

Statement on the Historical Origins and Implications
of the Times, Places and Manner Clause
(U.S. Constitution, Article I, Section 4, Clause 1)

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Introduction

In its origins and substance, the Times, Places and Manner Clause (hereafter TPM) rested on two presumptions about the nature of the system of national popular representation that the Constitution created. First, the initial responsibility for determining how members of the House of Representatives would be selected would devolve to the state legislatures. This presumption reflected the underlying structure of a federal system in which the individual states remained autonomous units of government, entitled to decide how their electorates would be constituted and empowered to choose their representatives. Second, their decisions about the election of members of Congress would be subject to federal oversight and congressional alteration. That authority rested in part on the belief that determining how to best represent the people was itself an experimental problem in constitutional design that should be subject to review in the light of further political experience. But the adoption of the TPM Clause also reflected the serious

misgivings about the state legislatures that many framers of the Constitution shared. That skepticism about the state legislatures was a conspicuous element in the Federalist movement that favored the adoption of the Constitution. Anyone concerned with the original meaning of the TPM Clause, as it was understood in the late 1780s, needs to take this attitude into account. Translated to the political discourse of our own moment in American history, this historical reading justifies an expansive interpretation of the potential uses of the TPM Clause (as contemplated, for example, in HR1, the For the People Act). Indeed, in certain respects the concerns of the 1780s still seem pertinent two-and-a-third centuries later.

Origins of the TPM Clause

At the Federal Convention, the TPM Clause originated in the work of the five-member Committee of Detail, which met over ten days before presenting its report on August 6, 1787. The Committee's essential task was to convert the general resolutions the Convention had adopted during its first eight weeks of debate into a working text of a constitution. Beyond stipulating "That the Members of the first Branch of the Legislature" would be elected by the people and arranging for a decennial census to be conducted to adjust the size of the lower house, the Convention had previously said nothing about the mode of election. The Committee of Detail filled this omission. In the initial sketch of the TPM provisions drafted by Edmund Randolph, with "emendations" from John Rutledge, elections to the House "shall be *biennially* held on the same day through the *same* state: except in case of accidents, and where an adjournment to the succeeding day may be necessary." The place of election "shall be fixed by the legislatures from

time to time, or on their default by the national legislature.”¹ The reference to state legislatures *defaulting* their electoral obligations indicates, at the very least, a fear that recalcitrant states might discourage or prevent their constituents from being able to elect their representatives. The provision then underwent further refinement. A fresh draft in the pen of James Wilson provided that “The Times and Places and the Manner of holding the Elections *of* the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered and superseded by the Legislature of the United States.” Here again the draft language seems to contemplate obstructive action by the state legislatures. The phrase “at any Time, be altered and superseded” implies that Congress might need to intervene quickly to prevent a derelict state legislature from impeding the election of the people’s representatives.² Nothing in this wording implies that these alterations need be a matter of negotiation between Congress and the affected state or states; or that there should be a waiting period delaying congressional action or constructive state action. Nor, however, were such processes precluded.

Further tinkering with the draft version of the TPM Clause made its language less threatening. Another draft in Wilson’s hand eliminated “superseded,” which would have been redundant of “altered” in any case. As reported to the Convention on August 6, the times, places, and manner of electing both houses would be “prescribed” by each state’s legislature, “but their provisions concerning them may, at any time, be altered by the Legislature of the United States.”³ The Convention debated the clause three days later. After James Madison and Gouverneur Morris failed in a motion to exclude the Senate from the clause, the delegates turned

¹ Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven, 1911, 1937), II, 137n., 139. From these quotations I have removed words deleted from Randolph’s draft but retained italicized words and letters indicating additions he made.

² *Ibid.*, 155.

