Experimentalist Equal Protection

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Elsewhere Garrett and Liebman have recounted that though James Madison is considered "the Father of the Constitution," his progeny disappointed him because it was defenseless against self-government's "mortal disease"—the oppression of minorities by local majorities—because the Framers rejected the radical structural approach to equal protection that Madison proposed. Nor did the framers of the Fourteenth Amendment's Equal Protection Clause and federal courts enforcing it adopt a solution Madison would have considered "effectual." This Article explores recent sub-constitutional innovations in governance and public administration that may finally bring the nation within reach of the constitutional polity Madison envisioned. To explain how Madisonian governance mechanisms can solve the problem of equal protection, the authors turn to the thinking of another home-grown practical philosopher who was ahead of his time, John Dewey. Dewey sets out what he calls an "experimentalist" problem-solving method for curing the equal protection ills Madison diagnosed. In two core civil rights contexts, public school reform and workplace discrimination, solutions both Madisonian and Deweyan already point the way to an "experimentalist equal protection" regime that remains well within our reach. Such experimentalism may not only open our rigid, tepidly enforced equal protection doctrine to an evolving, problem-solving approach, but in the process transform democratic institutions and community.

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I. INTRODUCTION

Two questions of constitutional theory preoccupied James Madison at the Constitutional Convention: What "vice" most threatens the stability and success of republics?[1] How can a constitution cure this republican "disease?" As we develop in a companion piece, Madison offered compelling answers to both questions.[2] Regrettably, however, the other conveners largely ignored his resulting proposals, leading Madison immediately after the Convention to privately disown the constitution we assume today was his beloved progeny.[3] Although the Civil War eventually forced the nation to heed Madison's first insight—that the Republic could not survive without an effective assurance of equal protection for minorities against local majority oppression— Madison's second great insight—that only structural devices can afford effectual equal protection—has been ignored to this day.

In this Article, however, we argue that recent sub-constitutional innovations in governance and public administration bring the nation within reach of the constitutional polity that Madison desired. To explain *how* Madisonian governance mechanisms can solve the problem of equal protection, an explanation Madison never convincingly provided his contemporaries, we rely on the thinking of another home-grown practical philosopher who was ahead of his time, John Dewey. Along the way, we cast aside some commonplace, but incomplete notions of what Dewey thought and what his brand of pragmatism means.[4] Unlike many recent and prominent revivalists of pragmatist rhetoric in

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1. Madison prepared a memorandum on the eve of the Convention examining the "Vices" of republican governments in general and in the thirteen states and the Confederation that he hoped the conveners would address. *See* James Madison, The Vices of the Political System of the United States (Apr. 1787), *in* 9 PAPERS OF JAMES MADISON 348 (Robert A. Rutland & William M.E. Rachal eds.) (1975). Madison attributed four "vices" or "mortal diseases" to "the Legislative sovereignties of the States"—the "multiplicity," "mutability," "injustice," and "impotence" of their laws. *Id.* at 353-57; Letter from James Madison to Edmund Randolph (Apr. 8, 1787), *in* 9 PAPERS OF JAMES MADISON 370; Letter from James Madison to George Washington (Mar. 16, 1787), *in* 9 PAPERS OF JAMES MADISON 384; James Madison's Speech at the Convention (June 8, 1787), *in* 10 PAPERS OF JAMES MADISON 41 (Robert A. Rutland et al. eds.) (1977). The third vice then became the one that Madison placed at the core of his most famous Numbers 10 and 51 in *The Federalist*, namely, the mortal diseases bred of faction. *See* JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 51 (1990) (stating that it was Madison's "overriding conviction that factious majorities within the states posed the greater danger to liberty" under the Articles). *See also* James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 Colum. L. Rev. 837, at Parts II-III (2004) [hereinafter *Madisonian Equal Protection*].

2. *See Madisonian Equal Protection*, *supra* note 1, at Parts II-III and Subsection IV.C.3.

3. Madison expressed his disappointment in a letter to Thomas Jefferson written during the last few days of the Convention: "I hazard an opinion," he wrote, "that the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts agst the state governments." Letter to Thomas Jefferson (Sept. 6, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 163-64. *See Madisonian Equal Protection*, *supra* note 1, at 889 n.235 and accompanying text.

4. *See* discussion *infra* notes 54-57 discussing what from our perspective appears as a superficial treatment of Dewey by many recent scholars.

the legal academy who use pragmatism as a synonym for hands-off inaction in the face of perceived impracticalities, we take Dewey's pragmatism to set out not just a generally anti-formalist and realistic creed, but also an experimentalist method that can be successfully and comprehensively applied to modern administrative bodies to actively redress the fundamental equal protection problems both Madison and Dewey identified. The result may provide a means for overcoming disappointments of past struggles to accomplish the equal protection Madison imagined, and in doing so surpassing his expectations by transforming democratic institutions through participatory community.

All of this begins with a recounting of Madison's theory of an "interior" or structural equal protection, and second, his prescient criticisms of our current "exterior" judicially enforced equal protection scheme. In the third Part, we compare Madison's equal protection approach to a growing body of writing on emerging "experimentalist" or public problem-solving administrative structures, which may better embody a Madisonian approach. In Part IV, we look to the experimentalist method of John Dewey for the pragmatic explanation Madison himself never managed to provide—at least not to the satisfaction of the other Framers—of how governance mechanics can inculcate a disposition towards equal protection and towards interdepartmental cooperation. Part V then describes the diverse functioning of modern experimentalist administrative innovations in a host of contexts ranging from upgrading conditions in prisons and mental institutions to effective habitat conservation and watershed management, and also how they instantiate Deweyan experimentalism in ways his theorizing seventy years before, as the modern administrative state was just taking shape, had never quite imagined. Part VI uncovers the "proto-experimentalist" in Madison by showing how experimentalism resonates with his equal protection approach. Part VII then completes the circle, describing, respectively, the Madisonian equal protection afforded by modern experimentalist mechanisms for reforming public school reform and discouraging employment discrimination, with each suggesting practical, desirable, and effective solutions for our Constitution that our "external" judicially enforced scheme cannot provide. Part VIII concludes by describing how experimentalist regimes better satisfy our past equal protection commitments and also offer the hope that in the future we can rethink, adapt, and improve equal protection norms through ongoing problem-solving and, in doing so, redefine democratic institutions and community.

II. MADISONIAN, "INTERIOR" EQUAL PROTECTION

What "vice" most threatens the stability and success of republics? Madison's answer was "injustice," meaning what we today call the denial of equal protection. Republics effectively protect individual liberty, the "first

object of government," both from other individuals and from oppressive government. But in doing so, they invite "oppression" by majority "factions" against "minorities."[5] Such "tyranny" is especially likely in smaller political units—including in particular the American states and their municipalities.[6] Victims of tyranny may be members of any group that chronically finds itself in the minority in those units, including, by Madison's reckoning, groups defined religiously, racially, occupationally, and geographically.[7]

How then can republican constitutions cure this republican "disease?" Here, Madison's answer was constitutional mechanics, that is, structuring

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5. As Madison vividly put it, "Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency." THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter, ed., 1961). In this same passage in *The Federalist No. 10*, Madison famously called faction "the mortal disease[] under which popular governments have everywhere perished." *Id.* at 77; see *Madisonian Equal Protection*, *supra* note 1, at Section I.B.

6. Madison wrote that in a "small . . . sphere oppressive combinations may be too easily formed against the weaker party." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 214; *see also* THE FEDERALIST NO. 10, *supra* note 5, at 83 (James Madison) ("the smaller the compass within which [individuals] are placed, the more easily will they concert and execute their plans of oppression."). Before and during the Convention, Madison was preoccupied with factional injustice in the States: Among those "evils which viciate the political system of the U. S.," he wrote, the most "alarming" is the "Injustice of the Laws of the States." James Madison, The Vices of the Political System of the United States (Apr. 1787), in 9 PAPERS OF JAMES MADISON, *supra* note 1, at 354. Cataloguing the States' "[i]nterferences" with "the security of private rights, and [with] the steady dispensation of government," Madison rhetorically asked the Convention whether it "[w]as . . . to be supposed that republican liberty could long exist under the abuses of it practiced in some of the States?" Speech of James Madison at the Convention (June 6, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 32. *See Madisonian Equal Protection*, *supra* note 1, at Subsection III.B.2.

7. At the Convention, Madison identified race as perhaps the most virulent source of faction and the oppression it invites: "We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man." Speech of James Madison at the Constitutional Convention (June 6, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 33; *see Madisonian Equal Protection*, *supra* note 1, at 866 n.131, 867 nn.138-40, 868 nn.141-42 and accompanying text (discussing other evidence that Madison recognized race as an important source of faction). As to occupational preferences, Madison objected to state legislation taking a position in favor of one and against another occupation, because it interfered with "the free choice of occupations by the people." James Madison, Essay on "Republican Distribution of Citizens" *for THE NATIONAL GAZETTE* (Mar. 5, 1792), *in* 14 PAPERS OF JAMES MADISON 246 (Robert A. Rutland & Thomas Mason eds.) (1983). From the beginning of his career in politics, Madison was a strong advocate of religious toleration; as a delegate to Virginia's Constitutional Convention in 1776, he secured the replacement of a provision in the proposed Virginia Declaration of Rights stating that "all men should enjoy the fullest Toleration in the *Exercise* of Religion, according to the Dictates of Conscience" with a stronger provision declaring that "all men are *equally* entitled to the free exercise of religion." RAKOVE, *supra* note 1, at 13. As for geographic preferences, Madison was troubled on the eve of the Convention by a proposal to allow Spain (then in possession of New Orleans) to close off the Mississippi to commerce for five years in return for trade concessions, arguing that the burden this proposal placed on the citizens of the "ultramontane" districts was so obviously great, and the benefits to the eastern districts so obviously modest, that its supporters could have reached their position only illegitimately or "unjustly"—by utterly ignoring the interests of the western districts. Letter from James Madison to James Monroe (Oct. 5, 1786), *in* 9 PAPERS OF JAMES MADISON, *supra* note 1, at 140. *See Madisonian Equal Protection*, *supra* note 1, at Subsection II.B.2 (discussing Madison's treatment of each type of discrimination).

government to prevent unjust decisions from being made in the first instance. In his view, the "interior" operation of government institutions had to habituate public officials to think and to channel their behavior in virtuous, public-minded directions. Such "impartial" decision making affords equal protection where all interests—minority as well as majority—are taken into account.[8] Madisonian constitutional mechanics may be considered from two perspectives: that of public officials and "the people" whose virtue is being induced and habituated, and that of the state and national institutions whose interactions are structured to do that work while enabling both sets of institutions to function effectively and justly.

From a human perspective, Madison's constitutional objective was to "situate" individuals within institutions so that it was in their immediate and "ambitious" interest to consider the interests of other persons and factions. Through the exercise of competing, overlapping powers, these individuals constrain others in adjacent institutions to behave in the same, "impartial" manner.[9] In turn, the constancy of this "ethical situation,"[10] the repeated practice of behaving virtuously, and the recognition over the long run of the beneficial effects of doing so, disposes officials to virtue, even though they

8. Madison opposed factional influences on public action, believing that they generated outcomes contrary to the public good, meaning that they were "adverse" not only "to the rights of other citizens" (i.e., "injustice"), but also "to the permanent and aggregate interests of the community." THE FEDERALIST NO. 10, *supra* note 5, at 78 (James Madison). As we discuss in *Madisonian Equal Protection*, *supra* note 1, at Subsection II.B.2, Madison's definition of the public good by reference to the community's "aggregate interests" implies the view that, in ascertaining the public good, all the interests that the members of the community pursue either singly or in groups ought to count for something. Madison's view anticipates John Hart Ely's conception of public action undertaken according to the principle of "equal concern and respect" in the sense that all interests count. JOHN HART ELY, DEMOCRACY AND DISTRUST 82 (1980) (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (rev. ed. 1978)).

9. THE FEDERALIST NO. 51, *supra* note 5, at 321-22 (James Madison); *see Madisonian Equal Protection*, *supra* note 1, at Section III.A.

10. Here, as in prior writings, we borrow Drucilla Cornell's concept of "ethical situations." Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 294 (1985); *see* James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1608-14 (1990) (claiming that certain "all-out" school desegregation remedies worked effectively by ethically situating citizens in what amounts to John Rawls' "original position," by assuring that the effects of the citizens' political actions could not be aimed at privileging their own children or harming previously discriminated-against classes of children and instead had to be directed to the good of all; although courts facilitate the remedy, the remedy itself operates structurally by placing political actors in situations in which it is in their self-interest to act accountably to citizens across factional lines). For similar usage by *The Federalist Papers*, see THE FEDERALIST NO. 10, *supra* note 5, at 81 (James Madison) ("the majority, having such coexistent passion or interest, must be rendered by their number and local situation, unable to concert and carry into effect schemes of oppression."); THE FEDERALIST NO. 72 (newspaper version); THE FEDERALIST NO. 73, *supra* note 5, at 443 (Alexander Hamilton) (stating that the separation of powers functions in part according to the principle that "[t]he oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation."). For discussion of the recognition by Madison scholars of the importance of constitutionally structured "situations," see *Madisonian Equal Protection*, *supra* note 1, at 855 nn.78-79 and accompanying text and Section III.A.

were not initially so inclined.[11] Finally, the example provided by officials who undergo this process may inculcate similar actions and dispositions in the people whom the officials represent.[12] Artificially constructing these virtue-creating "situations . . . incite[s] office-holders incidentally, but voluntarily, to conform to the norms of their office" and may encourage *people* to adopt the norms of citizenship in their public lives.[13] The imposition of these "ethical situations" in turn may help make an economized republican fraternity possible because it results from and reinforces each actor's recognition of her equality with all others based on a shared interest in preserving the faculties of choice.[14]

From an institutional perspective, the Madisonian desideratum is a cooperative federalism—or in Robert Cover and Alex Aleinikoff's phrase a "dialectical federalism"—with three attributes.[15] First, the constitutional structure assigns local legislators, who are more knowledgeable about local conditions and closer to "the people," the myriad workaday matters of public concern that are most of what concerns governments.[16] Second, the structure requires local officials constantly to provide the national government with information about the existence and range of possible responses to more

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11. Madison is known for his hope to design and empower the various branches and levels of government so that "[a]mbition [is] made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." THE FEDERALIST NO. 51, *supra* note 5, at 322 (James Madison). What is less frequently remarked is that Madison's purpose in proposing such mechanics was to turn representatives towards the public good. Madison gave a particularly detailed account of how the structuring of government activity can over time form virtuous habits in *The Federalist Papers No. 57*, which discusses the selection of members of the House. THE FEDERALIST NO. 57, *supra* note 5, at 352 (James Madison) (noting that "the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people"); *see also Madisonian Equal Protection*, *supra* note 1, at Section III.A.

12. *See* SAMUEL BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 358-59, 385-86 (1993); *Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4.

13. BEER, *supra* note 12, at 284-85 (noting that Madison did not trust "'parchment barriers,'" *i.e.*, "legal imperatives requiring conformity," and instead preferred to "use law to create situations which would incite office-holders incidentally, but voluntarily, to conform to the norms of their office"). *See id.* at 361 (discussing "the situation with which a republican constitution confronted the citizen exercising his right to suffrage"); DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 196 (1984) ("Just as *The Federalist* shows how the ambitious can be expected to rule better and more safely when placed in the situations which the structure of government create, it suggests similar benefits from the situation in which the people themselves are placed.").

14. In a critical passage in *The Federalist Papers No. 51*, Madison describes how justice requires that "the more powerful factions or parties be gradually induced . . . to wish for a government which will protect all parties, the weaker as well as the more powerful." THE FEDERALIST NO. 51, *supra* note 5, at 324-25 (James Madison). *See id.* at 325 (contending that "[i]n the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good . . . ."); *Madisonian Equal Protection*, *supra* note 1, at Section III.B.

