

THE PERILS OF PLURALISM

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ABSTRACT OF THE THESIS

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Many scholars believe that James Madison was one of the earliest proponents of political pluralism. In Federalist No. 10 Madison argued that an extended republic would minimize the danger of majority factions by allowing various interests to compete and compromise with each other. Nearly a century later, with the proliferation of minority factions-- interest groups-- Madison's ideas enjoyed a renaissance among scholars. Some, like Arthur Bentley, took pressure group theory even further, arguing that there was no such thing as a national interest, that whatever policy emerges from the interplay of interests, by its nature, exemplifies the relative weight of these interests in society. Yet others saw the growing number of special interests as a threat to the common good.

Madison insisted that minority factions not possibly threaten the national interest—they would simply be outvoted by way of the “republican principle.” More recently, a new group of scholars, neo-pluralists, have described an American system similar to Madison. This paper argues that while the neo-pluralists, and Madison, provide a model of government that accurately captures much of the American system, they fail to take note of one key way that interest groups can exploit the American political system. When the national interest is at stake, rational interest group leaders recognize the prospects that a given bill will become a law, and adjust their strategies accordingly.

They work to soften or undermine the bill instead, leaving an incoherent policy in the aftermath.

To test this theory, this paper uses a detailed case study of the Brady Handgun Violence Protection Act. A detailed analysis of the activity of the National Rifle Association shows that the group, as one spokesperson noted, “saw the writing on the wall” and weakened the bill in key ways. Notably, the efforts of the NRA, both during the crafting of the bill, and in the years that followed, crippled law enforcement’s ability to regulate the secondary gun market. Hence the one thing that gun-control and gun-rights activists can agree on—keeping weapons out of the hands of criminals-- is not possible due to the influence of minority factions.

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Introduction

When the framers met at the Constitutional Convention in May of 1787, fears for the future of the American union, as much as cautious optimism in the potential of a new system of government, motivated key members of the founding generation to change course in their radical experiment with popular sovereignty. Events like Shays' rebellion convinced luminaries, such as George Washington, that the confederation government lacked the cohesiveness to effectively defend America against the world's great empires, some of whom occupied territory just outside the new nation's borders. At the same time, the willingness of the Massachusetts government to grant amnesty to some of the participants in the rebellion, and to cave, in some ways, to the dirt farmers' demands for debt relief, alarmed many observers, like James Madison, about the potential for mob rule. As Gordon Wood makes clear, no longer did everyone in the founding generation have the civic republican faith that citizens and the political leaders who represented them could consistently put their self-interests aside for the sake of the public good.¹ To James Madison especially, the threat that citizens would organize into groups, and in the passions of any given moment, undermine the public good or tyrannize a minority group, presented the gravest threat to the future of republicanism. Having extensively studied the history of earlier democracies, Madison became convinced that sub-groups of narrow-minded, self-involved people – he called them factions-- destroyed many of the world's democracies in the past, and presented the most serious theoretical threat to the world's newest democracy in the future.²

1 Gordon S. Wood, *The American Revolution A History*, Modern library ed. (New York: Modern Library, 2002).

2 James Madison, "Federalist, No.10," in *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, 2001): 43-48.

Many contemporary observers and scholars conceive of modern day interest groups, like the National Rifle Association (NRA) or Big Tobacco, as the contemporary equivalent of Madison's factions-- often with the same degree of ambivalence or contempt. One need not look far to find some political commentator contending that interest groups are destroying America.³ It is a concept that agitated movements as distant in their political orientations as the Tea Party⁴ and the Occupy Wall Street Movement.⁵ But Madison's work makes it clear that he would probably be more fearful of the Tea Party or the Occupy Wall Street groups, given their size, than the relatively small number of financial elites both groups opposed.

In 1787, the dirt farmers that led Shays' Rebellion represented the vast majority of Americans, not a narrow segment of the population. As he made clear in his landmark tract, Federalist #10, Madison feared majority factions, not minority factions. If anything, the two major political parties would, in Madison's calculus, pose a greater threat to the republic than any small-sized interest. It was simply the case that under the Article of Confederation, where the loci of power was in state democracies, that a local majority could more easily overwhelm a local minority. Hence Madison, departing from the philosophical wisdom of his day, asserted that a large, extended republic was superior to small republics, represented by state governments. Madison provided an early template for what we now call pluralism, where the organized interests are allowed to deliberate

3 John Nichols, and Robert W. McChesney, "'Dollarocracy': How Special Interests Undermine Our Democracy," BillMoyers.com, <http://billmoyers.com/2013/11/08/dollarocracy-how-special-interests-undermine-our-democracy/> (accessed August 17, 2014).

4 Ted Abram, "Complicit Politicians and Special Interest Predators are Destroying America," FreedomWorks, <http://www.freedomworks.org/content/complicit-politicians-and-special-interest-predators-are-destroying-america> (accessed August 19, 2014).

5 Benjamin Powell, "Occupy Wall Street: A One Year Retrospective," The Huffington Post, http://www.huffingtonpost.com/ben-powell/occupy-wall-street-a-one-_b_2017494.html (accessed August 21, 2014).

and compete to influence the system, but where no one group ever predominates.⁶

But Madison's fear of majority factions above minority factions rested on a premise that will be challenged in this paper. In articulating the need for an extended republic, Madison matter-of-factly dismissed the potential for smaller factions to hijack the political system because of his faith in the republican principle, which, among other things, as Alexander Hamilton noted, requires that “the sense of the majority should prevail.”⁷ Minority factions, if they tried to bend the public interest to their narrow agendas, would simply be outvoted, he argued.⁸ This paper will argue that modern political developments, many of which Madison could not anticipate, make it possible for minority factions to distort the American republic in a fundamentally different, but no less harmful way, than majority factions. The developments were not simply systematic, but philosophical; with the development of theories of pluralism that deviated from Madison in a fundamental way-- challenging the very notion of the public interest-- the political system began to accommodate interest groups like never before. This paper will explore the development of pluralism in American political thought, including those who criticized its premises and implications. I will argue that while the critics of pluralism raise interesting practical concerns about the role that special interests play in American society, these scholars often confuse their own biases about what policies qualify as being in the public interest with what Madison would characterize as policies favorable to the public interest. In that sense, I will argue that much of what pluralists describe as the

6 Dante Germino, "James Madison: Philosophical Pluralist," *Modern Age* 27, no. 1 (1983): 42-49.

7 Alexander Hamilton, "Federalist, No. 22," in *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, 2001): 106.

8 Federalist, No. 10.

“give and take” of American politics-- even when it appears to be biased or parasitic-- still fits within a framework of normative democracy, and is consistent with the system that the framers designed in Philadelphia, even if those framers failed to anticipate the resilience of minority interest groups, or the role that money would play in politics. Yet in denying the very existence of a metaphysical public interest, pluralists ignore the narrow band of policies that would qualify as “the public interest” for Madison.

I will avoid the philosophical debate over whether or not the framers were wrong in assuming the metaphysical existence of a public good and, instead, offer a less abstract argument. The fact of the matter is that the system was designed with the notion of a public interest in mind-- one that I will discuss but that cannot be operationalized. To the degree that the current political environment deviates from that goal, it presents potentially serious *practical* problems for the nation.

In this way, I will also challenge the argument put forth by contemporary scholars, specifically neo-pluralists, who describe a system that more or less upholds a public interest while balancing the needs of special interests. If this represented a full accounting of the American system, it would be far more consistent with Madison's thinking. Neo-pluralist scholars offer an important corrective to the conventional notion that politicians are “bought off” and that the American public is impotent in the face of campaign donations from and high-priced lobbying efforts on behalf of well-heeled special interests. But neo-pluralists ignore a different problem presented by the cacophony of organized interests influencing public policy: policy incoherence. By this I refer to policies that are either too complex for faithful execution, or policies that contain programs or provisions that run counter to each other and/or the spirit of the policy itself.

Too many groups have too much of a say in the same policy, and in those instances when such policies dovetail with the public interest, America might as well have no policy at all. In fact, logic suggests that those policies that are in the public interest are likely to attract the kind of log-rolling that undermines their effectiveness. Using a case study to illustrate the problem, I examine the impact of interest group influence-- and policy incoherence-- on gun control policy, showing how the end result of interest group bargaining was a law that benefited neither the gun owner nor the gun control enthusiast. The "flaw in the pluralist heaven" is not, as Schattschneider said, that "the choir of angels sings with a strong upper class accent".⁹ Rather, the problem is that the angels don't sing in harmony when the music requires it.

Chapter One: Madison's Oversight

In focusing on James Madison, to the exclusion of other framers, I do not wish to diminish the contributions of others, including political thinkers who came before him. Madison himself borrowed many of his ideas for a new constitution from historians and thinkers he studied in a famously arduous analysis of over 100 books, many provided by his close friend, Thomas Jefferson. The threat of factions, for instance, can be found in Plato's *Republic*.¹⁰ The systems of checks and balances and separation of powers are borrowed from the Baron de Montesquieu's *Spirit of Laws*.¹¹ But as the man who set the agenda for the Constitutional Convention through his Virginia Plan, Madison created the

9 E. E., Schattschneider, *The Semi-Sovereign People: a Realists View of Democracy in America*, (New York: Holt, Rhineart and Winston, 1961): 34.

10 Plato. "The Republic," The Internet Classics Archive | The Republic by Plato, <http://classics.mit.edu/Plato/republic.html> (accessed April 11, 2013).

11 Charles de Montesquieu, "Montesquieu: The Spirit of Laws," Montesquieu: The Spirit of Laws: Book 11, http://www.constitution.org/cm/sol_11.htm (accessed August 21, 2013).

template for the system we presently use. In the Virginia Plan, we get a three branch government with a bicameral legislature and the basic election system we have today.¹²

Without question, other framers at that time, and even the anti-Federalists who opposed the original constitution, softened Madison's aims as they influenced the process. In proffering the New Jersey Plan, William Patterson proposed a Senate chosen by state legislatures, reflecting small state interests, an idea eventually embraced through the Connecticut Compromise. The anti-Federalists were instrumental in having a Bill of Rights added to the Constitution. Others combined to block Madison's attempts to provide the new Congress with an absolute veto over some types of state laws, first at the Convention, and later, when Madison proposed it for consideration as one of the new amendments that would become the Bill of Rights.

Yet, if anything, the nation has moved, indirectly, more and more in the direction of Madison. The 14th amendment provided the national government, albeit through the federal courts, with what amounts to a potential veto over state laws, as has been obvious through the nationalization of the Bill of Rights under the process of selective incorporation, and in the creation of civil rights laws that preempt state policies. The loose interpretation of the Commerce Clause only amplified this power later during the New Deal (1933-1940) as it became the basis, when combined with implied powers, for national regulation of what once were state practices.¹³ The 17th amendment, in providing for popular statewide elections of U.S. Senators, diminished the power of states as

12 James Madison, "Variant Texts of the Virginia Plan - Text A." Avalon Project - Variant Texts of the Virginia Plan - Text A," http://avalon.law.yale.edu/18th_century/vatexta.asp (accessed May 1, 2013).

13 Kenneth R. Thomas, *Federalism, State Sovereignty and the Constitution Basis and Limits on Congressional Power*; (Washington, D.C.: Congressional Research Service, Library of Congress, 2003.)

political units to the point that some modern advocates of federalism want it repealed.¹⁴ Those who speak to the original intent of the Founding Fathers in trying to reverse all of these trends ignore the fact that they clearly reflect the thinking of at least one framer, Madison, who is known as the Father of the Constitution.

To the extent that the actual structures of the political system have bent in Madison's direction, it is worthwhile to reconsider the thinking for Madison in proposing that system. In arguing that the influence of interest groups is distorting the current political system, I am not simply thinking of these structures, but of the theory that informs them-- they are merely proxies for a new line of political thought introduced by Madison, the earliest antecedent of pluralism. One can see this in Madison's rhetoric before, during and after the Constitutional Convention.

Madison entertained doubts about the efficacy of the confederation government as early as 1783, doubts that were only amplified by his ongoing studies of the defects of earlier republics and democracies while a member of the Confederation Congress. Just weeks after Shay's Rebellion, he had joined 12 delegates from five states in at the Annapolis Convention, to "Remedy Defects of the Federal Government."¹⁵ Having agreed to hold the now famous Constitutional Convention in May of the following year, Madison began to formulate specific criticisms of Articles of Confederation. In 1787, he wrote *Vices of the Political System of the United States*, where he identifies a whole host of problems with the decentralized confederation government, including the "Failure of

14 Charles C. W. Cooke, "Charles C. W. Cooke - Repeal the 17th Amendment!" National Review Online. <http://www.nationalreview.com/articles/341894/repeal-17th-amendment-charles-c-w-cooke> (accessed April 12, 2013).

15 Mary Mostert, *Banner of Liberty: The Threat of Anarchy leads to the Constitution of the United States*, (Provo, UT: CTR Publishing, Inc, 2004): 113

the States to comply with the Constitutional requisitions,” “Encroachments by the States on the federal authority,” and “Trespasses of the states on the rights of each other.” But most relevant to the discussions that follow, Madison argues that, under the Articles of Confederation, there is a “want of concert in matters where common interest requires it.”¹⁶ In this case, he highlights how the lack of unity and uniformity among states creates practical problems for commercial activity that would benefit everyone. Just as important to our future discussion of policy incoherence are the problems of ineffective government caused by the “multiplicity” and “mutability” of the laws within the states, which confuse both the citizen and those who have to administer the regulations. I will argue later that such problems are present even in the provisions of individual, complex laws. But Madison makes his key insight when he goes further to argue that the “injustice” of those laws goes beyond their incoherence.

Madison speaks to a broader problem he sees embedded in the political system. First, the laws are created by locally elected representatives who, given their proximity to their constituents, sacrifice “the public Good” for the sake of “ambition” and “personal interest.” Madison goes on to argue that the problem underlying “unjust” state laws:

... lies among the people themselves. All civilized societies are divided into different interests and factions, as they happen to be creditors or debtors--Rich or poor--husbandmen, merchants or manufacturers--members of different religious sects--followers of different political leaders--inhabitants of different districts--owners of different kinds of property &c &c. In republican Government the majority however composed, ultimately give the law. Whenever therefore an apparent interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the

¹⁶ James Madison, "Vices of the Political System of the United States," *Deficiencies of the Confederation*, <http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html> (accessed April 2, 2013).

minority, or of individuals? ¹⁷

Here, Madison feared that local majorities could exert abnormal amounts of influence over local politicians. In the heat of the moment, that could mean that the local governments pass laws that are subject to the whims and passions of the time, including laws that threaten minority groups. As with their representatives, public-mindedness was unlikely to damper these passions. Thus the system of government under the Articles of Confederation that decentralized power to state democracies posed a threat to the public interest and to minority rights.

