a society possessing no roots, no memories, no prejudices, no routine, no common ideas, no national character, yet with a happiness a hundred times greater

than our own . . . . This, then, is our starting point! What is the connecting element between these so different elements? How are they welded into one people?

The answer, as Tocqueville well understood, is that Americans built a new identity on and around two related cornerstones: first, their commitment to an idea—the idea of republicanism that motivated the Revolution; and second, a system they devised themselves to make that idea a practical reality in day-to-day governance—the U.S. Constitution. These became the foundation for expressing who we are as a people and what unites us as a nation: the phenomena that defined, and still today define, America and Americans uniquely in the world and in world history.

Lest you doubt it, I invite you to visit the National Archives, where you will see the Declaration and the Constitution laid out as on an altar, as clear a display as one could make of the one “true” religion—albeit a civic religion—that all Americans share.

We may, indeed, share nothing else, and still be Americans. We can worship different gods (or no god), we can eat different foods, enjoy different activities, read different books, want different things for ourselves and for our children. But what we all share in common is our commitment to this system of republicanism and constitutional government. This, indeed, is what it means to *be* an American.

It’s worth taking a few moments to recall just why this idea of republicanism had such power for the nation’s founding generation.

We tend to think of our Founders as the solemn old men they eventually became (as do we all, sadly). But they were in fact mostly in their twenties and thirties when the American Revolution began, which is to say, they were young men, still trying on identities and deciding who they were or would be.

And the Revolution provided their answer. It shaped their lives and turned them into radicals and revolutionaries in the fullest sense of the words. The dramatic, traumatic events of the 1760s and 1770s galvanized them emotionally as well as intellectually. It provided them with a purpose and a set of ideals that motivated the rest of their lives.

And that purpose was the creation of a republican nation. This, more than anything else, provided, as Gordon Wood has aptly put it, “the deeply felt meaning of the Revolution.”

A great deal of ink has been spilled trying to define just what Americans understood and meant by the term “republican,” and disagreement persists about what precisely the idea encompassed.

This was true, I should say, even at the time. John Adams once confessed that he “never understood” what republicanism meant, maintaining that “no man ever did or will” because the term “may signify every thing, or nothing.”

For our purpose, however, as well as the purpose of most Americans at the time, the idea of republicanism simply meant popular government, as opposed to monarchy or mixed government. It meant a government created and operated based explicitly on the consent of its people, a government whose whole authority derived from that consent, without hereditary rulers or orders.

Bear in mind that building a system of government wholly on popular authority was considered political heresy in the 18<sup>th</sup> century, something contrary to all wisdom and experience, which taught that republican government was unworkable in large, socially diverse states.

We tend today to forget what a risky gamble the Revolutionaries were taking, having lost sight of what Wood again has fittingly called “the radicalism of the American Revolution.”

The same cannot be said for the Americans who made it happen. St. George Tucker boasted in 1803 how the Revolution had “reduc[ed] to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers.” It was, Washington Irving agreed, expressing a sentiment widely shared among Americans, “one of the greatest Political experiments in the history of the world.”

Like radicals and idealists in other ages and at other times, moreover, the cause our founders fought for infused meaning into their lives, and they were determined to see it through. Making popular government work was both the reason for and triumph of our Revolution, the object for which Americans staked their lives, fortunes, and sacred honor.

Unfortunately, they soon discovered, achieving that object was a lot trickier and more complicated than they originally thought.

The story of how the early state constitutions failed is well known. Written in the flush of excitement that accompanied the Declaration, the new states adopted charters incorporating radical democratic innovations that had been theorized throughout the 18<sup>th</sup> century in the British Whig literature that was so popular in America: annual elections, unicameral legislatures, weak executives and judiciaries, councils of censor and of revision, and so on.

Not every state went as far as Pennsylvania in this direction, but all the states put their faith, and so most government authority, in powerful legislatures, in an optimistic belief that the republican virtue of the citizenry and its elected representatives were sufficient to ensure good government.

The results were not pretty, and by the mid-1780s many Americans had begun to fear that the Revolution was failing, viewing their situation as “critical and dangerous” and fast heading toward “national ruin.”

As James Madison described in his famous memorandum on the “Vices of the Political System of the United States,” state legislatures proved exceedingly irresponsible. The excessive “multiplicity” of their laws constituted a “nuisance of the most pestilent kind,” made worse by “mutability,” as new legislation was capriciously repealed or superseded, unsettling expectations and producing instability.

Worst of all, much of this legislation was foolish and unjust, “a defect still more alarming,” Madison brooded, “because it brings into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.”