15. *See* Robert Cover & Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

16. *See* THE FEDERALIST NO. 10, *supra* note 5, at 83 (James Madison) ("The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures."); *id.* (distinguishing the "great and national objects" of the national government from the "local circumstances and lesser interests" that prevail in the state legislatures); *see also* BEER, supra note 12, at 292-93.

momentous problems, and makes local officials available to administer the solutions to those problems that the national government adopts.[17] Finally, the arrangements give national officials a duty of continuous *umpireal* review of—but *not* command and control over—state legislation and administration.[18] This last attribute of Madisonian federalism is crucial to the first two. It helps inculcate local actors with the extended national government's impartiality and breadth of consideration while leaving local actors with day-to-day legislative and administrative responsibility and putting their information and experience at the disposal of the national government.[19]

Madison proposed two constitutional mechanisms for achieving these goals. The first mechanism made it into the Constitution, but the second was rejected by the other conveners. The half of Madison's positive program for structuring equal protection into the daily mechanics of government that he did manage to embed in the Constitution was "the extended republic of the United States." Through this virtue-inculcating mechanism, Madison sought to locate representatives of such a "great variety of interests, parties, and sects" together in a single national law-making body that "a coalition of a majority of the whole society [can] seldom take place on any other principles than those of justice and the general good."[20] Doing so would alleviate the "danger to a minor from the will of the major party" and, over time, make the interest-generalizing consideration of the common good a habit.[21]

Although this first part of Madison's solution was designed to dispose the *national* government towards equal protection, it did not affect the *states* where, in Madison's view, the far greater danger of majority oppression lay and where injustices had chronically occurred under the Articles of Confederation. In order to subject state legislators to a similar virtue-generating crucible, Madison proposed the ill-fated second half of his program: a "Power of the [National] Legislature to Negative State Law" in "all cases whatsoever."[22]

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17. Madison "foresaw legislators from across the country pooling their knowledge of their home state laws when drafting federal laws." BEER, *supra* note 12, at 306; *see, e.g.*, THE FEDERALIST NO. 44, *supra* note 5, at 287 (James Madison) (although "[t]he members of the federal government will have no agency in carrying the state constitutions into effect[]," "[t]he members and officers of the State governments, on the contrary will have an essential agency in giving effect to the federal Constitution"). Given Senators' and Representatives' access to "local knowledge of their respective districts," "considerable knowledge of [state] laws," and experience as members of state legislatures in the past or "[e]ven at the *very time*" they were serving in Congress, Madison expected Congress to rely upon "local information" and the "assistance of the State codes" in designing its own laws. THE FEDERALIST NO. 56, *supra* note 5, at 347-48 (James Madison).

18. As Madison predicted, "a double security arises to the rights of the people. The different governments will control each other, at the same time as each will be controlled by itself." THE FEDERALIST NO. 51 *supra* note 5, at 323 (James Madison); *see* BEER, *supra* note 12, at 302.

19. *See supra* notes 16-17 and accompanying text; *see also Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4.

20. THE FEDERALIST NO. 51, *supra* note 5, at 325 (James Madison).

21. *Id. See Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.3.

22. Madison's June 8, 1787 Speech at the Convention, *in* 10 PAPERS OF JAMES MADISON, *supra*

Under this proposal, state legislation could not have gone permanently into effect until Congress was given the chance to review and veto it based on the same sorts of considerations that Congress would apply to proposed national legislation. In typical Madisonian fashion, the "happy effect" of this device was not mainly supposed to arise *after* the fact, when Congress exercised the negative, but before the fact when state legislators imagined themselves in the same interest-generalizing "situation" as national legislators in order to predict how their proposals would fare under national review.[23] Along with feedback from state officials charged with collecting federal taxes and administering other federal initiatives, the national negative was designed to make "local information" and the "assistance of the State codes" routinely available to the national government and to enable and encourage states to follow the results of each others' experiments, including whether they passed congressional muster.[24]

The Framers adopted Madison's "extended republic" mechanism for structuring equal protection into the actions and deliberations of the national Congress, and Madison initially convinced his Virginia colleagues to include his national negative in the Virginia Plan that otherwise was the blueprint for the Constitution. The Framers then, however, spent the Convention chipping away at, and finally outright rejecting, Madison's increasingly desperate efforts to resuscitate the national veto. On one view, the conveners rejected the national negative because they did not understand Madison's sophisticated ideas about the uses of governance structure not only to constrain public officials but also to habituate them to "equal protection" virtue, and not only to check the states and the federal government by pitting each against the other but also to induce a cooperative federalism in which states and the national government would continually interact with and learn from each other. Professor Kramer has recently made a convincing case, though, for the other conveners' incomprehension of most of what Madison was driving at during the Convention.[25]

Whether or not the other Framers understood Madison's argument, they clearly did not believe that the national negative would work as he hoped. In part, Madison's arguments may not have been particularly credible. He did

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note 1, at 41. The "*all* cases whatsoever" language (emphasis added) was Madison's frequent description of the reach of the power to negative state laws that he wanted Congress to have. *See, e.g.*, Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF JAMES MADISON, *supra* note 1, at 383; *see also* Charles Pinckney's June 8, 1787 Motion at the Convention, *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 41 (proposing, in motion made on Madison's behalf, "that the National Legislature shd. have authority to negative all Laws which they shd. Judge to be improper").

23. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 PAPERS OF JAMES MADISON, *supra* note 1, at 318. See *Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.3.

24. THE FEDERALIST NO. 56, *supra* note 5, at 347-48 (James Madison); *see Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4.

25. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 647-71 (1999).

sometimes seem to rely more on faith or a belief in constitutional magic as a basis for predicting that the federal government would exercise its veto cooperatively, not coercively, and for predicting that state officials would imbibe the broadening influences of the "extended republic."[26] Although he repeatedly admonished his colleagues that the national veto was the most "necessary" component of any new constitution,[27] they just as persistently expressed their unwillingness to delay state action and paralyze federal business while congressional review of local legislation was supposed to take place and their distaste for the hammer they believed the veto would have given Congress over the States.[28]

And here again, there was much force to the conveners' concerns. Undoubtedly, Madison's proposal was impractical—a problem that would only have grown as the number of states and volume of state legislation increased. Extending the negative beyond the "legislative acts of the States," to which Madison's national negative was limited, so that it reached state administrative regulations and policies, as almost certainly would have been necessary to allow it to serve its purpose, would have pushed matters into the realm of the impossible and still left much government action by "street-level bureaucrats" beyond the veto's reach. Nor, whatever one thinks of "Our Federalism," is it likely that a constitution with the negative in it would have survived the ratification process, nor be palatable today, notwithstanding the nation's acceptance of an ever-widening role for the national government.

There is, in addition, very good reason to believe that the negative would have failed its purpose, even if it could have worked smoothly, while reaching most or all state action. This is largely because Congress—the engine of Madison's extended republic—has turned out to be more susceptible to factionalism and less of a model of broadly focused law-making in the common interest than had been hoped.[29] As Madison himself feared would be the case,

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26. For example, Madison downplayed his proposal for a negative as not coercive, but instead, "at once the most mild & certain means of preserving the harmony of the System." James Madison, Speech at the Constitutional Convention (July 17, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 102-03; *see Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4.

27. James Madison's Speech at the Convention (June 8, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 41.

28. For a description of the concerns of the conveners, s*ee Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.5. Gerry and Bedford were two of the strongest critics as to the negative's practicality and the power it gave the federal government over the states. For example, "Bedford asked, how the negative in practice could be used—would states upon enactment have to suspend all laws until they would be sent seven or eight hundred miles away, undergo deliberation of a faroff Congress? Would Congress have to then sit continually to undertake such review?" *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 167 (Madison's notes, June 8, 1787) (Max Farrand ed., rev. ed. 1937). Gerry feared that the negative "may enslave the states" and "will be abused," *Id.* at 165-66; Bedford added, "[w]ill not these large States crush the small ones wherever they stand in the way of their ambitious or interests views." *Id.* at 167.

29. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535-37, 539-40 (1986) (noting the link between

particularly in the absence of the national veto and a second structural protection he advocated but that the conveners rejected, a Council of Revision to prevent unjust laws from being passed by Congress,[30] "[a] local spirit [has] infallibly prevail[ed] much more in the members of Congress than a national spirit [has] prevail[ed] in the legislatures of the particular states," and "the members" of Congress have "too frequently displayed the character rather of partisans of their respective States than of impartial guardians of a common interest."[31] Recently, the Supreme Court has made matters worse by doubly truncating the extended republic—narrowing the range of issues over which Congress may exercise preemptive or joint responsibility vis-a-vis the States, and forbidding Congress to require state officials to administer federal programs.[32] In the light of experience, there is little assurance that Congress's

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equal protection and Madison's "extended republic" but concluding that it took the Fourteenth Amendment to achieve the needed protection); ELY, *supra* note 8, at 79-87 (1980) (linking Madison's discussion of faction in *The Federalist Papers* to equal protection, but assuming that Madison expected the "extended republic" by itself to solve the problem and implying Madison's lack of foresight with the comment that "it didn't take long to learn that from the standpoint of protecting minorities [the Constitution's safeguards were] not enough," *id.* at 80-81; arguing that the Equal Protection Clause as interpreted by the Warren Court *was* "enough"). Madison was clearly aware of the possibility of factional strife and control in the national legislature. *See* THE FEDERALIST NO. 46, *supra* note 5, at 296 (James Madison) ("A local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular States."). As happened with the national veto, however, his proposed solution to the problem—a national council of legislative revision—was defeated at the Convention. *See Madisonian Equal Protection*, *supra* note 1, at 913 n.363, 922 n.409, 965, n.657.

30. Madison proposed in the Virginia Plan creation of a panel composed of the chief executive and a number of judges, empowered to overturn unwise congressional enactments unless Congress overturned the veto by a two-thirds vote, and his hope in particular was that it would moderate Congress's use of the negative and render it "more respectable." James Madison, Revisionary Power of the Executive and the Judiciary (June 4, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 25. Madison also argued his Council of Revision, modeled on New York's 1777 Constitution, would provide "an additional check" against "unwise [and] unjust legislation" at the national level, James Madison's Speech at the Convention (July 21, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 109; would "introduce Checks, which will destroy the measures of an interested majority; and was "not only necessary for [the nation's] own safety, but for the safety of a minority in Danger of oppression from an unjust and interested majority, James Madison's Speech at the Convention (June 4, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 25 (King's notes). Madison's No. 48 in *The Federalist Papers* describes Pennsylvania's appointment of a Council of Censors in 1783-84 which uncovered persistent constitutional violations. See discussion of the Council of Revision proposal in *Madisonian Equal Protection*, *supra* note 1, at 913 n.363, 922 n.409, 965 n.657.

31. THE FEDERALIST NO. 46, *supra* note 5, at 296-97; *see Madisonian Equal Protection*, *supra* note 1, at 963 nn.645-48.

32. In an anti-Madisonian fashion, the Court has (1) diminished Congress's capacity under Section 5 of the Fourteenth Amendment to "enforce, by appropriate legislation," the assurance that the states will afford persons the equal protection of the laws—in the process vastly broadening the scope of the states' Eleventh Amendment sovereign immunity from private lawsuits to enforce federal statutes barring discrimination and unfair practices by the States, *see, e.g.*, United States v. Morrison, 529 U.S. 598, 602, 619 (2000) (invalidating provisions of the Violence Against Women Act that authorized civil law suits against the States by females victimized by crimes as a result of the State's under-enforcement of their criminal laws, concluding that the provisions were an overbroad exercise of Congress' Section 5 power and thus an inadequate basis for abrogating the States' sovereign immunity); City of Boerne v. Flores, 521 U.S. 507, 526-29 (1997) (holding that Section 5 authorizes Congress to define remedies but not to determine "what constitutes a Constitutional violation," a power the Court assigned exclusively to itself); Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (holding that only legislation properly enacted

exercise of the veto would very consistently discipline state oppression of minorities, *or* that state legislators who emulated the actions and thought processes of our national representatives would often shed their parochial tendencies.

More perfectly realizing Madison's vision of equal protection does not, therefore, mean adopting his national veto as the twenty-ninth amendment to the United States Constitution. But neither, for Madison's own reasons to which we next turn, is the answer to rest on the laurels of the Radical Republican's Equal Protection Clause or the Warren and Burger Court's burst of equal protection enforcement during the 1960s and 1970s. Nor for that matter is the answer to be found in more forceful admonition of public officials to mind, and of courts to enforce, the existing Equal Protection Clause.[33]

III. INEFFECTUAL, "EXTERIOR" EQUAL PROTECTION

In energetically promoting his "interior" solution to the republican vice of majority oppression of minorities, Madison was equally adamant about how *not* to design government operations to solve the problem. What would not suffice were judicially enforced non-structural, or "exterior" admonitions to local government officials to afford minorities the equal protection of the law.[34] In Madison's view—developed in detail in our companion article—judicially policed "parchment barriers" by themselves are an "ineffectual" protection against "this dreadful class of evils," the abuse of minority rights in the States. Moreover, courts could never effectively bolster those barriers in large part because courts are too disconnected from the public and its problems.[35] As a result, Madison predicted, courts would be unwilling to intervene against, and

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pursuant to Section 5 overcomes a State's Eleventh Amendment immunity); (2) narrowed Congress's regulatory power under the Commerce Clause, delivering larger spheres of legislation into exclusive state control, *see Morrison*, 529 U.S. 598 ; *see also* United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating the Gun Free School Zones Act on the ground that it exceeded Article I Commerce Clause power); and (3) forbidden Congress to require the assistance of state and local officials in enforcing federal law, *see* Printz v United States, 521 U.S. 898, 935 (1997) (invalidating provisions of the Brady gun control law that required state and local governmental officials to assist in executing a federal statutory requirement of background checks for prospective buyers of firearms); New York v United States, 505 U.S. 144, 149 (1992) (invalidating "take-title" provision of the Low-Level Radioactive Waste Policy Act finding that it unconstitutionally compelled States to enact regulatory legislation). *See generally Madisonian Equal Protection*, *supra* note 1, at Part VI (discussing these and allied decisions).

33. *See infra* Part II.

34. *See* THE FEDERALIST NO. 51, *supra* note 5, at 320 (James Madison) (describing "exterior" constraints as "inadequate"); *Madisonian Equal Protection*, *supra* note 1, at Section III.A.

35. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 PAPERS OF JAMES MADISON 295, 297 (Robert A. Rutland et al. eds.) (1977) ("repeated violations of these parchment barriers have been committed by overbearing majorities in every State"); Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 163-64 ("not effectual"); *see Madisonian Equal Protection*, *supra* note 1, at Section III.A. Madison's reference to the "dreadful class of evils" besetting the nation is in a speech he delivered at the Convention. *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 318-19 (Madison's notes, June 19, 1787).

instead would be tempted to seek favor with, the States and their popular majorities. And even in rare moments when courts do side with minorities against popular majorities, they are inaccessible to many litigants; rely too much on "cloudy," "dim and doubtful" words on "parchment" for their own guidance and for inculcating virtue among tyrannically inclined majorities; and have only a weak capacity to enforce their judgments in the face of majoritarian resistance.[36]

The solution Madison rejected is of course the one the Constitution adopts. The first Constitution took some halting steps in this direction by attempting to list and ban the worst majoritarian excesses of the state governments under the Articles of Confederation: bills of attainder, ex post facto laws, denial of privileges and immunities to residents of other states, and the impairment of contracts either directly or by debasing the currency and undermining creditor rights through the coinage of money and issuance of bills of credit.[37] The second Constitution then tried to make the ban on unjust state action more general and comprehensive through the enactment of the Due Process, Privileges and Immunities, and Equal Protection Clauses of the Fourteenth Amendment.

Moreover, federal courts did attempt for a time during the Civil Rights era to serve as the neutral "intermediate institution" between majorities and minorities that Madison himself acknowledged might serve as a back-up, after-the-fact solution to the problem of republics in the absence of an "interior" solution like his national negative.[38] And at first, the courts succeeded

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36. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 PAPERS OF JAMES MADISON 295, 297 (referencing parchment barriers); THE FEDERALIST NO. 37, *supra* note 5, at 229 (concluding that the inaccuracy of words or phrases "unavoidabl[y]" increases as they are applied to more complex ideas); *see Madisonian Equal Protection*, *supra* note 1, at 936 nn.491-493 and accompanying text.

37. U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."); U.S. CONST. art. IV, § 2, cl. 1 ("The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."). These constraints targeted several of the abuses with which Madison charged state legislatures in his writings before the Convention. *See* James Madison, The Vices of the Political System of the United States (Apr. 1787), in 9 PAPERS OF JAMES MADISON, *supra* note 1, at 348 (discussing States' trespasses against each other and the rights of their own citizens by, for example, issuing paper money and impairing contracts between debtors and creditors). The dormant commerce clause also protects out-of-state economic interests against discriminatory or abusive regulation by local majority factions. *See* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (speech of Madison) (Max Farrand ed., rev. ed. 1937) (explaining that this protection afforded by the incipient constitution "grew out of the abuse of the power by the importing States in taxing the non-importing [States], and [was] intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government").

38. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288-1302 (1976); Colin Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Litigation*, 65 VA. L. REV. 43, 46 (1979); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Reform Litigation*, 93 HARV. L. REV. 465, 467-72 (1980); Owen Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 2-5 (1979); William Fletcher, *The*

brilliantly, ending such blatantly retrogressive tyrannies as rural southern apartheid and feudally operated prisons.[39] When, however, the courts faced more nuanced conditions embedded in complex, modern institutions, their ambitious decrees fell outside their areas of competence, enabling affected majorities to attack the courts' already fragile legitimacy.[40] In order to hold elected officials, powerful bureaucracies, and entire constituencies liable for serious violations, judges had to give "cloudy" constitutional provisions more breadth and solidity than had ever previously been recognized. To remedy the violations, inexpert judges had to devise broad affirmative injunctions with only a "dim and doubtful" connection to the violation and its demonstrable harms.[41] The "public interest" the decrees pursued lacked overt democratic validation and relied instead on expert opinions and "special masters." The mandated programs had to be implemented by recalcitrant administrators, or by willing but politically wary officials whose support could only be surreptitious.[42] To the limited extent that office-holders and "the people" were engaged in the process, they were antagonists and adversaries, not partners and objects of virtuous habituation.

The result was as Madison predicted. Office-holders and their powerful constituencies revolted. In response, politically undefended courts quickly declined to extend the logic of their decisions to adjacent contexts, interposed inflexible obstacles to access and relief for aggrieved minorities, and finally abandoned ameliorative doctrines and decrees altogether.[43] More recently, the

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Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 YALE L.J. 635, 695-97 (1982); *Madisonian Equal Protection*, *supra* note 1, at Section V.A.

39. *See* James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance And Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003-2004) [hereinafter Liebman & Sabel, *Public Laboratory*]; Charles F. Sabel & William Simon, *Destabilization Rights: How The New Public Law Succeeds*, 117 Harv. L. Rev. 1015, 1034-43. In regard to dramatic reduction of school segregation in the rural South see JACK GREENBERG, CRUSADERS IN THE COURTS 383-91 (1994).

40. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 78-79 (1995) (describing a dearth of evidence of progress toward the district court's goal of closing the achievement gap between white and black children following a decade of remedial orders costing billions of dollars); Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 196-201 (discussing federal courts' increasing reluctance to address the thornier questions desegregation presented when litigation moved from the rural South to urban areas, particularly in the North and West); ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 117-38, 153-61 (2003); Sabel & Simon, *supra* note 39, at 1017-19; *see also* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 3 (1987) (arguing that "the salvation of racial equality has eluded us again"); *Madisonian Equal Protection*, *supra* note 1, at Subsection V.B.1 and accompanying text; GERALD N. ROSENBERG, THE HOLLOW HOPE 9, 28 (1991) (describing how federal courts and the Supreme Court halted their efforts to combat discrimination, debunking the view that the Supreme Court and federal courts were instrumental in securing civil rights, and questioning whether courts are an effective means of securing change).

41. *See* Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 196-201; Sabel & Simon, *supra* note 39, at 1016-52.

42. For these and other criticism of the federal courts' use of structural remedies, see sources cited *supra* notes 39-40.

43. *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 362 (1996) (reversing prison order as "inordinately—indeed, wildly—intrusive"); Missouri v. Jenkins, 515 U.S. at 83-90 (condemning, as

Supreme Court has even resisted efforts by Congress and other instrumentalities of the extended republic to adopt and enforce their own, democratically validated, protections for local minorities against States. Instead, the modern Court has truncated Madisonian dialectical federalism by placing a number of assertedly "local" issues off limits to the national government and by forbidding the national government to require state officials to help administer federal programs.[44] In short, a system of judicially enforced admonitions usually cannot operate—and the system we have had since the Civil War typically has not operated—in an effective Madisonian fashion that places public actors in situations that inspire them to adopt and apply the norms of impartiality and equal concern.[45]

What, then, would more perfectly realized Madisonian equal protection require? In the remainder of this Article, we argue that, given recent innovations in federal-state administrative arrangements, matters may have not turned out as badly in the negative's absence as Madison feared, nor so much worse than might have been the case had his impractical and under-inclusive negative been adopted. On the contrary, emerging administrative structures

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vastly beyond the district court's remedial powers, a plan to desegregate the Kansas City schools by inducing white suburban children to transfer voluntarily into the city district); City of Los Angeles v. Lyons, 461 U.S. at 112 (urging "restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws"); Bell v. Wolfish, 441 U.S. 520, 562 (1979) (disapproving orders that "enmeshed [lower courts] in the minutiae of prison operations"); Rizzo v. Goode, 423 U.S. 362, 380 (1976) (suggesting that federal courts should avoid ongoing intrusion into the policies of state law enforcement agencies; "the principles of equity, comity, and federalism must . . . restrain a federal court" (quoting Mitchum v. Foster, 407 U.S. 225, 243 (1972)); O'Shea v. Littleton, 414 U.S. 488 (1974) (denying relief on ripeness grounds and stating that federal court monitoring of state courts would violate principles of federalism); Younger v. Harris, 401 U.S. 37 (1971) (holding that federal courts must generally dismiss suits for equitable relief against pending state criminal proceedings); *see also* Lewis v. Casey, 518 U.S. at 349 (Scalia, J.) ("it is not the role of the courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."). *See also Madisonian Equal Protection*, *supra* note 1, at Subsection V.B.1.

44. *See supra* note 32 and accompanying text. The Court continues to allow Congress to make state assistance in administering federal programs a quid pro quo for the States' receipt of federal funds and, of course, permits' States' otherwise voluntary agreement to participate in carrying out federal initiatives. *See* New York v. United States, 505 U.S. 144, 167 (1992) (noting that conditions Congress imposes on States in conjunction with the receipt of federal monies are constitutional as long as they "bear some relationship to the purpose of the federal spending"); South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds") (upholding federal statute conditioning receipt of federal highway funds on state adoption of minimum drinking age); *see also infra* notes 169-171 and accompanying text (discussing conditional preemption). To that substantial extent, the cooperative federalism that Madison envisioned taking place through state administration of federal programs remains a central part of the modern administrative state.

45. *See Madisonian Equal Protection*, *supra* note 1, at Section V.B. For a discussion of why certain school desegregation decrees, which imposed what amounted to political, not institutional, remedies provide an exception to this rule, see Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 195-201; Liebman, *supra* note 10, at 1614-44; JENNIFER HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 80-82 (1984); Colin Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); JEFFREY RAFFEL, THE POLITICS OF SCHOOL DESEGREGATION: THE METROPOLITAN REMEDY IN WILMINGTON 120-53, 208-17 (1980).

may both instantiate and elaborate equal protection norms and remedies through interaction, oversight and coordination among federal, state, local, and private actors. In the process, this "democratic experimentalism" arguably takes a new and promising step—by way of the pragmatism of John Dewey—*towards* a modernized Madisonian equal protection.

IV. TOWARD AN EXPERIMENTALIST APPROXIMATION OF MADISONIAN EQUAL PROTECTION

Madison may have been the first, but he was by no means the only American constitutional architect whose equal protection accomplishments fell short of his ambitions. In Madison's case, his imagination outran that of his more practical colleagues at the Convention, who rejected his unwieldy negative.[46] Eighty years later, it was the imagination of the Radical Republicans that failed them, and in the years since, so has that of the federal judges on whom their Equal Protection Clause placed much of the interpretive responsibility.[47]

In considering whether a solution to the equal protection problem is available that is more realistic than Madison's veto and more effectual than the Radical Republican's Equal Protection Clause, we accept Madison's view of local majority oppression of minorities as the central republican "disease" and structural ("interior"), not admonitory ("exterior") equal protection as its "cure."

We deviate, however, from the more extravagant aspects of Madison's proposal to use the legislative veto to provide equal protection to local minorities. Our goal is to avoid not only the practical objections to the veto raised at the Convention but also the difficulty under modern conditions of public life of installing Madisonian mechanics in a partly non-Madisonian constitutional system managed by a downright *anti*-Madisonian Supreme Court.[48] With a conceptual boost from John Dewey, we conclude that a constellation of "experimentalist" administrative and remedial innovations taking place throughout the nation can approximate Madisonian equal protection without wrenching practical difficulty or formal constitutional amendment.

By "experimentalist" innovations, we mean a variety of administrative arrangements characterized by continuous, interactive cycles of local

46. On July 17, 1787, the Convention voted down Madison's national negative and immediately thereafter, as an acknowledged substitute more palatable to state interests, unanimously approved a Supremacy Clause. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 28 (Madison's notes, July 17, 1787) (Max Farrand ed., rev. ed. 1937) . The debates over Madison's national negative proposal are discussed in detail in *Madisonian Equal Protection, supra* note 1, at Subsection IV.C.5.

47. *See Madisonian Equal Protection, supra* note 1, at Part VI.

48. *See Madisonian Equal Protection, supra* note 1, at Part VI; *supra* notes 32, 44.

innovation and central monitoring. A growing body of writing identifies contemporary administrative contexts, ranging from environmental protection and educational reform to regulation of police discretion and control of workplace sexual harassment, where "experimentalist" or "public problem-solving" regimes of this sort are operating.[49] Most of this writing offers evidence that these innovative arrangements can achieve public regulatory

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49. *E.g.*, ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? (2001) (advocating a system of competitive self- and third-party monitoring of overseas working conditions by corporations operating global supply chains); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) [hereinafter Dorf and Sabel, *Democratic Experimentalism*] (describing the potential role of democratic experimentalism in resolving difficult questions of constitutional interpretation); Joshua Cohen & Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, *in* GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 691, 694-95 (Jonathan Zeitlin & David Trubeck eds.) (2003) [hereinafter Governing Work], *available at* http://web.mit.edu/polisci/research/cohen/sovereignty_and_solidarity_EU_and_US.pdf; Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Experimentalist Government*, 53 VAND. L. REV. 831 (2000) [hereinafter Doft & Sabel, *Drug Treatment Courts*] (discussing recent innovations in the use of court-monitored treatment plans for drug addicted offenders); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1 (1997); Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001) (advocating a system in which police departments use community partnership, monitored information collection, and problem-solving as a means of combating racial profiling); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001) [hereinafter Karkkainen, *Information as Environmental Regulation*] (championing the systematic use of performance monitoring and benchmarking as regulatory tools in the environment and other areas); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Environmental Performance*, 102 COLUM. L. REV. 903 (2002) [hereinafter Karkkainen, *NEPA*] (proposing that NEPA be retooled as a means of progressively redefining government projects to moderate their environmental effects to the extent currently possible); James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703 (2003) [hereinafter Liebman & Sabel, NCLB] (claiming that the No Child Left Behind Act is part of a national "new accountability" movement for school reform that potentially could supplant *Brown v. Board of Education* as the model for institutional reform and achievement of effective education); Liebman & Sabel, *Public Laboratory*, *supra* note 39, (describing how a combination of movements towards standards, changing goals of desegregation and school finance litigation, and state and federal legislation, have converged to create a promising experimentalist framework for school reform); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997) (exploring the uses of community-based planning and monitoring as a method of managing police discretion); Sabel & Simon, *supra* note 39 (describing an evolution in public law remedies from injunctive command-and-control regulation towards experimentalist remedies that permit collaboration, flexibility, and ongoing learning); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (advocating a multi-tiered and interactive "regulatory" framework that makes use of employee participation, problem-solving and ongoing monitoring to remedy often informal patterns of employment discrimination); Note, *After* Sandoval*: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774 (2003) (proposing that administrative enforcement of Title VI be used to establish an experimentalist regime for improving the protection of the civil rights of minorities affected by federally funded programs). *See generally* William H. Simon, *Solving Problems v. Claiming Rights: The Pragmatist Challenge to Legal Liberalism* (forthcoming 2004) (describing a new school of pragmatist thought that advocates carefully monitored problem-solving, in lieu of the announcement and enforcement of fixed entitlements, as the most effective means of reforming social institutions and responding to the needs of disadvantaged communities); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 448-50 (2003) (describing "[v]arious forms of flexible agency-stakeholder networks for innovative regulatory problem-solving [that] have been developed in order to avoid the limitations of top-down command regulation and formal administrative law procedures").

objectives that are beyond the grasp of bureaucratic, "public law" and market solutions. We conclude that these new arrangements—which we associate with John Dewey's twentieth century version of Madisonian cooperative federalism—also may achieve a more perfect equal protection than Madison's negative could have supplied and than the Fourteenth Amendment has supplied. Operating without formal constitutional amendment, and without the gridlock that Madison's negative would have produced, these new arrangements may help establish the constitution—and the equality—that Madison and the drafters of the Fourteenth Amendment had sought but failed to achieve.

By characterizing these arrangements as "Madisonian," we mean two things. First, we mean that the regimes are animated from within by his equal protection principle and are capable of instilling office-holders and the public with his brand of virtue. Second, we refer to a cooperative as opposed to a separated-spheres version of federalism. The constitutional structure Madison envisioned thus was neither a top-down national hierarchy connecting a center and thirteen subservient instrumentalities nor a bottom-up confederacy of thirteen independent States that occasionally conferred authority on a central body to act in their collective behalves. Instead, Madison imagined continuous state-federal-state interaction running *both* ways between thirteen productively diverse States with design and implementation responsibilities and a center with oversight responsibility. Although each State and the center needed the other's support to carry out those responsibilities, the concurring entity could not dictate the content of the responsible entity's actions. In carrying out its responsibilities, however, each entity had strong incentives to compare each target State's situation and proposed action to those of the other States to determine, based on thirteen or more actual experiences, the range of effective courses of action and (roughly speaking) the boundaries of a collectively indicated common good.

More concretely, the extended republic was designed to enable States to grant or withhold their support from the center through their influence with local citizens and factions who would have to coalesce with large groups of others elsewhere to mobilize a majority in the extended Republic's Congress.[50]

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50. Although Madison originally opposed the idea, the Convention gave the States substantial say in the national government by giving them equal representation in the Senate and allowing state legislatures to appoint those senators. *See Madisonian Equal Protection*, *supra* note 1, at 913 n.364. On the power of the States to shape national policy, see *id.* at Part V.B; THE FEDERALIST NO. 46, *supra* note 5, at 297-98 (James Madison):

> The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to

Through the national negative—or, we will argue, other less invasive devices—the center would give or withhold its support from the States without, however, being able to dictate alternative action or inaction. If these interlocking structures of action and concurrence (or objection) worked as Madison imagined, they would lead the national government, in marshalling support for its own initiatives, to attend to the interests of each of the States and their majority factions. In monitoring action by States, national legislators would model and apply their broadly focused sense of the general good as informed by individual practices and the collective going rate among the States. In granting or withholding their support for national initiatives, individual and allied groups of States would protect the interests of their majority factions. But in so designing their own initiatives, they would leaven proposals driven by their and their majority faction's particular needs, resources, and ideas. They would do this based on what they saw working (or at least avoiding Congress's veto) in the other states, and also by internalizing the more encompassing view of the common interest that they could expect Congress to use in reviewing their actions.

Finally, by contending only that these regimes "approximate" Madison's constitutional objectives, we mean that modern arrangements accomplish the equal protection and cooperative federalism that Madison imagined through mechanisms that are different from his national negative and, we think, that are more practical and less threatening to the States and can be achieved without constitutional amendment. Rather than requiring a choice between the legislature and the courts, moreover, "experimentalist" schemes invite the interactive participation of all state and national actors—legislators, judges, executive and administrative officers, and citizens. What these already up-and-going regimes provide, therefore, is an interactive federalism without a constitutional cataclysm. What Madison's thinking offers these regimes is a constitutional mission: the equal protection of the laws.

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encounter.

See also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 215, 287-93 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); *cf.* John C. Yoo, *Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1398-401 (1997) (doubting the effectiveness of some of the structural devices identified in Wechsler, *supra*, as safeguards for the State's "institutional" interests insofar as they differ from the "popular interests" of the voters who elect the members of Congress but acknowledging the States' ability to protect their interests by directly lobbying Congress and the President).

V. EXPERIMENTALISM: A DEWEY-INFLECTED INTRODUCTION

A. *John Dewey as Sociable Madisonian*

Modern "democratic experimentalism" or "public problem-solving"[51] may be associated with the pragmatism of John Dewey,[52] particularly his 1927 classic *The Public and Its Problems*.[53] This "democratic experimentalist" dimension of Dewey's thought should be distinguished from much of the current academic fashion that has revived interest in pragmatism and Dewey's pragmatism.[54] Leading figures such as Judge Richard Posner have taken to calling their conclusions pragmatist, and typically what they mean is "pragmatism" in the everyday sense of the word, that is, a practical, non-foundational mindset. Posner, for example, simply calls pragmatist an invitation to judges to decide cases flexibly and with reference to consideration of social consequences.[55] Though an academic turn towards pragmatic modes

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51. *See, e.g.*, Dorf & Sabel, *Democratic Experimentalism*, *supra* note 49, at 288-91; Garrett, *supra* note 49, at 125-40; Sturm, *supra* note 49, at 462-64.