In the *Vices of the Political System of the United States*, Madison laments the problem but does not provide a detailed solution. At the Constitutional Convention, he goes a step further in the latter direction. Speaking to the fellow delegates, Madison articulated the same issue with the states under the enfeebled Confederation Government:

What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number? Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The holders of one species of property have thrown a disproportion of taxes on the holders of another species. The lesson we are to draw from the whole is, that, where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure. ¹⁸

But Madison went further, in articulating the outlines of a solution:

... The only remedy is, to enlarge the sphere, and thereby divide the community into so great a number of interests and parties, that, in the first place, a majority will not be likely, at the same moment, to have a common interest separate from that of the whole, or of the minority; and, in the second place, that, in case they should have such an interest, they may not be so apt to unite in the pursuit of it. It was incumbent on us, then, to try this remedy, and, with that view, to frame a republican system on such a scale, and in such a form, as will control all the

¹⁷ Madison, *Vices*...

¹⁸ James Madison, *Notes of debates in the Federal Convention of 1787*, Bicentennial ed., (New York: Norton, 1987): 82-84.

evils which have been experienced.¹⁹

In “enlarging the sphere” of government, Madison was challenging one of the most widely read works in political thought at the time, *The Spirit of Laws*, by Baron de Montesquieu. A philosophe who like many of his fellow Frenchman, looked to England as the model for a superior government, Montesquieu saw England's size as a major benefit to its form of democracy. In small republics like England, local officials are more accountable to and aware of the interests of their local constituencies. When the locus of power is in centralized governments distant from a population, Montesquieu argued, there is a greater potential to defy popular expectations, to the point of tyranny.²⁰ Many anti-Federalists, in opposing the new Constitution, echoed this line of thought.²¹ Madison embraced Montesquieu’s ideas about checks and balances, and the separation of powers²², but offered a unique counter-perspective on the optimal size of a republic in Federalist No. 10.

Following a very clear, logical line of thought, Madison started with the premise that factions are the greatest threat to democracies. These are groups of people held together by an agenda that can be hostile to other groups and to the national agenda as a whole. Pure democracies are more open to this problem than are republics with elected representatives, but the latter is still subject to the same potential problem. This is especially true, Madison argued, because “faction is sown in the nature of man”²³ --- people naturally forms groups with common interests, and those common interests are

¹⁹ Ibid.

²⁰ Montesquieu, *Spirit of Laws*, Vol. 8 Sec. 16.

²¹ Brutus, "Brutus, no. 1," *Republican Government*. <http://press-pubs.uchicago.edu/founders/documents/v1ch4s14.html> (accessed August 21, 2014).

²² James Madison, “Federalist, No. 51,” in *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, 2001): 69.

²³ Federalist No. 10.

often colored by fleeting passions and prejudices. As it is impossible to have one interest, by force of will, manifest itself among an entire population, and as it is inevitable that these factions will form if one allows freedom of thought and freedom of assembly, the prospects for a liberal democracy—where the interests of the majority are balanced by protections for minorities-- are daunting. In an assertion that we will deal with for much of this paper, Madison, again, dismisses the potential for minority factions to hijack a republic, because they would be outvoted. The problem for Madison is if one faction grows to the point that it represents the majority in a political unit. The rights of minority groups can be taken away by this majority. And, implicitly acknowledging that the public interest is not one and the same with majority rule, Madison argues the nation's general needs can be hostage to a majority group with its own agenda.

At that point, Madison echoes his earlier thinking, arguing that the ability for a majority faction to form is more likely in smaller republic. This is a mere fact of geographical proximity. It is easier for individuals and groups to cooperate and to influence each other at closer distances. If, on the other hand, one “extends the sphere” of government-- places the loci of power in a central government with representatives who are literally far away from their constituents-- it is much less likely that such individuals and smaller factions will aggregate across state lines and hijack policy. Instead, and this is very important, the various factions across the nation would be forced to either compete with each other-- and in effect cancel each other out-- or compromise in a way that minimizes the influence of any one faction. “Extend the sphere,” Madison asserted, “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; it

will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.”²⁴

As a matter of practical politics, this makes a tremendous amount of sense. What would be a majority faction in Virginia, that, under the Articles of Confederation, might pass laws that redistribute land or obviate debts in that state, would have a much more difficult time doing so, if the policy instead required that the population of the nation, and several states, collectively embrace the same program. The state that might, individually, opt out of an important national treaty-- and hence, make any foreign nation less likely to engage in treaty-making with the United States to begin with-- would not be able to unilaterally veto the treaty under the new Constitution.

Indeed, this idea about limiting the influence of factions was, in many ways, at the heart of many of Madison's proposals, not simply the idea of the extended republic. If the extended republic makes an influential, majority faction much less likely, the other measures embraced by Madison make it almost impossible. If a faction dominates the House of Representatives, the Senate can be a check against that influence. If a faction dominates the whole Congress, the president can veto laws. If mob sentiment—a collective and visceral disposition to rash judgments-- dominates both branches, the Supreme Court can soften the law through interpretation, or nullify it through judicial review. And in the event the national government as a whole falls prey to the power of faction, at least in the theory Madison espoused later in the Virginia Resolutions of 1798,

24 Federalist No. 10.

federalism allows a group of states together, through interposition, to resist national encroachment. In the converse, even though the new constitution reserved powers to the states (especially with the 10th amendment of the Bill of Rights)²⁵ Madison hoped his proposed absolute veto would even fight factions on that level. In this sense, the structures and principles of the constitution are almost like the defenses for a castle, with each successive layer providing a different level of protection against the invading enemy, majority factionalism. As with the idea of the extended sphere in general, the principles that circumscribe the national government are, in large part, designed to force competing interests to check each other's agenda ("ambition counter-acting ambition" Madison says in Federalist No. 51) or force a level of deliberation that, by its very nature, limits the power of passion to the advantage of reason.²⁶

In essence, Madison was articulating a protean version of what many now call pluralism, the

idea that multiple interests should be allowed to compete and compromise to influence society. While

he did not embrace pluralism for pluralism's sake, in the same sense that others would in the future, he

recognized its inevitability in a liberal republic. Yet it's important to understand that at the same time,

Madison's design for government implicitly and explicitly acknowledged the concept of a public

interest. In Federalist No. 10, Madison condemns factions in part because of their tendency to "vex

and oppress each other..." rather than "co-operate for their common good."²⁷ In

25 James Madison, "Speech Proposing Amendments to the Constitution," Teaching American History, http://teachingamericanhistory.org/bor/madison_17890608/ (accessed May 2, 2013).

26 Federalist No. 51.

27 Federalist No. 10.

Federalist No. 45, he

argues that “the public good, the real welfare of the great body of the people, is the supreme object to

be pursued; and that no form of government whatever, has any other value, than as it may be fitted for

the attainment of this object.”²⁸

By proposing an extended republic in Federalist No. 10, Madison was not simply proposing a

remedy for the problem of factions, but advocating an approach to representation that would be better

at discerning the public good. In magnifying the scope of political units, through largely populated congressional districts for the House, through states that exercise their power through the U.S. Senate, through the new addition of a nationally-elected president,

Madison believed that he was maximizing the chances of developing a breed of leaders better suited to take account of the public interest. Through the filter of wider

competition, with a candidate who has to win office by standing out among a multitude of potential contenders, the “cream would rise to the top.” These men, of “attractive merit” and “established characters” would have, Madison argues in Federalist No. 10,

“enlightened views and virtuous sentiments” to “render them superior to local prejudices and schemes of injustice.”²⁹ Thus the extended republic amplifies that attribute of representative democracy that makes it superior, in Madison's mind, to popular or pure democracy, because it relies on 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

28 James Madison, “Federalist, No.45,” in *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, 2001): 238.

29 Federalist No. 10.

least likely to sacrifice it to temporary or partial considerations.”³⁰

What Madison meant by public interest was more clearly defined in Federalist No. 41. In

challenging the idea that the powers of the Constitution were too vaguely justified under concepts like

“general welfare” Madison argues that Congress could only operate within the parameters of the

“public good.” Echoing the Constitution's preamble, he further elaborated that this meant “1. Security

against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of

harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5.

Restraint of the States from certain injurious acts; 6. Provisions for giving due efficacy to all these

powers.”³¹

These six standards of the “public good” are admittedly broad and difficult to operationalize or

quantify. But generally speaking, they reflect policy areas that are likely to substantially benefit the vast

majority of the nation. Safety and the peace of mind that comes with it benefits all, as does smooth

interstate and intrastate commerce, which creates a climate that promotes prosperity. Madison

consistently uses the term “public good,” throughout his writing, but for the sake of the paper, I will

refer to it as “the public interest” as good might imply that it benefits everyone to equal proportion,

³⁰ Ibid.

³¹ James Madison, “Federalist, No.41,” in *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, 2001): 208.

when, in fact, some might have to sacrifice or risk more than others for the same good. To maintain

security against foreign danger requires that one maintain a military, and clearly soldiers often face

greater risks and suffer greater costs than the majority of the population, even during peacetime when

they must train for the possibility of combat. Yet if the American public forsakes the military en toto,

or, as was the case under the Articles of Confederation, fails to adequately or consistently provide for

said military, the dangers posed to everyone, including would-be soldiers, could be considerable.

Rather, for the sake of this paper, especially the case study on gun control, I will use the term the

“public interest” to reference anything that provides a substantial benefit to the general population,

even if some segments of the pay greater costs.

But even Madison understood that the filter of representation via the republican principle was

not enough to guarantee against self-serving, narrow-minded politics. As noted earlier, if factions

“captured” a particular representative or branch of government, the system of separation of powers

would quarantine the faction and the principle of checks and balances would minimize or nullify the

factional influence. The majority faction would then, per Federalist No. 10, have a difficult time

maintaining its coalition and extending its influence in the public at large, losing, in time, its intensity

and grip on power. People would no doubt organize into interests, including factional groups that

ignored the greater good in favor of their own narrow agendas, but these minority factions, in a

republican system built on single-member plurality districts and winner-takes-all elections would rarely

be able to secure a single representative much less a coalition in any branch of government. If they

opposed the public interest, they would lose elections per the republican principle, and thus

these interest groups would be left to compromise and compete with each other to secure any influence

at least on national policies that could affect the public interest. By distancing national politicians from

the passions of the public, and creating veto points at multiple layers of government, the Madisonian

system, in theory, not only allows for such compromise and competition, it encourages it.

To a new class of political scientists whose studies paralleled and followed the post-Civil War

proliferation of America's first national-level interest groups, this deliberation and give-and-take

between organized interests not only describes the essence of American democracy, it provides an

organic and desirable means by which to aggregate interests in society. Many observers see Madison

as the earliest advocate of this concept, which came to be known as political pluralism.

In the following section, I will examine the evolution of pluralism in American political

thought, but I will also highlight its criticisms. Many scholars agree with the pluralists that American

politics, at its core, is about interest group dynamics; but they argue that the system does not work in

the way Madison intended. They see a system that is biased in favor of elite groups, one that is

parasitic in nature, one where narrow-minded interest groups are as resilient as they are focused, one

where these groups overwhelm the system at the expense of the public good. I will defend pluralists

against their critics to a point, but ultimately I will simply redirect the criticisms to a more narrow

sub-set of policies. But by narrow, I do not mean unimportant. To the contrary, I contend many of the

criticisms of pluralism apply exactly when a policy is in the public interest as characterized by

Madison. The pluralists are correct that their critics often confuse their own preferences with the

notion of a public interest, but in denying the very possibility of a public interest, they ignore the role it

played in the framers' constitutional design.

Chapter Two: Pluralism (and its discontents) In American Political Thought

Political pluralism is defined by Avigail Eisenberg as a “theory that seeks to organize and

conceptualize political phenomena on the basis of the plurality of groups to which individuals belong

and by which individuals seek to advance and, more importantly, to develop, their interests.”³² That

scholars have noted the traces of this idea in James Madison's political thought is thus not surprising,

given his assertion of the inevitability and primacy of groups in democratic systems.

³² Avigail Eisenberg, "Reconstructing Political Pluralism." In *The Political Theory Reader*, Chichester, (West Sussex: Wiley Blackwell, 2010): 18-21.

Even

introductory political science textbooks draw the connection between pluralism and Madison's political

theorizing.³³

Even opponents of pluralism acknowledge that Madison and the framers designed a political system that was uniquely hospitable to interest groups. The Bill of Rights that Madison helped draft guarantees freedom of assembly, freedom to petition and freedom of political expression, all basic to the existence of interest groups. Political scientists note, additionally, the large number of access points at which interest groups can compete for influence.³⁴ The federal system allows interest groups to influence elections and lobby elected officials at multiple layers of government, from town council to state assemblies to the U.S Congress. The Constitution allows Congress to create its own rules and procedures, and thus, for more than 200 years, each chamber has divided its labor into committees, who play an instrumental role in policy-making. As will be described in depth later, interest groups play a major role in that process, especially at the committee level. Finally the system of separation of powers means that interest groups can and do affect policy through the courts, for instance by filing *amicus curae* briefs, and through the executive branch, for instance, by influencing bureaucratic rule-making.

Yet political pluralism did not emerge as a cohesive theory of American political activity until the turn of the 20th century. Without question, political observers recognized the importance of groups in the American political system. Madison spoke to organized

33 Kenneth Janda, Jeffrey M. Berry, Jerry Goldman, and Kevin W. Hula. *The Challenge of Democracy: American Government in a Global World*, 7th ed. (Boston: Wadsworth Cengage Learning, 2009): 64.

34 Peter Woll, *Public Policy*, (Washington, D.C.: University Press, 1974): 41.

interests, or large groups of people who share a common bond (Madison emphasized property and religion).³⁵ Alexander De Tocqueville famously highlighted the propensity of Americans to solve their problems by way of local, group associations.³⁶ But both men doubted the capacity of smaller interests to influence the central government, or to coalesce across long distances. But technology began to change that dynamic at approximately the same time that de Tocqueville was writing *Democracy in America*-- the telegraph, the steamboat and railroad made it possible for groups to communicate across long distances. The development of a national political consciousness following the Civil War dovetailed with the the rise of industrial capitalism, and the economic integration of what were once disparate regions of the country and this led to multi-decade boom in interest group development, starting in 1870s. Groups of individuals displaced or limited by the changing economy-- farmers and laborers-- coalesced into interest groups that demanded more from central government officials that was increasingly able, but perhaps not willing, to intervene in the economy.

In this environment, hints of what would become contemporary pluralism do appear in William Graham Sumner 1888 work *What Social Classes Owe Each Other*.³⁷ Sumner divides socio-economic classes into groups and argues that the “free interplay of interests” in a laissez-faire society reaches “an equilibrium ... produced by a re-adjustment of all interests and rights.”³⁸ Sumner was criticizing the growing demand, in the labor and farm-protest movements, for regulations and restrictions on “moneyed

35 Federalist No. 10.

36 Alexis de Tocqueville, "Vol. 2, Ch. 5: On the Use Americans Make of Association in Civil Life." In *Democracy in America*, (New York: Library of America, 2004): 595-599.

