EXECUTIVE BRANCH EXPANSION IS AN INEVITABLE CONSEQUENCE OF THE MADISONIAN PSYCHOLOGICAL FRAMEWORK

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The old Romans all wished to have a king over them because they had not yet tasted the sweetness of freedom. – Livy[1]

I. INTRODUCTION

On September 20, 2001, then President George W. Bush addressed a joint session of Congress and the American people in the wake of the most devastating terrorist attack on U.S. soil.[2] In concluding his speech, the President said, "I will not forget this wound to our country, or those who inflicted it. I will not yield—I will not rest—I will not relent in waging this struggle for the freedom and security of the American people."[3] The American people saw in the President someone who felt their anger and pain, and in that moment the President personified the nation's emotions.

President Bush presented himself as the sole person who would, or could, seek justice for the attacks. His speech helped unite the country during a time of grieving and garnered popular support for the subsequent war on terror that would begin in early

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1. TITUS LIVIUS, 1 THE HISTORY OF ROME § 17.3 (W. Weissenborn & H.J. Müller eds., 1898) (quotation translated from Latin to English by this Article's Author).

2. 147 CONG. REC. S9555 (daily ed. Sept. 20, 2001) (statement of President George W. Bush).

3. *Id.*

October of 2001.[4] Evidence of this unification and support is seen in Bush's post-speech approval ratings. Following the speech, Gallup conducted a poll and found that Bush had a 90 percent approval rating, the highest in history.[5] In comparison, President Truman had 87 percent approval at the end of World War II.[6] These data are not insignificant. Heightened presidential approval coming on the heels of a national crisis speaks to the profound psychological relationship between the American people and their chief executive.

The U.S. Constitution established three co-equal branches of government: an executive, a bicameral legislature, and a judiciary.[7] While the President is the leader of one of the co-equal branches of government, a substantial percentage of the American public may be unable to name the Speaker of the House, the Senate Majority Leader, or even the Chief Justice of the Supreme Court. But love them or hate them, they can name their President. The President flies in their own plane and has their own song when they step off it. Their approval ratings soar following a national crisis, showing that their role goes beyond merely faithfully executing the laws passed by Congress, a role originally envisioned by the Framers.[8] These high approval ratings suggest a coalescence of the national identity around the President in times of crisis.

Executive aggrandizement lies at the heart of normative discourse regarding the contours of presidential power. The Framers likely did not consider the possibility that an executive order would be an instrument to enact policy changes or the poignant threat of demagoguery during the Trump era.[9] Indeed,

4. *Global War on Terror*, GEORGE W. BUSH PRESIDENTIAL LIBR., https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror (last visited Aug. 28, 2024).

5. *Presidential Approval Ratings -- George W. Bush*, GALLUP, https://news.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx (last visited July 12, 2024).

6. John Woolley & Gerhard Peters, *Harry S. Truman Public Approval*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/data/harry-s-truman-public-approval (last visited Aug. 17, 2024).

7. U.S. CONST. arts. I–III.

8. J. Tyson Chatagnier, *The Effect of Trust in Government on Rallies 'Round the Flag*, 49 J. PEACE RSCH. 631, 632 (2012).

9. *See generally* Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOB. LEGAL STUD. 369 (2017) (arguing that expansion of executive power can be attributed to a weakened and more

with respect to law and implementation of policy, there appears to be a disconnect between the role of the President, as described in the Constitution, and the modern presidential embodiment.[10] This Article posits that psychological phenomena explain the modern presidency's divergence from its modest constitutional roots.

Indeed, such expansion is not confined to this century. American history is riddled with examples of such expansion of presidential power. For example, Morton Frisch writes:

> The expansion of presidential power, the most controversially political subject in the recent history of American public affairs, was the issue in the debate over President Roosevelt's recommended reorganization of the executive branch in 1938; President Truman's seizure of the steel mills in 1952, which intended to prevent a nationwide steel strike during the Korean War, and the Supreme Court's nullification of that action; the proposed Bricker Amendment in the mid-1950s limiting presidential power to make executive agreements (in the wake of FDR's secret executive agreement with the Russians at Yalta in 1945); President Johnson's escalation of American involvement in Indo-China in 1965 on the basis of the controversial Gulf of Tonkin Resolution; and the passage of the War Powers Resolution in 1973 which attempts to delineate the boundaries of the President's war powers as part of a general sentiment that something must be done about the "Imperial Presidency."[11]

Frisch's intentional characterization of the presidency conjures visions of a monarch; other scholars share this sentiment, recognizing that presidential legislative action falls outside those duties contemplated by the Framers.[12] Yet there must be some

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politicized legislature); Emily Pears, *Demagoguery in America*, 53 NAT'L AFFS. 116 (2022) (offering an American history of demagoguery, from Washington to Trump).

10. Erin Peterson, *Presidential Power Surges*, HARV. L. TODAY (July 17, 2019), https://hls.harvard.edu/today/presidential-power-surges/.

11. Morton J. Frisch, *Executive Power and Republican Government—1787*, 17 PRESIDENTIAL STUD. Q. 281, 283 (1987).

12. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 1 (2017); Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829, 830 (2018); Shany Winder, *Extraordinary Policymaking Powers of the Executive Branch: A New Approach*, 37 VA. ENV'T L.J. 207, 208–09 (2019); Cary Coglianese & Christopher S. Yoo, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1588–89 (2016); Gillian E. Metzger, *The Independent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 428–29 (2009); William P. Marshall, *Break Up the Presidency?*

intrinsic societal mechanisms at play that permit this over-extension. While there is no shortage of scholarship relating this expansion of power to law and policy,[13] few compelling explanations address the element of human nature. And if, as this Article suggests, the Framers designed the Constitution based on human nature, then there are clues within our psychology, both individual and collective, that can explain aberrations or unintended consequences of the original constitutional design. Thus, this Article will explore the psychological and social factors as to why the presidency evolved to acquire more powers than those initially granted by the Framers.

Expansion of presidential power was psychologically inevitable. The judiciary's former deference to executive agencies[14] and congressional delegation of duties[15] are merely manifestations of a deeper-rooted phenomenon. This Article explores how the Framers, acutely aware of human nature and political philosophy, crafted the Constitution to curb corrupt impulses and prevent concentration of power into a few hands. While there are many psychological forces at play in the organization of society, only a few provide the fertile ground for an expanded executive. In *The Federalist*, James Madison identifies one such force when he explains that for the new constitutional system to work, the rulers and the ruled must share a community of interest, or "sympathy."[16]

Such sympathy drives public approval for executive action,[17] even though the public's desire for such action flies in the face of the anti-monarchic sentiments of the Revolution.[18] Yet despite these cautious sentiments toward monarchism, the psycho-

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Governors, State Attorneys General, and Lessons from the Divided Executive, 115 YALE L.J. 2446, 2469–70 (2006) [hereinafter *Break Up the Presidency?*].

13. *See, e.g.*, Epstein & Posner, *supra* note 12, at 830–31; Winder, *supra* note 12, at 208; *Break Up the Presidency?*, *supra* note 12, at 2448–49.

14. *See, e.g.*, Kisor v. Wilkie, 588 U.S. 558 (2019); Auer v. Robbins, 519 U.S. 452 (1997); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

15. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465–66 (2015); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 120 (2011).

16. THE FEDERALIST NO. 57, at 297 (James Madison) (George W. Carey & James McClellan eds., 2001).

17. *See* BARBARA HINCKLEY, THE SYMBOLIC PRESIDENCY: HOW PRESIDENTS PORTRAY THEMSELVES 12 (1990).

18. *See generally* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE (2005).

political relationship between the President and the American people, and its psychological consequence, is a feature of the Madisonian Constitutional framework designed to both mirror and work within the confines of human nature.