Nor were matters better at the national level, though the problem there was too little rather than too much activity, as the Continental Congress proved singularly incapable of dealing with any of the new nation’s problems.

Conventional wisdom has for some time held that the move to adopt a new federal constitution (as opposed to following Congress’s direction simply to amend the Articles of Confederation) was motivated chiefly by a desire to address the problems of state government.

It’s now clear, I think, that this supposition is wrong. The national government’s own failures under the Articles supplied more than sufficient reasons to take this step.

What most definitely is true, however, is that the Framers of the Constitution sought to learn from what was not working in the states, and so to create a national republican government that could, as Madison later wrote in Federalist 10, “secure the public good and private rights . . . , and at the same time . . . preserve the spirit and the form of popular government.”

The task of the men who met in Philadelphia, in other words, was to devise a better system, to learn from and use their experience to find a structure that would finally secure the republican fruits of the Revolution.

And they succeeded beyond even their own hopes and expectations—at least insofar as their fellow countrymen were concerned. Yes, the battle for Ratification was hard fought, and Anti-Federalists often employed extreme rhetoric. Yet once Ratification was secured, opposition to the new government disappeared as quickly as it arose—a phenomenon quite without parallel in history.

Fierce disagreements persisted. Indeed, the 1790s was one of the most politically contentious decades in our history, second only to the civil war. But by the spring of 1791, the Constitution had been accepted on all sides as the starting point for further debate.

More important, the Constitution quickly established itself as the quintessence of American republicanism. At the close of his first inaugural, Jefferson called it “the touchstone by which to try the services of those we trust.” Schoolbooks of the era described the Constitution as divinely inspired, routinely attaching adjectives like “revered,” “glorious,” and “sacred.”

In his July 4th oration of 1800, Daniel Webster (then still a student at Dartmouth College) declared that ratification of the Constitution would “stand on the catalogue of American anniversaries—second to none but the birthday of [our] Independence.” And so it has.

But if acceptance of and commitment to our republican Constitution defines what it means to be American, we need to ask, what does the Constitution stand for? Or, more accurately, what does it require of us?

Each of you will have answers to this question, most of them, I suspect, pointing toward values like equality, free speech, due process, privacy, property rights, and so forth. All of which are unquestionably important, though it's interesting to note how the most typical answers come from the later-added Bill of Rights, and not from the original Constitution.

In any event, I am thinking of something different. Because at its heart, our Constitution is about realizing and implementing democratic self-government, and the question we really need to ask is: what does the Constitution require of us to make that work?

And the answer, interestingly enough, is not something typically highlighted or even mentioned in most discussions of our constitutional system. Yet it is essential: a set of core values—perhaps *the* core values—needed to make republicanism work. I mean, as the subtitle of this talk indicates, a willingness to deliberate, to negotiate, and, ultimately, to compromise with others who disagree. This, I want to suggest, is a fundamental obligation and responsibility of both citizens and their representatives in government, a necessary condition for republican rule, and one of the central principles on which our constitutional system rests.

That claim may come as a surprise or sound strange, because while deliberation has always attracted attention, hardly anyone highlights or draws specific attention to negotiation and compromise as constitutional values at all, much less as core ones.

I'm not sure why this should be so. I'd like to think it's because their importance is so obvious it has been taken for granted. Or maybe it's because their legitimacy has seldom been questioned—until today, that is.

Whatever the reasons, it's a relatively straightforward exercise to demonstrate the significance and centrality of negotiation and compromise in our constitutional scheme.

We begin with a reminder that the heart of republicanism and republican government is popular control, the idea that (in Madison's words) "power is in the people over the government, and not in the government over the people" and that "Public opinion . . . is the real sovereign in every free [government]."

That much, I take it, is uncontroversial. Less obvious, but equally important, is the proposition that popular control means majority rule: that our constitution is majoritarian, not counter-majoritarian.

This is a point Madison and others made regularly. In his Vices memo, for example, Madison wrote that in a republic, not only does "the majority, however composed, ultimately give the law," but this is, indeed, "the fundamental principle of republican Government."

And that gives rise to a problem—gives rise, we might say, to *the* problem—because the sad lesson of the 1780s was that popular majorities were often unjust and unreasonable.

Yet the people who fought the Revolution had not dedicated their lives to the cause of republicanism without regard for its quality or content. A republican government could be just, but it didn't have to be. And an unjust government—even if republican—would not be worth serving or preserving.

So while republicanism meant subjecting “the will of the government to the will of the society” (meaning the will of the majority), that alone was not enough. It was necessary as well to subject “the will of the society to the reason of the society.”