52. *See* Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 227 (associating experimentalism with Dewey but noting that Leo Tolstoy actually anticipated its application to public education more fully than Dewey himself, despite the latter's well-known focus on that domain); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 884-85 (2003); Charles F. Sabel, *Design, Deliberation, and Democracy: On the New Pragmatism of Firms and Public Institutions*, *at* http://www2.law.columbia.edu/sabel/papers/Design.html (discussing pragmatism and democratic experimentalism); William H. Simon, *Solving Problems Versus Claiming Rights: The Pragmatist Challenge to Legal Liberalism* (2003) (unpublished manuscript) (on file with author) (describing legal pragmatist and democratic experimentalist scholarship); Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943, 957-60 (2003) (describing relationship of pragmatism and work of John Dewey to new approaches to ecosystem management); *see also* Karkkainen, *NEPA*, supra note 49, at 907 n.11 (gently criticizing much of what passes for modern legal pragmatism).

53. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927).

54. *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003) [hereinafter POSNER, LAW]; RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 227-310 (1999) [hereinafter POSNER, PROBLEMATICS]; THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE (Morris Dickstein ed., 1998); Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996); Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988). For an excellent treatment of the implications of John Dewey's thinking for modern theory of the liberal state, that pre-dates the recent revival, see Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 463 (1985). The revival includes scholars on all sides of the political spectrum, and in very different areas of scholarly specialization. *See* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 410 (1990) ("[I]t seems only a slight exaggeration to suggest that a movement which five years ago included almost no one today appears to embrace virtually everyone."); Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 316 (1996) ("Prominent representatives of the left, center, and right in U.S. legal theory—of critical legal studies, critical feminism, critical race theory, law and economics, and of the mainstream—scholars who otherwise hold sharply divergent opinions about law, have begun to assert that pragmatism points the way.")

55. Posner, for example, is one of the prominent advocates for a return to Dewey's thinking, and he presents an extended discussion of Dewey's work in *Law, Pragmatism, and Democracy*, *supra* note 54, at 97-129, which we do not substantially disagree with by way of summarizing Dewey's writing. Our

of thinking may be noteworthy and beneficial, we are not interested here in such general rhetoric of pragmatism, nor pragmatism as a philosophical approach.[56] More troubling from the pragmatic perspective than theoretical coherence of such views is that such debate ignores the substance and modern application of Dewey's actual experimental *method* that we submit was at the heart of his thinking.[57] As Bradley Karkkainen writes of the scholarship, putting it generously, where Dewey believed in a "dynamic, experimental, iterative, and adaptive problem-solving approach," "Dewey's pragmatism is more experimental and adaptive than many other variants currently in circulation."[58] As will become clear, the project of democratic experimentalism

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departure is from conclusions as to judicial pragmatism, which is Posner's focus throughout. Posner concludes that Dewey's method suggests judges should behave in a "pragmatic" manner, by flexibly and eclectically taking into account social consequences, and leaving social experimentation to the other branches. *See id.* at 22-23, 122-29. Critics have contended Posner's approach is inconsistent, far removed from philosophical pragmatism, and generally lacks substance beyond an everyday use of the word "pragmatism" as distrust for impractical philosophical theory. *See, e.g.* David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 43-50 (1996); David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 STAN. L. REV. 1001, 1006-20 (1996). Posner offers discussion of how *Bush v. Gore* and other recent decisions can be justified on pragmatic terms, risking some appearance of the results-orientation he criticizes. POSNER, LAW, *supra* note 54, at 213-49, 322-56. The inadequacy from a pragmatic perspective, though, is that Posner offers little by way of suggesting how democratic institutions could meaningfully engage in participatory, Deweyan experimentation, or what role law could play except by keeping its hands off—though he does suggest that judges should be a more diverse body. *Id.* at 119, 128, 354. Posner fails to define a more positive or participatory vision of democratic experimentation, despite statements that many legal academics fail to appreciate Dewey's concern for such experimentation. *See id.* at 122. Posner, perhaps correctly, as discussed *infra* note 104 and accompanying text, notes the same defect in Dewey and believes Dewey fell short when writing about law and policy, noting Dewey's "paradoxical lack of engagement with concrete problems and real institutions." *Id.* (discussing Dewey's short essay *Logical Method and Law*, 10 Cornell Q. 17 (1924)). Posner fails to cite or discuss, however, any of the burgeoning body of "democratic experimentalist" work, *supra* notes 49, 52. Such scholarship, of which this piece is a part, intends to take Dewey's thinking and method beyond the level of philosophical or judicial rhetoric and instead, in a meaningful and comprehensive way, suggests ways that Dewey's experimental method can be put into public administrative practice in real institutions, perhaps in ways that Posner is correct that Dewey "barely imagined." *See* Liebman & Sabel, *Public Laboratory*, *supra* note 39.

56. The academy has been beset by long, fairly unproductive debates as to what such use of pragmatist thinking means, if anything. *See, e.g.*, Catharine Pierce Wells, *Pragmatism, Feminism, and the Problem of Bad Coherence*, 93 MICH. L. REV. 1645, 1648 (1995) ("It is sometimes easier to describe what pragmatism rejects than to identify its affirmative claims."); Gene R. Shreve, *Rhetoric, Pragmatism and the Interdisciplinary Turn in Legal Criticism—A Study of Altruistic Judicial Argument*, 46 AM. J. COMP. L. 41, 57 (1998) ("The philosophical community has never arrived at a settled definition of 'pragmatism.' Nor have legal scholars been able to agree what they mean when they appropriate pragmatism. Nor have scholars been able to agree whether or how pragmatism in legal theory differs from philosophical pragmatism."); Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593, 596 (1999) (contrasting different forms of legal and philosophical pragmatism).

57. Dewey was a persistent critic of "refuge in academic specialism, comparable in its way to what is called scholasticism." DEWEY, *supra* note 53, at 167, 168. One of the projects of democratic experimentalism is to try to reorient the academy towards research into new forms of institutional architecture, enabling both teachers and students to participate in the experimentalist process described further below. *See* James S. Liebman, *Towards a New Scholarship For Equal Justice*, 30 WM. MITCHELL L. REV. 273, 282-93 (2003).

58. Karkkainen, *NEPA*, *supra* note 49, at 907 n.11 (discussing Posner, Daniel Farber, Margaret Radin and Thomas Grey's recent work discussing Dewey and pragmatism).

flows from Dewey's method and seeks to implement a dynamic, experimentalist approach to public and sometimes private governance. Rather than try to categorize Dewey's thinking, we instead begin with Dewey's own assessment of modern governance and the experimentalist method that he proposed.

As described in *The Public and its Problems*, Dewey's pragmatic view of democracy is a worthy twentieth century heir of Madison's dialectical federalism. The main difference between the two may be Dewey's more developed view of the "factions" Madison placed at the core of his political theory. Where Madison understood rational reflection on the objects of self-interest as the motivator of substantial amounts of human action and association—those motivated by "interest" as opposed to "opinion"[59]—Dewey felt that *all* political motivations are encrusted in habits arising from associational customs. Agreeing with William James that habits are "the enormous fly-wheel of society," Dewey believed that:

> the idea that men are moved by an intelligent and calculated regard for their own good is pure mythology. Even if the principles of self-love actuated behavior, it would still be true that the objects in which men find their love manifested, the objects they take as constituting their peculiar interests, are set by habits reflecting social customs.[60]

Dewey's view that individuals are inextricably defined by their idiosyncratic associations and the sticky habits those associations create[61] led him to focus more attention than Madison on the difficulty of constructing (as opposed to discovering) the common good. To be sure, Madison recognized that, even with "the greatest technical skill" and "the fullest and most mature deliberation," the common good is difficult to define "distinctly" and without "obscurity."[62] For Madison, however, the main problem is "the imperfection of human faculties" and the "cloudy medium" of language.[63] Although briefly acknowledging the role played by "the complexity of object[ive]s," Madison mainly proceeded on the assumption that the "general good"—"the comprehensive and permanent interest of the State"—is there to be discovered as long as inquiry is scientific and untainted by the "prejudices, interests and pursuits" of "ambitious . . . parties, and sects."[64]

For Dewey, in contrast, "[t]he prime difficulty . . . is that of discovering the means by which a scattered, mobile and manifold public may so recognize

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59. *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 5, at 78 (James Madison), and *infra* note 76.

60. DEWEY, *supra* note 53, at 159-60.

61. *See, e.g.*, *id.* at 186 ("[I]ndividual and social are hopelessly ambiguous, and the ambiguity will never cease as long as we think in terms of an antithesis.").

62. THE FEDERALIST NO. 27, *supra* note 5, at 229 (James Madison); *see Madisonian Equal Protection*, *supra* note 1, at 936 n.493.

63. THE FEDERALIST, NO. 27, at 229.

64. *Id.*; THE FEDERALIST NO. 46, *supra* note 5, at 296 (James Madison); THE FEDERALIST NO. 51, *supra* note 5, at 325 (James Madison).

itself as to define and express its interests."[65] The problem thus "lies deeper" than the rule of decision (for example, one person one vote and majority rule). "[I]t is in the first instance an intellectual problem: The search for conditions under which the Great Society"—the mass of individuals in a polity—"may become the Great Community" through the formulation and expression of a common interest.[66]

Despite these differences, Dewey's and Madison's constitutional visions are strikingly similar. Both understand the chief object of human society and government to be "[l]iberty . . . that secure release and fulfillment of personal potentialities."[67] Both define equality (what Madison called "justice") in the economized manner demanded by that libertarian concern. In Dewey's words, "[e]quality does not signify that kind of mathematical or physical equivalence in virtue of which any one element may be substituted for another" but rather the "effective regard for what is distinctive and unique in each, irrespective of physical and psychological inequalities."[68] Equality thus "is not a natural possession but is a fruit of the community when its action is directed by its character as a community."[69] Dewey's belief that "community" is distinguished from "society" by its members' recognition of their shared interests,[70] and that equality "is a fruit of the community"—if and when the community's "action is directed by its character as a community"—also seem to track Madison's view that fraternity or the minimum condition of social solidarity consists in the shared acceptance of all members' equal capacity to pursue their own distinctive and unique potentialities.[71]

Like Madison, Dewey believed that the great desideratum, liberty, is also its own worst enemy. For Madison, the pursuit of liberty leads people to threaten each other's exercise of that capacity, and worse yet, to band together in factions to do so. When republican self-rule replaces other forms of government, the problem grows because of the power of majority factions to use self-government as a mechanism for "injustice" for majorities' ongoing "oppression" of minorities.[72] Characteristically, Dewey takes the point a step

65. DEWEY, *supra* note 53, at 146.

66. *Id.* at 146-47.

67. *Id.* at 150; *see infra* note 77; *Madisonian Equal Protection*, *supra* note 1, at Subsection II.B.1 (discussing Madison's similar views).

68. DEWEY, *supra* note 53, at 150-51.

69. *Id.* at 151; *see Madisonian Equal Protection*, *supra* note 1, at Subsection II.B.2 (discussing Madison's similar views).

70. DEWEY, *supra* note 53, at 147.

71. *See* THE FEDERALIST NO. 10, *supra* note 5, at 78 (James Madison) ("The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government."); *see also* EPSTEIN, *supra* note 13, at 121 ("It would appear that the minimum requirement for a republic is that it honor the great body of the people by respecting their capacity to choose."); *Madisonian Equal Protection*, *supra* note 1, at Subsection II.B.1 (discussing Madison's similar views).

72. *See Madisonian Equal Protection*, *supra* note 1, at Section II.B. Dewey also makes Madison's

further: Liberty is not simply facilitated by group action; it *is* group action. The "secure release and fulfillment of personal potentialities" that constitute liberty "take place *only* in rich and manifold association with each other."[73] Yet, it is exactly those associations, and the habits they generate, that over time enslave individuals by preventing them from pursuing potentialities that have no use or place within the group. They "'doom[] us all to fight out the battle of life upon the lines of our nurture or our early choice, and to make the best of a pursuit that disagrees, because there is no other for which we are fitted and it is too late to begin again.'"[74]

As did Madison, Dewey often used associations defined by occupation as illustrations, including of the entrapping quality of associational habit:

> Habit does not preclude the use of thought, but it determines the channels within which it operates. Thinking is secreted in the interstices of habits. The sailor, miner, fisherman and farmer think, but their thoughts fall within the framework of accustomed occupations and relationships. We dream beyond the limits of use and wont, but only rarely does revery become a source of acts. . . . Thinking itself becomes habitual along certain lines; a special occupation.[75]

Also like Madison, Dewey recognized that the most powerful associations and habits are ones built not on occupation but on belief or "opinion."[76]

If anything, Dewey was more committed to majority rule than Madison. For Dewey, democracy as a form of government is not just (as for Madison) the fulfillment of the logic of liberty and self-government.[77] It also is the best general method of discovering the common interest in any given situation. Following De Tocqueville, Dewey believed that "popular government is educative [of rulers], as other modes of political regulation are not."[78] It "forces a recognition that there *are* common interests, even though the recognition of

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basic point in abbreviated fashion, stating "[l]iberty is then thought of as independence of social ties, and ends in dissolution and anarchy." DEWEY, *supra* note 53, at 150.

73. DEWEY, *supra* note 53, at 150. Dewey here describes each of the basic ideas associated with democracy as "shibboleths," and that "[f]raternity, liberty and equality isolated from communal life are hopeless abstractions. Their separate assertion leads to mushy sentimentalism or else to extravagant and fanatical violence which in the end defeats its own aims." *Id.* at 149.

74. *Id.* at 159-60 (quoting William James); Dewey concluded that "[h]abit is the mainspring of human action." *Id.*

75. DEWEY, *supra* note 53, at 160.

76. *Id.* at 162 ("Habits of opinion are the toughest of all habits . . . ."). Dewey discusses the power of habit at greater length in *Human Nature and Conduct*, which begins by comparing habits to "physiological functions, like breathing, digesting." JOHN DEWEY, HUMAN NATURE AND CONDUCT 14 (1922). For Madison's view, *see supra* note 59; *Madisonian Equal Protection*, *supra* note 1, at Section II.B, and in particular on his concern for oppression based on differences in opinions at Subsection II.B.2.a.

77. For Madison's view, *see supra* note 5, and *Madisonian Equal Protection*, *supra* note 1, at Subsection II.B.1. Madison concluded that only republican government was "reconcilable . . . with the honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government." THE FEDERALIST NO. 39, *supra* note 5, at 240 (James Madison).

78. DEWEY, *supra* note 53, at 207.

what they are is confused."[79] Moreover, "the need it enforces of discussion and publicity brings about some clarification of what [the common interests] are"—all forms of democracy "to some extent . . . involve a consultation and discussion which uncover social needs and troubles."[80] And democracy seeks that information from the individuals most likely to have it. "The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied."[81]

Yet, Dewey was also at least as concerned as Madison about "the 'problem of minorities'"—that is, their oppression by "an oligarchy managed in the interests" of less than the whole.[82] Dewey without naming Madison, compares how among early American writers, "[f]actionalism was decried by all thinkers as the chief enemy to political stability," and yet "[e]xtensive and consolidated factions under the name of parties are now not only a matter of course, but popular imagination can conceive of no other way by which officials may be selected and governmental affairs carried on."[83] Dewey describes how advances in industrial organization and technology of communication made possible consolidation of political power far beyond the sort of factions that the Framer's imagined, making factional control a permanent fact of political life.[84]

For Dewey the protection of minorities is a matter not simply of preserving their liberty against the "repression of . . . potentialities."[85] It also is a matter of informing the community about common problems and solutions. There thus are two reasons why members of the minority must "have the chance to inform" office-holders "as to their needs," why this "enlightenment must proceed in ways which force the administrative specialists to *take account* of their needs," *and* why minorities must rightly know "that next time [they] may

79. *Id.* at 207.

80. *Id.* at 207, 206.

81. *Id.* at 207. Dewey qualified that "[p]opular government has at least created public spirit even if its success in informing that spirit has not been great." *Id.*

82. *Id.* at 208. Although in these passages, Dewey was most concerned about an oligarchy of "experts," what he says about the problem of tyrannized minorities holds true whether their oppressors are experts or majorities who habitually freeze them out of consideration.

83. *Id.* at 119. Dewey decries how "big business rules the governmental roost," and "bosses with their political machines fill the void between government and the public," though even "parties are not creators of policies to any large extent," but instead are largely ineffective except in retaining power, and only "yield in piece-meal accommodation to social currents, irrespective of professed principles." *Id.* at 118-20.

84. Dewey notes that early critics of popular government "prophesied a flux of governmental regimes, as individuals formed factions, seized power, and then lost it as some newly improvised faction proved stronger." *Id.* at 116. This sort of flux, with no faction taking permanent control, is something like what Madison hoped would occur. *See Madisonian Equal Protection*, *supra* note 1, at Subsection II.B.2. The cause of the transformation is that "elimination of distance, at the base of which are physical agencies, has called into being the new forms of political association." DEWEY, *supra* note 53, at 114-15.