Thus, this Article will argue that, despite correctly understanding human psychology, the Framers could not anticipate how psychological sympathy would function as the country expanded. The argument posited by this Article works within the Madisonian psycho-political framework to show that as the size of the country increased interests became more diverse and disparate. As a result, personalities—not principles—shaped electoral politics. And there is perhaps no personality more salient and influential in American domestic policy than the President. Moreover, this process did not occur in isolation, but rather functioned in parallel with the American tendency to heroize its revolutionaries very early in the country's history.

Two processes led to the President's expanded power: a government built on harnessing human sympathy and the tendency for political figures to undergo heroization. Accordingly, this Article will show that executive expansion is a psychological inevitability rather than a merely political or legal one. Finally, this Article will propose an apolitical remedy to curtail the executive's accumulation of power: by returning policy emphasis to the local community, individuals will become the organizing force of law and culture, just like the federalist system envisioned. This is not to say that this Article is arguing for a reduction in the federal government. Rather, this Article takes the position that shifting the psycho-political emphasis away from the national to the local will contract the demographic expansion and return the psycho-political system to that community of interest conceived by the Framers. In other words, a citizen's senators or congresspeople will be better representatives of their interests than the President. In this way, the very same psychological phenomena that gave rise to a powerful executive can curb it.

II. THE CONSTITUTIONAL CONVENTION: THE FRAMERS' PSYCHOLOGICAL INSIGHTS INTO HUMAN NATURE

The summer of 1787 was stifling.[19] Conferring together in the old Pennsylvania State House, a group of revolutionaries began work on their monumental mandate: forging from scratch a new form of government the world had not yet seen.[20] The Articles of Confederation failed to mythic proportions,[21] and with them, any hopes for the success of this new political experiment.[22] This was the Founding Fathers' last chance to create a functioning government that would, as they believed, enshrine the values of the Revolution or risk the new nation's status as yet another failed state.[23]

The Convention concluded on September 17, 1787, having constructed the Constitution of the United States as the fruit of its labor in those stuffy rooms during the Philadelphian summer.[24] The Constitution necessitated a divided government in which powers were not overly concentrated in one branch at the expense of any another. Yet, as history has shown, the powers and influence of the modern presidency far surpass those contemplated by the Framers.[25]

Indeed, during the Convention itself, except for Alexander Hamilton, Gouverneur Morris, and James Wilson, none of the delegates saw a role for the executive beyond enforcing the laws and general state administration.[26] Even Madison himself wrote to Washington, "I have scarcely ventured as yet to form my own opinion of the manner in which [the executive] ought to be constituted or the authorities with which it ought to be clothed."[27]

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19. William P. Kladky, *Constitutional Convention*, GEORGE WASHINGTON'S MOUNT VERNON, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/constitutional-convention (last visited July 12, 2024).

20. *See generally* CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787 (2007).

21. Jack Rakove, *The Legacy of the Articles of Confederation,* 12 PUBLIUS 45, 45 (1982).

22. *See generally* GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION (2017) (explaining how the Confederation's failure led to the Constitutional Convention of 1787).

23. ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 3 (1993); JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 284 (2003).

24. Kladky, *supra* note 19.

25. *See* William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 506–07 (2008).

26. Frisch, *supra* note 11, at 281.

27. *Id.*

Madison would eventually change his tune, but his views in the spring of 1787 are telling: the role and power of the executive were, since its inception, murky.[28]

The delegates reached an agreement in September of 1787,[29] and then the real work began. To convince the colonies to ratify the new Constitution, Alexander Hamilton, John Jay, and James Madison published a number of papers under the pen name "Publius."[30] Through their writing, collectively known as *The Federalist*, Madison, Jay, and Hamilton sought to ground the Constitution in Enlightenment psychology and political theory.[31]

Based on "ideas about universal human nature,"[32] *The Federalist* is a masterpiece of rhetoric, sociology, and psychology. Publius' understanding of human nature and how it operates is of particular interest to this Article. In spite of its sophistication, or rather, because of it, scholars are divided as to the source of Publius' psychology. American historian Daniel Howe compared Publius to John Calvin and Thomas Hobbes, a French theologian and English philosopher, respectively, who believed human nature was like a wild beast, wrought with passions and in need of taming.[33] Others treat the Founders as optimists who suppose human virtue is possible despite our collective and individual passions.[34] Daniel Howe argues "[a]ll these interpretations can be

28. *See generally* SIDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776–2021 (9th ed. 2022); CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY (Liberty Fund, Inc., 2007) (1923); WILFRED E. BINKLEY, THE POWERS OF THE PRESIDENT: PROBLEMS OF AMERICAN DEMOCRACY (1937).

29. Kladky, *supra* note 19.

30. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 84–86 (2011).

31. John Wood, Note, *The "Constitution of Man": Reflections on Human Nature From* The Federalist *Papers to Behavioral Law and Economics*, 7 N.Y.U. J.L. & LIBERTY 184, 197–99 (2013); *see generally* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985) (synthesizing the philosophical and ideological origins of the Constitution).

32. Daniel W. Howe, *The Political Psychology of* The Federalist, 44 WM. & MARY Q. 485, 486 (1987).

33. *Id.* at 486–87; *see also* Benjamin F. Wright, The Federalist *on the Nature of Political Man,* 59 ETHICS 1, 3–4 (1949); RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT 3 (1948); GEORGE MACE, LOCKE, HOBBES, AND THE FEDERALIST PAPERS: AN ESSAY ON THE GENESIS OF THE AMERICAN POLITICAL HERITAGE 52 (1979); JOHN PATRICK DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM 195 (Univ. Chi. Press 1986) (1984).

34. Howe, *supra* note 32, at 486–87; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 53 (1969); Jean Yarbrough, *Representation and Republicanism: Two Views*, 9 PUBLIUS 77, 98 (1979); Jean Yarbrough, *Republicanism Reconsidered: Some Thoughts on the Foundation and Preservation of the American Republic*, 41 REV. POL. 61,

synthesized within the paradigm of the faculty psychology Publius employed, which found places in human nature for passion, interest, and virtue."[35] Whether optimistic or pessimistic, Publius believed human psychology underscores political systems.

Publius formulates arguments by framing his analysis of good government within the natural functions of the human mind.[36] *The Federalist* authors showcased the Constitution "as a marvel of social engineering" that utilizes "human nature to control human nature[.]"[37] The Madisonian psycho-social theory intended to delve into the science behind politics.[38] Thus, "[f]aculty psychology provided an explanation and defense of the nature and structure of the Constitution's provisions."[39] Jeffrey Smith writes: "*The Federalist* presents the Constitution as a strategic response to the regular and predictable motives of human nature in order to establish good government and promote human flourishing."[40] Stated differently, a carefully crafted political system based on human psychology can promote human growth. Smith suggests Publius defended the Constitution by showing how its structures anticipated human motivation and action.[41]

Indeed, these impulses of the soul, which are both a universal feature of human nature and particularized in individuals, form "primarily a theory of motivation."[42] Therefore, the Constitution's aim is to "set[] up a kind of Newtonian machine, a law-abiding mechanism, operating according [to] the reliable and predictable springs of action they can expect and anticipate whe[n] they take men as they find them, rather than as they should be."[43]

As noted above, the key psychological theory in which Publius worked is faculty psychology. Before continuing, it is worthwhile to give some context for what this theory entails. Faculty

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63 (1979). *See generally* GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981) (analyzing the philosophical development of *The Federalist*).

35. Howe, *supra* note 32, at 487.

36. *See* Mary Ann Glendon, *Philosophical Foundations of* The Federalist *Papers*: *Nature of Man and Nature of Law*, 16 HARV. J.L. & PUB. POL'Y 23, 29–30 (1993).

37. Howe, *supra* note 32, at 494.

38. MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 102 (1987).

39. Jeffrey P. Smith, *The Federalist* Papers' Account of Human Nature 328 (Sept. 14, 2021) (M.A. thesis, City University of New York) (on file with the Graduate Center, City University of New York).

40. *Id.*

41. *Id.* at 322.