37 William Graham Sumner, *What Social Classes Owe to Each Other*, (Caldwell, Idaho: Caxton Printers, 1952.)

38 Ibid., 107.

interests” arguing that, naturally and over time, “the interest of owners of capital [will] be limited by the interests of other groups.”³⁹ But Sumner spoke mostly in philosophical and broad terms; he did not offer a formal model of politics much less a qualitative or quantitative justification for one. As a formal theory of political analysis, pluralism only emerged as those in the newly developing field of political science took notice of and debated the shift in political mood during the Progressive Era (1896-1919), in favor of a more interventionist central government; that mood manifested in several national-level regulations, and may have resulted in more if it had not been obstructed by the federal courts. Not surprisingly this shift in government behavior occurred during the most prolific era of interest group formation in American history, as individuals coalesced to protect or promote their agendas within the political system.⁴⁰

It was during the Progressive Era that Arthur F. Bentley offered what many scholars believe to be among the first, and most influential, articulation of pluralist theory. In 1908, Bentley, a middle-aged lecturer at the University of Chicago who studied political theory in Germany, developed his doctoral thesis into what would become a landmark work, *The Process of Government: A Study of Social Pressures*. In time, it became required reading in political science courses at many colleges and universities, and remained so several decades. Writing at a time when, as we shall see, even presidents were attacking the influence of special interests, Bentley countered with a rigorous defense of the status quo.⁴¹ In *The Process of Government*, Bentley asserts that

39 Ibid., 73.

40 Ronald J. Hrebienar, *Interest Group Politics in America*, 3. Ed, (Armonk, NY : Sharpe, 1997): 17.

41 Nicholas Lemann, "Conflict of Interests," *The New Yorker*.

<http://www.newyorker.com/magazine/2008/08/11/conflict-of-interests> (accessed August 18, 2014).

there are no “legislative judgments that are not reducible to group interests.”⁴² He adds that the “play of group interests” – the “... log-rolling, or give and take” between them-- is the “very nature of the [political] process.”⁴³ The moral disfavor with which some view certain interests' activities are not so much a reflection of a greater understanding of a public interest, but of social prejudices at any given time, he argues. For instance, when oil tycoon John D. Rockefeller gave favorable rates to certain companies, he was simply behaving the way a grocer would in giving a discount to a loyal customer rather than a stranger. Of a prevailing sentiment of the time, that “robber barons” like Rockefeller were manipulating the political system to their own ends, Bentley counters “...[W]e depend on moral qualities to suit our momentary view of the facts for our explanations.”⁴⁴

But in arguing for pluralism as a justification for the status quo, Bentley was also abandoning the notion of a metaphysical national interest that the framers like Madison held so dear. Bentley writes:

... the phraseology of the 'public interest or welfare,' is something non-existent on the discussion level, save in the times of violent opposition of one nation as a whole to some by other or others, in which case it represents not the whole society under consideration but only the particular nation as one group in the larger society in which the interaction-- war, tariff dispute, or what not-- is going on... the "national interest" is rather a form of argument used by party members, than a characteristic of party tendency. It is a phrase which stands in representative capacity to the special interest groups composing the party, and at the same time aims to reconcile other group interests to the proposed policy... there can be no opinion which does not reflect interests or which has any value apart from interests.⁴⁵

Even during his own time, there were those who rejected Bentley's idea that

42 Arthur Fisher Bentley, *The Process of Government: A Study of Social Pressures*, (Cambridge: Belknap Press of Harvard University Press, 1967).: 371.

43 Ibid.

44 Bentley, 9.

45 Ibid., 402-403.

“... there is

nothing that is best literally for the whole people.”⁴⁶ This extended to the highest ranks of

American government. The previous era of American politics, the Gilded Age, was a time of

laissez-faire capitalism that allowed, in the minds of some, for a dangerous concentration of

wealth and power. Several laws regulating campaign financing, in fact, started immediately after,

during the Progressive Era, in response to this perception that special interests enjoyed an

outsized influence. This period saw some of the first campaign finance regulations, notably the

Tillman Act of 1907, that prohibited corporations from using their treasury to help political

campaigns (recently overturned in the *Citizens United* case.⁴⁷) Even after the passage of

legislation such as this, Presidents Theodore Roosevelt and Woodrow Wilson continued to lament

the role of special interests in subverting the national interest. Gearing up for a third party run in

1910, Roosevelt, in his New Nationalism speech argued:

At many stages in the advance of humanity, this conflict between the men who possess more than they have earned and the men who have earned more than they possess is the central condition of progress. In our day it appears as the struggle of freemen to gain and hold the right of self-government as against the special interests, who twist the methods of free government into machinery for defeating the popular will....our government, national and state, must be freed from the sinister influence or control of special interests. Exactly as the special interests of cotton and slavery threatened our political integrity before the Civil War, so now the great special business interests too often control and corrupt

⁴⁶ Ibid., 370.

⁴⁷ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2008).

the men and methods of government for their own profit...⁴⁸

Though not mentioning him by name, Roosevelt reasserted Madison's conception of a

public interest. The “log-rolling” described by Bentley as being the essence of the American

political system, led, in Roosevelt's words, to the “subordination of the general public interest to

local and special interests.” “The small class of enormously wealthy and economically powerful

men, “ he added, “enable these men to accumulate power which is not for the general welfare.”⁴⁹

Shortly before he competed with Roosevelt for office in 1912, future President Woodrow

Wilson echoed Roosevelt's concerns about the national interest. Before becoming President of the

United States, Wilson had been one of America's most influential, early political scientists. In his

1911 piece for the American Political Science Review , *The Law And The Facts*, Wilson argues

that America's “national policy” had:

... been a policy of stimulation, but of miscellaneous stimulation. Anyone who clamoured for legislative aid and brought the proper persuasive influences to bear could get assistance and encouragement. It was everybody for everything upon a disordered field. There was no attempt to coordinate. Our legislation has been atomistic, miscellaneous, piecemeal, makeshift.⁵⁰

But whereas Bentley saw as perfectly acceptable result of the interplay of interests, Wilson

argued that for a “new statemanship... which must be, not a mere task of

48 Theodore Roosevelt, "New Nationalism Speech [1910]," Teaching American History, <http://teachingamericanhistory.org/library/document/new-nationalism-speech/> (accessed June 8, 2013).

49 Ibid.

50 Woodrow Wilson, "The Law and the Facts," *The American Political Science Review* 5, no. 1 (1911): 5, <http://www.apsanet.org/media/pdfs/presidentialaddresses/1910addrwilson.pdf> (accessed July 24, 2014).

compromise and

makeshift accommodation, but a task of genuine and lasting adjustment, synthesis, coordination,

harmony, and union of parts.”⁵¹ Lest one think that this was an argument for simply a better

functioning pluralism, Wilson made clear in his book *The New Freedom* (1913):

... our government has been for the past few years under the control of heads of great allied corporations with special interests. It has not controlled these interests and assigned them a proper place in the whole system of business; it has submitted itself to their control. As a result, there have grown up vicious systems and schemes of governmental favoritism ... far reaching in effect upon the whole fabric of life, touching to his injury every inhabitant of the land.⁵²

That critics of pluralism were reasserting the primacy of a public interest, identifying the undue influence of specific types of interests, is a reflection of the change in politics and the economy by the turn of the 20th century. Industrialization allowed for the accumulation of massive fortunes, but at the same time, shifted millions of Americans from independent farming to factory life. It also allowed for the mass production and distribution of similar products, and for much greater integration of the economy as a whole, even as the 14th amendment, in its first interpretation and wide application by the conservative courts, began to extend rights to corporations. Rightly or wrongly, there was a great demand for regulations that protected the rights of workers and the interests of consumers. For those like Bentley, the Rockefellers of the world had as much right to assert their interests in the political system as a consumer advocacy group, and the balance of interests that resulted was policy that reflected each interests’ relative presence

⁵¹ Wilson, *The Law And The Facts*, 7.

⁵² Wilson, Woodrow, *The New Freedom: A Call for The Emancipation of the Generous Energies of a People*, (Englewood Cliffs, N.J.: Prentice-Hall, 1961.)

in society. To someone like Roosevelt or Wilson, corporate interests enjoyed an outsized influence in the system far exceeding that of the everyday citizen.

Much of the criticism of pluralism that followed echoed this latter line of thinking. The most notable early academic critic was Eric E. (E.E.) Schattschneider. As early as 1935, Schattschneider, one of America's early and influential political scientists, studied the impact of interest groups on the political system. Specifically, he examined trade policy. In a case study of tariff policy in the 1920s, Schattschneider found that “in tariff making, perhaps more than in any other kind of legislation, Congress writes bills which no one intended.”⁵³ Those interests who push for tailored protections all but shut out those who favored the general principle of free trade. The nature of the policy, as much as the nature of the interests, helped make this possible because “benefits” of a protective tariff are concentrated on the group that gains an edge in the domestic market, while the “costs” of such tariffs, described by thinkers like Adam Smith for more than a century, were “distributed” to the public at large. In this sense, per Schattschneider, free trade functions in the public interest but is undermined by the pressure group system.

Schattschneider would expand his observations in a broader, more theoretical way years later in *The Scope and Bias of the Pressure System*.⁵⁴ Schattschneider argues that most groups were shut out of interest group politics, and were not even part of the “give and take” honored by Bentley. His study of interest groups in the aggregate concluded that 90% of what he called the “pressure group system” were business interests; like Roosevelt and Wilson, he argues that the system is biased in favor of economically

53 E. E. Schattschneider, *Politics, Pressures and the Tariff: a study of free private enterprise in pressure politics, as shown in the 1929-1930 revision of the tariff*, (New York: Prentice-Hall, 1935): 13.

54 Schattschneider, *The Semi-Sovereign People*, 21-46.

advantaged groups. In his most famous quote, he argues that the “flaw in the pluralist heaven is that the choir of angels sings with a strong upper class accent.”⁵⁵

Schattschneider also took on the other fundamental assumption from Bentley and other pluralists, that there is no such thing as the common interest. Free trade served this role in 1935. But Schattschneider addressed the matter in more depth in 1961. Citing national defense as an obvious example of a real-world public interest, he offers a more theoretical response to pluralism:

The diet on which the American leviathan feeds is something more than a jungle of disparate special interests. In the literature of democratic theory the body of agreement found in the community is known as the "consensus" without which no democratic system can survive. The reality of the common interest is suggested by demonstrated capacity of the community to survive. There must be something that holds people together⁵⁶.

For Schattschneider, the best hope at recovering the public interest from the biased pressure group system was through political parties. While they may be imperfect aggregators of diverse interests, he argues, they offer one advantage to a popular democracy that interest groups do not: they are accountable to the public through elections. To the extent that public opinion can serve as an imperfect proxy for the public interest, this was better than what pluralists were suggesting, in Schattschneider's view. Many political scientists, including some in the American Political Science Association, joined Schattschneider in pushing for a “responsible party system” to fight the effects of interest groups.⁵⁷

Yet at the same time, a whole new era of pluralism scholarship was being

⁵⁵ Ibid., 34.

⁵⁶ Schattschneider, *The Semi-Sovereign People*, 23.

⁵⁷ Louis S. Maisel, and Jeffrey M. Berrey, *The Oxford handbook of American political parties and interest groups*. (Oxford: University Press, 2010).

developed, most notably by political scientist David Truman. Truman offered the disturbance model of interest group theory, arguing that individuals mobilize into interest groups when their way of life is dramatically disrupted by some change in society. Groups form to protect their interests both from the government and from rival interest groups in this new, dynamic environment. In the normative sense, to the extent that anyone deserves this strength in numbers, and to the degree that the process applies to all potential interests, pluralism is a beneficial element of the political system.⁵⁸

While he owed a debt to Bentley's emphasis on groups, political scientist Donald Brand argues that the pluralist turn represented by Truman reflects a fundamental break with Bentley on a key point, the importance of the political system in maintaining order among competing groups. For Truman, there are “rules of the game” that “restrain and moderate the selfish pursuit of narrow group interests.”⁵⁹ But in applying this universal element, it is worth noting that this is not the same thing as acknowledging a public interest but rather a recognition by interest groups that their behavior could be limited through the apparatus of government, that the government can serve as some sort of umpire.

This is the problem with pluralism highlighted by Theodore Lowi, who, in his influential work, *The End of Liberalism*⁶⁰, attacks modern pluralism's ambivalence toward Madison's notion of the public interest as representing a fundamental and unfortunate break from political tradition. For Lowi, pluralism is synonymous with what

58 David B. Truman, *The Governmental Process: Political Interests and Public Opinion*. 1st ed., (New York: Knopf, 1951.)

59 Donald R. Brand, "Three Generations of Pluralism: Continuity and Change," *The Political Science Reviewer* 16 (1985): 109-142. http://www.mmisi.org/pr/15_01/brand.pdf (accessed May 24, 2013).

60 Theodore J. Lowi, *The End of Liberalism: ideology, policy, and the crisis of public authority*, 1st ed. (New York: Norton, 1969.)

he called “interest group liberalism”-- the practice of politicians providing subsidies and favors, via policy, to different constituencies without concern for how those decisions affected the nation on their own, or, more importantly, in the aggregate. Lowi argues that this flowed from influence of pluralist ideas on politicians, pushing them to see “as both necessary and good, a policy agenda that is accessible to all organized interests and makes no independent judgment of their claims...” one that “defines the public interest as a result of the amalgamation of various claims.”⁶¹ In fighting poverty, for instance, policies aimed at eliminating systemic root causes are ignored as a matter of public interest, in favor of policies that directly address the needs of various impoverished groups, at the moment of “disturbance.” The result, in Lowi's mind, were policies that, if anything, undermined the kind of individual initiative needed to permanently lift oneself out of poverty.⁶² This paper will argue that Lowi is right that groups exert influence on the system at the same time on the same policies, and that this is a logrolling process rather than a consensus-building process. But I do not share his universal contempt for this kind of “interest group liberalism.”⁶³ Furthermore, as we shall see, the neo-pluralists have raised questions about the extent to which groups cannibalize the political process in some kind of amoral vacuum.