In promoting the authority of public opinion, in other words, Madison was preaching majority rule but not simple majoritarianism. Majority opinion would hold sway, but the majority opinion that *should* hold sway had to be more than the unreflective reactions of a transient majority of citizens. It had to reflect the true interests of the society.

This was Jefferson's point as well when he urged in his first inaugural address that Americans “bear in mind the sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable.”

Ensuring that the will of the majority would be reasonable was no easy task. There is, of course, no surefire way to guarantee that every decision will be just and reflect the best interests of society as a whole. But, then, the same could be said for any system of governance. The most we can ever do is to build a system we think likely to achieve such outcomes as often as possible, though in the American context, this challenge included the additional requirement that the system be republican. This, then, was the task Madison and the other Framers set for themselves in Philadelphia.

A first principle, one Madison gleaned from his study of history, was that popular government could succeed only if decision-making was mediated and refined through a system of accountable representatives.

That lawmaking would be done by a representative legislature was never in question, of course, if only because more direct forms of democracy were impractical on a national or even statewide scale. There were, however, very different views about how this representative body should be constituted and how we should expect it to operate.

Many Anti-federalists (and some Federalists) viewed representation as an inferior second best to direct democracy, and believed that the representative body should (as Theophilus Parsons wrote in *The Essex Result*) “be an exact miniature of their constituents.” Representatives on this view were meant literally to re-present whatever their constituents would want.

Madison and most Federalists viewed representation differently. They saw the representative assembly as a filtering device that could, if properly constituted, improve the quality of legislative decision making through thoughtful deliberation.

As he explained in Federalist 10, representation made it possible:

to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose.

Elected representatives were not mere ciphers for their constituents, mechanically reflecting their views. Rather, they had an important role to play shaping public opinion.

As Colleen Sheehan notes, precisely because public opinion is sovereign, “the republican statesman is obliged to advance its formation and expression.” It was with this in mind, for instance, that Madison emphasized how critical “Representatives going from, and returning among every part” of the nation were to securing republican liberty, a safeguard whose importance, he said, was matched only by “a circulation of newspapers through the entire body of the people.”

Representatives traveling to and from the seat of government (responsible to be, as a friend of mine jokingly put it, “reachoutty”) served as “agents for the exchange of political ideas among the citizenry. As elected officials whose task was to deliberate on issues of national import, they [could] both attend to the views of their constituents and convey back to them the concerns and interests of the nation at large.”

This sort of educative leadership would be effective, however, only if proper leaders were in place. Hence Madison’s excitement when he realized how a large republic could foster “a process of elections as will most certainly extract from the mass of the Society the purest and noblest characters which it contains.”

But Madison’s objective was not to select an elite that would deliberate *for* the public, as it has sometimes been caricatured. Nor was it to place this elite at such a remove from the people that it could work free from their interference, another caricature.

Rather, Madison wanted “the ablest Statesmen & soundest Republicans” to seek positions of leadership so they could teach and inform the public, elevating the discussion, fending off local prejudices, and improving the citizens’ minds and morals. Those in office, whoever they were, would necessarily know more about public affairs than ordinary citizens. It would be their job to know and would be what they spent their time learning about.

Public officials were, as a result, in the best position to provide the kind of civic education that was essential to guide the public’s thinking. To play their part well, however, these public officials had a responsibility to use their superior knowledge and position to move public opinion in the direction of reason, moderation, and justice.

The extended republic served a second critical purpose in Madison's scheme. Generating reasonable and reasoned public opinions takes time and requires a proper forum for deliberation. This is difficult to achieve in a small republic, where the limited range of competing interests makes forming a factious majority capable of acting quickly and for bad reasons too easy.

Virtuous leaders could, in theory, prevent this, but in practice "[i]t is vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm."

Added safeguards were needed to blunt the process of majority formation: to slow it down long enough for the country to have a proper public debate. And among the surest of these additional safeguards was simply to make the republic larger:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

The difficulty of forming such majorities would, in turn, create time and space for the kind of public deliberation and discussion that is necessary to refine popular opinion and help it coalesce around a just and reasonable decision.

Note how this description of the effect of enlarging a republic differs from the usual understanding of Madison's famous argument. The usual assumption is that, because Madison feared legislators would be too responsive to majorities, he wanted to prevent majorities from forming, thereby leaving officials free to craft solutions that satisfied an independent and objective notion of "the public good."

But, as we have seen, Madison was committed to the idea of majority rule and believed in the sovereignty of public opinion. His actual concern was more focused. It was not majorities that Madison feared. It was unreflective, factious majorities, the kind of majorities that he thought could be formed all too easily and all too quickly at the state level.