42. WHITE, *supra* note 38, at 103.

43. Smith, *supra* note 39, at 328–29.

psychology assumes that universal human motivations drive behavior.[44] Thus, the relationship between a person's hidden motivations and observable behavior is causal and calculable.[45] Understanding people's underlying motivations, which are engendered by the different faculties of the mind, allows one to predict how others will act. Jeffrey Smith argues that "Publius sought to address how men actually act and to discern and analyze the variegated springs of the soul which incite them to these actions."[46]

Publius attempts "to compare the strength of different motives in order to support various provisions of the Constitution and to defend those provisions against hostile criticism[.]"[47] By examining the actions of people in the past, Publius, and especially Madison, constructed a psycho–political model aimed at balancing freedom with order.[48] This balancing could be achieved by carefully studying and titrating the faculties and drives of the mind—a concept that will be discussed further in this Article.[49]

Indeed, Publius did not construct his political psychology out of whole cloth. The late 18th century was characterized by this very philosophical movement of faculty psychology. By studying the multimodal drives of the mind, faculty psychology aimed to obtain "knowledge of the qualities, powers, and capacities of humankind's nature, collectively and individually."[50] Furthermore, it would "reveal the psychological springs of vice and virtue individually and collectively."[51]

The idea is simple. While appearing unified, the human mind is, in reality, multimodal.[52] Each facet, or faculty, of the mind is not only responsible for participating in the collective mental action that generates our inner life but is also comprised of its own unique drives and desires.[53] This theory is not new, even for

44. *Id.* at 330.
45. *See id.* at 298, 320.
46. *Id.* at 329; *see also* WHITE, *supra* note 38, at 102–03.
47. WHITE, *supra* note 38, at 102.
48. Smith, *supra* note 39, at 329–30.
49. *See infra* notes 73–98 and accompanying text.
50. Smith, *supra* note 39, at 330 (quoting Roger Smith, *The Language of Human Nature*, *in* INVENTING HUMAN SCIENCE: EIGHTEENTH CENTURY DOMAINS 101 (Fox et al. eds., 1995)).
51. *Id.*
52. *See generally* C.A. Mace, *Faculties and Instincts*, 40 MIND 37 (1931) (exploring nuances of faculty psychology and arguing that systems of instincts can explain human behavior).
53. *Id.*

Madison's time; faculty psychology has played an integral role in Western scholarship since Aristotle.[54] Enlightenment thinkers spent considerable time developing this science, further refined in the writings of the likes of Niccolo Machiavelli, René Descartes, Thomas Hobbes, Baruch Spinoza, John Locke, and David Hume—authors almost certainly read and internalized by Publius.[55]

Well versed in Enlightenment behavioral science, Publius understood the central tenet of faculty psychology: by learning about the different parts of the mind and its unique activities, we can better predict our behavior.[56] Such behavioral predictions are predicated on understanding human motivations. Enlightenment psychologists believed they could scientifically study motivation:

> In developing a psychological model on which institutions could be founded, Madison and Hamilton analyzed those politically germane motives in order to assess their likely impact. This analysis involved a comparison of motives in order to assess the relative force and constancy of each in motivating human action. This procedure, consistent with the Enlightenment psychology on which they drew, sought to compare the relative "strength of what Hume called the different motives or actuating principles of human nature."[57]

In *The Federalist* papers, Publius, and especially Madison, argue that the success of the Republic relies on these inherent qualities of the human soul.[58] Since people's minds have unique parts, each with its impulse and drive, a government must be structured along those psychological principles.[59] Governments and republics do not exist in the abstract but are comprised of individuals who think, feel, and possess human minds with multimodal drives and functions.

In the ethical or political space, individuals with these drives and impulses are capable of both virtue and vice.[60] Examples of

54. *See generally* ARISTOTLE, DE ANIMA (R.D. Hicks ed. and trans., 1907) (discussing the nature of the soul, including its capacity for perception, desire, reason, and thought).

55. *See* Daniel Lambright, Comment, *Man, Morality, and the United States Constitution*, 17 U. PA. J. CONST. L. 1487, 1500 (2015).

56. Howe, *supra* note 32, at 491.

57. Smith, *supra* note 39, at 334 (quoting WHITE, *supra* note 38, at 102).

58. *See* Judith N. Shklar, *Publius and the Science of the Past*, 86 YALE L.J. 1286, 1291 (1977).

59. *See generally* THE FEDERALIST NOS. 51, 62 (James Madison) (arguing for the separation of powers and appointment of senators by state legislature, respectively).

60. *See* Lambright, *supra* note 55, at 1504.

these virtues are duty, patriotism, and justice, which are experienced as feelings.[61] These feelings, or sentiments, "arise from a naturally human 'sensibility' that has its locus in the heart, not the head, mind, or reason" and impress themselves on our minds, forming our opinions.[62] In sum, virtue is a "natural, non-rational, not unselfish, impulse."[63]

Interestingly, scholars of cognition and theory of mind confirm Madison's intuition about the metaphysical nature of virtue.[64] In outlining a history of ethics,[65] philosopher Julia Annas notes that:

> In ancient ethical theory considerable attention was paid to three points: (1) virtues are dispositional. (2) Virtues have an affective aspect: they involve our feelings, especially our feelings of pleasure and pain, and developing a virtue involves habituating our feelings in certain ways. (3) Virtues have an intellectual aspect: they involve reasoning about, and grasp of, the right thing to do, and developed virtue implies good practical reasoning or practical intelligence. The development of all three points contributes to our understanding of what a virtue is.[66]

Virtue arises out of the combined efforts of the emotional and rational parts of the mind.[67] Being the product of emotion and reason, human beings must learn to regulate their emotions or subject them to reason, so that the mind is habituated to move toward virtue.[68] We may desire to eat an extra piece of cake (emotion), but we subject the desire to reason ("I must eat healthier food"). The net result is the virtue of self-control. In the context of the state, habituating collective emotions toward good is difficult, despite rationally understanding what might be good for society.

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61. Leonard R. Sorenson, *Madison on Sympathy, Virtue, and Ambition in* The Federalist *Papers*, 27 POLITY 431, 432 (1995).

62. *Id.* at 432–33.

63. *Id.* at 433; *see also* THE FEDERALIST NO. 10, *supra* note 16, at 43 (James Madison); JAMES MADISON, THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 403 (Marvin Meyers ed., Brandeis Univ. Press rev. ed. 1981).

64. *See* Sorenson, *supra* note 61, at 432–33.

65. JULIA ANNAS, THE MORALITY OF HAPPINESS, 48–49 (1993).

66. Joshua August Skorburg, *Where Are Virtues?*, 176 PHIL. STUD. 2331, 2333 (2019) (quoting ANNAS, *supra* note 65, at 48–49).

67. *See* Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 459 (1989).

68. *Id.* ("The virtue required is the capacity to overcome passion, or appetite, in both reason and will. Virtue thus requires wisdom as a precondition of choice.").

We have certainly seen ample evidence of collective emotions at work over the last several years.[69] Emotion tends to overtake virtue, which diminishes rationality. Thus, in state governance, "[t]he fundamental 'defect of the better motives,' the virtuous sentiments, is that they are weak impulses that cannot generally be depended upon to produce either restraint or action."[70] These motives are weak not because they are weaker mental drives but because subjugating the emotive to the rational is laborious and produces few immediate rewards.[71] Yet, despite this difficulty, Publius understood the necessity of virtues in a successful society, and the value of cool rationality that can subjugate emotions and direct society toward virtuous ends. The Constitution, therefore, aims "to 'obtain for rulers men who possess . . . [the] . . . most virtue to pursue . . . the common good of the society.'"[72] Virtues are teleologically valuable, if not practically so. In other words, pursuing virtue is ultimately good for society even if that pursuit does not provide immediate reward.