Lowi was one of the first political scientists to articulate what amounts to a transaction-model of interest group activity. In this theory, interests groups seek policy favors from public officials, who expect some kind of support in return, such as public endorsements. Another means of currying those favors, campaign donations, came to

61 Ibid., 71

62 Ibid., 244.

63 Ibid., 75-76.

prominence not long after Lowi wrote his indictment of the political system. The influence of money in politics had been an issue since the Progressive Era, when Congress, through the Tillman Act, forbade corporations from providing treasury money to political campaigns. In the 1940s, this prohibition was extended to labor union treasuries, who then began to form the earliest version of what we now call Political Action Committees (PACs.) The reason PACs did not form after the Tillman Act had to do alternative sources of political contributions: unlike the owners of most corporations, working-class laborers lacked the money, as individuals, to independently finance campaigns. But private donations became problematic when the press discovered that Richard Nixon took an enormous contribution from wealthy donors. Soon, the Federal Elections and Campaigns Act of 1971 placed restrictions on private contributions, with court cases and updates to follow.⁶⁴ Perhaps as much as anything, the idea that money buys votes is the most common prejudice coloring perceptions about interest groups.⁶⁵ One wonders how many “everyday” Americans would endorse the normative foundations of pluralism, that interplay of interests yields results, organically, in a society that more or less reflects the needs and desires of various groups. Such skepticism extended to one of the most influential thinkers about politics and economics.

Mancur Olson, a Nobel-prize winning economist, is more associated with the transaction model of interest group politics than any other person. Olson began to articulate his ideas about interest group activity in his ground-breaking work, *The Logic*

64 Ebscohost, "The Federal Election Campaign Act, Contributing to Candidates, Elected Leaders, Money Contributions to National Parties, and the History of Campaign Finance Laws," History of Campaign Finance Laws, <http://connection.ebscohost.com/politics/campaign-finance-reform/history-campaign-finance-laws> (accessed April 27, 2013).

65 Jordy Yager, "Poll: Majority wants corporate money out of politics," TheHill. <http://thehill.com/blogs/ballot-box/campaign-ads/264087-poll-majority-want-corporate-money-out-of-politics> (accessed May 8, 2013).

of *Collection Action*, in 1965.⁶⁶ Olson argues that individuals formed groups for material incentives, and that smaller groups are more likely to form as the costs of coordination and the benefits of free-riding are lower. Olson is careful to distinguish groups that pursued private goods (such as industry-specific tax breaks) from those that pursued public goods (such clean air), as the latter offered less incentives for individuals to contribute their time and effort to the cause.⁶⁷ Later, in *The Rise and Decline of Nations*, Olson identifies the inevitable proliferation of interest groups as the driving force behind the gradual, sclerotic decline of democracies throughout history. Departing from Madison, Olson highlights the tyranny of minority factions-- not one, but many. The key was not only that small interest groups were easier to form and hold together over time, but that they were more cohesive than public groups in pursuing their goals-- and those goals almost inevitably took the form of rent-seeking a la Lowi. Under his theory, as more and more groups form, each seeking their own benefits from the political system, the government grinds to a halt as it can no longer afford to accommodate them, literally and figuratively.⁶⁸ This idea was updated and applied to Clinton-era government by political commentator Jonathan Rauch in the early 1990s, who coined the term “demosclerosis” to describe the process.⁶⁹

For the purposes of the argument in this paper, it is worth noting the critics of pluralism were, in large part, accepting pluralists' descriptive premise that American politics consistently involved the give-and-take between interest groups. In that sense, the

66 Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, (Cambridge, Mass.: Harvard University Press, 1965).

67 Ibid., 14-28.

68 Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities*. (New Haven: Yale University Press, 1982).

69 Jonathan Rauch, *Demosclerosis: the Silent Killer of American Government*, (New York: Times Books, 1994).

pluralists were defending the aspect of the Madisonian system that allowed groups to form and petition government, to compete and compromise in the arena of policy-making. But the critics of pluralism were instead arguing that system of government designed by the framers to foster this approach created an environment that undermined the public interest, one where the “deck was stacked” in favor of certain interests over others, or, one which was too fragmented to solve national problems. These critics accepted the existence of a public interest, as Madison did. But, in line with a core argument of this paper, they believed that the original system of government simply did not anticipate the power of minority interests.

In contrast to Lowi, Olson and Rauch, and even to Bentley and Truman, Robert Dahl, in his landmark 1961 work, *Who Governs?*⁷⁰, argues that the interaction between organized interests in society is more complicated in practice than many experts realized, especially when one expands his/her definition of what qualifies as an organized interest. In many ways, Dahl represents a transition from the type of pluralism advocated by Bentley and Truman, into what is now referred to as neo-pluralism. Contrasting with those, like Schattschneider, who see an elitist dimension to the “pressure group system,” Dahl pushed back by pointing out that involvement in politics is as much a function of intensity and salience as it is a product of resources and access. Different groups choose to be active at different times in lawmaking, and in the case of New Haven, Connecticut, the city analyzed by Dahl, this often meant that business interests, in fact, were passive. Moreover, more resources than just money, like knowledge and political office, were

⁷⁰ Robert Alan Dahl, *Who Governs? Democracy and Power in an American City*, (New Haven: Yale University Press, 1961.)

important to policy-making. No one group had a monopoly on all resources, and so groups had some measure of equality with each other. Finally, public opinion, as expressed through elections and polling, also factored into the policy-making equation, alongside but also distinct from the structures of government that Truman saw as an “umpire.” The net result was that many competing interests had access to the system, in different but relatively equal ways, when they had something at stake, and that public opinion could temper their activity.

I will argue that while the critics of pluralism were correct in reasserting the existence of a public interest, their arguments were flawed on two fronts. First, in an empirical sense, the work of a group scholars, neo-pluralists, raises serious questions about the nature and extent of interest group influence within the political system. Neo-pluralists have done a convincing job of showing that interest groups influence the system in more narrow ways, and can and have been “defeated” when they attempt to nullify a policy that has serious, intense public support behind it. To the extent that pressure group system biases the policy-making process in favor of one group or another, it is often at the level of access, outside of the public view, rather than the type of corruption many imagine. This may allow some groups to influence the language of bills, which, admittedly, is no small matter, and may allow for the kind of log-rolling that worries critics of pluralism. But my second argument will be a theoretical one, that in cases of policy where the public interest is not easily definable or at stake, the biases in the interest group system, and the log-rolling that accompany them, can fit into a normative understanding of democracy. By implication, this would mean that the neo-pluralists’ insights into the political system may well show that the Madisonian system

works on Madison's terms; that when minority factions oppose the popular will, they are indeed outvoted, but when they operate outside these narrow parameters, the political system weighs and balances interest to form an acceptable policy.

But I will ultimately argue that the Madisonian system is still incomplete and open to the mischiefs of faction. Even if, *arguendo*, the pluralists are correct about the metaphysical non-existence of a public interest their case fails on practical grounds. This is because the Madisonian system rests on the foundation that a public interest exists. It is like someone who rigged his only car to compete in drag races; the engine of the car still needs to be maintained in a unique way even if the owner uses the vehicle to travel to work, and never competes in a drag race. Even if the insights of neo-pluralists, explored in the next section, hold true, the problem of minority factions still remains. Neo-pluralism, and to an extent even pluralism, can fit a normative understanding of democracy in general, but does not provide a healthy proscription for America's republic in particular.

The neo-pluralist model of American politics comes close to suggesting a Madisonian system in the way Madison intended, as I will argue in next part of the paper. The national mood that can overwhelm an entrenched interest, in the neo-pluralist model, could in theory be a proxy for the public interest. At times, this may be the case. But I will argue, in the final section of the paper, using the so-called Brady Handgun Violence Protection Act of 1994 as a case study, that a multiplicity of interests can often be a detriment to the public interest. Because issues that “qualify” as being in the public interest may signal to organized interests that said policy is likely to pass, logic dictates that various groups will seek to manipulate a bill to advance their narrow interests. The

end result is a policy that, like the Brady Handgun Violence Protection Act of 1994, is too incoherent to achieve its intended goal.

Chapter Three: Neo-pluralism and Its Normative Implications for the Madisonian System

As the version of pluralism, in its descriptive observations of American democracy, that comes the closest to resembling Madison's prescription for liberal democracy, neo-pluralism is worth exploring in some depth, particularly in its assumptions about the interaction between various players in the political system. To the extent that neo-pluralism was created as much as a research program as it was a school of political thought, many of its primary assumptions are implicit in its approach to research. David Lowery and Virginia Gray, two prominent neo-pluralists, articulate six of these premises.⁷¹

First, they argue, there are many different organized interests that exert influence on the policy process, not just elite groups. Second, the interactions between interest groups are incredibly important-- "ubiquitous" they assert-- and fundamentally misunderstood. Contrasting their approach with Olson's economic transaction model of interest group politics that implies smooth one-to-one relationships between lobbyists and their client politicians, neo-pluralists argue that "interest systems are viewed far more like ongoing food fights than as a super-market where goods are politely delivered upon payment."⁷² Thirdly, they point to large-n studies of interest group activity which show that context creates variation in the strategies and tactics employed by groups, and circumscribes their relative chance of success. As they put it "...given contingency and context, the exercise of influence is very much a sometime thing."⁷³ Fourthly, the

71 David Lowery, and Virginia Gray. "A Neo-pluralist Perspective On Research On Organized Interests." *Political Research Quarterly* 57, no. 1 (2004): 163-174.

72 Ibid, 168-169.

73 Ibid, 167.

prevailing assumption by both traditional pluralists and economic modelers that for groups “interests were always well defined, the intentions of others fully understood, and decision rules fixed” is false; uncertainty permeates what Schattschneider referred to as the “pressure group system.”⁷⁴ Fifthly, the activity and the degree of success or failure at one stage of the policy-making process conditions strategy and tactics at other stages of the system. Finally, the actual success and failure in mobilizing on one issue can impact tactics, strategy and even group dynamics at later stages, creating something like a feedback loop between outcomes and approaches. To this they say that “the influence production process is not a sausage that can be neatly sliced to isolate narrow problems.”⁷⁵ As a result, in contrast to the utopian views of traditional pluralists, neo-pluralists find “that [interest group] mobilization will not be automatic or easy, nor will it perfectly reflect the distribution of interests in society.”⁷⁶ Yet while the latter argument tilts in favor of the kind of bias in the system articulated by Schattschneider, neo-pluralists also believe that public opinion can be a serious constraint on any interest group, regardless of how well-heeled it may be. The most notable examples of the public “overcoming” special interests, as articulated by other neo-pluralists, include the successful push to mandate seatbelts in cars, the effort to regulate and fine Big Tobacco in the 1990s, and the mostly-successful effort to regulate the nuclear power industry.

Yet, several of the very insights from neo-pluralists actually suggest the very way in which interest groups (when operating as minority factions) can still undermine the public interest. The neo-pluralists are convincing in arguing that interest groups adjust

74 Ibid, 170.

75 Ibid.

76 Lowery and Gray, 165.

their strategy at various stages of the political process, based on their relative success or failure at previous stages, or in anticipation of influence (or a lack thereof) at later stages. But one of the very things these groups can adapt to is the the type of mass mobilization that neo-pluralists claim allow the public David to slay the special interest Goliath. A smarter Goliath, anticipating that he will likely lose and die in combat with David, might adjust his approach to sustain an injury rather than a fatal blow. In the same sense, an interest group, sensing that public sentiment-- and the electoral fate of politicians-- is clearly behind a particular policy objective, would likely seek to modify or soften the policy at some stage of the political process. What's more, even after a policy is passed, the political system allows interest groups to manipulate policy at the executive level, when the public headwinds that secured the passage of a bill have dissipated, or through litigation in the federal courts. When policies fall outside the scope of the public interest, the neo-pluralist model of American politics – and even the pluralist model of American politics-- can fit within a normative understanding of democracy, even if one assumes bias and rent-seeking within the political system. But when a policy *is* connected to the public interest, it is possible and even probable that the interest groups can serve as minority factions, undermining the public interest.

Chapter Four: Neo-pluralism and Pluralism and Madison's Normative Democracy

Before arguing that minority factions, in the form of interest groups, can present a menace to American democracy, and that they do distort the Madisonian system, it is important to recognize the ways that they do not corrupt the system. The case that modern pluralism maintains the spirit of Madison's normative idea for the American republic is stronger than most critics allow. Even most critics of pluralism accept the basic premise that groups play a fundamental role in American political outcomes, and that Madison allowed for this via the structure of the Constitution; but what critics charge is that in failing to anticipate the power and resilience of smaller groups, that system has become a dystopian exaggeration of Madison's pluralism, one where Madison's fear of factions is coming true-- only with minority factions (in the form of interest groups) as the culprit. But the modern pluralist could justifiably argue that those who want to fundamentally change the structure of government to limit the power of interest groups are the ones who are encouraging factionalism in government.

Critics who want to dampen the influence of interest groups in favor of an ideal, one-person-one vote democracy ignore one of Madison's chief aims in replacing the Articles of Confederation: preventing tyranny of the majority. As noted earlier, Madison feared this on the local level and shifted some profound powers from states to a central government in part because he felt it would be less susceptible to that temptation. But if more power has gone to the central government since 1787, and if the public has greater ability to form coalitions across geographic regions, then the problem of majority tyranny simply shifts to Washington, D.C.; interest groups that use money, or policy expertise, or litigation, or grassroots mobilization to amplify their position in America politics are

protecting themselves against systematic alienation within the political system. Yes, Madison may have miscalculated that minority factions would consistently be outvoted due the republic principle-- but an interest group only becomes a minority faction if it seeks to subvert the public interest. And it is clear that Madison did not assume that mere majority rule automatically equated with the public interest.

Even though interest groups have a greater say in national policy than they did in 1790, even though these groups spend money on elections and campaigns as never before, the American political system still allows for fair competition between groups. Fair does not mean equal, but to the extent that a given policy fight favors one group over another, that could be a natural reflection of the legitimate and greater stake one group has in a given policy area than others. Without question, certain groups influence policy in ways that outstrip their demographic weight in the overall population. But this may simply reflect a preferable and more nuanced understanding of interest aggregation than simply counting votes in an election and then expecting politicians to take heed of opinion polls from their states and districts. That certain groups are willing to spend greater time and utilize greater resources to advance their goal at the expense of others-- even the majority-- does not mean that said group is undermining the public interest. Some issues are more salient to certain interest groups, and some interest groups are more intense in maximizing their policy goals in those areas. The very fact that the issue is more salient, and the group is more intense, suggests that said group not only will but *should* have a greater say in the given policy area. Taken together with the neo-pluralist observation, that an intense and mobilized public can overcome even a well-heeled and established interest group, one is left with a system that not only allows groups to

participate in the system, but allows them to have a legitimate say on issues that matter to them most, without hijacking the political system as a whole.