The benefit of extensive size was that, by making it more difficult for majorities to form, a large republic gave reasoned argument an opportunity to prevail, so that whatever "coalition of a majority of the whole society" eventually emerged "could seldom take place on any other principles than those of justice and the general good."

At the risk of oversimplifying, we can characterize the process Madison envisioned as a conversation: a conversation in which elected officials deliberate collectively and lead by persuasion an electorate actively engaged in making its own judgments and decisions.

And what can we say about the nature of this conversation? We can, I think, quickly put aside two common interpretations of Madison's thinking. First, we can dismiss the old pluralist reading (associated with Martin Diamond), which assumed that representatives would be brokers for the interests of their constituents, engaging in a process of horse trading and log rolling to achieve legislative outcomes.

This anachronistic view has been thoroughly dismantled by historians, who have recovered and emphasized the distinct intellectual framework of Madison and the other founders—a framework in which interest groups were still an evil to be overcome and the political system was supposed to transcend interest, not give it free play.

These same scholars have offered an alternative reading of Madison that is, unfortunately, also problematic. According to their “civic humanist” alternative, Congress was designed to secure power for a virtuous elite of “disinterested gentlemen.” Freed from corrupting political pressure by size and distance, these noble patricians could then serve as “proper guardians of the public weal.”

There are, I believe, a number of problems with this interpretation of Madison as well, which has nevertheless come to predominate the literature. It is, to begin, far too anti-democratic. Certainly Madison’s anxiety about the risks of popular government was real. He unquestionably saw certain forms of democratic politics as noxious and unjust, and he believed it possible to engineer the government’s internal structure to minimize these. But structural innovations were mere “auxiliary precautions” to a more basic and primary “dependence on the people.”

Madison’s hope, his whole purpose, was to make democratic politics work, not to minimize the extent to which it interfered with a ruling elite. Madison was, above all, a committed republican who believed in popular government and believed that the people must control the government and laws at all times. Hence, his emphasis on representatives communicating with constituents and leading a public debate.

Moreover, the civic humanist characterization strikes me as unrealistic to the extent it imagines a disinterested elite coming together and achieving consensus about the public good through impartial discussion. To believe that’s how decisions would be made seems naïve and unrealistic—two things James Madison most definitely was not.

To say this is not to engage in anachronism. I am not reading my own experience back into Madison’s mind. Rather, I doubt Madison would have believed this because nothing in his own experience would have supported such a belief. On the contrary, everything he had seen and experienced would have suggested the improbability of such a process.

Remember that Madison had been a representative in the Continental Congress as well as the Virginia legislature, and he had also been a delegate to the Annapolis, Mt. Vernon, and Philadelphia Conventions. Yet none of these assemblies had looked or acted remotely in the manner scholars imagine Madison expected Congress to act. All were characterized by a mix of enlightened deliberation, stubborn self-interest, and hard negotiation and bargaining.

Surely Madison did not think the members of Congress would be superior to the delegates at the Constitutional Convention. Yet the Convention was filled with disagreement, self-interest, and the grudging resolution of controversy by close votes after angry argument.

Indeed, were it not for the willingness of the delegates in Philadelphia to compromise, even on such matters of high principle as slavery and representation, there would have been no Constitution to ratify.

Madison was “a tough minded realist, not given to illusions,” someone who learned from experience. And by 1787, he had a great deal of experience with legislative assemblies at their best and their worst, experience that must have informed his understanding of and expectations for the new federal Congress.

So how did Madison expect Congress to work? Madison scholars are plainly right in rejecting the pluralist view. But the alternative to pluralism is not some idealized philosophers’ club or debating society. To be sure, Madison believed that, with time and proper encouragement, representatives and constituents could rise above self-interest and think about the greater public good.

But he also understood that how people saw the public good would differ depending on who they were, where they came from, and who they were accountable to. How people saw the public good, in other words, would inevitably be shaped by their situation and their interests.

The whole point of extending the Republic was to encompass people from a wider variety of situations and so take in a greater number of interests. The resulting diversity of viewpoints would both slow down and improve the process of majority formation because it would require a complex process of negotiation and compromise—the same process Madison had witnessed in Philadelphia, except more complicated because members of Congress could not work in secret and would need to include and inform constituents in the ongoing deliberations.

Nor is size the only way our Constitution ensures discussion and deliberation. The risk that “enlightened statesmen will not always be at the helm” required, in addition, that power be divided—as Madison explained in Federalist 51, “first between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments.”

All these different branches and departments of government could then use their powers to impede actions by others if they objected, thus forcing the kind of public debate needed for “the reason of the society” to emerge and coalesce.