Passions, in contrast, are more robust psychological drivers than virtues.[73] Emotions tend to incite behavior, especially when those emotions are self-serving. Publius understood that virtues are the best aspiration for society, but very few individual members could habituate themselves toward those virtues by subjugating their desire to reason.[74] Thus, Publius turns his focus onto passion, or vice, as a powerful motivating mental drive.[75] The human mind is capable of many passions; however, as Professor Leonard Sorenson understands, of all the passions, "[i]n particular, ambition and fear can be depended upon to produce action or

69. *See, e.g.*, Scottie Andrew, *The Psychology Behind Why Some People Won't Wear Masks*, CNN, https://www.cnn.com/2020/05/06/health/why-people-dont-wear-masks-wellness-trnd/index.html (May 6, 2020, 12:53 PM) (providing reasons why some Americans refused to wear masks during the Covid-19 pandemic despite the general consensus that doing so would reduce the virus' spread).

70. Sorenson, *supra* note 61, at 433.

71. *See generally* CHRISTIAN B. MILLER, MORAL CHARACTER: AN EMPIRICAL THEORY (2013) (proposing that moral character is often neither virtuous nor vicious); CHRISTIAN B. MILLER, CHARACTER AND MORAL PSYCHOLOGY (2014) (maintaining that a person's moods influence their behavior as much as, if not more than, reason and virtue); DAVID EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (Paperback ed., 1986) (noting that good virtues are non-rational impulses that cannot be depended upon for political purposes).

72. Sorenson, *supra* note 61, at 433 (quoting THE FEDERALIST NO. 57 (James Madison)) (alteration in original).

73. *Id.*

74. *Id.* at 432–33.

75. *Id.* at 433.

restraint."[76] This is an important point: the passions can be harnessed, like a sail harnesses the chaotic and violent wind, to direct behavior toward action or restraint.[77] Thus, while society's goal is virtue, passion drives society to that goal since it is the more vigorous mental impulse.

When different individuals' vices work against each other, society moves toward virtue. In other words, this counteraction between passions has the net effect of directing society toward a virtuous end.[78] In this psychological model, the personal passions of government members would work to counteract each other, and this counteraction would result in the entire government's movement toward a virtuous end as a net result.[79]

Although understanding that it would be ideal for a society to be structured based on human virtue, Madison noted "[i]f men were angels, no government would be necessary."[80] As the more vital mental impulse, passion can counteract other passions such that the cumulative result is the movement toward virtue. For this reason, Madison insisted upon the separation of powers; by harnessing the shared passions of the rulers, the impulse counteraction would drive society toward virtue.[81]

For passion to counteract passion and urge society toward virtue, Publius emphasized that there must be one precondition: a community of interest between ruler and ruled.[82] Rulers need "common interest" and "sympathy with" the people.[83] This means that the rulers and the ruled must share similar sentiments and interests. Indeed, sympathy is not a feeling *for* another but a feeling *like* that perceived by the other.[84] This kind of sympathy is not merely an emotional attachment but a shared feeling of common purpose such that rulers and ruled see a part of themselves in each other.

Publius was stunningly correct in his appraisal of human psychology. Indeed, recent developments in cognitive science have

76. *Id.*
77. Howe, *supra* note 32, at 493.
78. *Id.* at 493–94.
79. *Id.* at 494.
80. THE FEDERALIST NO. 51, *supra* note 16, at 269 (James Madison).
81. *See generally id.* (arguing for the separation of powers).
82. *See generally* THE FEDERALIST NO. 57 (James Madison) (discussing the closeness between those elected to the House of Representatives and the people).
83. THE FEDERALIST NO. 52, *supra* note 16, at 273 (James Madison).
84. Sorenson, *supra* note 61, at 435.

convincingly shown that "cognitive processes sometimes extend beyond the boundaries of the agent."[85] Scholars like S. Orestis Palermos and Richard Heersmink found that "when a system . . . becomes so tightly coupled, treating that system as comprised of two independent components often does not do justice to the dense patterns of interaction, especially the ways in which, over time, such interaction transforms downstream cognitive processing."[86] Simply put, as two individuals become more integrated, they influence each other's thoughts and feelings. Thus, the deeper the connection between two people, the more powerful any emotions shared will be. For example, as my friend and I become closer, our interactions become more integrated such that something that affects my friend also affects me. The integration of my and my friend's feelings creates mutual extension, transcending beyond the self. This extension then brings about *sympathy* in the Madisonian sense, where I begin to think and feel *like* the people in my life, not just *for* them.

In a state where ruler and ruled have sympathy, a ruler, in theory, should never act against the people's best interest because, in so doing, he acts against his own interest due to the community of interest between ruler and ruled. I say "in theory" because sympathy is a double-edged sword. Indeed, the ruler can create unique feelings in the populace which he then uses as a post hoc demonstration of sympathy, justifying his expansion of power. Leonard Sorenson explains that sympathy "does not refer to a sentiment but to a circumstance in which both officials and the people possess the same sentiment."[87]

The cognitive and emotional expansion of one agent can extend to their community.[88] The common sentiments shared by

85. Skorburg, *supra* note 66, at 2334.

86. *Id.* at 2336; *see generally* S. Orestis Palermos, *Loops, Constitution, and Cognitive Extension*, 27 COGNITIVE SYS. RSCH. 25 (2014) [hereinafter *Loops, Constitution, and Cognitive Extension*] (theorizing that cognitive extension occurs from interpersonal communication); S. Orestis Palermos, *The Dynamics of Group Cognition*, 26 MINDS & MACHS. 409 (2016) [hereinafter *The Dynamics of Group Cognition*] (arguing that distributed systems of thinking within a population can be attributed to interactions between individual group members); Richard Heersmink, *Dimensions of Integration in Embedded and Extended Cognitive Systems*, 14 PHENOMENOLOGY & COGNITIVE SCIS. 577 (2015) (proposing dimensions of a cognitive system that can help determine how integrated its members are with each other).

87. Sorenson, *supra* note 61, at 435.

88. *See generally* David M. Chavis & Grace M.H. Pretty, *Sense of Community: Advances in Measurement and Application*, 27 J. CMTY. PSYCH. 635 (1999) (explaining how the relationship between a residential neighborhood and a sense of community can engender

my friend and me from the example above—the mutual cognitive and emotional influences that emerge out of long-term patterns of interaction—also are shared by me and my immediate community, and vice versa. Madison understood this essential factor in human psychology and sought to structure the Constitution accordingly.

Madison's psychological model establishes that the sentiment of sympathy is guaranteed by the careful balance between virtue and passion, crystallized in the constitutional institutions that separate powers between branches of the federal government. Sorenson contends that the "constitutional circumstance, creating both 'communion of interests' and 'sympathy of sentiments,' therefore, is simply the requirement of rule by equally applicable law and separation of powers."[89] Separation of powers ensures the community of interest remains intact so as to maintain sympathy between ruler and ruled.

The community of interest between the ruler and the ruled was therefore designed to ensure that a ruler will never make a law that is not in the people's best interest because, in doing so, he acts contrary to his own interest. Since all people, by nature, act according to their best interests, when all branches of government act in their best interests, they inevitably also act in the people's best interests. Indeed, "[t]he separation of powers thus means that to oppress others is to oppress oneself."[90]

Three important points merge from Madison's understanding of sympathy. First, the Constitution produces fear of oppression in lawmakers because by oppressing the people they oppress themselves.[91] Second, the fear inspires the virtuous impulse of restraint.[92] Third, the impulse of restraint produced by fear becomes the action of restraint.[93] Because rulers share sympathy with the ruled, they restrain their oppressive impulses out of fear of oppressing themselves. As Sorenson notes, "[w]ithout fear, there is no virtue; without virtue, fear is blind; without fear, virtue is impotent. The Constitution depends equally upon direction-giving

local and national change); David W. McMillan & David Chavis, *Sense of Community: A Definition and Theory*, 14 J. CMTY. PSYCH. 6 (1986) (explaining the elements of a sense of community and how certain types of communities can strengthen the social fabric).

89. Sorenson, *supra* note 61, at 436 (quoting THE FEDERALIST NO. 57 (James Madison) (Clinton Rossiter ed., 1961)).

90. *Id.*

91. *Id.* at 437.