³ *Ibid.*, 165, 179.

their attention to the second half of the clause, with its congressional oversight provision. Two South Carolina framers, Charles Pinckney and John Rutledge (a member of the Committee of Detail), moved to strike this whole provision, on the grounds (as Madison recorded the point) that the states “could & must be relied on in such cases” to do their duty. Five delegates then discussed the motion. Their remarks offer the best evidence of how the framers understood the scope and significance of the clause.⁴

Nathaniel Gorham of Massachusetts, a past president of the Continental Congress, opened the remarks by noting that “It would be as improper [to] take this power from the Natl. Legislature” as it would be for the British Parliament to leave “the circumstances of elections . . . to the Counties themselves.” Madison then gave a lengthy speech detailing a slew of concerns and objections justifying his opposition to the South Carolina motion. He began by noting that one could not uncritically assume that the state legislatures would always prefer “the common interest at the expense of their local conveniency or prejudices.” Because the “mode” chosen for the appointment of representatives could affect the results, the state legislatures “ought not to have the uncontroled right of regulating the times places & manner of holding elections. These were words of great latitude,” Madison continued, and would therefore be subject to “all the abuses that might be made of the discretionary power.”

Madison then detailed the range of decisions that states would have to make to determine how their representatives would be elected:

Whether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place; shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many

⁴ Ibid., 239-42. All the quotations cited in the next four paragraphs are covered by this note.

other points would depend on the Legislatures, and might materially affect the appointments.

As this single sentences demonstrates, Madison’s account of the scope of the TPM Clause covered everything from how individuals would vote to the definition of which constituencies would be represented. These matters were substantive in nature, and precisely because that was the case, the qualms he expressed about how the states would answer these questions justified federal oversight. “Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.” Moreover, wherever there was an “inequality” in the distribution of seats within the state legislatures, one could expect a corresponding bias to “produce a like inequality in their representation in the Natl. Legislature.” Given these dual concerns with substantive questions about representation and the prospect for partisan distortions in the election of representatives, granting Congress the power to alter state regulations seemed entirely sensible.

Following Madison, three other delegates addressed the Pinckney-Rutledge motion. Rufus King noted that no one had suggested how this power might be abused. Gouverneur Morris “observed that the States might make false returns and then make no provisions for new elections.” Roger Sherman indicated that he thought the clause should be retained, “though he had himself sufficient confidence in the State Legislatures.” The South Carolina amendment was then rejected without a roll call. The second half of the TPM Clause was then revised at the suggestion of George Read. Instead of using the word “prescribed” to refer to the decisions of the state legislatures, Read proposed inserting the phrase “regulations, in each of the foregoing cases may at any time, be made or altered by the Legislature of the U.S.” The point of this revision, Read explained, was “to give the Natl. Legislature a power not only to alter the

provisions of the States, but to make regulations in case the States should fail or refuse altogether.” The entire clause was then approved *nemine contradicente*—with no one voting against it.

In his notes of debates, Madison gave himself the principal credit for defending the TPM Clause. His arguments will shortly be examined in greater detail; they offer important insights not only into his criticisms of the “vices” of the state legislatures but also into the substantive problem the TPM Clause necessarily had to address. But even without giving special attention to Madison’s speech, the thrust of this debate indicates that the framers were generally united on the importance of giving Congress significant authority over the conduct of its own elections. One element of that consensus was the perception that individual state legislatures might well misuse, abuse, or even obstruct the entire process, thereby jeopardizing the right of their constituents to be adequately and fairly represented in the national legislature. But Madison’s defense of the TPM Clause also implicates questions and problems that the whole American polity had to consider, namely, beyond agreeing that one branch of the national legislature had to represent (or re-present) the people themselves, what other norms and criteria should the House of Representatives also fulfill?

James Madison’s Concerns

Whether or not we identify Madison as “the father of the Constitution,” or simply regard him as a major shaper of the agenda of the Federal Convention of 1787, his political concerns and writings still dominate our understanding of the origin of the Constitution. In the period preceding the assembling of the Convention at Philadelphia in May 1787, no one did more than Madison to shape its agenda. His papers reveal more about the concerns and the tactics that

drove the emerging Federalist movement than those of any other framer. And in the end, although Alexander Hamilton was the original author of and most prolific contributor to the eighty-five essays of *The Federalist*, Madison's papers—starting with his first essay, the much-analyzed *Federalist 10*—define the outlines of what modern commentators often call our “Madisonian constitution.”