Structural innovations in the form of federalism and separation of powers became the final elements of Madison’s constitutional design, a means of further ensuring a process of public deliberation, negotiation, and, eventually, compromise to advance the cause of republican liberty.

Which brings me back to my main point: that the lawmaking process envisioned by the Constitution could work—was intended to work—only if participants understood and acknowledged that they were part of an extensive republic, comprised of people whose views about the public good would necessarily differ, and were willing to contribute in good faith to the inevitable process of deliberation, negotiation, and compromise needed to secure that good while “at the same time [preserving] the spirit and the form of popular government.”

The process of deliberation, negotiation, and compromise, both inside Congress and within the larger society, is desirable: the heart of what Madison affirmed with pride at the end of Federalist

10 is “a Republican remedy for the diseases most incident to Republican Government” (emphasis on that first “Republican”).

Which brings me to today, because we seem to be losing sight of the importance of these core values as critical features of our constitutional system.

Worse, we seem increasingly to be turning what are essential values in republican government into dirty words. This is a long-term trend that began in the 1970s but has been accelerating in recent years. In an almost comical interview when he first became Speaker in 2009, John Boehner literally refused to say the word “compromise,” conceding only that he would seek common ground with opponents while insisting that he would not change positions on anything.

Yet he was recently challenged as Speaker, an almost unheard of event, because even he is seen by many in his party as too accommodating.

Today, we have candidates for office, lots of them, campaigning on explicit pledges never to work with the other side. Or candidates—including a powerful majority leader in the House—defeated because they were willing to consider looking for common ground.

Matt Kibbe, CEO of FreedomWorks and a leader of the Tea Party said, apparently without irony, that “not compromising seems to be the glue that holds us together as a social movement.”

But the problem extends well beyond the Tea Party. In the run up to the most recent midterm election, the Washington Post published a column entitled “Compromise IS a Dirty Word” that concluded, based on polling data, that “‘compromise’ is a political loser.” And when John Dingell was asked in connection with his retirement after 57 years in Congress what the biggest changes were, he replied: “Lack of collegiality. Refusal to compromise. An absolute reluctance to work together.”

A research assistant helping find material for this speech wrote me that “if digital content had any weight, there would literally be a ton of material on ‘compromise’ being a dirty word.”

Such assertions are, sadly, supported by quantitative evidence. Sarah Binder, a leading scholar on Congress, constructed a measure of gridlock based on the number of issues left unresolved in a given term relative to the number of issues that are actually salient. She found that gridlock has been rising for several decades and that the 112<sup>th</sup> and 113<sup>th</sup> Congresses were the most gridlocked ever.

That being so, it’s no surprise to learn that Congress has also become notably less productive. Less than .1% of bills became laws last year, the fewest since before WWII and the emergence of the modern administrative state. I am aware that passing a lot of laws doesn’t equate with effectiveness, but surely a drop of this magnitude suggests that something has gone wrong, particularly when measured against the output of other second term presidents in divided governments.

In 1997, with Clinton as president, Congress enacted 153 laws. During Reagan’s second term, in 1985, Congress enacted 240 laws. Even in the midst of the Watergate scandal in 1973, Congress managed to enact 247 laws. Compare these figures to last year’s paltry 72 laws, and you see the problem.

Historians have already awarded the 113<sup>th</sup> Congress the title of “worst ever” in the modern era, adding that the only real competitor for that title is the 112<sup>th</sup>—a verdict shared by the public, whose disdain is expressed in Congress’s record low poll numbers (which were never particularly high but have now reached depths no public institution has ever achieved).

Blame for Congress’s decline is usually placed on a steady, and (in recent years) steep, increase in partisan polarization.

Political scientists define polarization in terms of two interrelated phenomena: First, political parties move farther apart on policy, the liberal party moving to the left as the conservative party shifts rightward. Second, the range of views within each party becomes narrower—each of the bimodal peaks having a higher median and a smaller spread. Thus defined, polarization is at an all-time high.

Party-line voting, in particular, has never been more prevalent. Last year, majorities of the two parties differed with each other on seven of every ten roll call votes, the highest in at least six decades. More telling, both Houses of Congress set records for the number of instances in which 90 percent of one party voted against 90 percent of the other.

Generally speaking, members in both Houses exhibit far more party discipline than in the past. As late as the 1970s, the typical member of Congress voted with his or her party just over 60 percent of the time. That increased to 70 percent in the 1980s, 80 percent in the 1990s, and in the 2000s has risen to an astonishing 87 percent.

There has been ongoing debate about whether this polarization is “asymmetric”: whether, as Tom Mann and Norm Ornstein have claimed, it is mostly the fault of Republicans.