92. *Id.*

93. *Id.*

virtue and restraint-producing ambition."[94] The crux of this theory hinges on cognitive and emotional sympathy between the ruler and ruled.

Madison was correct about human nature. He understood what drives the mind and how to harness human nature to create effective governance. As noted, modern cognitive science confirms Madison's intuitions regarding cognitive and emotional sympathy between the ruler and ruled.[95] Scholars like Joshua Skorburg observe that there are degrees of functional integration between people;[96] the deeper the integration, the more extended and coupled the system.[97] In other words, the emotional and cognitive integration level between people does not exist on a binary scale. Instead, the level of integration lies on a continuum and along various emotional and cognitive dimensions.[98] A child, for example, is more highly integrated—experiences more sympathy—with their sibling than with a friend at school. Similarly, adults experience more integration with community members than they do with people on the other side of the country. This cognitive and emotional integration forms the basis of the community of interest between the ruler and the ruled.

The problem with this constitutional design, however, is that "[p]eople show less and less emotional attachment to groups as these get progressively larger: 'a man is more attached to his family than to his neighborhood, to his neighborhood than to the community[.]'"[99] How can a community of interest be established between rulers and ruled when the community is large? What does a New Mexico citizen have in common with a Connecticut citizen, other than that they are both American? The emotional attachment between the ruler and the ruled, or sympathy, became unwieldy as the country expanded, but it did not disappear. American expansion engendered a psychological phenomenon, focusing the country's attention and sympathy toward the

94. *Id.* at 438.
95. *See supra* notes 85–88 and accompanying text.
96. Skorburg, *supra* note 66, at 2335–36, 2347.
97. *Id.* at 2335.
98. *See id.*
99. Howe, *supra* note 32, at 492 (quoting THE FEDERALIST NO. 17 (Alexander Hamilton)).

President, who used emotional influence to accumulate authority.[100]

This expansion of sympathy did not occur in isolation but found a companion in the late 19th century American tendency toward making heroes out of the revolutionaries. On this point Barry Schwartz notes that "the Americans created emblems of their own self-conception."[101]

Palermos and Heersmink's findings show that extending cognition and emotion onto others depends on a pattern of common activity between people, like members of the same club or neighborhood.[102] This heightened cognitive and emotional expansion helps formulate an emblematic self-concept in the other. In other words, one might see themselves in their friend because a commonality of experiences facilitates the mirroring of thoughts and feelings.

Madison's formulation holds within a community and between ruler and ruled. The problem is that as the community grew, the sympathy refocused onto a person who became emblematic of the nation's self-conception through the already-present American tendency toward the heroization of historical figures.

III. HEROIZATION OF THE EXECUTIVE: A CONSEQUENCE OF SYMPATHY

This Part discusses how the psychological phenomenon of sympathy led to the President's heroization. It begins by expounding on the sociological principles of group cohesion and concludes by demonstrating how these abstract forces induce presidential heroization.

100. Jay Cost, *The Expanding Power of the Presidency*, HOOVER INST. (Oct. 2, 2012), https://www.hoover.org/research/expanding-power-presidency.

101. Barry Schwartz, *Emerson, Cooley, and the American Heroic Vision*, 8 SYMBOLIC INTERACTION 103, 104 (1985) (internal citations omitted).

102. *See generally Loops*, *Constitution, and Cognitive Extension*, *supra* note 86; *The Dynamics of Group Cognition*, *supra* note 86; Heersmink, *supra* note 86.

A. Social Cohesion: A Socio-Psychological Phenomenon Based in Prototypes

Many sociologists and psychologists have worked on the issue of social cohesion[103]—that is, how individuals unite with each other to form a group.[104] However, a universal interpretation of the term does not exist. Some sociologists, like Jacob L. Moreno, Helen H. Jennings, and Leon Festinger, understand cohesion as "the forces holding the individuals within the groupings in which they are."[105] Stated differently, social cohesion is "the *resultant* of all forces acting on the members of a group to remain in the group."[106] Others contend that the phenomenon is primarily concerned with how attractive the group is to each member,[107] as "such attitudes are the proximate cause of persons' decisions to remain in or depart from a group."[108] Psychologist Dorwin Cartwright notes that "the members of a highly cohesive group, in contrast to one with a low level of cohesiveness, are more concerned with their membership and are therefore more strongly motivated to contribute to the group's welfare, to advance its objectives, and to participate in its

103. *See, e.g.*, Robert S. Albert, *Comments on the Scientific Function of the Concept of Cohesiveness,* 59 AM. J. SOCIO. 231 (1953); Kenneth L. Bettenhausen, *Five Years of Groups Research: What We Have Learned and What Needs to be Addressed*, 17 J. MGMT. 345 (1991); Albert V. Carron, *Cohesiveness in Sports Groups: Interpretations ani* [sic] *Considerations*, 4 J. SPORT & EXERCISE PSYCH. 123 (1982); Ronald L. Breiger & John M. Roberts, Jr., *Solidarity and Social Networks*, *in* THE PROBLEM OF SOLIDARITY: THEORIES AND MODELS 239 (Patrick Doreian & Thomas J. Fararo eds., 1998); Stuart Drescher et al., *Cohesion: An Odyssey in Empirical Understanding*, 16 SMALL GRP. RSCH. 3 (1985); Nancy J. Evans & Paul A. Jarvis, *Group Cohesion: A Review and Reevaluation*, 11 SMALL GRP. RSCH. 359 (1980); MICHAEL A. HOGG, THE SOCIAL PSYCHOLOGY OF GROUP COHESIVENESS: FROM ATTRACTION TO SOCIAL IDENTITY (1992); GROUP COHESION: THEORETICAL AND CLINICAL PERSPECTIVES (Henry Kellerman ed., 1981); John M. Levine & Richard L. Moreland, *Progress in Small Group Research*, 41 ANN. REV. PSYCH. 585 (1990); A.J. Lott & B.E. Lott, *Group Cohesiveness, Communication Level, and Conformity*, 62 J. ABNORMAL & SOC. PSYCH. 408 (1961); Miller McPherson & Lynn Smith-Lovin, *Cohesion and Membership Duration: Linking Groups, Relations, and Individuals in an Ecology of Affiliation*, 19 ADVANCES GRP. PROCESSES 1 (2002); Peter E. Mudrack, *Defining Group Cohesiveness: A Legacy of Confusion?*, 20 SMALL GRP. RSCH. 37 (1989); MARVIN E. SHAW, GROUP DYNAMICS: THE PSYCHOLOGY OF SMALL GROUP BEHAVIOR (3d ed. 1981); Arthur A. Stein, *Conflict and Cohesion: A Review of the Literature*, 20 J. CONFLICT RESOL. 143 (1976).

104. *See* Noah E. Friedkin, *Social Cohesion*, 30 ANN. REV. SOCIO. 409, 411 (2004).

105. *Id.* (quoting J.L. Moreno & H.H. Jennings, *Statistics of Social Configurations*, 1 SOCIOMETRY 342, 371 (1938)).

106. Friedkin, *supra* note 104, at 411 (quoting Leon Festinger, *Informal Social Communication*, 57 PSYCH. REV. 271, 274 (1950)).

107. *See* Neal Gross & William E. Martin, *On Group Cohesiveness*, 57 AM. J. SOCIO. 546, 554 (1952).