The dominant themes Madison expressed in his August 9 speech on the TPM Clause were fully consistent with his pre-Convention arguments about what he described as the “Vices of the Political System of the United States.” The twelve-point memorandum on that subject that Madison drafted mostly in April 1787, roughly a month before the Convention was scheduled to assemble, repeatedly emphasized the failings of the state legislatures, not only to fulfill their duties to the national government under the Articles of Confederation, but also to vindicate the principles of majority rule that constituted the foundational premise of republican government. The most obvious failings dealt with the failure of the states to provide their “requisitions” to fund national purposes and their failure to comply with the terms of national treaties—most importantly, the Treaty of Paris ending the war for independence. Others concerned the unfair measures states pursued against the citizens of other states and the “want of concert in matters where common interest requires it.” Madison traced the weakness of the Continental Congress to its lack of authority to “sanction” or “coerce” the states into performing their acknowledged duties. The omission of this essential authority owed something to the patriotic enthusiasms of 1776-77, when the Articles of Confederation were drafted. But they also reflected conditions that, he now concluded, would impair any federal system in which the central government had to rely on the voluntary compliance of the states to implement its measures. The basic facts, Madison reasoned, were that the interests of the were too diverse interests to produce common

agreement; that each contained “courtiers of popularity” who would happily mobilize opposition to federal measures; and that even where common agreement on federal policy did exist, doubts about whether other states would comply would impair the collective performance of all.⁵

To this litany of vices about the failure of the states to support federal policy, however, Madison added a fresh set of charges criticizing the internal vices of the state legislatures. Here he complained about the “multiplicity,” “mutability,” and finally the “injustice” of state legislation, the last of which “betrays a defect still more alarming, more alarming not merely because it is a greater evil in itself, but 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.” Madison then posed a serious question which was not merely rhetorical in nature: “To what causes is this evil to be ascribed?” The answers he gave to this question in the remainder of the memorandum in turn provided the first statement of the arguments we know best from *Federalist* 10. The famous conclusion that Madison drew was that the greater the extent of a republican society, the more difficult it would become for the wrong kinds of factions to form, the kind, that is, that would not respect the common good and private rights. *Contra* the conventional wisdom which held that republics should be geographically small and socially homogeneous, Madison concluded that a society possessing “a greater variety of interests, of pursuits, of passions, which check each other” would prove more resistant to the vices of faction. The extended national republic of the United States

⁵ James Madison, Vices of the Political System of the United States, [April 1787], in Jack N. Rakove, ed., *James Madison: Writings* (New York: Library of America, 1999), 69-73. Here I draw on my prior writings, especially Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York, 1996), 35-36; idem., *A Politician Thinking: The Creative Mind of James Madison* (Norman, OK, 2017), 21-53.

would prove less vulnerable to the evils of factious republicanism than any or all of the individual states.⁶

Madison drew one critical programmatic conclusion from this analysis, and it had a profound impact on his agenda for the Federal Convention. Beyond the “positive” legislative powers that Madison wished to vest in the national government, he also believed that the national legislature should exercise “a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative” over the American colonies. This veto power struck Madison as being “absolutely necessary, and . . . the least possible encroachment on the State jurisdictions.” It would have two great uses. First, it would enable the national government to protect itself against the efforts that Madison still expected the states to make “to invade the national jurisdiction, to violate treaties & the law of nations & to harass each other with rival and spiteful measures dictated by mistaken views of interest.” Second, such a negative would act as a “controul [sic] on the internal vicissitudes of State policy; and the aggressions of interested majorities on the rights of minorities and of individuals.” It would, that is, allow the national government to intervene within the states individually, preempting the enactment of laws that were subversive of national policies or that would disadvantage minorities.⁷

The negative on state laws did not, of course, become part of the Constitution. Its rejection was a bitter disappointment to Madison, and one reason why, when the Convention adjourned, he still doubted that the Constitution would do enough to “prevent the local *mischiefs* which every where excite *disgusts* agst the *state governments*.”⁸ In late October 1787 Madison wrote a lengthy letter to Thomas Jefferson that provided an extended defense of this proposal,

⁶ *Madison: Writings*, 74-80.