The conclusion of those who hold this view is chiefly based on so-called DW-NOMINATE scores, which measure ideology in roll call votes on a two-dimensional spatial model, and which do indeed appear to show more movement on the right.

Recent scholarship, however, points out that DW-NOMINATE scores do not accurately depict ideological movement over time, and other evidence suggests that both parties have moved in roughly equal measure. Both have certainly moved, in any event, so like it or not, Democrats and Republicans must share the blame for congressional gridlock and inaction.

This conclusion is further supported by survey evidence, like a recent one from the Pew Research Center finding that, while Democrats are more willing to say they favor compromise, in practice they are no more likely than Republicans actually to support it.

There is also evidence that, on average, neither liberals nor conservatives have changed their positions very much. Liberals are not particularly more liberal today than they were in the past, nor are conservatives all that much more conservative. Rather, what has happened is that liberals and conservatives have become better “sorted” ideologically, with conservatives confined to one party and liberals to the other. That change, which appears clearly in roll call votes in Congress, would account for both of the developments that political scientists interpret as polarization.

Be all that as it may, I think it a mistake to blame the decline of compromise on political polarization—to assume that polarization increased and, as a result, compromise has suffered.

If anything, the opposite is more accurate: decreased willingness to negotiate and compromise is the behavior that defines political polarization. Let me explain briefly why I say this and then turn to why it matters.

Why do I say this? First, because while it undoubtedly is true that people who are farther apart ideologically find it harder to compromise, the willingness to compromise stands independent of substantive ideology.

Someone disinclined to compromise will be disinclined to do so whether the other side is ideologically close or distant, just as someone who believes in achieving compromise may be as willing and able to reach agreement with people whose positions differ greatly as with those who are ideologically closer.

In the language of economics, the likelihood of compromise is a product of the legislators' reservation prices, which are a product of attitudes independent of their ideal prices.

The literature on polarization is written as if legislators only ever vote their ideal price, or as if their reservation prices are always close to their ideal price. On this view, we plot where members of Congress stand on a left-to-right continuum and assume that everyone simply votes that position. If the middle disappears, the legislature will grind to a halt.

In fact, the results we see may be a product of decreased interest in or willingness to compromise, rather than increasing distance between liberals and conservatives.

But then why, you may ask, do DW-NOMINATE depictions of roll call votes look as if the parties are drifting farther apart while becoming narrower within? Because the DW-NOMINATE score assigns members an ideological position based on how they actually vote: on what they do, rather than what they might want to do.

Suppose, for instance, that I am a centrist Democrat, but either as a matter of party loyalty or to preserve my position within the party, I always support the party's leadership, which is more liberal than me. In that case, my DW-NOMINATE score will portray me as ideologically identical to party leadership.

It follows that the polarization that appears may reflect—and this is what I think it chiefly reflects—little more than a decreased willingness to compromise with the other party. Polarization is an *outcome*, in other words, not a cause: the outcome of reduced willingness to meet the other side somewhere in the middle.

That conclusion is consistent with the data on sorting I described earlier. The left is not farther left, nor is the right farther right. Instead, there is lesser disposition in each party to compromise, a result of changes in party composition and competition, not any increase in ideological polarization in Congress as a whole.

So what explains the reduced disposition to compromise? I do not think we can account for it by saying that officials won't compromise with others whose ideology is different.

After all, back when there were conservative Democrats, they usually supported their more liberal fellow party members, and the same was true for liberal and conservative Republicans. Not on all issues, of course. Passage of the civil rights laws, for example, depended on an alliance of liberals and moderates in both parties against conservatives in both parties.

But such issues were closer to the exception than the rule, and party alignment overcame ideological disagreement more often than not: as we saw, 60 percent of the time back in the 1960s and 70s. Yet today, there is no willingness to compromise even on small matters. So something beyond ideology must account for the change.

Polarization—now understood as decreased willingness to compromise across party lines—is a byproduct of two reinforcing changes in the parties: (1) the sorting that has made each party more ideologically monochromatic, and (2) a significant uptick in party discipline or the willingness of members to vote the party line even if they disagree or would be willing to moderate their position.

The former change (sorting) has robbed people who differ ideologically of the best incentive they used to have to compromise (being co-partyists), while the latter change (party discipline) has made it harder to compromise even absent an ideological driver.

This is what Mann and Ornstein mean when they talk about the most significant development in American politics being the emergence of parliamentary style parties in a separation of powers system. Party discipline now trumps willingness to accommodate opponents a lot more than it used to.

Accounting for these changes in party composition and competition is not difficult.

The sorting of the parties into more clearly defined liberal and conservative camps has many causes, but chief among them is probably the dynamic created by passage of the Civil Rights Acts and Nixon's "Southern strategy" in 1968.