108. Friedkin, *supra* note 104, at 411 (citing Gross & Martin, *supra* note 107, at 554).

activities."[109] An individual member's degree of enfranchisement determines the group's cohesiveness.[110]

Nevertheless, questions remain about how this enfranchisement occurs. Several scholars have conducted sophisticated mathematical modeling to answer this question,[111] with one study proposing that "endogenous mechanisms of interpersonal influence are probably involved in producing attitudinal consensus and behavioral uniformity."[112] Further elaborating on this point, sociologist Noah Friedkin adds that "[t]hese endogenous mechanisms may produce attitudinal agreement and behavioral concordance via sequences of interpersonal interactions in which members' attitudes and behaviors are influenced by the attitudes and behaviors of one or more other members."[113]

As shown above, group cohesiveness begins at the micro-scale as a psychological phenomenon where those near each other share thoughts and feelings.[114] Sociologist Edward Laumann's work emphasized the importance of face-to-face interactions, as they can enforce to younger members of the group what kinds of behavior are socially appropriate; this "primary environment" stimulates greater participation in larger group settings.[115] This is not to say that groups must be small for social cohesion to work. To the contrary, a large group whose members are connected by direct or indirect interpersonal ties "may be cohesive if the group's social network has particular structural characteristics."[116]

When groups expand, and sympathy becomes diluted, they may still cohere provided there are essential structural characteristics of the group. These structures are thus necessary

109. Dorwin Cartwright, *The Nature of Group Cohesiveness*, *in* GROUP DYNAMICS: RESEARCH AND THEORY 91 (Dorwin Cartwright & Alvin Zander eds., 1968).

110. Friedkin, *supra* note 104, at 414.

111. *See* Robert P. Abelson, *Mathematical Models of the Distribution of Attitudes Under Controversy*, *in* CONTRIBUTIONS TO MATHEMATICAL PSYCH. 142, 149–53 (Norman Frederiksen & Harold Gulliksen eds., 1964); Noah E. Friedkin & Eugene C. Johnsen, *Social Influence and Opinions*, 15 J. MATHEMATICAL SOCIO. 193, 196–98 (1990); Noah E. Friedkin & Eugene C. Johnsen, *Social Influence Networks and Opinion Change,* 17 ADVANCES GRP. PROCESSES 1, 3–5 (1999); Andrzej Nowak et al., *From Private Attitude to Public Opinion: A Dynamic Theory of Social Impact*, 97 PSYCH. REV. 362, 364–67 (1990).

112. Friedkin, *supra* note 104, at 414.

113. *Id.* at 415.

114. *See supra* notes 105–13 and accompanying text.

115. Friedkin, *supra* note 104, at 416 (quoting EDWARD O. LAUMANN, BONDS OF PLURALISM: THE FORM AND SUBSTANCE OF URBAN SOCIAL NETWORKS 111 (1973)).

116. *Id.* at 417.

conditions for group cohesion. Michael Hogg discussed one such structural characteristic that allows for larger groups, like nations, to become cohesive.[117] Group cohesion occurs when members of a group differentiate themselves from other groups. As individuals in a group see themselves less as individuals and more as members of a group, they adopt prototypical in-group norms that are "self-enhancing" and different from the norms of an out-group.[118] An example of prototypical in-group norm may be attending a fireworks show on the Fourth of July or watching football on Thanksgiving.

The mechanism of prototyping that drives group coherence "operates at the group level and . . . is nonreductionist because the prototypes to which group members are conforming are group-level phenomena that are determined by the distribution of individuals' attitudes and behaviors."[119] Group-unifying prototypes are typically interpersonal influences, like ideas, beliefs, or values.[120] But an individual can also achieve a prototypical status within a community through heroization and shared sympathy.[121]

B. Heroization: The Abstract Prototype of Social Cohesion Becomes Human

Thomas Carlyle wrote that heroes are "the modellers, patterns, and in a wide sense creators, of whatsoever the general mass of men contrived to do or to attain."[122] For Paul Meadows, "[t]he hero as model becomes imperative in the forking-points of experience whether of the group or the individual. Whether professional or folkic, the hero model serves as the carrier of cultural values as well as a pattern for personal experience."[123] As such, the hero can function as a prototype for social cohesion in Hogg's sense. She becomes a prototype upon whom and from whom a group identity emerges and in whom it is reflected: "Heroes arise in areas of life . . . described as events having drama and human

117. *See generally* HOGG, *supra* note 103 (reducing the concept of group cohesiveness to interpersonal attraction).

118. Friedkin, *supra* note 104, at 420.

119. *Id.*

120. *Id.*

121. *See id.* at 418–19.

122. Paul Meadows, *Some Notes on the Social Psychology of the Hero*, 26 SW. SOC. SCI. Q. 239, 246 (1945) (quoting THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 1 (Charles Scribner's Sons, 1903)).

123. *Id.* at 247.

interest. . . . They are situations of suspense or unmet need, such as conflict, competition, effort, or struggle."[124]

The hero's function is both sociological and psychological. Thus, "[t]he hero may illustrate social interaction in its myriad forms: social control, leadership, imitation, propaganda, the social movement, crowd psychology."[125] At the same time, heroes demonstrate psychological processes in which the self is mirrored in the group.[126] The heroized individual can "typify the whole culture or perhaps some aspect of it. . . . [Or] may be thought of as an index of the national mind or spirit."[127] Often, we create heroes out of a psychological impulse to emulate a person we desire to become. But a hero also speaks to society's collective consciousness, as the individual evolves into the paragon for that community's needs, values, goals, and identity. The hero becomes a prototype or emblem of the whole and serves as a unifying figure of a large group of people who share sympathy with her. She becomes a prototypical structure upon whom the edifice of a unified society coheres.

Making heroes is integral to the American story. The American self-notion at its core, according to Tom Engelhardt, is the cultural embodiment of the American dream, a monolithic tale where heroes flourished, and their personal victories valorized the country's stature.[128] Engelhardt's analysis provides decisive historical evidence to the notion that heroes are somehow a part of the American experience of self-identification.[129] While his project exemplified the decline of the American hero post-Cold War, Engelhardt's work shows that heroes embody the American self-concept.[130]

Honoring heroes appears to be an inherent aspect of American patriotism. Dixon Wecter argues: "The earth upon which our feet are planted, from which we draw our livelihood, becomes an over-soul, the greatest hero of our national loyalties."[131] However, over

124. Orrin E. Klapp, *The Creation of Popular Heroes*, 54 AM. J. SOCIO. 135, 136 (1948).
125. Meadows, *supra* note 122, at 239.
126. *Id.* at 245, 247.
127. *Id.* at 239.
128. TOM ENGELHARDT, THE END OF VICTORY CULTURE: COLD WAR AMERICA AND THE DISILLUSIONING OF A GENERATION 179–80 (1995).
129. William Graebner, *"The Man in the Water": The Politics of the American Hero, 1970–1985,* 75 HISTORIAN 517, 520 (2013).
130. *Id.*
131. DIXON WECTER, THE HERO IN AMERICA: A CHRONICLE OF HERO-WORSHIP 2 (1972).

time, and with an influx of immigration from various nations, Americans' ancient roots are not running as deep as they previously did. Railroads and increased transportation drew people to larger cities, diluting the deep loyalties of the past.[132]

Because of the country's sheer size and diversity, Wecter reasons that patriotism toward the land is less tenable in the New World than it was in the Old, and he explains how Americans must instead center our national affection around collective symbols:

> [T]he Flag, the Declaration of Independence, the Constitution, and the touchstone of our heroes—are more precious than such institutions are in the Old Word. They nourish our sense of national continuity. . . . With a faith not untouched by pathos, we accept its framers, as Thomas Jefferson described them, as "demigods," and their work without flaw.
>
> . . .
>
> But after reviewing these symbols of government, one must not forget an equally vital force in building our concept of what is "American." It comes from the voices of our heroes. . . . In a sense they have ceased to be persons, and have become institutions.[133]

Consequently, heroes in America become prototypes or symbols of national unity and national identity precisely because of the size and diversity of the population. This typification of a person is not unique to the American experience as a psychological phenomenon. Instead, as Meadows contends, it is based on a profound psychological need to see yourself reflected in your identity's prototype.[134]

IV. HEROIZATION OF THE PRESIDENT IS A NATURAL CONSEQUENCE OF THE MADISONIAN SYMPATHY BETWEEN RULERS AND RULED

Stories, speeches, and written language provide critical media through which heroes become immortalized.[135] The process of heroization, already nascent in the early American attempts to tie

132. *Id.*
133. *Id.* at 3.
134. Meadows, *supra* note 122, at 244.
135. *See* WECTER, *supra* note 131, at 3.

themselves to institutions rather than the land,[136] grew and evolved within the Madisonian psychological framework of sympathy between ruler and ruled. Heroization is not limited to great figures of the past; prominent, living governmental figures like the President and other national figureheads can experience heroization.