To take an example, imagine there is some effort to repeal a tax subsidy for dairy farmers. To the public, this may represent, in real terms, a few cents in savings for all taxpayers. But to the dairy farmers, the loss of that subsidy could represent a near-existential threat. Under such a circumstance, it stands to reason that the dairy farmers would put a greater effort into trying to protect the subsidy than those who oppose it. If the issue, and the efforts of the dairy farmers, are not enough to mobilize intense public attention against the subsidy, then not only practical politics, but common sense, suggests the dairy farmers would have a greater say than others in stopping the repeal effort or in softening its impact. In a normative understanding of democracy that includes the ability of different groups to have a *real* say in policies that affect said group, this level of extra-influence would be desirable. The reality, contra-Lowi, is that most government policies require some expenditure of tax payer money, either to fund a program or to fund an agency that monitors said policy. Everyone is, in some sense, a rent-seeker in the pressure group system.

In that sense I argue that the pluralists are correct in at first recognizing the need for and activity of organized interests in the political system. That on any given policy, one group may be more heavily weighted into the policy's goals than others can actually represent a more substantive form of political representation than a simple majority vote along party lines, contrary to what pluralism's critics contend. In the example I provided above, under the current polarized political environment, with the kind of party discipline evident in Congress, the dairy farmer who is only limited to filtering her interests via a

vote for one or more of the major political parties, a la Schattschneider's ideal, could find herself without any substantive voice if she has the misfortune of supporting the losing, minority party. The neo-pluralists have demonstrated that if the dairy farmers are seen as some kind of major threat to the nation's future, the public can mobilize against them; otherwise, the outsized influence the dairy farmers have on milk subsidies is not much different than the outsized role many Americans would hope that doctors may have on medical policy or that teachers may have on education policy.

Hence my criticism of pluralism and neo-pluralism is not, per Schattschneider and Lowi, that some groups benefit from the political system at the expense of others, but that on policies that serve the public interest, too many groups may try and obtain benefits. In these instances, the neo-pluralist contention that the public may "outvote" the given interest ignores their other insights—that the type of interest group activity and the way it manifests itself in policy are affected by the potential for success. In short, when it becomes clear that politicians recognize that a policy is in the public interest to the degree that said policy is likely to pass, interest groups seek to influence the policy at other stages in hopes of winning concessions, softening the impact, etc. This may result in an incoherent policy on issues that affect the nation as a whole.

At this point, the critiques of Olson and Rauch become salient—that smaller, organized interests are likely to be more active and more persistent than larger groups. Neo-pluralists have poked holes in this argument, but the fact remains that many of the most influential interest groups today have pedigrees dating back more than 100 years, such as the NRA, the American Medical Association, etc, and there has been an explosion of interest groups over time, even if some merge with others. Regardless of who they are

and what interests they represent, the impact on the types of policies I describe will create an even greater likelihood of an incoherent policy. I thus disagree with the nature of the problem Olson and Rauch identify-- “democratic sclerosis”—as a natural and unfortunate consequence of the proliferation of interest groups. At the time Theodore Lowi launched his critique of “interest group liberalism” there obviously were plenty of interest groups to go around, and they did not stall the system. In contrast, political parties-- the closest thing in Madison's thinking to majority factions- are currently bringing the system to a halt according to many experts. Instead, the neo-pluralists in fact point the way to the actual problem. Their studies clearly show that public opinion is a constraint on interest group activity but one that forces inside more than outside lobbying, at more discreet levels of the policy-making process, such as Congressional committees.

However, I believe that because of the very opacity of policy-making at this lower level, neo-pluralist assumptions can break down-- specifically when interest groups seek to manipulate the language of legislation. At this level, the actions of an interest group are not only obscure to the public, but possibly to other, potentially competing interest groups. If true the “food fight” metaphor for interest group interaction becomes less apt and the kind of logrolling discussed by Lowi takes place. Logic dictates, as I will explain, that this is much more likely to happen when the policy in question is, indeed, an issue of public interest. Hence the problem becomes an issue not of interest groups “cannibalizing” the process a la Rauch and Olson, but one of policy incoherence, where some elements of a policy that is vital to the country conflict with and unnecessarily complicate other parts of that same policy, or undermine the purpose of the policy itself. The problem is that an interest group, be it one or several, can create policy incoherence

on issues of concern to the entire nation. In the following section, I will rely heavily on neo-pluralist research to highlight the many ways that interest groups can and do influence policy, highlighting, specifically, the tactic of shaping the language of legislation. Then I will use a case study on the the Brady Handgun Violence Prevention Act of 1994 to show how, on a matter of public interest, this tactic can critically undermine the spirit of the policy.

Chapter Five: How Interest Groups Work

An interest group wanting to shape a policy to suit its preferences has a wide-variety of tactics to use in exploiting a political system that provides numerous access points for such influence, both during the policy-making process and after the policy is passed.

Many works have explored the various tactics employed by interest groups, and the reasons and contexts that encourage the use of one tactic versus another. Berry, in his seminal text on interest groups, lists testifying at hearings, publishing candidate voting records, launching ad campaigns through the media, donating to campaigns, among many favored approaches.⁷⁷

Interest groups spend most of their time providing information to public officials, what we would call lobbying. Lobbying itself broadly captures several tactics beyond just providing information to public officials. Berry divides it into two camps. Outside lobbying includes harnessing ones membership to exert public pressure on lawmakers to favor or oppose a policy option. Inside lobbying, which occurs outside of public scrutiny, is of particular interest to this study, and includes some forms of campaign donations, private meetings, and directly influencing the text of legislation. The latter is the most relevant to our discussion.⁷⁸

Hall and Deardorff conceive of lobbying as a form of legislative subsidy, whereby lobbyists find allies with likeminded goals and then lend their support in areas where said legislator lacks the time and budget to fully realize that goal. By influencing the text of

⁷⁷ Jeffrey M. Berry, *Lobbying for the People: the Political Behavior of Public Interest Groups*, (Princeton, N.J.: Princeton University Press, 1977).

⁷⁸ Berry, 1-10.

legislation, lobbyists leverage one of their major advantages in engaging the political system, their policy expertise. Most politicians are policy generalists, with only a vague understanding of specific policy areas. Lobbyists whose members are interested in or are potentially affected by future legislation often have a much deeper understanding of policy. For this reason, it is not surprising that certain lobbyists actually craft parts of bills when they are designed, or propose direct changes to a bill's text as during the committee markup process.⁷⁹ Congressmen themselves are aware of the importance of a bill's language to interest groups. Former Congressman Lee Hamilton, in his basic guide to Congress, noted that, as a lawmaker, "you need to consult people outside Congress, including key special interest groups who have much to gain or lose depending on the precise language of the bill..."⁸⁰

"Much to gain"-- or lose-- is an understatement. Even on the state level, one observer described the perception of lobbyists that "he who writes the language of the bill has control".⁸¹ One lobbyist noted that "... depending on how regulations are written, you can save millions of dollars, sometimes a hundred million dollars."⁸² As noted by Baumgartner and Leech, two very different pairs of political scientists-- Schattschneider and Bauer, Poole and Dexter—focused their seminal studies on how interest groups help to draft legislation.⁸³ Quantitative studies support the idea that this is one of the most

79 Richard L. Hall, and Alan V. Deardorff, "Lobbying As Legislative Subsidy." *American Political Science Review* 100, no. 01 (2006): 69-84.

80 Lee Hamilton, *How Congress Works and Why You Should Care*, (Bloomington: Indiana University Press, 2004): 57.

81 Jack R. Slik, *Politics in the American States and Communities: a Contemporary Reader*, (Boston: Allyn and Bacon, 1996): 149.

82 Anick Jesdanun, "Pa. Companies Make Lobbying Their Business." *The Observer Reporter* (Green County), April 27, 1997, sec. A2: 1.

83 Frank R. Baumgartner, and Beth L. Leech, *Basic Interests: the Importance of Groups in Politics and in Political Science*, (Princeton, N.J.: Princeton University Press, 1998): 126.

common practices for lobbyists. In such a study on healthcare lobbying, Hojnacki finds that a clear plurality of the organizations she examined spent their time trying to “shape the content” of legislation.⁸⁴ In their study of state-level lobbying, Nownes and Freeman noted that 85% of the lobbyists they analyzed reported that they helped draft legislation. On the national level, Schlozman and Tierney also found 85% of lobbyists they surveyed engaged in the tactic. Perhaps most relevant to a discussion on policy incoherence, even on issues where different interest groups competed over the same policies to change the status quo or to challenge it, Baumgartner, et al. found that about 39% of the lobbyists surveyed reported drafting legislative language.⁸⁵

Clearly context affects when a bill is going to be subject to lobbying over wording and when it is not. Neo-pluralists especially have explored a host of factors and their potential impact on lobbying tactics. Studies have considered public salience and the public agenda, the presence of competing interest groups, ideological climate, and, institutional factors.⁸⁶ Notably for the latter, the concerns include the level of accountability that decision makers have to the public. It has been noted earlier that public opinion constrains the tactical choices of lobbyists; with the issue of crafting bill language, the evidence suggests that, because the bulk of that process occurs at the relatively obscure committee level, that this would encourage significant activity in that

84 Marie Hojnacki, "The Changing Process of Direct Lobbying," Unpublished Paper prepared for the Midwest Political Science Association n/a (2000).
http://www.unc.edu/~fbaum/books/lobby/_documentation/midwest_2000.pdf (accessed May 1, 2013): 19.

85 Frank R. Baumgartner, Jeffrey M. Berry, Marie Hojnacki, Beth L. Leech, and David C. Kimball, *Lobbying and Policy Change: Who Wins, Who Loses, and Why*, (Chicago: University of Chicago Press, 2009): 151-2.

86 Marie Hojnacki, David C. Kimball, Frank R. Baumgartner, Jeffrey M. Berry, and Beth L. Leech, "Studying Organizational Advocacy and Influence: Reexamining Interest Group Research," *Annual Review of Political Science* 15, no. 1 (2012): 389-391.

regard.

In contrast to floor voting and the amendment process, political scientists note that “a multitude of decisions about the content of legislation often are made without a vote” in committee.⁸⁷ This includes activity that directly and indirectly relates to the language of a bill, so “a group will lobby to encourage legislators to craft legislation that conforms to its interests, to change the wording of a bill, and to ensure that favorable bills and amendments are placed prominently on a committee's agenda.”⁸⁸ The committee itself offers a number of “access points” for interest group influence. If one cannot consult with the lawmaker herself, they can try and influence committee and personal staff. Thus Hall and Wayman found that whereas PACs contributions do not correlate with public votes (including committee voting) they do correspond to the time committees and committee members provide to lobbyists. This access in turn allows for lobbyists to influence, and even directly suggest, changes to bills.⁸⁹

Many scholars have also considered the perceived chance of success as a factor that conditions the tactics used by an interest group.⁹⁰ To a large extent, success is perceived largely in terms of whether or not the interest group will achieve it using one approach versus another. There is little direct attention paid to whether or not the interest group anticipates that a policy will pass. This could possibly be inferred by proxy measures that have been studied, that correlate interest group activity (in our case, shaping the language of bills) to such things as party competition and the presidential or

87 Marie Hojnacki, and David C. Kimball, "Organized Interests and the Decision of Whom to Lobby in Congress," *The American Political Science Review* 92, no. 4 (1998): 784.

88 Hojnacki 2000: 6.

89 Hall, Richard L., and Frank W. Wayman. "Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees." *The American Political Science Review* 84, no. 3 (1990): 797-820.

90 Hojnacki, et al. 2012: 14, 18-19.

public agenda/salience. The disparate findings of Baumgartner, et al. and Schlozman and Tierney suggest that the presence of a competing interest group, for instance, may limit the expectations that a policy will pass. If so, why should an interest group exert effort manipulating a bill?

It appears that the prospects for a policy's success-- and the perceived prospects for a policy's success-- are dependent on a host of factors that are not captured in studies that look at one or two proxy variables. Without question, in most cases, the level of perceived uncertainty, as documented by neo-pluralists, is so great, that one would not expect a bill to pass. But what if there was a high degree of likelihood, almost a near-certainty, that something would pass, at least early on in the political process? Would that change the calculus of what interests groups seek to do?

There are a number of factors, again, that correlate with the likely success of a policy initiative. A highly salient issue, if there is little ideological conflict over it at a given time, such as the PATRIOT ACT, would qualify. So too would a policy that was high up on the president's agenda at a time when there is unified government with support from key interest groups; the Medicare Part D adjustment, would count. The various moving parts would make it hard to generalize across contexts and eras; one might have unified government but not a super-majority in a Senate. It may be rare, but a bill can enjoy these kinds of favorable headwinds, at least at early stages of the policy process, and possibly at other points throughout.

And even if the bill becomes law without much input from a hostile interest group, said group can continue to influence the policy by either impacting how the executive branch implements the policy, or by working through the federal courts.

Congress frequently creates broad laws and pass the bulk of the specific rule-making and regulation-making on to administrative agencies. Laws require agencies with resources to interpret and enforce them; per the Administrative Procedures Act of 1946, executive agencies must also subject potential rules to public debate. Recent work has established how interest groups influence the enforcement of a law, including by campaigning to deny funds and jurisdiction to relevant agencies and by influencing the rule-making process in public debate.⁹¹ Even if an unfavorable regulation is passed, interest groups can challenge the legality of said regulation via the federal courts; they can also challenge the constitutionality of parts or all of the law in question. Interest groups can do this as direct litigants, for instance, if the American Civil Liberties Union attempts to undermine domestic surveillance operations on Fourth Amendment grounds, or interest groups can join another's case by filing *amicus curae* briefs.

Collectively, these activities may fit within Madison's conception of a pluralist democracy. But only when they apply to policies that our outside the scope of the public interest. When a policy is favorable to the public interest-- and thus is more likely to pass- this kind of activity can undermine the spirit of a law, or confuse its implementation. This is exactly what happened with the Brady Handgun Violence Protection of Act of 1994, as will be discussed in the next section.

⁹¹ Ken Godwin, Scott H. Ainsworth and Eric Godwin, *Lobbying and Policymaking: the Public Pursuit of Private Interests*, (Thousand Oaks: CQ Press, 2012).