White Southern democrats had not necessarily shared their party's views since the New Deal, but reflexive, leftover, Civil War resentment against Republicans had kept them in the fold. Abolishing Jim Crow and securing voting rights to African Americans proved too much, however, and Nixon took advantage of that, along with growing resentment over social issues touching on sexual and family values. And so began the process of turning the solid Democratic South into the solid Republican one.

As the Republican Party became more conservative, moreover, liberal Republicans were induced to make the opposite shift, finding a more agreeable home with the Democrats.

A variety of other developments, in the meantime, have enhanced party discipline, further narrowing room for compromise already reduced by ideological sorting. In no particular order, these developments include such things as:

Changes in Congress's internal operations that centralized power and strengthened leadership at the expense of committees and committee chairs. These include a wide variety of rule changes, the abandonment of regular order, and various other shifts that curbed the ability of individual members to break ranks.

Negotiation and compromise across party lines have likewise been inhibited by massive growth in organized external networks of so-called intense policy demanders. These consist of organized outside interests dependably associated with one party or the other (such as the Democrats and unions, or the Republicans and evangelicals) who are able to pressure party leaders and disrupt potential compromises before they can even be formulated.

Campaign finance reform has played a major part in this development. By weakening the role of parties in financing elections, well-meaning but ultimately misguided reforms enhanced the power of these policy demanders, who use their financial leverage to reward supporters and punish the unfaithful (particularly in primary elections).

Room to act independently of one's party has been further hampered by the simultaneous development of what is aptly called "the outrage industry": partisan media that punish anyone imprudent enough to deviate from the party line and that give a platform and a powerful public voice to the parties' most doctrinaire elements.

The most important cause, however, may simply be that Americans are genuinely and closely divided on issues. As a result, and even taking gerrymandering (the effect of which is greatly exaggerated) into account, every election has the realistic potential to shift control in one or both Houses of Congress.

Consider that Democrats held the House for all but four of the 62 years between 1933 and 1995, and held the Senate for all but the same four years between 1933 and 1981. Since the 1980s, in contrast, the Senate has turned over five times and the House three times, and the opportunity to win control in one or both chambers has usually been within reach.

The potential to gain or lose control every two years has, in turn, given rise to a "permanent campaign" mentality that keeps the partisan temperature at a constant boil.

When every action is fraught, undertaken as if in the middle of a hotly contested election, it's no surprise that "teammanship" and hyper-partisan posturing are at a premium, and that compromise and moderation suffer.

This brief list of causes is hardly exhaustive, of course. A wide variety of institutional and cultural developments have contributed to or exacerbated the problem—things like a shortened workweek combined with reluctance to live in Washington, which has undermined cross-party personal relationships.

The point, in any event, is that a combination of factors has contributed to a profound shift in political culture—in which it is now increasingly difficult to compromise, in which paying more than lip service to the idea of compromise is increasingly devalued, and, indeed, in which the need even to pay lip service is fast waning.

Still more worrisome, these developments, which began at the federal level and in Congress, are now metastasizing out to the state and local levels and, worst of all, into the general public.

Why that matters should be evident from what I said in the first half of this lecture.

The American constitutional system is built on an idea of negotiation and compromise among people with different passions, interests, and beliefs.

If embrace of our constitutional system is what it means to be an American, and embrace of negotiation and compromise is an essential part of what it means to embrace that system, then the repudiation of compromise as a value is a repudiation of our core identity.

I am loath to use a term like “un-American” given the sorry history of such charges, but if the accusation were to be made against anyone, it would be those who repudiate the value and importance of compromising. They are the ones denying the essence of what defines our democracy.

Let me hasten to add that I absolutely am *not* saying there are no matters of principle on which should not compromise. Of course there are, slavery being the most obvious example from American history.

But God save us from the people for whom every issue and every disagreement is a matter of high principal, equivalent to opposition to slavery in the 19<sup>th</sup> century. It is simply preposterous to treat the difference between a 36 percent and a 39 percent marginal tax rate as if it were a choice between socialism and oligarchy, just as it is idiotic to describe the modest Affordable Care Act as tantamount to slavery or Paul Ryan’s proposal for “premium support” under Medicare as equivalent to telling the elderly to eat cake.

This is a matter of political culture, of attitudes and expectations. There is a world of difference between assuming we can and should compromise over our differences, subject to rare exceptions for matters of particular import, and shunning compromise unless an existential crisis is at hand. Hard choices will always need to be made, but our attitude in approaching them should be one of respect for disagreement and openness to accommodation.