85. *Id.* at 148. For Madison's views, see *Madisonian Equal Protection*, *supra* note 1, at Subsection II.B.1.

be successful in becoming a majority."[86] First is Madison's reason. Only in these ways can minorities' need for self-fulfillment be met, providing them with a socially stabilizing "substitute for bullets."[87] But second, the interests of minorities and their preferred means of obtaining them will often turn out to be more socially useful and generalizable than other interests. Dewey thus believed that "all valuable as well as new ideas begin with minorities, perhaps a minority of one. The important consideration," therefore, "is that opportunity be given that idea to spread and to become the possession of the multitude."[88] Diversity becomes a critical component of the experimentalist method, permitting different ideas to be tested and compared, and providing a creative ferment out of which a better democracy can emerge.

For Dewey as for Madison, therefore, a "cure for the ailments of democracy"[89] must permit two things to occur. It must preserve individuals' freedom to govern themselves and the groups and the polity through which they operate. But it also must free individuals from the parochialism and internecine strife that factional allegiances invite—rendering possible a stable political community defined and governed according to its common interest.[90] Both theorists also believed that institutional structures had to be developed to wean self-governing individuals of their disposition towards narrow-minded pursuit of factional self-interest or habitual social customs and to enable them instead to discern and pursue the objectives of the wider community.

Revealing that he had more in common with Dewey than at first appears, Madison struggled to design "interior" arrangements or "situations" that made "habitual" officials' consideration of the broadest possible range of interests in addition to their own—that "incite[d] office-holders incidentally, but

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86. DEWEY, *supra* note 53, at 208 (emphasis added).

87. *Id.* at 207.

88. *Id.* at 208.

89. *Id.* at 146. *See Madisonian Equal Protection*, *supra* note 1, at Section V.A, 860 n.98, 886 n.222 (discussing Madison's similar formulation as to the "mortal diseases" of the Articles); *see also* James Madison, The Vices of the Political System of the United States (Apr. 1787), in 9 PAPERS OF JAMES MADISON, supra note 1, at 353-57; Letter from James Madison to Thomas Jefferson (Mar. 19, 1987), *in* 9 PAPERS OF JAMES MADISON, *supra* note 1, at 318.

90. Although lacking in Madison's elegance in *The Federalist Papers* Nos. 10 and 51, Dewey's version is substantively similar:

> From the standpoint of the individual, [democracy] consists in having a responsible share according to capacity in forming and directing the activities of the groups to which one belongs and in participating according to need in the values which the groups sustain. From the standpoint of the groups, it demands liberation of the potentialities of members of a group in harmony with the interests and goods which are common. . . . [T]his specification cannot be fulfilled except when different groups interact flexibly and fully in connection with other groups. [It cannot be fulfilled] . . . at the cost of [a group's] repression of [its members'] potentialities which can be realized only through membership in other groups . . . [or by] prevent[ing] the operation of all interests save those which circumscribe [the group] in its separateness.

DEWEY, *supra* note 53, at 147-48; *see Madisonian Equal Protection*, *supra* note 1, at Part III (discussing Madison's similar views).

voluntarily, to conform to the norms of their office."[91] And despite Madison's more optimistic view of the accessibility of the common good, he anticipated Dewey's recognition that achieving a "greater understanding of the public interest" required national institutions to "draw[] on the diverse interest and opinions of the people at large"—in the process harnessing "a wider knowledge than would be available to government by the few" and converting "diversity . . . to unity."[92] Revealing that Dewey was less of a Pavlovian than his emphasis on habit might suggest, he sought governance arrangements that enabled individuals to break the hold of pre-existing "habits" and "groups" and discover interests held in common with others—arrangements that make habitual an *openness* to new associations, opinions, and solutions to public problems.[93]

B. *Dewey's Experimentalism*

It is here that Deweyan experimentalism comes into play. Experimentalism is the "method" Dewey proposed to enable the "scattered, mobile and manifold public . . . [to] recognize itself" as a "great community" defined by common interest.[94] This transformation, he believed, could occur only in the actual day-to-day process of self-government, which he equated with public problem-solving—"uncover[ing] social needs and troubles" and "best judg[ing] how the trouble is to be remedied."[95]

By calling the method "experimental, not absolutistic," Dewey did not mean "carrying out . . . experimentation like that of laboratories," but instead keeping premises and conclusions open and subject to constant testing and revision.[96] Dewey believed that thought is fundamentally practical. We resort to instrumental thinking, and set our habits aside, when there is a problem that we need to solve and our habits are no longer adequate for the task. Further, whether we recognize it or not, all thought works a change in the conditions under which we interact with our environment. Once we start to define a problem, each effort will shed light not just on solutions, but on the problem itself or on our presuppositions, opinions, and habits. Dewey believed that

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91. BEER, *supra* note 12, at 284-85; THE FEDERALIST NO. 57, *supra* note 5, at 352. *See* DEWEY, *supra* note 53, at 160 (noting that "all distinctively human action has to be learned, and the very heart blood and sinews of learning is creation of habitudes").

92. BEER, *supra* note 12, at 252-53, 383, 381 (discussing Madison's "horizontal federalism").

93. DEWEY, *supra* note 53, at 147-48, 185-219.

94. *Id.* at 146; *see id.* at 185 (arguing that "the outstanding problem of the Public is discovery and identification of itself").

95. DEWEY, *supra* note 76, at 206-07; *see* DEWEY, *supra* note 53, at 151 ("Associated or joint activity is a condition of the creation of a community."); *id.* at 188 (arguing that movement from mere interaction to a "community" "demands . . . perception of the consequences of a joint activity, and of the distinctive share of each element in producing it"; this "perception creates a common interest," *i.e.*, "concern on the part of each in the joint action and in the contribution of its members to it.").

96. DEWEY, *supra* note 53, at 202.

proper inquiry remains open, by approaching a problem recognizing that we may come across the unexpected. "[C]oncepts, general principles, [and] theories" are not taken as established first principles, or obstacles to learning, but instead are "shaped and tested as tools of inquiry."[97] In particular, as to the political science of government and regulation, "policies and proposals for social action [are] treated as working hypotheses, not as programs to be rigidly adhered to and executed"; they are "entertained subject to constant and well-equipped observation of the consequences they entail . . . and subject to ready and flexible revision in the light of observed consequences."[98] The object of the governing "apparatus" is "no longer" understood to be the generation of correct answers itself but instead the development of the "*means* of making discoveries of phenomena having social import and understanding their meaning."[99] In the process, pre-existing habits of belief about what is absolute and eternal give way to the habit of jointly forming, testing and refining provisional judgments about the best approach for the "special situation" at hand. Doing so helps clear the underbrush of inflexibly held opinions that anchor the "tough[est]" factional commitments and hamper the formulation of common interests:

> Differences of opinion in the sense of differences of judgment as to the course which it is best to follow, the policy which it is best to try out, will still exist. But opinion in the sense of beliefs formed and held in the absence of evidence will be reduced in quantity and importance. No longer will views generated in [response to] special situations be frozen into absolute standards and masquerade as eternal truths.[100]

Dewey believed that government or regulation could proceed using this experimentalist method, as discussed. Further, not only does the process define the work of the governing apparatus, but the functions and make-up of the state itself must be reevaluated using this process, so that they are "critically and experimentally determined."[101]

Thus the state cannot remain static, but must evolve as the social conditions that underlie it evolve. However, this evolution need not proceed blindly or haphazardly or be constrained by opinion and habit, as in the past. Instead, Dewey asks that we instead proceed experimentally, with solutions to our needs in mind. Only by doing so can we realize our potential. In Cornel West's words, "[f]or pragmatists, the future has ethical significance because human

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97. *Id.*

98. *Id.* at 202-03.

99. *Id.* at 203 (emphasis added).

100. *Id.*; *see id.* at 193 (giving as an example the debate over whether market or plan is the best way to organize human activity: "[T]he question of what transactions should be left as far as possible to voluntary initiative and agreement and what should come under the regulation of the public is a question of time, place and concrete conditions that can be known only by careful observation"). Or, as William James put it, "'The true' . . . is only the expedient in the way of our thinking, just as 'the right' is only the expedient in the way of our behaving." WILLIAM JAMES, THE MEANING OF TRUTH (Fredson Bowers ed., Harvard Univ. Press 1975) (1907).

101. DEWEY, *supra* note 53, at 74.

will—human thought and action—can make a difference in relation to human aims and purposes."[102] The focus, as always with Dewey, remains on the future and on change.[103]

VI. TWENTY-FIRST CENTURY EXPERIMENTALISM

Although something of a turbo-charged Madisonian in his political theory, Dewey was no match for Madison as a political scientist. Although an entire chapter of *The Public and its Problems* is devoted to the "method" by which the government should go about determining the common interest, Dewey admitted that his "experimental" approach was "not, indeed, . . . the method" much less "practical procedure" but only "the intellectual antecedents of such a method"; they reveal Dewey "groping" towards a useable form of "social inquiry," not devising a real plan of government.[104]

Dewey did, however, suggest hope for reinvigoration of our political system, in terms suggesting Madisonian collaborative federalism. While "older forms of territorial association do not satisfy present needs," "functional" or "occupational" ties that "grow out of immediate intercourse and attachment" might permit such "reconstruction of face-to-face communities."[105] Dewey described that "[w]hatever the future may have in store," the need is that "local communal life [] be restored," providing new public space that will be "alive and flexible as well as stable."[106] Such local communities would engage each other, enrich each other, and though "[t]erritorial states and political boundaries will persist," "they will not be barriers which impoverish experience."[107]

Further, Dewey may be Madison's match as a constitutional prognosticator, given how aptly Dewey's "experimental" "apparatus" describes a multitude of novel governance arrangements that have recently been adopted in the United States and elsewhere. Those arrangements pursue public objectives as diverse as improving outcomes for poor and minority public school students,[108] preventing sexual harassment and other employment discrimination,[109]

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102. CORNEL WEST, KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA 111 (1994).

103. Or as Richard Rorty writes, with humorous approval, Dewey's pragmatism provides "a rationale for nonideological, compromising, reformist muddling-through (what Dewey called 'experimentalism'). It claims that categorical distinctions of the sort philosophers typically invoke are useful only so long as they facilitate conversations about what we should do next." RICHARD RORTY, OBJECTIVITY, RELATIVISM, TRUTH 211 (2001). For Dewey, while "muddle, compromise and blurry syntheses" may be less attractive as political or philosophical ideology, they also permit social progress and adaptation to new circumstances. *Id.*

104. *Id.* at 185-86, 203, 217.

105. *Id.* at 212-13.

106. *Id.* at 216.

107. *Id.* at 216-17.

108. *See* Liebman & Sabel, NCLB, *supra* note 49; Note, *After* Sandoval, *supra* note 49.

109. *See* Sturm, *supra* note 49.

reducing housing discrimination and providing shelter for homeless families,[110] upgrading conditions of confinement in prisons and mental institutions,[111] creating enforceable fair labor standards for overseas factories,[112] creating effective habitat conservation and watershed management,[113] regulating toxic chemicals,[114] ensuring adequate representation of indigent criminal defendants,[115] pursuing community-based policing,[116] deterring racial profiling and other law-enforcement abuses,[117] ensuring constrained sentencing discretion,[118] and decreasing drug addiction and drug-related crime.[119]

The gist of experimentalism, or public problem-solving,[120] is the definition by the "center" of an important public problem and the center's setting of rough improvement goals and incentives for improvement. For example, in the public education context, a state department of education might identify an achievement gap between white and black public school students[121] and set as a goal "reasonable" yearly progress towards ending the achievement gap in a

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110. *See* Sabel & Simon, *supra* note 39, at 1047-52; Leslie Kaufman, *New York Reaches Deal to End 20-Year Legal Fight on Homeless*, N.Y. TIMES, Jan. 18, 2003, at A1 (describing creation of independent monitoring body to oversee provision of housing to homeless families as settlement to long-running litigation by homeless families seeking a right to shelter).

111. *See* Sabel & Simon, *supra* note 39, at 1029-43; Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 644 (1993) ("document[ing] a shift from a test case to an implementation model of advocacy" in the context of prison reform litigation and "urg[ing] the development of effective remedial strategies as a method of linking litigation to a broader strategy").

112. *See* FUNG, ET AL., *supra* note 49.

113. *See* CHARLES F. SABEL ET AL., BEYOND BACKYARD ENVIRONMENTALISM 3 (2000); Michael Burger, *A Watershed Moment: A New Environmental Movement Is Born*, NEXT AM. CITY, Issue 4, 2004, at 10.

114. *See* Karkkainen, *Information as Environmental Regulation*, *supra* note 49.

115. *See* Kyung M. Lee, *Reinventing* Gideon v. Wainwright: *Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 32 AM. J. CRIM. L. (forthcoming fall 2004).

116. *See* Garrett, *supra* note 49; Livingston, *supra* note 49; *see also,* Lawrence Rosenthal, *Policing And Equal Protection*, 21 YALE L. & POL'Y REV. 53 (2003) (discussing constitutional issues raised by "problem-oriented policing").

117. *See* Garrett, *supra* note 49.

118. *See* Brian Goldberg et al., Proportionality Review (June 10, 2003) (unpublished manuscript, on file with author); James S. Liebman, Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2003 (unpublished manuscript, on file with author) .

119. *See* Dorf & Sabel, Drug Treatment Courts, *supra* note 49. In regard to uses of these techniques outside the United States, see, for example, Gianpaolo Baiocchi, *Participation, Activism, and Politics: The Porto Alegre Experiment*, *in* ARCHON FUNG & ERIC OLIN WRIGHT, DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 45 (2002); Cohen & Sabel, *supra* note 49; T.M. Thomas Isaac & Patrick Heller, *Democracy and Development: Decentralized Planning in Kerala*, *in* FUNG & WRIGHT, *supra*, at 77; Ann-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEG. STUD. 347 (2001); and Stewart, *supra* note 49, at 455-58.

120. For other general descriptions, see Dorf & Sabel, *Democratic Experimentalism*, *supra* note 49, at 267; Dorf & Sabel, *Drug Treatment Courts*, *supra* note 49, at 846-47 (describing initial benchmark procedures for drug treatment courts and their elaboration over time to include refinements); Simon, *supra* note 49; Sabel & Simon, *supra* note 39, at 1067-97; Sturm, *supra* note 49, at 462-63.

121. Statewide versions of the experimentalist regime described in the parenthetical examples in this paragraph are in operation in Kentucky, North Carolina, and Texas. The federal No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (to be codified at 20 U.S.C. § 6311-15), puts in place some elements of an analogous national regime. *See* Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 223-300; *see also infra* Subsection VII.C.1.

decade. The department would measure such progress and provide for annual publication of performance data enabling the public to compare progress for black and white children at all socio-economically similar schools in the jurisdiction. The center's actions bind local actors or governing bodies but leaves them with the freedom and responsibility to adopt their own, more specific improvement metrics and plans for achieving the centrally set goal. For example, schools may use achievement tests or portfolios of performance measures to quantify the gap and indicate improvement; changes in school governance, intensified professional development, and curricular innovations might be components of an improvement plan. Typically, local improvement planning is done by teams of stakeholders with a variety of informational perspectives but who are all committed to defining the target problem more precisely, then solving it (for example, principal, teachers, parents, second students, community activists, and business leaders).

Periodic monitoring, comparison, and publication of all localities' plans and outcomes on their own and on common metrics enable the center and the public to identify "benchmark" levels of performance for comparable localities—the highest levels shown as of then to be within the grasp of comparable sites of local activity—and "best" or (preferably) "better" practices associated with improved performance. Benchmarks and better practices change over time, as new sites of experimentation produce still better results, which explains why some observers call these standard-setting processes "rolling rules regimes."[122] Information about what works and doesn't work likewise enables the center to raise, lower, or make more specific its initial goals, and to switch or supplement its performance metrics. Localities that repeatedly fail to reach or make progress towards those benchmarks become the focus of special attention from the center. Typically, improvement planning is assisted by teams of trained professionals from similar, but better performing sites. Localities that chronically fail face sanctions (for example, "take over" or reorganization of failing schools or districts).

Overall, the process is continuous, not fixed or start-and-stop. Experimentation is continuous, because local entities continually respond to the particular and current manifestations of the problem by planning, implementing, evaluating, re-planning, re-implementing, and so on. The flow of information to, and monitoring and benchmarking by, the center is continuous, because each local entity's unprecedented success sets a new standard for similar entities. The flow of information back to the localities and among networks of them also is continuous, because benchmarks create new demands *on* localities, and demand *by* them for information about the better practices that set the standard elsewhere. Everything—goals, standards,

122. *See* Simon, *supra* note 49; Sabel & Simon *supra* note 39, at 1062.

measures, plans, and policies—is under continuous revision at both the center and local sites.