Chapter Six: Case Study

The Brady Bill, The Public Interest And Incoherence

The Brady Handgun Violence Protection Act (Public Law 103-159), otherwise known as the Brady Bill, was signed into law by President Bill Clinton on November 30, 1993, after seven years of wrangling by various parties and actors in Congress that saw multiple, previous versions of the bill fail to pass. The purpose of the act was to reduce gun violence by requiring background checks and waiting periods for the purchase of a firearm. That the bill passed despite a rigorous lobbying effort against it by the National Rifle Association, in the face of a presidential veto threat (in its earlier iterations), and with the opposition of key committee leaders, is sometimes portrayed as an outright victory for gun control advocates, and a sign, consistent with the neo-pluralist perspective, that a tide of public opinion can push forward legislation over the objections of powerful interest groups.⁹² The reality, as will be argued here, is that measures taken by the NRA and others, in fact, weakened (or eliminated) key provisions of the bill in such a way that it may, in fact, have had little or no effect on handgun violence. Ironically, this was for the very reasons highlighted by the opponents who weakened the bill—the Brady Act did little to prevent black market purchases and sales of handguns. As a bill that was weakened in anticipation of its passage, and as a bill whose measures were aimed at sensibly preventing the sale of firearms to potentially dangerous individuals, the Brady Bill illustrates the problem highlighted in this paper: that the danger to the American political system posed by interested groups is the way in which those groups corrupt the spirit of legislation aimed at advancing the public interest. The

⁹² Gregg Lee Carter, *Guns in American Society: an Encyclopedia of History, Politics, Culture, and the Law*, 2. ed. (Santa Barbara, Calif.: ABC-CLIO, 2012): 967-968.

principal ways this is done, as argued before and will be illustrated with the Brady Bill, is by shaping the language and provisions of the bill and/or by undermining or influencing its execution after it passes. With the Brady Bill, a minority faction was not defeated by the “republican principle,” per Madison, but instead, “played the game” and poisoned legislation that another interest group-- Handgun Control, Inc. (HCI) – considered, at the time, to be a major victory for its agenda. The result was an incoherent policy-- a policy that was destined to fail because of provisions that were contradictory, too weak, or non-existent (removed in advance).

The Brady Bill was the culmination of seven years of activity, spurred largely by the efforts of HCI. Formed in 1973, the group became the leading voice for gun control following a series of public confrontations with the National Rifle Association; one such confrontation, involving HCI leader Susan Sullivan on the Today Show, created a groundswell of support for the group and its cause, and was followed by national petition drives and congressional hearings in favor of gun control. From the beginning, HCI “wanted to license handgun owners, place restrictions on certain handgun types, and create a national registry of handgun owners and their guns.”⁹³ A major turning point for the group and its efforts came in 1981, when a would-be- assassin, John Hinckley, wounded but failed to kill President Ronald Reagan. Reagan’s press secretary, Jim Brady, was seriously wounded in the cross-fire, and paralyzed from the waist down. Brady and his wife, Sarah, became leading advocates for gun control, joining HCI in the mid-1980s, with Sarah Brady becoming its chair as of 1991 (the group itself would change its name

93 The University of Illinois at Chicago, "Committee for Handgun Control, Inc. records MSCFHC79," Richard J. Daley Library Special Collections and University Archives, <http://www.uic.edu/depts/lib/specialcoll/services/rjd/findingaids/CFHCf.html> (accessed July 12, 2014).

to the Brady Campaign, in the couple's honor, as of 2001.) A series of different bills, from 1987 to 1993, to bolster restrictions on the sale of firearms to former criminals and mentally disturbed individuals by way of a national background check, each were named after Jim Brady. In essence, the bill would make it possible to verify the information that handgun customers provided to licensed dealers on the Federal Firearms Transaction Form (Form 4473); under pre-Brady gun laws, an individual with a criminal record could simply lie on the form and obtain a weapon. Beyond HCI, the Brady Bill also had the support of other organized interests, notably police officers organizations such as The Fraternal Order of Police.⁹⁴ Together they opposed the National Rifle Association (NRA), who has pushed for gun owners' rights since their formation in 1871.

The NRA normally had the support of law enforcement fraternal organizations, but this changed after 1986, when the Congress passed the Firearms Owner Protection Act (FOPA). The FOPA loosened or weakened several provisions in the last major pieces of federal gun control legislation, Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968. Both of these laws prohibited the sale of firearms to individuals with criminal records or to mentally disturbed persons, but FOPA removed or weakened restrictions against the interstate sales of weapons by non-licensed dealers. Known today as the "gun show" loophole, FOPA changed the wording on who was subject to the 1968 restrictions on the sale of firearms, essentially limiting enforcement to dealers with Federal Firearms Licenses (FFL). It more or less allowed for anyone to purchase weapons at a gun show without regulation or without consequence to the dealer.

⁹⁴ Weir, Margaret. *The Social Divide Political Parties and the Future of Activist Government*. New York, N.Y.: Russell Sage Foundation, 1998): 328.

⁹⁵ Closing this loophole became a major objective for the HCI, and the failure to close it via the Brady Bill in the face of NRA opposition, it will be argued, substantially undermined the spirit of the law.

Attempts to sponsor and produce legislation to monitor who could and who could not obtain a firearm failed until 1993, when what would become the Brady Handgun Violence Protection Act was introduced in congress as H.R. 1025. When introduced in its first incarnation in 1987, the bill faced significant obstacles. In several iterations through different sessions of the United States Congress, the bill faced general opposition from the Republican Party, veto threats from the president (George H.W. Bush), vocal opposition from the NRA, and, perhaps most importantly, resistance from the NRA's allies on key committees in the House and in the Senate. This included even Democrats, such as Jack Brooks (D-TX) and John Dingell (D-MI), key committee leaders, both of whom worked with Republicans to kill or to defeat variations of the Brady Bill in multiple sessions of Congress. The fate of the bill began to turn in favor of gun control activists when President William Jefferson Clinton was elected in November of 1992; Clinton featured gun control on his platform, and continued to advocate for it in his State of the Union Address. Popular opinion also weighed heavily in favor of gun control legislation. The vast majority of Americans in both parties, and even the majority of gun owners, favored background checks on firearms sales.⁹⁶ Again, law enforcement groups put their support behind the legislation, as did the American Medical Association. Advocates gained a key boost when the popular, former president, Ronald Reagan, gave

⁹⁵ Carter, 300.

⁹⁶ Gregg Lee Carter, *Gun Control in the United States: a reference handbook*, (Santa Barbara, Calif.: ABC-CLIO, 2006): 38.

his support to the bill, including in a nationally syndicated op-ed.

With the backing of the new president and the old president, and with the headwinds of public support, the bill pushed through both chambers of Congress, despite several public efforts to thwart its passage or to weaken its efforts through amendments. It passed the House of Representatives, 238-189, on November 10, 1993, and then moved to the Senate for two weeks. Once it cleared its biggest hurdles, the NRA, through proxies in Congress, attempted to undermine the bill through two general approaches. The first was to offer a replacement, alternative bill in the Senate, that was more amenable to the NRA; this failed. The second amendment, to require instant background checks rather than a waiting period, succeeded but only after the amendment was weakened by pro-gun control lobbyists. The compromise that became part of the law required a five-day waiting period before the purchase of a gun, but one that would be replaced, in 1998, with an instant background check from a just (in 1993) forming federal database, the National Instant Criminal Background Check System (NICS.)⁹⁷

The New York Times and the American media hailed the 1993 act as a major victory for gun control advocates.⁹⁸ But NRA lobbyist Richard Feldman, in his book *Ricochet: Confessions of A Gun Lobbyist*, pointed out that the NRA simply adjusted its strategy when it became clear that the Brady Bill would pass. Per Feldman: "... we knew enough to help shape it and to save our political capital for winnable fights."⁹⁹ Years later he added: "The NRA was smart enough to see the writing on the wall. It wasn't so much

⁹⁷ Ibid.

⁹⁸ Clifford Krauss, "GUN-CONTROL ACT WINS FINAL BATTLE AS G.O.P. RETREATS," *The New York Times*. <http://www.nytimes.com/1993/11/25/us/gun-control-act-wins-final-battle-as-gop-retreats.html> (accessed July 23, 2014).

⁹⁹ Richard Feldman, *Ricochet: Confessions of a Gun Lobbyist*. (Hoboken, N.J.: John Wiley & Sons, 2008): 142.

about liking it as was liking it better than the alternative. [T]he Brady campaign got their bill, even it was our bill!"¹⁰⁰ As asserted earlier, interest groups simply adjust their strategy to weaken bills that are likely to pass. The very public pressure that neo-pluralists argue can, at times, overcome the bias in the pressure group system, becomes the signal that the "writing is on the wall," to use Feldman's characterization, and that the lobbying strategy must change.

For the NRA, this change in tactics came in four forms: by blocking any effort to regulate non-licensed, private sales of guns; by placing restrictions on what information can be gathered under the law and how law enforcement can use said information; by weakening the power of the ATF to investigate illegal gun sales; and, finally, by challenging the Brady Act through federal litigation and weakening its provisions in the years after its passage. Taken together, this has created a major, secondary market – a black market—that accounts for the sale of most of the weapons used in criminal activity. The NRA's leader, Wayne LaPierre, half-heartedly supported the final version of the bill, agreeing with the idea that criminals should be prevented from acquiring weapons, but insisting, at the same time, that "the waiting period is unfair to honest, law-abiding people. The criminals won't wait."¹⁰¹ The irony is that waiting period has effectively disappeared with instant background checks, but the NRA, both during and after the passage of the Brady Act, has supported measures that increase the likelihood that criminals will obtain firearms. While the bill made it more difficult for a felon to obtain a

100 Bob Adelman, "House Passes Bill to Increase Funding for Background Checks," House Passes Bill to Increase Funding for Background Checks.
<http://www.thenewamerican.com/usnews/politics/item/18391-house-passes-bill-to-increase-funding-for-background-checks> (accessed July 4, 2014).

¹⁰¹ Krauss.

weapon “over the counter” it did very little to prevent the felon from obtaining said weapon through what are known as “straw purchases,” or, separately, by way of unregulated purchases from private dealers.

Today, and even immediately after the bill’s passage, gun control advocates cite two major oversights in the bill: the failure to close the gun show loophole, and relatedly, the way it limits investigations into potential off-the-books arm sales by hampering record-keeping.

In the case of the former, the so-called gun-show loophole provides a potential avenue for someone with a criminal history or a mental health issue from buying a weapon without having to undergo a background check. Again, the “gun show loophole” is in reality, a loophole in the 1968 gun control legislation as a result of the Firearms Owner Protection Act of 1986; the latter tightened language so that the only sellers who were tightly regulated under the 1968 gun control regulations were “over the counter,” storefront dealers. It is still illegal to privately sell a weapon to a known criminal, but FOPA essentially removed the private dealer from the orbit of federal regulation. Had the Brady Act required that private dealers subject potential customers to a background check, it could have closed this loophole, but while the original 1987 bill opened the door to that possibility, subsequent versions (including the final law) did not in part due to the NRA’s efforts. Instead, there has been a major growth in gun shows, with anywhere from 2000 to 5200 per year, where” 25% to 50% of the vendors are unlicensed” and not subject to Brady Act restrictions.¹⁰²

¹⁰² "Gun Law Information Experts," Law Center to Prevent Gun Violence RSS, <http://smartgunlaws.org/maintaining-gun-sales-background-check-records-policy-summary/> (accessed August 19, 2014).

Although the rates of gun violence directly attributed to individuals who attributed to gun show purchases is admittedly low, they can be an important pivot in diverting weapons to the black market, where they then can be sold to criminals. A 2000 study of gun trafficking by the Bureau of Alcohol, Tobacco and Firearms (BATF) concluded that “gun shows were a major trafficking channel, involving the second highest number of trafficked guns per investigation (more than 130), and associated with approximately 26,000 illegally diverted firearms.”¹⁰³ Although it may be rare for someone with a criminal record to purchase a gun at the gun show itself before committing a crime, handguns acquired at these venues become part of an elaborate chain of sales and exchanges that form the basis of the black market for weapons. The ATF study estimated that 3 out of every 10 guns used the criminal activity they examined at some point connected to a gun show.

But, owing to other efforts by the NRA to weaken the Brady Act, it remains unlikely that, even if gun shows were covered under its provisions, that the secondary market for illegal guns would diminish. This is because the most common source for illegal guns are straw purchases that are difficult to regulate absent more complete and centralized record-keeping, record-keeping that was forbidden by the Brady Act directly, or undermined by measures taken after.¹⁰⁴ Surveys of prisoners show that a large majority do not get their guns directly through a licensed vendor or at a gun show, but informally, through rogue dealers.¹⁰⁵ As noted in one study: “...’street’ and ‘black market’ sources

103 Bureau of Alcohol, Tobacco, Firearms and Explosives, *Follow the Gun*, Washington, D.C.: GPO, 2000, <http://permanent.access.gpo.gov/lps4006/020400report.pdf> (accessed July 15, 2008).

104 *Follow The Gun*.

105 Philip J. Cook, and Jens Ludwig. "The Limited Impact of the Brady Act: Evaluation and Implications ." In *Reducing gun violence in America: informing policy with evidence and analysis*. Baltimore, MD: Johns Hopkins University Press, 2013. 28.

are important, sources that may well include traffickers who are buying from retail outlets and selling on the street.”¹⁰⁶

Again, straw purchases refer to a system where a front man or woman, with no criminal record, purchases firearms from a licensed firearms dealer, only to see said man or woman sell those weapons privately on a black market, to felons and would-be criminals. In the best of worlds, this would be difficult to stop, certainly at the first point of sale, as the first background check would reveal nothing that could stop a straw purchaser from obtaining a weapon. The best chance to prevent such activity is to carefully monitor who is purchasing multiple firearms and then to cross-reference that information against crimes involving said weapons. If a felon commits a crime with a weapon he/she obtained illegally, one can trace who originally purchased said weapon, and then check to see if there is a pattern where this individual purchased multiple firearms from a legal dealer or dealers, and/or if other guns purchased by the suspected “straw man” were used by felons in other crimes. This could become the basis for additional investigation, a sting operation, or a prosecution, as the black market sale is, in fact, illegal.

But the NRA lobbied for language in the Brady Act that substantially weakened any chance of monitoring and tracking patterns of straw purchases. Specifically, the NRA made sure that the information provided on prospective gun buyers by gun dealers to the FBI and to the BATF could not be used to create a federal registry of handgun sales. Indeed, any record for someone who passed a NICS background check-- that

106 Anthony A. Braga and Peter L. Gagliardi, “Enforcing Federal Laws Against Firearms Traffickers: Raising Operational Effectiveness by Lowering Law Enforcement Obstacles,” in *Reducing Gun Violence in America: informing policy with evidence and analysis*.

would, again, include straw purchasers—had to be destroyed in 180 days; President Clinton reduced that to 90 days. Only the original vendor is allowed to maintain detailed data on the legal sale for any length of time (20 years).¹⁰⁷

Even if the information was allowed to be stored and kept in a central database, additional limitations would further hamper any effort to investigate black market sales. This is because the information submitted to NICS related to the purchase does not include the serial number and make of the gun. It would be simple enough to require that information from the dealers and then transfer it, simultaneously, to the BATF, who maintains the National Tracing Center, and who uses the center to link guns recovered from crime scenes to licensed dealers and ultimately to gun traffickers and their networks. At present, the BATF can only obtain this information when local or federal law enforcement officers provide that data in the midst of a criminal investigation. As it has with the NICs system, the NRA as also prevented the BATF from centralizing whatever information it does have. Thus the BATF, can trace a gun to a federally licensed dealer, who does store the necessary and detailed data for an investigator to connect a crime scene weapon to a potential straw customer; but the process is cumbersome and uneven, involving multiple calls to gun manufacturers, importers and wholesale dealers.¹⁰⁸ When it has collated the relevant data, federal law enforcement has exposed major gun trafficking operations, including across state lines.¹⁰⁹

107 EPIC - Electronic Privacy Information Center. "Gun Owner's Privacy." EPIC.
<http://epic.org/privacy/firearms/> (accessed August 19, 2014).