We should be able to disagree about policy without labeling our political opponents illegitimate or refusing to work with them on any terms short of their capitulation.

If we cannot do that, cannot restore the ability of elected officials to reach sensible accommodations around such differences, cannot make and get behind the critical decisions needed to govern a complex society and economy in a post-industrial world, it’s not clear that our constitutional system has much of a future.

It was with this in mind that the Hewlett Foundation last year launched what we are calling (for reasons that should by now be obvious) “the Madison Initiative.”

It’s an effort to mobilize support for changes that can bring the spirit of negotiation and compromise back into Congress. And, through that, we hope, to the larger political society.

I’ll not go into detail here. You can find a description of the Initiative on the Hewlett Foundation website. As you’ll see, it’s short on details, as we are still feeling our way around the problem and trying to identify what might make a difference.

We are, as an initial matter, tentatively exploring three areas we think can—especially taken in conjunction—make a difference in how Congress operates: First, we are looking at rules and

norms inside Congress that can be changed in ways that foster agreement across party lines. These include everything from re-strengthening committee chairs to restoring regular order (especially for the budget process), filibuster reform, restoring practices like bipartisan factual briefings, finding ways to build personal relationships across party lines, and so on.

Second, primary elections and nominating caucuses are critically important moments—often as or more important than the general election, since they reduce the field of choice to two. Yet only a tiny portion of citizens actually participate in these events, as few as 7-10% of voters in primaries and even fewer in caucuses. These voters tend, moreover, to be the most activist and ideologically extreme, which is why elected candidates from both parties are consistently and considerably more ideologically polarized than the general electorate. We are, accordingly, looking for ways to increase turnout and/or otherwise structure primaries to mitigate the problem.

Third, strong, professional political parties tend to be moderating forces (because the people in charge want to win). And for most of American history, our parties were responsible for campaigns. Parties no longer play this role, and candidates today instead spend well over half their time trolling for dollars from intense policy demanders who, among other things, punish them for compromising. Hence, we are exploring whether there are ways to re-strengthen the role of parties in campaign finance, while also looking for ways to free candidates from needing to devote so much of their time to raising money.

In addition to these central efforts, we are looking at other changes that might help make a difference, such as enriching media coverage of Congress and politics, or improving election administration as a way to rebuild public confidence that change for the better is possible.

What's most important is that the effort be truly non-partisan. The Foundation has policy goals in its other programs, but achieving or even advancing those goals is not the purpose of this one.

I might root for the Cubs (I don't, but that's another story) while you root for the Phillies. When we play each other, we each really want our respective team to win. But we are both presumably capable of understanding that developing the best rules for the game is different, and that the game is not helped by trying to warp those rules to make it more likely that my team or your team will win when we play (especially since what favors my team today may favor yours tomorrow).

Equally important is undertaking work of this sort with realistic expectations and an appropriate sense of modesty. The Hewlett Foundation is not going to singlehandedly "save" America's democracy.

We do hope we can find a few areas in which to intervene where we can help nudge the system in a better direction. But we know that we cannot accomplish even that much alone and that we will need allies from the funder and activist communities and from the left, right, and center, just as we know that even if we succeed in our immediate efforts, ultimate success will depend on factors bigger than us and outside our control.

Foundations can sometimes help reform or change institutions. But political reforms are notoriously easy to thwart or distort depending on how the background political culture receives

them. Institutional change can affect the culture, but it's a two-way street, and our ability—anybody's ability—self-consciously to move culture is limited at best.

Even viewing the odds of success as long, we decided to undertake the effort because the stakes are so high. I don't mean to sound melodramatic, but we should not assume that the American Republic is permanent and cannot fail. If history teaches us anything, it is that all human institutions can fail.

In the end, as with everything in a republican system, responsibility for making things work rests with and depends on The People Themselves.

The Foundation will try to do some things we hope will begin to rebuild public confidence that change for the better is possible, relatively simple things, like improving election administration.

We also seek to be part of a movement to improve our nation's political processes and to restore a sense that successful compromises are something to celebrate. But in the final analysis, the American people must revitalize the political culture themselves.

So let me finish, as I started, with Ben Franklin. Upon learning that the Constitutional Convention had concluded its business, a crowd gathered outside the Pennsylvania state house (today's Independence Hall) where the delegates had been meeting. As he left the building, a Mrs. Powel in the crowd asked Franklin what form of government the Constitution would create. "A republic," he replied, "if you can keep it."

Most of you have probably heard this famous story before. I remember feeling pride the first time I read it, which was many years ago—pride in realizing how tenuous the American experiment was at its launch, and pride in thinking how distant that fragility now seemed.

It no longer seems distant to me. And it shouldn't to you either.