In America, presidential heroization began with the Founding Fathers.[137] The mystique surrounding the President arose in tandem with the country's birth. Historian Marcus Cunliffe notes that Washington's influence was so strong that babies were named after him as early as 1775, and people paid to see his wax effigy while he was still President.[138] Admirers saw him as "godlike Washington," while critics grumbled about his "demigod" status.[139] This hero worship extended beyond Washington as well. Clinton Rossiter, an American political scientist, explains that Americans need myths and heroes, as evident by their reverence for six Presidents: Washington, Jefferson, Jackson, Lincoln, Theodore Roosevelt, and Wilson—each of whom embody cherished American virtues and dreams.[140] American philosopher Michael Novak explains that the President's power can inspire or alienate citizens depending on their alignment with his ideas.[141] Novak argues that the President embodies national aspirations, making abstract ideals tangible.[142] Thus, the President is a living representation of the nation's history and meaning.[143]

Ideas are incarnated and embodied due to profound psychological forces. This Article contends that the Madisonian community of interest between ruler and ruled, based on accurate human cognitive processes and designed to prevent tyranny, in combination with the American propensity toward heroization,

136. *See id.* at 2–3.

137. *See generally* MARCUS CUNLIFFE, GEORGE WASHINGTON: MAN AND MONUMENT (1958) (discussing the heroization of George Washington).

138. *Id.* at 6.

139. *Id.*

140. Michael Novak, *President of All the People*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 337, 337–38 (2002).

141. *Id.* at 340.

142. *See id.*

143. *Id.* at 342; *see also* Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 888 n.209 (1996) ("[I]t is part of the symbolism of the office that [presidents] are singularly responsible for the nation's well-being.") (quoting BARBARA HINCKLEY, *supra* note 17, at 2).

resulted in the formation of a president who not only executed the laws but became himself a symbol of the nation. Once the president's office achieved this unique status due to the Madisonian framework, it became easy for presidents to overstep their constitutional limits precisely because they had popular support or created it for themselves. By stirring popular sympathy toward their cause, presidents could then gain legitimacy for their actions. The community of interest and the propensity toward heroization worked hand in hand to expand executive power. The following Part explores two historical examples where presidents made decisions by executive order, an important mechanism for executive expansion.

V. TWO CASE STUDIES OF EXECUTIVE ORDERS HIGHLIGHTING THIS PHENOMENON

This Part presents two historical examples of presidents governing through executive order. The Emancipation Proclamation and the Deferred Action for Childhood Arrivals show how the community of interest and presidential heroization expanded presidential power.

A. The Emancipation Proclamation

On September 22, 1862, at the peak of the Civil War, President Abraham Lincoln issued Proclamation 95, the executive order now known as the Emancipation Proclamation.[144] Lincoln's order sought to immediately alter the legal status of over three million enslaved African Americans in Confederate states.[145] Brian Dirck writes that "[t]he Emancipation Proclamation was an executive order, itself a rather unusual thing in those days."[146] In fact, Lincoln himself was not entirely confident in its legality. In *Oregon v. Mitchell*, Justice Brennan notes that, "even President Lincoln doubted whether his Emancipation Proclamation would be operative when the war had ended and his special war powers had

144. *Emancipation Proclamation*, HISTORYMAPS (Feb. 10, 2023), https://history-maps.com/story/History-of-the-United-States/event/Emancipation-Proclamation.

145. *Id.*

146. BRIAN R. DIRCK, THE EXECUTIVE BRANCH OF FEDERAL GOVERNMENT: PEOPLE, PROCESS, AND POLITICS 102 (2007).

expired."[147] Nevertheless, Lincoln carefully proceeded, believing that it was the best course of action to maintain the Union.

According to Paul Finkleman, "[f]rom the moment the [civil] war began, Lincoln faced demands for emancipation. Abolitionists and antislavery Republicans wanted Lincoln to make the conflict a war against slavery."[148] Despite this, Lincoln still needed political support; while most Northerners opposed slavery, few were willing to accept a protracted fight against it.[149] Lincoln understood that he would have to shape the political climate to make emancipation an acceptable goal, so he relied on early military victories to rally support.[150] In the summer of 1862, Lincoln began "laying the groundwork for public support and constitutional legitimacy [of emancipation] on the basis of military necessity."[151] A skilled lawyer, he did not reveal his strategy immediately, as he wanted to prepare the American public gradually.[152] While Lincoln did not boldly assert that he had the constitutional power to end slavery, "he made it unmistakably clear that if such power existed," he was willing to use it.[153]

Acknowledging that emancipation must happen with the country's support,[154] Lincoln generated the Madisonian sympathy by emphasizing the importance of the Civil War to maintain the country's unity. After the major Northern victory at the Battle at Antietam, Lincoln argued that emancipation was the natural next course of action, ultimately allowing him to move forward with the Emancipation Proclamation.[155] Thus, Lincoln had garnered the necessary public support to move forward with the Proclamation on September 22, 1862.[156] By linking the President and Commander-in-Chief roles through military victory, Lincoln initiated his own heroization process. The public support for

147. Oregon v. Mitchell, 400 U.S. 112, 253 (1970); *see also* Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 351 (2008) ("[I]n 1863 Lincoln assumed that there would be a legal challenge to the Proclamation, and he wrote it with that prospect in mind. Thus he made it as narrowly focused and as constitutionally solid as possible.").

148. Finkelman, *supra* note 147, at 358.

149. *Id.* at 360.

150. *Id.* at 362.

151. *Id.* at 378.

152. *Id.*

153. *Id.*

154. *Id.* at 384.

155. *Id.* at 385.

156. *Id.*

preserving the Union and his military heroization gave Lincoln the political raw materials from which he could use to issue the Proclamation.

B. President Obama's Executive Action on Deferred Action for Childhood Arrivals

While the next example occurred almost 150 years after the Emancipation Proclamation, it shows the president functioning within the same psychological mechanisms of sympathy and heroization. In June 2012, President Obama signed the Deferred Action for Childhood Arrivals ("DACA"), an immigration policy that created protections for some children who entered the country without legal documentation.[157] Following DACA, immigration advocates called on Obama to expand deferred action but, like Lincoln with ending slavery, Obama was initially reluctant to institute massive immigration reform too quickly and risk losing popular support.[158] For example, in January 2013, President Obama was asked if he could help an "undocumented mother of three" children who were citizens and do for her what "he did for the dreamers."[159] He replied, "we can't simply ignore the law."[160] In February of that year, he added, "[m]y job is to execute laws that are passed . . . [and] we have certain obligations to enforce the laws that are in place."[161] These statements are significant because "[w]hen the President speaks for the nation, he speaks with one voice as the 'sole organ' of the United States government."[162] Josh Blackman's statement about the President being the sole organ of the United States government gives the first piece of evidence in this example of the psychological phenomena discussed previously.[163] Moreover, scholars like Blackman argued that it is

157. Fernie Ortiz, *Obama-Era DACA Policy Turns 12*, FOX40 (June 17, 2024, 8:30 AM), https://fox40.com/news/obama-era-daca-policy-turns-12/.

158. Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 290 (2016).

159. *Id.* at 291 (quoting *Obama Tells Telemundo He Hopes for Immigration Overhaul Within 6 Months*, NBC LATINO (Jan. 30, 2013, 10:26 PM), http://nbclatino.com/2013/01/30/obama-tells-telemundo-he-hopes-for-immigration-overhaul-within-6-months/ [https://perma.cc/L2NQ-QWX9]).