108 Gun Law Information Experts

109 Dan Freedman, "How the NRA became ATF's biggest enemy," SFGate.
<http://www.sfgate.com/nation/article/How-the-NRA-became-ATF-s-biggest-enemy-4950703.php>
(accessed August 18, 2014).

This an example of a larger issue: the NRA hampering the BATF in a way that limits the potential of the Brady Act to prevent dangerous individuals from acquiring hand guns. The BATF is the federal agency most responsible for regulating and monitoring gun trafficking, and the group most responsible for enforcing federal gun laws. Political scientist Robert Spitzer asserts that the NRA is “extremely successful at demonizing, belittling and hemming in the ATF as a government regulatory agency.”¹¹⁰ Publicly, one lobbyist for the NRA, Neal Knox, “declared war on the NRA.” Another NRA spokesperson referred to BATF personnel as being “jackbooted thugs.”¹¹¹ Less overtly, the NRA fought against budget increases for the agency, while adding riders to appropriations bills that hamper the function of the agency. The restriction on centralizing records, in fact, connects to one such rider; included among other riders is a measure that overrode an ATF ruling against the importation of certain kinds of shotguns and one that limited how much trace firearms data can be shared with outside agencies. One of the more limiting riders is one that, counter-intuitively, prevents any other federal law enforcement agency from assuming the duties of the BATF. Observers have suggested that by limiting the functions of gun control to one agency, the NRA can more easily target federal gun regulation via the press and through other riders.¹¹²

In terms of resources, the budget for the BATF has increased only 20% from 2003 to 2013, while the budget for other federal law enforcement agencies has gone up by 50% (in the case of the Drug Enforcement Agency) to 67% (in the case of the FBI)

110 Alan Berlow, "How the NRA Hobbled the ATF," Mother Jones,

<http://www.motherjones.com/politics/2013/02/atf-gun-laws-nra> (accessed July 27, 2014).

111 Associated Press. "NRA Defends Vitriol Toward Federal Agents / Letter calls them 'jack-booted thugs'." SFGate. <http://www.sfgate.com/news/article/NRA-Defends-Vitriol-Toward-Federal-Agents-3034757.php> (accessed July 27, 2014).

112 Berlow.

over the same time period. The number of agency personnel remains, in 2013, approximately the same as it did in 2003.¹¹³ This not only hampers the ability of the NRA to conduct the tedious investigations of illegal, unlicensed gun trafficking noted before, but also limits its ability to inspect licensed dealers to see if they are honoring the demands of the Brady Act and other gun control restrictions-- or selling over the counter weapons to potential felons. The BATF cites this as the third largest contributor to the illegal arms market, and one study of crime-connected weapons subject to BATF traces in 1998 pointed to a very limited number of gun dealers—less than 1%-- who contributed almost all of the “over the counter” guns used directly in crimes. With the clear suggestion that only a small number of licensed vendors are either corrupt or lax in their approach to gun sales, it stands to reason that more inspections could dramatically limit this source of illegal gun trafficking.¹¹⁴ A study of state-by-state commitment to random inspections showed that states with intense inspection regimes showed “64% less diversion of guns to criminals by in-state gun dealers.”¹¹⁵

Representatives of the BATF say that the agency has reached a *modus vivendi* with the NRA, focusing the agency’s resources on the illegal market for guns in ways that are hospitable to gun-rights activists, rather than, in the words of NRA lobbyist Jim Baker, going after “...law-abiding people trying to engage in legitimate business who forgot to cross a ‘t’ or dot an ‘i’...”¹¹⁶ But, as has been amply demonstrated, however much the NRA may sincerely want to target black market sales, their efforts to limit

113 Berlow.

114 *Commerce in Firearms in the United States*, (Washington, D.C.: The Bureau, 2000).

115 Daniel W. Webster, Jon S. Vernick, Emma E. McGinty, and Ted Alcorn, “Preventing the Diversion of Guns to Criminals through Effective Firearms Laws,” in *Reducing Gun Violence in America: informing policy with evidence and analysis*, 112.

116 Freedman.

common-sense measures that would strengthen the Brady Act only make such secondary markets more tenable.

The final way the NRA attempted to reduce the impact of the Brady Act was by challenging its authority in the federal courts. Their most successful litigation culminated in 1997 with *Printz v. United States*¹¹⁷, which upheld the fundamental Brady provision for a national background check, but struck down, on Tenth Amendment grounds, the provision in the law requiring states to conduct their own background checks. In theory, this could have represented a major obstacle in preventing illegal gun trafficking, in part because studies have shown that states with weaker gun control laws are sources of the inter-state transfer of guns to states with stronger gun control laws; had several states abandoned the background check system, it could have increased these kinds of transfers. As it stood, all but two states (Ohio and Arkansas) voluntarily agreed to continue background checks, and eventually, so too did the remaining holdouts. That it has not undermined the Brady Act as intended does not change the fact that the effort illustrates how a minority faction can potentially undo a policy that favors the national interest. In the event the central government wanted to compel states to license gun owners, for instance, the *Printz* decision would prevent this from happening.

The net effect of these counter-measures by the NRA has been to greatly limit the potential impact of the Brady Act. The most cited study on the impact of the Brady Act on gun-violence, by Duke scholars Philip Cook and Jens Ludwig¹¹⁸, argues that the law did very little or nothing to lower gun-violence in America. The authors compared states

¹¹⁷ *Printz v. United States*, 521 U.S. 898 (1997).

¹¹⁸ Cook and Ludwig in *Reducing Gun Violence in America: informing policy with evidence and analysis*, 21-32.

whose weak background check measures were preempted by the Brady Act to 18 states who, pre-Brady Act, already participated in a background check regime, and were thus exempted from Brady. The 18 control states showed the same general drop in homicide rates as was seen in those states that only implemented background checks post-Brady. The decline in other gun violence (not homicide) post-Brady correlated with the general drop in both homicide and non-gun related crime—hence one is apt to attribute the general decline in gun crime in the 1990s to other factors; the authors cite such developments as the end of the crack epidemic as possible reasons for the decline in gun-related homicides.

The authors note that 312,000 felons were denied access to guns from 1994 to 1998 owing to the NICS checks. But the authors also argue that the kind of felons who would acquire weapons “over the counter” and in person are not the kinds of felons who want to commit future crimes—citing other studies on that issue, they argue that the background check denials may have stopped approximately 60 crimes. Additionally, the authors point out, not all criminal records disqualify someone from buying a gun-- the Brady Act limits the prohibition to those who are felons and those convicted of domestic violence. But more than anything, the authors cite data-- much of it discussed here, that felons continue to obtain weapons on the secondary market and use those handguns for crimes. The Brady Act could have provided several opportunities to limit or obstruct those secondary markets-- they were measures supported by HCI since its inception-- but the NRA successfully resisted such provisions, and took steps after the Brady Act was passed to limit its scope and power.

The NRA likely does not want to encourage a secondary market for guns for illegal arms trafficking. They have consistently maintained that they do not want felons to have access to guns. Nor is this to say that the NRA is wrong, at all times-- or even in most cases—to push for gun owners' rights. But, in this narrow instance involving criminal background checks, the NRA's dogmatic pursuit of their own agenda has undermined public safety to the detriment of the country.

In choosing a case study on the Brady Act, it is important to distinguish between efforts to ban or restrict certain types of firearms and ammunition, and efforts to prevent certain types of people (those with a criminal history or those with a history of mental illness) from obtaining firearms and ammunition. Madison applied the concept of the public interest, as argued earlier, to policies that show clear and substantial benefits to almost everyone, even if some groups and individuals must pay a higher cost to obtain those benefits. Welfare payments would not qualify, as a swath of the nation may pay heavily into the treasury, by way of taxes, while never qualifying for the benefits. Even social security does not qualify, for even while every American is eventually eligible for the benefits, upper class Americans stand to gain little from the relatively modest pensions. On the other hand, in a general sense, everyone benefits from the protection of America's armed forces, even if soldiers bear a higher burden than civilians during combat. The alternative-- an America with no military at all-- would be as risky as it is inconceivable.

Preventing felons and mentally disturbed individuals from obtaining firearms, or preventing black market buyers from legally obtaining said weapons and providing them to those same dangerous people, falls into the same category, in a way that direct bans

and restrictions may not. Gun rights advocates can (and do) reasonably argue that bans and restrictions on weapons and ammunition in fact disadvantage honest citizens trying to protect themselves from the very criminals who purchase said firearms on the black market. The criminal will find a way to obtain the weapon, illegally if necessary, gun rights advocates argue, while the law abiding citizen will be left without a weapon to protect him or herself. The point is debatable-- but the very debate likely places it in the category of “this-group’s-interest vs. that group’s-interest” that fits into the pseudo-pluralist system Madison envisioned for the nation. In contrast, reasonable measures aimed at stopping dangerous individuals from obtaining these weapons in the first place, while allowing for law-abiding citizens to protect themselves from robbery or assault, fit into Madison’s understanding of the public interest. These reasonable measures go beyond Brady’s background checks, which could have and should centralized access to more detailed data on gun sales for the sake of diminishing the secondary market for illegal guns.

The NRA has claimed that any effort to maintain ongoing and detailed records of gun purchases and to allow that material to be centralized, could result in a national registry of gun owners that could aid a future, tyrannical leader in any effort to confiscate guns *en masse*. The NRA says it is keeping with the spirit of the 2nd amendment, which many argue was aimed at arming the lay population in the event of government tyranny.¹¹⁹ Widespread confiscation has long been a fear cited by gun rights activists as a potential threat posed by any kind of gun control legislation. Gun-rights activists cite, with mixed degrees of historical accuracy, efforts by totalitarian leaders, such as Mao Tse

119 Michael Waldman, *The Second Amendment: a biography*, (New York: Simon & Schuster, 2014).

Tung and Adolf Hitler, to confiscate weapons as a means of consolidating power. This slippery slope argument ignores the fact that such a national gun registry already exists in the United States but for the classes of guns—machine guns-- regulated by the first major piece of gun control legislation, the National Firearms Act of 1934. The government has not used this database to confiscate weapons or discriminate against gun owners to date, and machine gun violence, which prompted the 1934 law, is now incredibly rare. Moreover, the historical examples of gun confiscation—in Nazi Germany and Communist China- did not require a national database of gun owners to be successful. And if the issue is stopping citizens from having the means to resist some kind of future tyranny, the actual weapons themselves, should, in theory, be a bulwark against mass confiscation, if, indeed, such an abuse is something to fear from the government. In short, if a government in possession of tanks, body armor and armed helicopters fears a citizenry armed with handguns and rifles, then the very people with those handguns and rifles would still hold the weapons needed to resist the government's encroachment, including the mass confiscation of firearms.

The NRA refuses to accept even simple compromises that would require that the gun dealer provide a weapon's serial number and make & model to federal law enforcement without providing any identifying information on the gun's would-be owner. To the NRA, this is a backdoor to eventual confiscation, but it is difficult to understand how the central government would confiscate weapons if all they could do was trace the weapon to a dealer. Sure, the government could compel the dealers to provide them with the name and location of those who purchased firearms, but the practical limitations on making that happen would seem to mitigate against doing it en masse. Even if the

government could acquire the information on new owners, they would be powerless to find the owners of millions of weapons sold before this kind of registration took place, and then sold and re-sold at places like gun shows.

But while the NRA remains obstinate in its opposition to such measures, criminals continue to obtain handguns on black markets, and these armed criminals pose a major threat to the public safety. The National Institute of Justice reported that between the years 1993 and 2011, the number of firearms victims have ranged from a low of 371,289 in 2008, to a high of 1,529,742 in 1994. Since 1999, there have been on average between 10,000 and 12,000 gun-related homicides per year. A sizable portion of all gun-related crimes are handgun related.¹²⁰

The impact of gun crime on America is not limited to actual violence but extends to the nation's collective psyche. A Kaiser Family Foundation survey in 2013 found that 1 in 5 Americans knew a victim of gun-violence; of those 20%, the majority of the victims in question were friends or family members (or the respondent was a victim himself or herself.) Approximately 40% of Americans report being at least somewhat worried about gun violence. Minorities and those earning below \$40K per year were more worried than others, but it is worth noting that more than a quarter of those earning above \$90K reported similar fears.¹²¹

Madison tended to limit his discussion of public safety (in the public interest) to protection from foreign invasion, but if a foreign army was victimizing the American

120 "Gun Violence." National Institute of Justice. <http://www.nij.gov/topics/crime/gun-violence/Pages/welcome.aspx> (accessed August 17, 2014).

121 The Henry J. Kaiser Family Foundation. "Kaiser Health Tracking Poll: February 2013." One In Five Americans Know A Victim Of Gun Violence; Worry Reaches Even More Broadly. <http://kff.org/disparities-policy/poll-finding/kaiser-health-tracking-poll-february-2013/> (accessed August 11, 2014).

public to the same degree as handgun crime, it would represent the most profound, sustained attack on the home-front since the Civil War. Without a doubt, the types of measures proposed in response to the problem would not eliminate gun violence, as not all gun crimes are perpetrated by recidivist criminals-- but the evidence suggests these measures would reduce gun violence, perhaps substantially, over time, as the secondary markets become less substantial. Had the Brady Act allowed for detailed data to be stored, centralized and shared between law enforcement agencies (rather than prohibit such measures), the BATF, among groups, could easily launch major investigations to undermine secondary markets; had the Act required the background checks at gun shows, this further would have eliminated an outlet for straw buyers. Members and leaders of the NRA certainly want to reduce violent gun crime, and have frequently demanded that, in lieu of burdening gun owners with additional gun control regulations, that the United States government enforce the laws currently "on the books." The irony is that with one such law, the Brady Act, the NRA has undermined its effectiveness to the point that, however much it may burden gun owners, it is too incoherent to effectively reduce handgun violence.

Chapter Seven: Closing Thoughts

It would be presumptuous to assert that one case study can serve as a foundation for a fundamental critique of the Madisonian system. Yet the mode of analysis here could easily be extended to other issues that appear to fit under the category of the “public interest.” The ambiguous nature of the term “public interest,” and the subjective nature of such an analysis has its own perils. But possible candidates for further study include: efforts to “bend the cost curve” for Americans’ medical expenditures, that have risen much faster than inflation and that threaten the solvency of the nation; and efforts to do something about “too big to fail” financial institutions, those institutions so fundamental to the entire economic system that their mistakes or failures pose a systemic risk to the nation’s well-being. In each case, it would appear that solving the problem would offer great benefits to the wider public, even if some groups-- hospitals and big banks—may bear a greater burden from any policy initiative. If the analysis in this paper is correct, case studies on efforts to deal with those problems-- Obamacare and Dodd-Frank—will show public officials who cave to special interests even while passing what appears to be substantive legislation; unfortunately, another prediction would be that this will result in incoherent policies that ultimately fail to achieve their intended goal.