In the public education example sketched above, the center-locality relationship is between state and municipal entities, both of which are public administrative bodies. But experimentalist arrangements currently exist between entities at any two or more of the national, state, regional, county, neighborhood, and even household levels. In the public education context, for example, the federal No Child Left Behind Act of 2001,[123] coupled with state accountability regimes, invite a cascading series of center-local relationships between the federal and state departments of education, state departments of education and school districts, regional groupings or ad hoc networks of school districts and those districts, school districts and schools, schools and classrooms, and in some places classrooms and individual students and their parents.[124]

In other experimentalist regimes, the central function of defining the problem and setting overarching goals is performed in part by Congress[125] or state legislatures,[126] by the Supreme Court[127] or state high courts,[128] by standards and monitoring structures created by lower federal or state court consent decrees,[129] or by local "problem-solving" courts.[130] And local entities may be state or local courts[131] or even individual juries,[132] as well as a variety of administrative agencies and officials. Both central monitors[133] and local experimenters[134] may also be or include non-governmental actors or collections of public and private actors. Any number of combinations of these various center-locality relationships may arise, as, for example, in the problem-solving court, indigent representation, and sentencing guidelines contexts, where

123. Pub. L. No. 107-110, 115 Stat. 1425 (2001) (to be codified at 20 U.S.C. § 6311-15).

124. *See* Liebman & Sabel, NCLB, *supra* note 49, at 1710-13. For example, teachers in schools and classrooms in Texas observed by one of the authors develop individual improvement plans for each child. *See generally* H. M. Levin & C. R. Benfield, *Families as Contractual Partners in Education*, 49 U.C.L.A. L. REV. 1799 (2002).

125. *See* Garrett, *supra* note 49, at 92; Karkkainen, *NEPA*, *supra* note 49, at 904; SABEL ET AL. *supra* note 113, at 4,7-8, 10, 17-20.

126. *See* Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 231-57.

127. *See* Dorf & Sabel, *Democratic Experimentalism*, *supra* note 49, at 388-404; Sturm, *supra* note 49, at 479-89. *See generally* Liebman, *supra* note 118.

128. *See* Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 231-57; Sabel & Simon, *supra* note 39, at 1035-43.

129. *See* Garrett, *supra* note 49, at 92-98; Sabel & Simon, *supra* note 39, at 1043-47.

130. *See* Dorf & Sabel, *Drug Treatment Courts*, *supra* note 49, at 832; *see also* Judith Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125 (2004).

131. *See* Kaye, *supra* note 130; Goldberg et al., *supra* note 118; Liebman, *supra* note 118, at 75-76.

132. *See* Liebman, Slow Dancing with Death, *supra* note 118, at 104-05.

133. *See* FUNG ET AL., *supra* note 49, at 28; Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 230, 234, 242, 245-46; Sturm, *supra* note 49, at 546-54.

134. *See* Dorf & Sabel, *Drug Treatment Courts*, *supra* note 49, at 831-39. *See generally* Lee, *supra* note 115.

federal or state administrative entities sometimes serve as standard setters and monitors, and combinations of local courts and public and private professionals do the experimenting.[135]

A variety of arrangements may create incentives for local governmental agencies and officials to take part in these problem-solving regimes. In some cases, participation is mandated or induced by legislative or administrative improvement mandates,[136] judicial decrees[137] or potential civil liability.[138] In other cases, participation is the voluntary price of public funding.[139] Sometimes, participation is prompted by a desire to avoid risk or default penalties—for example, in the habitat conservation context, the stark all-or-nothing outcomes faced in litigation under the Endangered Species Act,[140] and in the drug courts context, the risk of conviction and lengthy imprisonment.[141] At other times, the "shaming" consequences of public reporting requirements provide an inducement.[142]

Once local entities undertake these monitored experiments, the range of actors they permit or invite to participate in local improvement planning and monitoring is determined by a variety of mechanisms. Most important is the logic of the problem itself. When faced with the task of achieving improvements at least equal to those achieved by similar experimenters, it is important to involve all parties with knowledge of causes and consequences as well as individuals thought to be skilled in solutions—in Dewey's phrase "[t]he man who wears the [pinching] shoe" as well as "the expert shoemaker."[143] If, for example, the idea is to fit police priorities and practices to the needs of the community, then not only the police and community leaders, but also the day-to-day victims of crime and of abusive police practices should be present.[144] When instead the problem is diverting first-time-offending drug addicts from prison to a productive life, the addicted offender, members of his family, and potential service providers may be as crucial to the process as judge, prosecutor, and defense lawyer.[145] When the issue is how to substitute a

135. *See* Dorf & Sabel, *Drug Treatment Courts*, *supra* note 49, at 832-34; Goldberg et al., *supra* note 118. *See generally* Lee, *supra* note 115.

136. *See* Goldberg, et al., *supra* note 118; Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 229-57, 278-823; Lee, *supra* note 115, at 11-13; *infra* notes 169-171 and accompanying text (discussing federal conditional pre-emption regimes).

137. *See* Sabel & Simon, *supra* note 39, at 1022-47.

138. *See* Garrett, *supra* note 49, at 77-81, 92-93; Sturm, *supra* note 49, at 479-89.

139. *See* Liebman & Sabel, NCLB, *supra* note 49, at 1721; Note, *After* Sandoval, *supra* note 49; *infra* Subsection VIII.C.1.

140. *See generally* SABEL ET AL., *supra* note 113.

141. *See* Dorf & Sabel, *Drug Treatment Courts*, *supra* note 49, at 841-51.

142. *See* Karkkainen, *Information as Environmental Regulation*, *supra* note 49, at 305-09.

143. DEWEY, *supra* note 53, at 207.

144. *See* Livingston, *supra* note 49, at 653-67; Garrett, *supra* note 49, at 107-41.

145. *See* Dorf & Sabel, *Drug Treatment Courts*, *supra* note 49, at 871-72.

habitat-specific conservation plan for the local, state, and federal land-use and environmental regulations and decrees that might otherwise govern, it is important for officials from each of those levels of government, as well as the various actual and would-be users of the land in question and environmental activists, to take part.[146]

Central monitoring also plays a role in broadening participation. Monitors provide a focal point for aggrieved stakeholders who were not allowed to participate; the breadth and conditions of participation may themselves be a subject of benchmarking and better practices; and improvement teams organized by the center to review failing local entities may include, or locally engage, a broad range of participants. Over time, the local improvement planning process with the best informed collection of participants—which ought to include the broadest range of actual stakeholders—should "win," setting the benchmark that all others, for the time being, must meet.

In addition, legislative, administrative, and judicial mandates may specify stakeholders who must be able to participate in improvement planning.[147] Public reporting requirements may also give aggrieved and vocal consumers of the information an entree. The latter may occur when local community groups use public information as a basis for agitating for improvement—or for working with insiders to investigate the problem, plan to improve it, and monitor effects.[148] Outsiders also may gain entrée when public information triggers the filing of administrative or judicial enforcement actions and helps the moving parties meet their burden of proof.[149]

These various participants proceed to problem solve in a fluid manner that preserves their diverse contributions. Consistent with Dewey's outline of the preferred "experimental" process, "general principles" are not taken as eternal truths but only as "tools of inquiry." True, the center begins by defining the problem and setting rough performance goals and measures. It does so, however, without any assumption that the definition, goals, and measures are the right ones and with a willingness to revise them in the light of experience. The center does not impose a single central solution but requires a host of local experimenters to devise their own locally tailored answers, subject to continuous local, central, and public monitoring for success, and to revisions called for by comparing results. In good Deweyan fashion, "policies and

146. *See generally* SABEL ET AL., *supra* note 113.

147. *See, e.g.*, Garrett, *supra* note 49, at 88-89 (describing legislation that defines stakeholders to take part in evaluating traffic stop statistics).

148. *See, e.g.*, Archon Fung & Erik Olin Wright, *Countervailing Power in Empowered, Participatory Governance*, *in* ARCHON FUNG & ERIC OLIN WRIGHT, DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (2002); Liebman & Sabel, NCLB, *supra* note 49, at 1739-43 (giving an example of this process in the school context in Louisville, Kentucky).

149. *See, e.g.*, Liebman & Sabel, NCLB, *supra* note 49, at 1744-45.

proposals for social action [are] . . . not programs to be rigidly adhered to and executed," and instead are "treated as working hypotheses . . .subject to constant and well-equipped observation of the consequences they entail . . . and . . . to ready and flexible revision in the light of observed consequences." The center's product is not "itself knowledge"—the right solution for every permutation of the problem—but instead the "means" of discovering answers in particular situations and based on experience over time. Because participation is organized around the common goal of resolving a roughly agreed upon problem, and because of a commitment to data-driven analyses of success, "[d]ifferences of opinion" will more often than before be "differences of judgment as to the course which it is best to follow" or "the policy which it is best to try out" and not differences of "beliefs formed and held" habitually in common with one's associates and in the absence of evidence. Because a range of experiments takes place, and likes are compared to likes, solutions "generated in view of special situations" are not "frozen into absolute standards."[150]

VII. MADISON AS PROTO-EXPERIMENTALIST

Although John Dewey gave experimentalism its name and elaborated "antecedents" of a "method" for achieving it,[151] James Madison had long since designed a rudimentary constitutional method for achieving it and assigned it a crucial constitutional purpose.[152] The method is cooperative federalism. The purpose is equal protection.[153]

In its basic structure, Madison's interactive or dialectical federalism was experimentalist.[154] The national government would have responsibility for

150. The quotations in this paragraph are from Dewey, *supra* note 53, at 202-03, discussed *supra* Section V.B.

151. DEWEY, *supra* note 53, at 185; *see supra* Sections V.A-B.

152. *See Madisonian Equal Protection*, *supra* note 1, at Section IV.C; *supra* Part II.

153. *See id.*

154. Dorf and Sabel suggest this possibility based on Madison's idea of dividing responsibilities among competing agencies of government that are jealous of each other's powers. *See* Dorf & Sabel, *Drug Treatment Courts*, *supra* note 49, at 876 (arguing that "the experimentalist form of accountability could be considered neo-Madisonian because it harnesses competition among institutions to ensure that they all act in the public interest . . . [by] play[ing] rival branches and levels of government against one another . . . ."). *But cf. id.* at 875 (arguing that in experimentalist regimes "accountability is not of the Madisonian sort, in which power is divided among distinct representative units, and in which deliberation—in the sense of disinterested preference-changing reflection—is the province of a senatorial elite removed from ordinary politics"); Dorf & Sabel, *Democratic Experimentalism*, *supra* note 49, at 267 (arguing that "a shift towards democratic experimentalism holds out the promise of reducing the distance between, on the one hand, the Madisonian ideal of a limited government assured by a complex division of powers and, on the other hand, the governmental reality characteristic of the New Deal synthesis"). Here and in *Madisonian Equal Protection*, *supra* note 1, we show that the Madisonian ideal—as opposed to the Constitution actually adopted in 1789—is closer to democratic experimentalism than Dorf and Sabel suggest, and that equal protection achieved through interactive federalism is what fills the gap between the Madisonian ideal and the imperfect reality of 1789.

more momentous problems calling for general solutions; state responsibilities would be more numerous and mundane, their solutions more specific.[155] In the few cases in which the national government acted, it would use state officials to administer its solutions, with the dual goal of having local officials "embrace [the national government's] more enlarged plan of policy than the existing [state] government may have pursued," while providing "local information" and the "assistance of state codes" to the national government.[156] In most matters, initiative would come from the states, subject to review for "injustices" by an organ of "the extended republic."[157] The veto power through which that review would take place was to be "the mildest expedient that could be devised for preventing these mischiefs."[158] In lieu of the "coercion" of commanded actions before the fact or punitive force against unjust acts after the fact, Madison relied on continuous monitoring by broadly focused national officials to instill local actors with habits of action that routinely "prevent attempts to commit [the mischiefs]."[159] By monitoring, national officials would gain more local information, including about state codes, which would influence exercise of the veto, especially when state results were compared. The power to formulate solutions to public problems would remain chiefly with each of the States, and would be regulated as much by what the other states did and how they succeeded as by the independent judgments of national officials.

Madison's proposed governance method was, to be sure, a rudimentary version of the experimentalism Dewey later groped for and public regimes are currently engaged in. True to Madison's eighteenth century vantage point, his sense of the locus of the problem and solution was not on administration but on legislation—prompting a veto that was legislative both in what was reviewed and in who did the reviewing. Also, because it was a confederation of states the Framers convened to fix, Madison's constitutionalism focused mainly on relations between states and the nation. The relations Madison imagined were also more "start and stop" than continuous. State legislation would await congressional review before going into effect; federal legislation would be infrequent and episodic; and state administration of federal initiatives would be a local side-light, not an occupation.

Even in these respects, however, Madison anticipated the lines along which a more sophisticated interactive federalism might develop. He recognized, for

155. *See supra* note 16 and accompanying text.

156. THE FEDERALIST NO. 46, *supra* note 5, at 297 (James Madison); THE FEDERALIST NO. 56, *supra* note 5, at 347-48 (James Madison); *Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4; *supra* note 17 and accompanying text.

157. *See Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4; *supra* note 17 and accompanying text.

158. James Madison's Speech at the Convention (June 8, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 41.

159. *Id.*; *see Madisonian Equal Protection*, *supra* note 1, at Section III.A; *supra* Part II.

example, that "counties and towns are to the [states]" what the states are to the national government, inviting the same local injustices and warranting the same structural solutions.[160] At the Convention, objections to his legislative veto led him to advocate quasi-administrative adjuncts: state and national "councils of revision," which would engage executive officials and judges in reviewing legislative experiments at the state level and monitoring the congressional monitor at the national level.[161] To reduce the impracticality of suspending state laws until Congress passed on them, Madison proposed having state laws go immediately into effect, pending national review.[162] In doing so, he acknowledged the potential role of intermediate monitors, proposing that "some emanation of the [veto] power" be vested in some set of men within the several states with an impartial perspective who could temporarily approve laws until Congress finished its review.[163] Importantly, this last adjustment invited national monitoring based on the experience of state laws already in operation, thus enriching the information pool based on which the veto and state-by-state comparisons would take place.[164]

Recent developments in federal administration illustrate the adaptability of Madison's dialectical federalism to modern experimentalist regimes. As Professor Beer has shown, there is a strong affinity between Madison's interactive federalism—what Beer calls "horizontal federalism"—and "the huge expansion of conditional grants in aid by the federal government," which invite "state and local governments" to serve as "the administrative agents of a vast array of national programs."[165] Although Beer's observations encompass a variety of federal programs, including ones in which the "strings" tied to federal money are essentially command-and-control cables and pulleys, the Madisonian link is clearest in experimentalist "grant in aid" arrangements.[166] Under these latter arrangements, the administration of albeit national programs contemplates a more equal and collaborative partnership between the national

160. THE FEDERALIST NO. 46, *supra* note 5, at 296 (James Madison).

161. *See supra* notes 29-30 and accompanying text.

162. *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 168 (remarks of James Madison) (Madison's notes, June 8, 1787).

163. *See id.*; 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 28 (Madison's notes, July 17, 1787) (remarks of James Madison).

164. *See Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4; *supra* notes 15-17 and accompanying text.

165. BEER, *supra* note 12, at 252-53.

166. *See* Dorf & Sabel, *Drug Treatment Courts*, *supra* note 49, at 875-76:

> An experimentalist Congress will decreasingly enact statutes containing all of the details about implementation. Nor (per the post-New Deal pattern) will it declare policy and delegate to administrative agencies the authority to write rules and bring enforcement actions that ostensibly carry out that policy. Instead, the legislative function will increasingly consist in the identification of a problem and simultaneous authorization of local experimentation on condition that the experimentalist entities (state, local, or ad hoc assemblies of smaller or larger groups) assure rights of democratic access to relevant participants, fully disclose their methods and results, and submit to evaluations comparing performance across jurisdictions.

government, which identifies the problem and generally describes the kind or degree of solution desired, and local administrative officials and institutions, which design solutions in the first instance. Via reporting and re-granting requirements and the benchmarking they invite, experimentalist grant in aid programs also take better advantage of "local information" and "codes" than do command and control approaches.[167]

Still more Madisonian *and* experimentalist is federal regulation through conditional preemption, or what the Supreme Court itself has aptly dubbed "cooperative federalism."[168] Under this form of administration, Congress imposes a default scheme of federal regulation but invites the states to opt out of it if they adopt their own, experimental, regulatory regimes that meet general federal minimum standards and are subject to approval mechanisms inviting interstate comparison and benchmarking.[169]

The spending power is classically thought to apply when, compared to the states, the federal government is the more fair or efficient revenue collector but the less fair or efficient spender.[170] Conditional preemption similarly applies when federal officials are better at identifying problems in need of national solution, but the states are better at solving them.[171] Generalizing both propositions, the classically experimentalist situation arises when the problem at hand is of sufficient moment to warrant a national commitment and the diversion of national resources to its solution, but when the problem cannot be solved without the application of local knowledge to the problem's local idiosyncrasies followed by the national dispersion to similar localities of the comparatively best results. The resulting combination of, on the one hand, "extended" national perspective in identifying the problem, in calling for local

167. *See, e.g.*, The No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (discussed *infra* Subsection VII.C.1).

168. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981).

169. In areas in which it has authority to preempt state regulation, Congress may instead, without engaging in impermissible "commandeering," offer states the choice of adopting their own regulatory scheme pursuant to federal standards or having their citizens subjected to preemptive federal regulation. *See* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 758-59 (1982) (holding that the Public Utility Regulatory Policies Act of 1978 permissibly requires that states adhere to federal standards in lieu of federal preemption); *Hodel*, 452 U.S. at 288 (describing the federal Surface Mining Act as establishing a program of "cooperative federalism" that permits States to opt out of preemptive federal regulation if they enact programs that conform to local needs while meeting federal minimum standards); *see also* New York v. United States, 505 U.S. 144, 161-63 (1992) (citing *Hodel* and *Fed. Energy Regulatory Comm'n* approvingly in explaining that conditional preemption does not directly compel states to enact federal mandates and thus does not violate the Tenth Amendment); Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992) (noting that the Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective").

170. *See, e.g.*, Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1204-12 (1997).

171. *See, e.g.*, *id.* at 1214; BEER, *supra* note 12, at 252-53; *see also* New York v. United States, 505 U.S. at 168 (noting that conditional preemption leaves states with the ability to set their own policy: "[S]tate governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.").

solutions, and in monitoring and dispersing better or "best" results, and, on the other hand, local independence, ingenuity and information in devising solutions is classically Madisonian.

VIII. EXPERIMENTALISM AS PRAGMATIC MADISONIAN EQUAL PROTECTION

A. *Experimentalism as Madisonian Equal Protection*

This Madisonian light on experimentalism reveals how modern experimentalist regimes help solve the problem of equal protection—what Dewey called "the 'problem of minorities'" and Madison called "injustice." Although many more levels and branches of government are involved than Madison contemplated (not to mention private actors) the basic Madisonian structure of local initiative in the shadow of the center's "enlarging" and generalizing definition of problems and monitoring of local solutions is intact. Local entities plan and implement indigenous solutions to problems provisionally identified at a higher level, but with the awareness that their plans and results will be reviewed by others. The monitors have the "extended," more "impartial" perspective that comes from being responsible to, and for, a broader range of citizens, and they extend their perspective further by surveying and comparing a wide array of local solutions. Each locality plans and implements its solution, and the center reviews all solutions, with an eye to what has been done elsewhere.

Over time, local actors develop a disposition to include minorities among those whose interests they consider. Even if minorities have little power to command attention locally, they are likely to have a more respected place in the central monitoring agency's more "extended" constituency. Because local action will be taken with an eye toward the expected response of the central monitors, and because participation levels may themselves be benchmarked, the "happy effect" Madison predicted will occur: local action will be taken with the monitor's eye towards the interests of otherwise neglected minorities.[172] In addition, local actors' incentive to adopt local solutions that stack up against the best solutions achieved elsewhere give them a stake in obtaining the "new" and "valuable" contributions that, as Dewey showed, minorities can often make.[173] Experimentalism thus pushes beyond equal consideration toward equal participation. Incentives to solve problems encompass incentives to make participation in problem-solving as broad as the range of groups with a stake in

172. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 PAPERS OF JAMES MADISON, *supra* note 1, at 317, 318; Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF JAMES MADISON, *supra* note 1, at 382-84; *see Madisonian Equal Protection*, supra note 1, at Subsection IV.C.4; *supra* notes 22-24 and accompanying text.

173. *See supra* note 88 and accompanying text.

the problem's solution and thus with information about how to solve it. Where collective action problems exist, it behooves the local experimenting agency to find appropriate representatives for groups whose members know a lot about the problem because they contribute to its cause or suffer its effects even if individual members have little incentive to join in its solution.

Also Madisonian is the center's constant accessibility to "local information" about what works and what does not, what is possible and what has not yet been shown to be. Such information can help answer a difficult standard-setting question that has long plagued judicial efforts to define and implement equal protection: which constituency with more favorable outcomes is the "similarly situated" one whose outcomes provide the standard against which equality is fairly measured? Returning to the example of the achievement gap in public education, it may not be possible or fair to require every local school to enable its African-American students to perform immediately at the level its white children do, much less at the level of the average white pupil in the state or nation. But by comparing a school's progress in closing the gap to the progress attained by myriad schools around the state or nation—including many that, with little controversy, can be seen to be similar to the school in question—it is possible to hold the school to a standard of improvement that is demonstrably within its grasp.[174] This benchmarking process can continue until the average of each population is equal to that of all others both locally and nationally or until it is demonstrably shown that no further progress is possible. But the impossibility of attaining those goals all at once no longer provides an excuse for making no progress at all.

Finally, experimentalism mimics Madison's objective of developing local allegiances to the center's "more enlarged plan of policy" by relying upon local officials to administer the center's initiatives.[175] Notwithstanding each locality's autonomy over initial planning and implementation, the provisional definition of the problem, the obligation to seek solutions of some sort, and a general idea of the target level of improvement local sites are obliged to pursue are all the product of a higher level of government with a "more enlarged" outlook. The source of the general definition of the problem and solution in representatives of a more extended constituency, the recognition that each local entity's successes will contribute to the more extended jurisdiction's overall solution and will be systematically shared with other local entities, the availability to less successful local entity's of improvement teams organized by the center and comprised of skilled practitioners from other local sites, and local practitioners' contributions to the center's successful problem-solving as

174. *See* James S. Liebman, *Towards a New Scholarship for Equal Justice*, 30 WM. MITCHELL L. REV. 273, 289 (2004).

175. THE FEDERALIST NO. 46, *supra* note 5, at 297 (James Madison); *see Madisonian Equal Protection*, supra note 1, at Subsection IV.C.4; *supra* notes 15-17 and accompanying text.

well as their own, all have a capacity to create "affections and consultations" that transcend the parochial.[176] Insofar as this broadened perspective is more considerate of the interests and open to the participation of local minorities it, too, contributes to Madisonian equal protection.

In sum, modern experimentalism's vibrant brand of Madisonian cooperative federalism[177] provides substantial protection to local minorities afflicted by nationally defined problems who, under the yoke of factional tyranny or neglect, lack the power to compel local solutions and participate in formulating them. Experimentalist equal protection is undoubtedly quieter than the "exterior" Fourteenth Amendment brand on which the nation has recently relied, punctuated as it has been by high profile judicial decrees, protracted litigation, affirmative remedial injunctions, massive and passive resistance, heated debates about the meaning of rights, ferocious attacks on the legitimacy of review and remedial engineering by unelected judges, and judicial retrenchment and retreat.[178] But like its "interior" Madisonian forerunner, experimentalist equal protection has the potential to be more effective, hardwired as it is into the continuous operation of local, state, and national government.

B. *Experimentalism as Pragmatic Madisonianism*

Experimentalism is not only an updated version of Madisonian equal protection, but also a more pragmatic version in both senses of the word. Above, we show that experimentalism à la Dewey is even more philosophically committed than Madisonian dialectical federalism to philosophical pragmatism: to learning by doing and to the provisionality of knowledge and beliefs.[179] Here we show that modern experimentalism is more practical than Madison's national negative in that it is more efficient and more easily administered. It penetrates far deeper into the interstices of government where discrimination can take place, while intruding less on state and local prerogatives.[180]

1. *Broader Equal Protection*

As we note earlier, Madison's effort to reach the "infinitude of... expedients,"[181] by which local majorities may oppress minorities through a

176. THE FEDERALIST NO. 46, *supra* note 5, at 296 (James Madison).

177. *See Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4; *supra* notes 15-17 and accompanying text.

178. *See Madisonian Equal Protection*, *supra* note 1, at Section V.B; *supra* Part II.

179. *See supra* Section IV.B.

180. *See Madisonian Equal Protection*, *supra* note 1, at Part VII (discussing the national negative's impracticality and intrusions upon state sovereignty); *supra* notes 28-32 and accompanying text (same).

181. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 PAPERS OF JAMES MADISON, *supra* note 1, at 212.

congressional veto power in "all cases whatsoever on legislative acts of the States" was both wildly under-inclusive, given the many state and local tyrannies that occur under executive and administrative authority, and wildly over-inclusive, given the many local legislative actions that pose little threat of injustice.[182] Modern experimentalism avoids both problems.

To begin with, unlike Madison's legislative veto,[183] modern experimentalism reaches municipal and administrative as well as state and legislative injustices. Indeed, unlike contemporary doctrine under the judicially enforced Equal Protection Clause,[184] experimentalism even reaches injustices by street-level bureaucrats that lack the imprimatur of state law or policy. Moreover, experimentalism relies less than Madison's national negative on heroic assumptions about Congress's insulation from factional influence emanating from the states, its own constituencies, or the national political parties (for which Madison never accounted, but which he feared would emerge and whose formation he hoped his national negative and Council of Revision would prevent).[185] This advantage is due partly to experimentalism's preference for more "expert" and "neutral" administrative, judicial or even private monitors over legislative ones.[186] More importantly, experimentalism is less susceptible to factional capture because of the greater objectivity of the data-driven, inter-local comparisons on which the center's monitoring is typically based. Because these comparisons are usually public and based on transparent, quantifiable criteria, the outcome of the center's review is more akin to recognizing the winner of a basketball game based on the final score than of intuiting the winner of a congressional beauty contest. As Dewey complained, "There is no particular public concerned in finding expert school instructors, competent doctors, or business managers."[187] Experimentalist remedies set out to create a public concerned with such problems. Also important is the fact that scores are never final. In contrast to the up-or-down, once-for-all-time nature of the Madisonian veto, the provisional character of the experimentalist monitor's benchmarking judgments subject to additional, continuously flowing information may further reduce the attractiveness and effectiveness of factional

182. Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF JAMES MADISON, *supra* note 1, at 383.

183. *See Madisonian Equal Protection*, *supra* note 1, at Section IV.C; *supra* Part II.

184. *See Madisonian Equal Protection*, *supra* note 1, at Section V.B; *supra* Part II.

185. *See Madisonian Equal Protection*, *supra* note 1, at Section VII.C (noting that from the standpoint of the equal protection concerns motivating Madison at the Convention, any "generalizing" effect the two political parties have achieved at the national level has been more than offset by their fortification and perpetuation of factional control at the state level). Dewey also criticizes the effect of the party system, which he writes gives the public no choices, stating that parties are ineffective; "parties are not creators of policies to any large extent," and "[p]olitical parties may rule, but they do not govern. The public is so confused and eclipsed that it cannot even use the organs through which it is supposed to mediate political action and polity." DEWEY, *supra* note 53, at 120-21.

186. *See supra* notes 50-51 and accompanying text.

187. DEWEY, *supra* note 53, at 123.

capture. Thus, less is at stake in each one of a protracted series of reviews in which relative positions are constantly changing.

2. *Less Intrusive Equal Protection*

These same characteristics help modern experimentalism minimize the threat to local prerogatives and associated impracticalities that led the Convention to reject Madison's congressional veto.[188] Chief among those risks and impracticalities was the uncertainty of the standards Congress would use in deciding whether a state law passed national muster. Although the track record of legislation adopted in sister states would have provided some assurances (at risk of inefficient copy-catting and path dependency), first movers would have no such assurances, and later movers would have remained at the mercy of congressional changes of heart and turnovers in party control. Experimentalism's dependence on "Can you top this?" inter-local comparisons and benchmarking based on relatively objective criteria provides more protection for early movers, who are held harmless at least until the next round of reporting, and more certainty for later movers based on where they stand vis-à-vis sister localities.

Under experimentalist regimes, local entities' substantial freedom to adopt their own goals, plans and performance metrics—or, at least, to offer theirs as alternatives to default standards imposed by the center—is enhanced compared to Madison's veto by the central monitor's committed agnosticism among local choices apart from the results they produce. As a result, local entities are more clearly responsible for failing to meet their own standards than under both the Madisonian precursor (where opaque, inconstant, and ill-informed congressional preferences among goals, plans, and metrics might be blamed for the rejection of local initiatives) or under post-New Deal command-and-control regimes (where local failures can often rightly be attributed to inflexible supra-local standards imposed without sensitivity to differences in how problems manifest themselves locally).

In addition, the typical experimentalist remedy is not a "veto" of a locality's proposal based on fuzzy predictions about its probable consequences, or even rejection of the locality's plan *after* experience has shown it to be a failure. Rather, the remedy is to let the locality decide how to meet the applicable benchmark, including by standing pat with its existing plan, improving the plan's implementation, or revising or replacing it. Even that remedy is not ordered unless the center can back it up with information about demonstrably effective better practices and by dispatching an improvement-assistance team of skilled practitioners with a track record history of success elsewhere.

188. *See Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.5; *supra* notes 24-28 and accompanying text.

Chronic failure may result in more drastic remedies, but only based upon the locality's proven incapacity to meet attainable benchmarks after multiple tries.

Finally and most obviously, experimentalism tracks Madisonian interactive federalism without putting states at the mercy of what even Madison believed was the nation's most dangerous branch[189] and without violating the Supreme Court's new limitations on state "commandeering."[190] Most of the central-local relationships on which modern experimentalism relies do not put Congress (or even federal administrative agencies) over state legislatures (or even state-level administrative agencies).[191] Moreover, the "grant in aid" and "conditional preemption" arrangements that typically are used when experimentalism does create federal-state relationships are constitutional and relatively non-intrusive because they involve *voluntary* state participation in federal programs or regulation in return for federal funds or exemption from preemptive federal regulation.[192] Moreover, state autonomy, initiative and equal partnership with the federal government is real, not a fiction, under experimentalist as opposed to command-and-control versions of these arrangements because state and local entities design, as well as implement, policy.[193]

Overall, experimentalist regimes capitalize on the strengths of different branches and levels of government while avoiding the institutional conflict that Madison's colleagues feared the veto would create—and that post-New Deal regulatory systems have often created. Through these regimes, Congress and other central agencies avoid engaging in complex, prescriptive rulemaking beyond their expertise. Instead, they at most define the public problem, establish a general framework for measuring progress toward a solution, and either themselves provide, or create intermediate administrative centers to provide, an infrastructure for generalizing successful local initiatives, holding poor performers to account, and periodically redefining the general rules. Nor is authority to impose prescriptive substantive rules delegated to administrators who are likewise distant from the people and their problems and subject to factional capture. Nor, finally, are courts put in the untenable position of second-guessing expert administrative judgments and imposing their own vision of a correct, national solution.[194] Instead, local bodies generate local, and contribute to supra-local, standards as part of a process of experimentation,

189. *See, e.g.*, THE FEDERALIST NO. 50, *supra* note 5, at 316; *Madisonian Equal Protection*, *supra* note 1, at Subsection V.B.2.

190. *See Madisonian Equal Protection*, *supra* note 1, at Part VI; *supra* note 32 and accompanying text.

191. *See supra* notes 175-178 and accompanying text.

192. Supreme Court decisions recognizing the constitutionality of both types of state involvement in the administration of federal programs are cited *supra* notes 169-171.

193. *See supra* notes 171-173 and accompanying text.

194. *See* Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 192-95. For discussion of the important roles for courts in experimentalist regimes, see *id.* at 278-322. Sturm, *supra* note 49, at 537-42; *infra* notes 239-246, 253-258 and accompanying text. *See generally* Sabel & Simon, *supra* note 39.

benchmarking, and exchanges of better practices. As definers of problems and monitors of solutions, supra-local entities do what Madison recognized they do best: bringing a more "extended," more "impartial" perspective to bear on all stages of the process, triggering "a more enlarged plan of policy than" by itself the local "government may have pursued."[195]

3. *More Fraternal Equal Protection*

Experimentalism improves on Madisonian equal protection in one other respect. Consistently with its Deweyan strain, experimentalism has a more sophisticated understanding of the joint activity needed to define the common good and thus a more fully developed concept of "fraternity."[196]

Madison and Dewey both juxtaposed political activity that, on the one hand, pursues factional or habitual interests driven by unchosen family, religious, racial and class associations and the "opinions" and occupations that go with them, to governance that, on the other hand, is less partial, more general and pursues the common good.[197] Both also believed that "diversity" was largely responsible for the problem of faction and habit but also was crucial to the process of steering political action in the latter, ameliorative direction.[198] As we develop elsewhere, however, Madison had a somewhat more sanguine view of this process than Dewey.[199]

For Madison, it was enough for "the extended republic" to make national legislators beholden to a "society [with] so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable."[200] Merely facing such a large and unruly throng of interests and opinions would force national legislators to consider all interests impartially in choosing actions consistent with the public good. Local legislators would in time adopt the same stance, because they knew that, without it, their acts and codes would be less likely to pass congressional muster.[201] Madison assumed that freeing legislators from the politically irresistible distractions posed by the demands of stable majority factions would

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195. THE FEDERALIST NO. 10, *supra* note 5, at 83 (James Madison); THE FEDERALIST NO. 46, *supra* note 5, at 297 (James Madison).