⁷ Letter of Madison to George Washington, April 16, 1787, *ibid.*, 81-82.

⁸ Letter of Madison to Thomas Jefferson, September 6, 1787, *ibid.*, 136.

which he knew Jefferson was unlikely to favor. The idea that the national legislature should be able to quell or override state legislation remained a remedy that Madison still privately supported. His “disgust” with the state legislatures may have run deeper than the feelings of other framers of the Constitution, but then again, it was based on his reflections about his three-and-a-half years of uninterrupted service in the Continental Congress (1780-83) and another three years spent as the dominant member of the Virginia House of Delegates (1784-86). In fact, the debate of August 9, 1787 indicates that other framers shared Madison’s general concerns with the potential delinquency of the states.⁹

In its own way, the TPM Clause implemented the logic of Madison’s pet scheme for a negative on state laws. To say that Congress “may at any time by Law make or alter such Regulations” as the states had enacted governing the election of members of both houses was to allow the legislative authority of the states to be superseded or overruled. The TPM Clause would thus operate much as the negative on state laws would have done, except that it could be applied either against individual delinquent states (literally negatively) or used positively if there was a national agreement on the optimal mode for choosing members of the House. (In the case of the Senate, the sole question that mattered was whether senators would be elected in a joint session of both houses or bicamerally, with each house consenting on a final selection.)

The critical question thus involved the election of the House of Representatives. Here the disparaging comments that Madison directed against the state legislatures were secondary to the genuinely substantive problems that this issue raised. On what basis, or in conformity to which

⁹ Letter of Madison to Thomas Jefferson, October 24, 1787, *ibid.*, 146-52. The arguments in this letter anticipate the famous theory of *Federalist* 10, which was published four weeks later. The most significant difference between the texts is that there was no need for Madison to offer a public defense of a provision the Convention had rejected.

principles, should the people of a state be represented? Should an entire state be regarded as a single constituency, with individual voters casting as many ballots as the state's whole delegation? Should voters cast a single vote for one member of their geographically defined district? Should voters in each district vote for members coming from all the districts into which a state could be divided?

Prior to 1787, the Anglo-American model of representation—as applied to the House of Commons and the colonial and (post-1776) state legislatures—had rested on simple principles. In the English (post-1707 British) House of Commons, each shire or county sent two members to Parliament, and legally chartered bodies (such as urban boroughs or other corporations) could be granted the same right of representation. The idea, however, that the right to representation should be equally proportioned across the population, or that towns should be given the power to send members to the House of Commons as they grew more populous, was not a norm that was generally accepted. From the late seventeenth century down to the passage of the two great parliamentary Reform Acts of 1832 and 1868, complaints about the inequities of political representation were a recurring theme in British politics. After the Hanoverian dynasty acceded to the British throne in 1714, the ministries that held power thereafter used the existence of “rotten” and “pocket” boroughs—respectively, constituencies with few voters or where a government or aristocratic interest dominated—to develop the parliamentary majorities needed to sustain their administration. Coupled with the use of offices and pensions to make members of the House susceptible to Crown influence, these practices supported the common criticism that Britain's “vaunted” or “boasted” constitution rested on a corrupt foundation.¹⁰

¹⁰ See the general discussion in Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, 1967, 1992, 2017), 55-93.