The Constitution was created in large part because Madison and others had given up on the idea that politicians were virtuous creatures above pandering to the parochial interests of their constituents for the sake of their own political ambitions. But the Constitution also created a political environment that Madison and others hoped would attract a *more* virtuous politician, one who if given sufficient political space (literal and abstract distance from his/her from his/her constituents), and if allowed (indeed forced) to

deliberate with other politicians, could identify and advance the public interest *when needed*. In essence, the Madisonian system implies an inertia of soft pluralism punctuated by periods of deliberative democracy; in the former, public officials often serve as arbiters between various interest groups; in the latter, those same politicians are supposed to serve as republican trustees, to advance the national interest. The neo-pluralist model comes closest to capturing this dynamic, but fails to consider how interest groups change their behavior at the very moment when the public interest is at stake. The case study on the Brady Act of 1994 suggests that said groups change their strategy—something in line with neo-pluralist axioms—for the very reason that the policy is likely to pass. The interplay of interest groups may work according to Madison’s designs most of the time, but when those interest groups have narrow agendas that are hostile to the public good, they soften legislation and continue to weaken the policy to the point of incoherence. Minority factions are not outvoted by way of the republican principle-- per Madison. Rather, in allowing groups to freely interact and influence the system at all times--at multiple layers of policy-making-- and in failing to anticipate how influential those groups would become, Madison and his fellow framers left America open to corruption at the very point it could least be tolerated.

Bibliography

- Abram, Ted. "Complicit Politicians and Special Interest Predators are Destroying America." FreedomWorks. <http://www.freedomworks.org/content/complicit-politicians-and-special-interest-predators-are-destroying-america> (accessed August 21, 2014).
- Adelman, Bob. "House Passes Bill to Increase Funding for Background Checks." House Passes Bill to Increase Funding for Background Checks. <http://www.thenewamerican.com/usnews/politics/item/18391-house-passes-bill-to-increase-funding-for-background-checks> (accessed July 4, 2014).
- Associated Press. "NRA Defends Vitriol Toward Federal Agents / Letter calls them 'jack-booted thugs'." SFGate. <http://www.sfgate.com/news/article/NRA-Defends-Vitriol-Toward-Federal-Agents-3034757.php> (accessed July 27, 2014).
- Baumgartner, Frank R., and Beth L. Leech. *Basic Interests: the Importance of Groups in Politics and in Political Science*. Princeton, N.J.: Princeton University Press, 1998.
- Baumgartner, Frank R., Jeffrey M. Berry, Marie Hojnacki, Beth L. Leech, and David C. Kimball. *Lobbying and Policy Change: Who Wins, Who Loses, and Why*. Chicago: University of Chicago Press, 2009.
- Berlow, Alan. "How the NRA Hobbled the ATF." Mother Jones. <http://www.motherjones.com/politics/2013/02/atf-gun-laws-nra> (accessed July 27, 2014).
- Bentley, Arthur Fisher. *The Process of Government: A Study of Social Pressures*. Cambridge: Belknap Press of Harvard University Press, 1967.
- Berry, Jeffrey M.. *Lobbying for the People: the Political Behavior of Public Interest Groups*. Princeton, N.J.: Princeton University Press, 1977.
- Brand, Donald R.. "Three Generations of Pluralism: Continuity and Change." *The Political*

- Science Reviewer* 16 (1985): 109-142. http://www.mmisi.org/pr/15_01/brand.pdf (accessed May 24, 2013).
- Brutus. "Brutus, no. 1." Republican Government. <http://press-pubs.uchicago.edu/founders/documents/v1ch4s14.html> (accessed August 21, 2014).
- Carter, Gregg Lee. *Gun Control in the United States: a reference handbook*. Santa Barbara, Calif.: ABC-CLIO, 2006.
- Carter, Gregg Lee. *Guns in American Society: an Encyclopedia of History, Politics, Culture, and the Law*. 2. ed. Santa Barbara, Calif.: ABC-CLIO, 2012.
- Commerce in firearms in the United States*. Washington, D.C.: The Bureau, 2000.
- Cooke, Charles C. W.. "Charles C. W. Cooke - Repeal the 17th Amendment!." National Review Online. <http://www.nationalreview.com/articles/341894/repeal-17th-amendment-charles-c-w-cooke> (accessed August 21, 2014).
- Dahl, Robert Alan. *Who Governs? Democracy and Power in an American City*. New Haven: Yale University Press, 1961.
- Ebscohost. "The Federal Election Campaign Act, Contributing to Candidates, Elected Leaders, Money Contributions to National Parties, and the History of Campaign Finance Laws." History of Campaign Finance Laws. <http://connection.ebscohost.com/politics/campaign-finance-reform/history-campaign-finance-laws> (accessed April 27, 2013).
- Eisenberg, Avigail. "Reconstructing Political Pluralism." In *The political theory reader*. Chichester, West Sussex: Wiley-Blackwell, 2010. 18-21.
- EPIC - Electronic Privacy Information Center. "Gun Owner's Privacy." EPIC. <http://epic.org/privacy/firearms/> (accessed August 19, 2014).
- Feldman, Richard. *Ricochet: Confessions of a Gun Lobbyist*. Hoboken, N.J.: John Wiley & Sons,

2008.

Freedman, Dan. "How the NRA became ATF's biggest enemy." SFGate.

<http://www.sfgate.com/nation/article/How-the-NRA-became-ATF-s-biggest-enemy-4950703.php> (accessed August 18, 2014).

Germino, Dante. "James Madison: Philosophical Pluralist." *Modern Age* 27, no. 1 (1983): 42-49.

Godwin, Ken, Scott H. Ainsworth and Eric Godwin. *Lobbying and Policymaking: the Public Pursuit of Private Interests*. Thousand Oaks: CQ Press, 2012.

"Gun Law Information Experts." Law Center to Prevent Gun Violence RSS.

http://smartgunlaws.org/maintaining-gun-sales-background-check-records-policy-summary/#footnote_2_5885 (accessed August 19, 2014).

"Gun Violence." National Institute of Justice. <http://www.nij.gov/topics/crime/gun-violence/Pages/welcome.aspx> (accessed August 17, 2014).

Hall, Richard L., and Frank W. Wayman. "Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees." *The American Political Science Review* 84, no. 3 (1990): 797-820.

Hall, Richard L., and Alan V. Deardorff. "Lobbying As Legislative Subsidy." *American Political Science Review* 100, no. 01 (2006): 69-84.

Hamilton, Lee. *How Congress Works and Why You Should Care*. Bloomington: Indiana University Press, 2004.

The Henry J. Kaiser Family Foundation. "Kaiser Health Tracking Poll: February 2013." One In Five Americans Know A Victim Of Gun Violence; Worry Reaches Even More Broadly. <http://kff.org/disparities-policy/poll-finding/kaiser-health-tracking-poll-february-2013/> (accessed August 11, 2014).

Hojnacki, Marie, and David C. Kimball. "Organized Interests and the Decision of Whom to Lobby in Congress." *The American Political Science Review* 92, no. 4 (1998): 775-790.

Hojnacki, Marie. "The Changing Process of Direct Lobbying." *Unpublished Paper prepared for the Midwest Political Science Association* n/a (2000).

http://www.unc.edu/~fbaum/books/lobby/_documentation/midwest_2000.pdf (accessed May 1, 2013).

Hojnacki, Marie, David C. Kimball, Frank R. Baumgartner, Jeffrey M. Berry, and Beth L. Leech.

"Studying Organizational Advocacy and Influence: Reexamining Interest Group Research." *Annual Review of Political Science* 15, no. 1 (2012): 379-399.

Hrebener, Ronald J.. *Interest Group Politics in America*. 3. ed. Armonk, NY : Sharpe, 1997.

Janda, Kenneth, Jeffrey M. Berry, Jerry Goldman, and Kevin W. Hula. *The challenge of democracy: American government in a gobal world*. Brief ed., 7th ed. Boston: Wadsworth Cengage Learning, 2009.

Jesdanun, Anick. "Pa. Companies Make Lobbying Their Business." *The Observer Reporter* (Green County), April 27, 1997, sec. A2.

Krauss, Clifford. "GUN-CONTROL ACT WINS FINAL BATTLE AS G.O.P. RETREATS." *The New York Times*. <http://www.nytimes.com/1993/11/25/us/gun-control-act-wins-final-battle-as-gop-retreats.html> (accessed July 23, 2014).

Lemann, Nicholas. "Conflict of Interests - The New Yorker." *The New Yorker*.

<http://www.newyorker.com/magazine/2008/08/11/conflict-of-interests> (accessed August 22, 2014).

Lowery, David, and Virginia Gray. "A Neo-pluralist Perspective On Research On Organized Interests." *Political Research Quarterly* 57, no. 1 (2004): 163-174.

Lowi, Theodore J.. *The End of Liberalism: ideology, policy, and the crisis of public authority*. 1st ed. New York: Norton, 1969.

Madison, James. "Variant Texts of the Virginia Plan - Text A." Avalon Project - Variant Texts of the Virginia Plan - Text A. http://avalon.law.yale.edu/18th_century/vatexta.asp (accessed May 1, 2013).

Madison, James. " Vices of the Political System of the United States." Deficiencies of the Confederation. <http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html> (accessed May 21, 2013).

Madison, James . "Speech Proposing Amendments to the Constitution." Teaching American History. http://teachingamericanhistory.org/bor/madison_17890608/ (accessed May 27, 2014).

Madison, James. *Notes of debates in the Federal Convention of 1787*. [Bicentennial ed. New York: Norton, 1987.

Maisel, Louis S., and Jeffrey M. Berrey. *The Oxford handbook of American political parties and interest groups*. Oxford: University Press, 2010.

Montesquieu, Charles de . "Montesquieu: The Spirit of Laws: Book 11." Montesquieu: The Spirit of Laws: Book 11. http://www.constitution.org/cm/sol_11.htm (accessed August 21, 2014).

Mostert, Mary. *Banner of Liberty: The Threat of Anarchy leads to the Constitution of the United States..* Provo, UT: CTR Publishing, Inc, 2004.

Nichols, John, and Robert W. McChesney. "'Dollarocracy': How Special Interests Undermine Our Democracy | Blog, Money & Politics | BillMoyers.com." BillMoyerscom. <http://billmoyers.com/2013/11/08/dollarocracy-how-special-interests-undermine-our->

democracy/ (accessed August 21, 2014).

Olson, Mancur. *The Logic of Collective Action: Public Goods and the Theory of Groups*.

Cambridge, Mass.: Harvard University Press, 1965.

Olson, Mancur. *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities*. New Haven: Yale University Press, 1982.

Plato. "The Republic ." The Internet Classics Archive | The Republic by Plato.

<http://classics.mit.edu/Plato/republic.html> (accessed August 21, 2014).

Powell, Benjamin. "Occupy Wall Street: A One Year Retrospective." The Huffington Post.

http://www.huffingtonpost.com/ben-powell/occupy-wall-street-a-one-_b_2017494.html

(accessed August 21, 2014).

Rauch, Jonathan. *Demosclerosis: the Silent Killer of American Government*. New York: Times Books, 1994.

Roosevelt, Theodore. "New Nationalism Speech ." Teaching American History.

<http://teachingamericanhistory.org/library/document/new-nationalism-speech/> (accessed June 8, 2013).

Schattschneider, E. E.. *Politics, Pressures and the Tariff: a study of free private enterprise in pressure politics, as shown in the 1929-1930 revision of the tariff*. New York: Prentice-Hall, 1935.

Schattschneider, E. E.. *The Semi-Sovereign People: a Realist's View of Democracy in America*. S.I.: Holt, Rhineart and Winston, 1961.

Slik, Jack R.. *Politics in the American States and Communities: a Contemporary Reader*. Boston: Allyn and Bacon, 1996.

Spitzer, Robert J.. *The Right to Bear Arms: rights and liberties under the law*. Santa Barbara,

Calif.: ABC-CLIO, 2001.

Sumner, William Graham. *What Social Classes Owe to Each Other*. Caldwell, Idaho: Caxton Printers, 1952.

Thomas, Kenneth R.. *Federalism, State Sovereignty and the Constitution Basis and Limits on Congressional Power*. Washington, D.C.: Congressional Research Service, Library of Congress, 2003.

Tocqueville, Alexis de. "Vol. 2, Ch. 5: On the Use Americans Make of Association in Civil Life." In *Democracy in America*. New York: Library of America :, 2004. 595-599.

Truman, David B.. *The Governmental Process: Political Interests and Public Opinion*.. 1st ed. New York: Knopf, 1951.

The University of Illinois at Chicago. "Committee for Handgun Control, Inc. records MSCFHC79." Richard J. Daley Library Special Collections and University Archives. <http://www.uic.edu/depts/lib/specialcoll/services/rjd/findingaids/CFHCf.html> (accessed July 12, 2014).

Unger, Brigitte, and Frans Van Waarden. "Interest associations and economic growth: a critique of Mancur Olson's Rise and Decline of Nations." *Review of International Political Economy* 6, no. 4 (1999): 425-467.

Waldman, Michael. *The Second Amendment: a biography*. New York: Simon & Schuster, 2014.

Webster, Daniel W., and Jon S. Vernick. *Reducing Gun Violence in America: informing policy with evidence and analysis*. Baltimore, MD: Johns Hopkins University Press, 2013.

Weir, Margaret. *The Social Divide Political Parties and the Future of Activist Government*. New York, N.Y.: Russell Sage Foundation, 1998.

Wilson, Woodrow. "The Law and the Facts." *The American Political Science Review* 5, no. 1

(1911): 1-11.

<http://www.apsanet.org/media/pdfs/presidentialaddresses/1910addrwilson.pdf> (accessed July 24, 2014).

Wilson, Woodrow. *The New Freedom: A Call for The Emancipation of the Generous Energies of a People*. Englewood Cliffs, N.J.: Prentice-Hall, 1961.

Woll, Peter. *Public Policy*. Washington, D.C.: University Press, 1974.

Wood, Gordon S.. *The American Revolution a history*. Modern library ed. New York: Modern Library, 2002.

Yager, Jordy. "Poll: Majority wants corporate money out of politics." TheHill.

<http://thehill.com/blogs/ballot-box/campaign-ads/264087-poll-majority-want-corporate-money-out-of-politics> (accessed May 8, 2013).