160. *Id.*

161. *Id.* (quoting Robert Farley, *Obama's Immigration Amnesia,* FACTCHECK.ORG (Nov. 18, 2014), http://www.factcheck.org/2014/11/obamas-immigration-amnesia).

162. *Id.* at 292 (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936)).

163. *See supra* notes 103–34 and accompanying text.

likely that President Obama's statements both assuaged Congress that he was not planning on executive action, and rallied popular support around him for further immigration reform that was to follow.[164]

By June 2013, the U.S. Senate passed the Border Security, Economic Opportunity, and Immigration Act.[165] The Bill was set to be voted on by the House of Representatives in June 2014.[166] However, in a seemingly insignificant turn of events, "on June 10, 2014 . . . House Majority Leader Eric Cantor (R-VA) was defeated in his primary by the relatively unknown Dave Brat."[167] This defeat likely resulted in the end of the "Gang of Eight bill," which was a bipartisan bill that sought to give a path to citizenship for undocumented immigrants.[168] And in fact, after Cantor's defeat, the House of Representatives announced that it would not bring the bill to vote.[169] In a Rose Garden speech, the President assured the American people that he would "fix as much of our immigration system as I can on my own, without Congress."[170] He continued, "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing."[171] He added that "as long as [Congress] insist[s] on [obstruction], I'll keep taking actions on my own. . . . I'll do my job."[172] Obama reasoned that taking unilateral action was consonant with his constitutional duty and not an attempt at presidential overreach.

As David Pozen writes, "many of the most pointed ways in which Congress and the President challenge one another can plausibly and profitably be modeled as self-help rather than self-aggrandizement, as efforts to enforce constitutional settlements

164. *See* Blackman, *supra* note 157, at 292, 303–04.
165. S. 744, 113th Cong. (2013); *see also* Blackman, *supra* note 157, at 279.
166. Blackman, *supra* note 157, at 280.
167. *Id.*
168. *Id.* (citing Aaron Blake, *Make No Mistake: Immigration Reform Hurt Eric Cantor,* WASH. POST (June 11, 2014, 11:56 AM), https://www.washingtonpost.com/news/the-fix/wp/2014/06/11/yes-immigration-reform-hurt-eric-cantor/).
169. *Id.* at 298 (citing *Transcript: President Obama's June 30 Remarks on Immigration*, WASH. POST (June 30, 2014, 4:06 PM), https://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-immigration/2014/06/30/b3546b4e-0085-11e4-b8ff-89afd3fad6bd_story.html).
170. *Id.* at 299.
171. *Id.*
172. *Id.* (quoting *Weekly Address: Focusing on the Economic Priorities for the Middle Class Nationwide*, THE WHITE HOUSE (June 28, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/06/28/weekly-address-focusing-economic-priorities-middle-class-nationwide).

rather than to circumvent them."[173] Indeed, President Obama's executive action on immigration was explained to the public as a reasonable solution to congressional stalemate.[174] Consequently, "[f]our months after Representative Cantor's defeat, and two weeks after the Republicans gained seats in the midterm election, President Obama announced his new executive action on immigration."[175]

The President viewed "the current levels of . . . [congressional] intransigence [as] sufficiently problematic to trigger a conditional self-help power"[176]—"self-help" because Congress failed to act due to partisan gridlock.[177] In other words, because Congress was intransigent, President Obama presented his executive action to the people as a solution to a serious problem faced by the nation. In so doing, he made himself out to be both the representative of a view of the American immigration zeitgeist and its savior. In this example, we see once again the Madisonian community of interest and American heroization coalesce in a President who saw his role as someone the country needed to sweep in to solve a national crisis when Congress had the constitutional power to act but chose not to.

VI. PROPOSED SOLUTION: A RETURN TO THE LOCAL COMMUNITY

If presidential expansion arose from the Madisonian system of government as a psychological inevitability, then any attempt to curtail it by law or policy will likely fail. This Article has shown thus far that national expansion leads to the creation of human prototypes who represent the entire nation, sharing sympathy with citizens and acting as heroes, at times seemingly in their own best interests. If expansion led to an imbalance of power, this Article proposes that the solution to this problem is psychological contraction.

Alexander Hamilton observed that human affections weaken with distance.[178] Just as people are more attached to their family

173. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 8 (2014).
174. Blackman, *supra* note 157, at 299.
175. *Id.* at 280.
176. *Id.* at 299 (quoting Pozen, *supra* note 172, at 79 n.345).
177. *Id.*
178. THE FEDERALIST NO. 17, *supra* note 16, at 81 (Alexander Hamilton).

than their neighborhood, and to their neighborhood more than the community at large, they would likely favor their state governments over the federal government.[179] This tendency could only be countered by a superior administration at the national level—one that harnesses the people's sympathies and their tendency to form heroes who embody their identity and unify their diversity.

Scholars like Skorburg observe that "[t]he main idea is that there are varying degrees of functional integration between agents and artifacts. The deeper the functional integration is along these various dimensions, the stronger the case for positing an extended coupled system."[180] The level of integration depends on the proximity of people to each other. Thus, reigning in executive expansion requires a shift in psychology to return legal, political, and cultural attention back toward the local community—a restructuring to unify Americans according to principles, not heroic ideals. Suppose I feel connected with and invested in my local community. In that case, I find the unique human need for self-extension, or sympathy, within it, and in so doing, feel less of an attachment or need for a unifying national figure. This results in a shift of heroization away from living governmental figures toward historical ones.

To be sure, the federal government plays an essential role in preserving the Union. However, as James Ducayet argues, in a large country, the ties between the rulers and the ruled are weakened, since "rulers . . . [are] not as familiar with the unique concerns and problems of their constituents," which makes it more difficult to supervise leaders and could lead to increased corruption and diminished confidence in government.[181] Ducayet explains that Publius's vision of two governments would force state and federal leaders to "compete for the affections of the people," both in the quality of governance and the "psychological realm of interests and passions."[182]

Returning to the local community as the psychological organizing force can re-establish people's community of interest with those closest to them. Contracting the community of interest

179. *Id.*
180. Skorburg, *supra* note 66, at 2335.
181. James W. Ducayet, *Publius and Federalism: On the Use and Abuse of* The Federalist *in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821, 860 (1993).
182. *Id.* at 865.

to the neighborhood, the city, and the State, reduces the need for a national hero to sweep in and save the nation. In other words, Americans can rein in the heroized executive by tying themselves more to their local needs and interests. Doing so reflects the psychological principle Publius envisioned, that those closest to us both echo and influence how we think and feel. Moreover, such a change would define national identity not around the person of the president but around the ideal that we, the People, can indeed strive to form a more perfect Union.[183]

VII. CONCLUSION

Presidential expansion occurs in a growing nation when the Madisonian psycho-political framework joins the American propensity toward heroization. Rulers and ruled must share the same sentiments and interests to preserve liberty. In this way, a ruler will never act against the best interest of the people because, in so doing, he acts against his own best interest as well due to the community of interest between ruler and ruled. Madison's framework establishes that the sentiment of sympathy is guaranteed by the careful balance between virtue and passion crystallized in the constitutional institutions that separate powers between branches of government.

Madison could not anticipate how sympathy would operate as the country expanded. Indeed, as the size of the country increased, interests became more diverse and disparate. Expansion led the diverse sentiments of the people to focus on a single person, the president, who became a symbol of national unity. Thus, executive expansion had, as its driving engine, the implicit psychological support of the people, and as such, executive expansion was a psychological inevitability as a diverse group of people saw in the president a symbol of their identity. This process took root in the fertile ground that already existed in the natural tendency for Americans to heroize the great leaders of the Revolution. Sympathy and heroization worked together to create a president who sees it as his personal mission to both unite the country and save it. This Article concludes by emphasizing that the way to reset this is by returning to the localism that the federalist system envisioned so that the local community becomes the organizing

183. U.S. CONST. pmbl.

force of law and culture. As a result, citizenship would revolve around a shared American identity rather than a person who holds the executive office.