The American colonists and revolutionaries were well versed in these criticisms of this corrupted constitution. More than that, beginning with the Stamp Act crisis of 1765-66, the differences between the practices of representation in Georgian Britain and in its American provinces formed a fault line that worked to mobilize colonial opposition to British imperial policy. The standard American response to the Stamp Act held that taxes were the “free gift” of the people, to be granted only with the consent of one’s own legislature. Because Americans sent no members to the House of Commons, Parliament had no authority to tax them. Defenders of the British government replied that the colonists were “virtually” represented in Parliament, because members of the House of Commons had the responsibility of considering the good of the entire polity, and not the mere interests of their immediate constituents.¹¹

Americans found these claims wholly unpersuasive. In the colonies the right of political representation was routinely extended to communities—either townships or counties—as they were legally organized. There was no selective process of granting the right of representation to some communities while denying it to others. When spokesmen for the British government wrote argued that the colonies had no greater right to representation than, for example, the emerging industrial cities of the English midlands, American writers scoffed at their arguments. The most famous response came from the Massachusetts lawyer, James Otis. “To what purpose is it to ring everlasting changes to the colonists on the cases of Manchester, Birmingham, and Sheffield, who return no members? If those now so considerable places are not represented, they should be.”¹² So much for the claim that the colonists could be virtually represented by members of the House of Commons whom they would never see! In the face of these objections, the British response

¹¹ Ibid., 161-75.

¹² Ibid., 169 for the famous Otis quotation.

moved in a different direction. Instead of insisting that the colonists were somehow represented in Parliament, the government argued that Parliament (acting with the king's consent) was the ultimate sovereign within the British empire, and that when Parliament acted, the colonists simply had to obey its decisions. The idea that the consent of the people was essential to their duty to obey the laws here gave way to the idea that law was nothing more nor less than the command of the sovereign, here conveyed by the idea that ultimate sovereignty within the British empire resided in the king-in-Parliament.¹³

The expectation that representation was a *right* that should be routinely extended to all communities, rather than a *privilege* that government could offer, withhold, or even retract through *in quo warranto* proceedings, was part of the common understanding that shaped the new state constitutions that Americans began writing in 1776. That idea worked well at the state level of politics, where there was a finite number of communities to be represented. One impact of the political enthusiasm that accompanied the American movement toward independence in the mid-1770s was to encourage more communities to make sure that their representatives would physically attend the legislative assemblies. But the framers of the Federal Convention faced a more complicated question. Believing that effective debate within a legislative chamber would require some upper limit on the number of its members, they could not imagine allowing the size of the House to expand indefinitely. The individual communities to which American practice had routinely assigned legislative seats would have to be combined one way or another. Perhaps the state itself was the appropriate unit of representation—as it remained for some small states until 1842, when Congress deployed the TPM Clause to require that all members of the House would

¹³ Ibid., 198-229.

be elected in single-member districts. The latter was the model of representation that most other states adopted quickly.

Yet the general resort to this practice still begged an important question. Unlike towns, townships, and counties, which exercise multiple functions of governance and hence encourage some sense of civic identity, congressional districts exist for one purpose only: to elect members of the House of Representatives. They are in that sense arbitrary and artificial in their creation; they expect nothing of their constituents beyond exercising their suffrage (if individuals choose to vote). If one lives in a populous state, it is unlikely that one knows the number of one's district, much less its boundaries. A district is simply an arbitrary entity imposed on a map, an artifact of political arithmetic and geography that has only one purpose. It is that arbitrary character that makes congressional districting so vulnerable to political manipulation, as state legislatures, armed with ever more refined information about their constituents, redesign districts for partisan ends. As commentators like to say, in the United States, voters do not choose their representatives; the representatives (or their party's mercenary agents) choose their voters.

When Madison defended the TPM Clause on August 9, 1787, he thus had two concerns in mind. One was the danger of overt manipulation (or obstruction) conducted for improper purposes by partisan state legislatures, producing results that might prove subversive of the collective national good. It was the absence of any formula prescribing what a district should be that left the whole problem of designing the "manner" of choosing representatives open to the wrong impulses. That was why a congressional remedy had to be kept available, one that could be legally invoked whenever Congress (and the assenting president, since it had to act by law) deemed it necessary. Yet the larger substantive problem also had to be confronted. The TPM Clause could be applied constructively, as Americans learned more about how their system of

political representation was actually working. It was thus an invitation to creative constitutional thinking, which would allow those to come “to form a more perfect union” through the lessons of experience.

The Mirror of Representation

There was, however, one other presumption about the nature of political representation that Americans repeatedly stated during the Founding era that is also relevant to our concerns. Although this presumption did not address the TPM Clause directly, it stated and defined an ideal of representation—or even re-presentation—that illuminated the underlying democratic values of this era of constitutional formation. Although these democratic values are not identical with ours, they nevertheless constituted an important first step in the process that has led the American electorate to expand from one generation to the next.

When Americans began writing new state constitutions in the spring of 1776, they expressed a republican enthusiasm that reflected their awareness of the historical novelty of their enterprise. As John Adams observed at the conclusion of his influential pamphlet, *Thoughts on Government*, which appeared in April 1776, he and his colleagues had “been sent into life at a time when the greatest lawgivers of antiquity would have wished to live.” Earlier in his pamphlet, Adams expressed the American ideal of a representative assembly:

The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other

words equal interest among the people should have equal interest in it. Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections.¹⁴

Two years later, when the new commonwealth of Massachusetts was still struggling to write its constitution, Theophilus Parsons reworked Adams's language in a tract commonly known as *The Essex Result*. "The rights of representation should be so equally and impartially distributed," Parsons wrote, "that the representatives should have the same views, and interests with the people at large. They should think, feel, and act like them, and in fine, should be an exact miniature of their constituents."¹⁵

The same opinion was also expressed at the Federal Convention. "The Legislature ought to be the most exact transcript of the whole Society," James Wilson declared on June 6, 1787. George Mason echoed the point a few minutes later. "The requisites in actual representation [the phrase that Americans used to distinguish their practices from the British notion of virtual representation] are that the Representatives should sympathize with their constituents, should think as they think, & feel as they feel, so much so, that even the diseases of the people should be represented—if not, how are they to be cured?"¹⁶

Of course, these comments hardly exhausted the concerns that the framers of the Constitution, their Federalist supporters, and their Anti-Federalist opponents expressed about the nature of political representation. This was a large subject, and arguably the most important problem of all, and a broader range of goals, fears, concerns, and opinions remained to be stated.

¹⁴ John Adams, *Thoughts on Government* (Philadelphia, 1776), reprinted in Philip B. and Ralph Lerner, eds., *The Founders' Constitution* (Chicago and London, 1987), I, 107-110.

¹⁵ [Theophilus Parsons], *Result of the Convention Holden at Ipswich in the County of Essex . . .* (Newburyport, 1778), reprinted in Oscar Handlin and Mary F. Handlin, eds., *The Popular Sources of Political Authority* (Cambridge, 1966), 341.

¹⁶ Farrand, ed., *Records*, I, 132-34, 142,

But the idea that the regulatory authority over elections exercised by either the state legislatures or Congress (under the TPM Clause) should be used to cloud the mirror, distort the miniature, and mutilate the transcript was never part of their discussion—except insofar as Federalists and Anti-Federalists argued that corrupt motives would tempt the other side to violate this fundamental norm.

Viewed in this light, the For the People Act and the authority it derives from the Times, Places and Manner Clause remain consistent with the deepest political ambitions of the Founding era and, one could argue, with the original meaning and intention of the Constitution. A latter-day Madisonian, like the author of this statement, would not find it difficult to write an analysis of state legislative politics, *circa* 2020-2021, that would be consistent with the animus of his April 1787 memorandum on the Vices of the Political System of the United States. To a strike though dispiriting degree, many of his criticisms still hold.