196. *See Madisonian Equal Protection*, *supra* note 1, at Subsection II.B.3 (describing Madison's economized conception of fraternity). In Madison's view, individuals are not required to fraternize at all, unless they choose to have public as well as private lives, in which case they are required to practice the similarly economized other-considering "virtue" described *supra* notes 9-12.

197. *See supra* notes 9-12, 64-66 and accompanying text.

198. THE FEDERALIST NO. 10, *supra* note 5, at 78 (James Madison); *see Madisonian Equal Protection*, *supra* note 1, at Section II.B; *supra* notes 73-74, 78 and accompanying text.

199. *See Madisonian Equal Protection*, *supra* note 1, at Section II.B; *supra* notes 77-79 and accompanying text.

200. THE FEDERALIST NO. 51, *supra* note 5, at 324 (James Madison).

201. *See supra* notes 11-13 and accompanying text; *Madisonian Equal Protection*, *supra* note 1, at Section III.A.

itself enable them to abstract from parochial interests and see on the horizon the "comprehensive and permanent interest" of the public that was visible to anyone who took a broader view.[202]

Madison's sanguine view of how the general good comes to be recognized left him with a thin notion of public participation and fraternity among members of the political community.[203] Over time, national and state legislators might develop a broader perspective and an eye for the general good, as might state executive and administrative officials whose role in implementing federal initiatives would make the broader interests of the nation "the objects of their affections and consultations."[204] But the connection of the public itself to the framing of the public good was more attenuated. For most people, the shared sense of a common good that underlies fraternity arises only from a common recognition—which occurs only occasionally, in individuals' better moments—of their equal status as choosers of values and plans and their equal interest in a system of government that respects that status.[205] In other respects, fraternity was negative. As long as the government did not play favorites, or chronically elevate the interests of one faction over others, there was a reasonable chance that violence would be avoided and a degree of social peace and stability achieved.[206]

Dewey was less sanguine about the ease of identifying the common good,

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202. Madison wrote:

> Everyone knows that a great proportion of the errors committed by the State legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interest of the state to the particular and separate views of the counties or districts in which they reside. And if they do not sufficiently enlarge their policy to embrace the collective welfare of their particular State, how can it be imagined that they will make the aggregate prosperity of the Union . . . the objects of their affections and consultations?

THE FEDERALIST NO. 46, *supra* note 5, at 296; *see Madisonian Equal Protection*, *supra* note 1, at Section III.B. An opposing view of Madison is that he defines the common good as the results achieved by any ad hoc coalition of interests that legislators happen to cobble together to form a majority on a given occasion, as long as they treat each individual's interest and support as the equal of those of any other individual, and thus are not captured by a single individual or group. *See* Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-35 (1985) (contrasting this interpretation of Madison, associated with "interest-group pluralism," and a view of Madison as contemplating "virtuous" legislators acting according to an independent concept of the public good); *see also* H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1339 (1994) (criticizing Madison for being in the "public good" not the "interest group" camp). We too reject interest-group pluralism as a description of Madisonian political theory and of the construction of the public good in modern experimentalist regimes. We note, however, that experimentalism, like interest-group pluralism, treats the common good as a distillate of the variety of interests held by members of the public. Under experimentalism, however, the extent of the refinement of interests and the range of additional considerations that are added to the mix are greater than under the standard view of interest-group pluralism.

203. *See Madisonian Equal Protection*, *supra* note 1, at Subsections II.B.3-4.

204. THE FEDERALIST NO. 46, *supra* note 5, at 296 (James Madison).

205. *See Madisonian Equal Protection*, *supra* note 1, at Subsection II.B.4; *supra* notes 9-11 and accompanying text.

206. *See Madisonian Equal Protection*, *supra* note 1, at Subsections II.B.3-4; *supra* note 8 and accompanying text.

even after attention is diverted from parochial concerns. For Dewey, "discovering the means by which a scattered, mobile and manifold public may so recognize itself as to define and express its [common] interests" is "[t]he prime difficulty" for democracy because it is only through "associated or joint activity" in which the definition and expression of common interests actually occurs that the grip of association and habit can be broken.[207] It is only through active participation in solving everyday public problems that a "society" may be transformed into a democratic "community":

> Wherever there is conjoint activity whose consequences are appreciated as good by all singular persons who take part in it, and where the realization of the good is such as to effect an energetic desire and effort to sustain it in being just because it is a good shared by all, there is so far a community. The clear consciousness of a communal life, in all its implications, constitutes the idea of a democracy.[208]

The core experimentalist activities require just the kind of joint activity that Dewey had in mind: continuous planning, implementing, evaluating, and re-planning of solutions at the local level, in inter-local networks, in exchanges of information between localities and the center, and in the former's responses to benchmarks the latter sets and improvement teams the latter organizes. Of course, as we have noted, Dewey did not follow-up his discussion of the "specifications" that had to be met if "the Community [was to] be organized as a democratically effective Public" by actually devising a method of structuring governance to realize those specifications.[209] For that, we had to turn to Madison's interactive federalism.[210] But once modern experimentalism puts in place the Madisonian structure of local innovation and central monitoring, the problem-solving communities it induces provide a richer version of fraternal interaction and commitment to commonly devised solutions than Madison hoped for. At least under modern conditions, that is, the breadth of the local, local-center, and inter-local interactions needed to solve national problems "attach[es] . . . to national objects," and mobilizes "the affections and consultations" of a wider constellation of public and private actors—leading them to "embrace a more enlarged plan of policy"—"than the existing government would have pursued" and, indeed, than Madison himself imagined.[211]

Experimentalism not only increases public participation but also thickens institutional interaction. Expanding upon Madison's "horizontal federalism,"

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207. DEWEY, *supra* note 53, at 146, 151.

208. *Id.* at 149.

209. *Id.* at 147, 149, 151. For Dewey's view that, to be successful, these associations had to be "contaminated by contact with use and service"—*i.e.* with real problems in their actual settings—see *id.* at 175.

210. *See Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4; *supra* notes 15-17 and accompanying text.

211. THE FEDERALIST NO. 46, *supra* note 5, at 440-41.

under which States learn from each other,[212] experimentalist regimes make readily available for emulation not only the higher-level monitor's expanded perspective, but also the decisional and substantive "better practices" of myriad other problem-solving communities facing the same problems under similar conditions.

C. *Two Examples of Pragmatic Madisonian Equal Protection in Action*

Brief sketches of experimentalism's operation in two contexts illustrate its capacity to achieve Madisonian equal protection through Deweyan problem-solving communities. We begin by fleshing out the public school example alluded to above. We then give a second example from the employment discrimination context.

1. *Reforming Public Schools*

In response to concerns that a deteriorating public school system was placing the nation at risk, states in the 1980s began holding pupils to "minimum standards" as measured by results on standardized tests.[213] By the mid-1990s, the prevailing, crudely Darwinian use of test results to drive "high stakes" penalties for failing students gave way, in some places, to diagnostic uses. In these new regimes, test results, often supplemented by other performance measures, are used to identify schools and districts, as well as children, in need of improvement and curricula and other educational interventions that are associated with success in particular contexts.[214]

Legislatures and courts in Kentucky, North Carolina, and Texas, for example, have responded to demands for a more equitable distribution of educational funds and adequate educational outcomes across school districts, and for greater accountability in the use of education funds, by setting general performance goals[215] and requiring state education departments, districts and schools to adopt plans for amplifying and achieving the goals and to report progress toward doing so.[216] State educational administrators have used the general goals as guides in the development of statewide curricula and tests aligned with the curricula. Typically, these curricula and metrics are defined not by information to be learned in particular grades, or teaching methods to be

212. *See Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4; *supra* notes 15-17 and accompanying text.

213. *See* Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 207-12.

214. *See id.* at 39-41.

215. *See, e.g.*, Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 212 (Ky. 1989) (setting general goals, for example, that each pupil be given "sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization"); *see* Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 231-57.

216. *See* Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 206-07, 242-43.

used there, but by operations students are expected to master by the end of a particular grade—for example, "a capacity to use context to facilitate reading comprehension."[217] State laws or regulations define levels of success on the tests, ranging above and below some marker of proficiency, and oblige all schools over time to reach proficiency, not only on average for the school as a whole but for each identifiable student population at the school, such as African-American, Latino, low-income and limited English proficiency pupils.[218] Schools are ranked not just on annual test scores and measures such as drop-out and attendance rates, but also based on rates of improvement on those measures.[219]

Typically, both proficiency levels and adequate improvement rates are based on comparisons with similar schools rather than a statewide norm. In Texas, for example, proficiency assessments are based on a comparison of outcomes at each school to those achieved at the thirty-nine other schools in the state with student bodies that are demographically and economically most like its own.[220] In North Carolina, improvement targets are set using a multiple regression analysis that accounts for socio-economic status and other student body demographics which affect predicted educational progress.[221] In Kentucky, part of the evaluation is based on progress toward closing achievement gaps between white male and other students.[222] Schools that fail to reach proficiency or to make adequate annual progress toward it after some specified number of years are required to engage in improvement planning. This requires that they identify improvement goals and programs to be implemented to achieve the goals, often with the assistance of teams of professionals from other schools and districts in the state who are trained in peer review and informed about better practices that have succeeded elsewhere under similar circumstances.[223] Schools with unacceptably low ratings over multiple years face sanctions such as reorganization or state take-over.[224]

State and (in some places) district-level educational administrators collect and publish information about school and district outcomes on accessible websites, organize improvement planning processes for failing schools, distribute monetary and other rewards for steadily improving districts, and

217. *See id.* at 60.

218. *See id.* at 70.

219. The Texas Education Agency compiles information about performance on each of these metrics at the school, district and statewide level and reports these results to the public on its website. *See id.* at 70-71. Similarly, in Kentucky, schools are required to improve at a given rate. *See id.* at 94.

220. *See id.* at 241.

221. *See id.* at 231 n.214.

222. *See id.* at 98-99.

223. *See id.* at 72.

224. *See id.* at 68, 73.

revise improvement targets and tests based on local experience.[225] A variety of private actors, some proceeding ad hoc,[226] others establishing highly sophisticated statewide nongovernmental organizations,[227] have used the data being generated at both the state and local levels to make comparisons with other like schools and districts, highlight deficiencies, demand improvements, identify best practices, provide technical assistance, convene networks of reforming schools, and the like. As much through these private actors as through public ones, a substantial amount of benchmarking, information sharing, and identification of "better practices" occurs.[228]

Partly in order to improve success on state tests and partly in response to demands by teaching professionals for a more meaningful say in their schools, a parallel but bottom-up process has taken place at the classroom and school levels. In some places, it has explicitly linked up with statewide accountability regimes.[229] Groups of teachers and principals devise plans for improving their students' mastery of important skills—say, reading comprehension for fourth grade students—by specifying in some measurable way the results they hope their pupils will achieve; collaboratively designing a plan for achieving the goal; implementing the plans in the multiple classrooms or schools representative in the collaborative; periodically comparing results across sites based upon "inter-visitation" and observation of each other's implementation of the plan in different settings; revise the initial plan and measures of success, or the plan's implementation at particular sites, based on what did or did not work in different settings; implementing and observing the results of the revised plan; and so on. These processes are facilitated by extensive, ongoing professional development activities built into the daily curriculum, opportunities for less skilled teachers to visit classrooms of master teachers for weeks at a time, periodic site visits by principals and district personnel, and other forms of continuous information-sharing, monitoring and peer evaluation.[230]

Recent federal legislation has the potential to extend these improvement regimes to the national level. Inspired by reforms in Texas, the No Child Left Behind Act of 2001 (NCLB)[231] requires states seeking federal education funds to submit plans to the federal Department of Education that identify the "challenging academic content standards" and "student academic achievement

225. *See id.* at 71, 86.

226. *See id.* at 102.

227. *See id.* at 73-76.

228. *See id.* at 242-46.

229. *See id.* at 246-50.

230. *See id.* at 47-48. In Kentucky, state legislation requires the collaborative setting of school policy by local councils composed of principals, parents, and teachers that formulate local policy in meetings open to the public. *See id.* at 90-91.

231. Pub. L. No. 107-110, 115 Stat. 1425 (2002).

standards" that each state has chosen to use to define an adequate education for all students in the state, annual tests in literacy and mathematics that are aligned with those standards, and performance targets on the tests that apply not only to schools as a whole, but also to each racially, economically, and educationally defined sub-populations within the school.[232] States then must report test results and other outcomes to the public in an accessible comparative form, again by school as a whole and by each sub-population within the school.[233]

Under the NCLB, each state sets its own goals for "annual yearly progress" (AYP), subject to the requirement that all plans call for all sub-populations to meet the state standard of adequacy within twelve years.[234] States must provide technical assistance premised "on scientifically based research" to schools that persistently fail to meet their AYP goals, in part through state-organized peer support teams of master teachers. Students attending failing schools must be provided with funds for supplementary education, and be permitted to transfer to other public schools in the same district with transportation funded by the state.[235] States also must reward schools (typically with monetary grants) that "significantly close[ ] the achievement gap" between students from different ethnic groups.[236] Public criticism of the NCLB by states, teachers unions, and local and national politicans may be justified as to its implementation thus far, where states may lack adequate federal funding to comply with the NCLB's requirements and adequate Department of Education regulations to provide guidance (though implementation remains in its preliminary stages).[237] The criticism we strongly disagree with, based on the discussion above, is that the NCLB unduly emphasizes rote testing and intrudes on state prerogatives. That criticism misunderstands the experimentalist nature of the remedy—the NCLB rejects inflexible testing goals imposed from above and instead asks that states set their own achievement and progress goals and standards. Those self-set goals may be quite demanding, and states certainly should receive the funding and guidance needed to comply, but the underlying program remains a valuable

232. *See* 20 U.S.C. §§ 1111(b)(1), 1111(b)(3), 1113-1115. Compliance is tied to receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965.

233. *Id.* §§ 1111(b)(2)(C)(v), 1111(b)(2)(G)(iii), 1111(b)(2)(I), 1111(b)(10), 1116(a)(1)(c).

234. *Id.* §§ 1111(b)(2)(B)-(G), 1111(b)(2)(I).

235. *Id.* §§ 1116(b)(5), 1116(e), §§ 1116(b)(1)(E), 1116(b)(9), 1116(b)(10).

236. *Id.* §§ 1111(c)(3), 1111(c)(4), 1116(b)(4), 1117.

237. For a detailed response to various criticisms of the NCLB, see Liebman & Sabel, *Public Laboratory, supra* note 39, at 286-300. The criticisms receiving the most coverage in the press are related to funding, regulatory guidance, and federalism. Regarding funding, the allotment for the NCLB is currently six billion dollars short of Congress's original authorization, leading some to contend that the "amount states are getting is certainly not adequate to meet the tough standards in the law." *See* Editorial, *Rescuing Education Reform*, N.Y. TIMES, Mar. 2, 2004, at A22. Furthermore, in regard to regulatory guidance, the Department of Education has thus far been "slow in adopting regulations on how the states can comply with the law." *Id.* Regarding federalism criticism by states, see Sam Dillion, *Bush Education Officials Find New Law a Tough Sell to States*, N.Y. TIMES, Feb. 22, 2004, at A1 (describing "discontent nationwide among educators and local politicians"). *See also* Sam Dillon, *Utah House Rebukes Bush With Its Vote on School Law*, N.Y. TIMES, Feb. 11, 2004, at A16.

reform that could, at minimum, provide the *catalyst* for the kind of sustained change involving participation of several sets of actors that occurred in Texas and Kentucky.[238]

Further, although courts are no longer the sole engine of reform in experimentalist remedies, they remain involved in two important ways. First, in states like Kentucky and Texas, courts triggered the adoption of these accountability schemes by ordering state legislatures to fix disparities in school funding and outcomes.[239] In Kentucky, the state supreme court took the initial step in building the experimentalist regime by setting general goals and standards and ordering the state to devise a method for reaching them.[240] In Texas, after repeatedly failing to generate enough funds and redistribution among school districts to satisfy state supreme court decrees in a funding-equity suit, the state legislature finally agreed to provide more of both in return for an experimentalist accountability system.[241] In both states, the courts' and/or legislatures' confidence to act was increased by the work of broadly representative groups of educational, community, and business leaders that had previously convened over a number of years and developed accountability proposals along the experimentalist lines that courts and legislatures later put in place.[242]

Second, once these schemes are in operation, and this includes the NCLB,[243] courts may be available as back-up monitors. Schools that fail to pool information, adopt best practices, or perform adequately—or school districts and states that permit them to do so without taking action—may be subject to judicial decrees holding officials accountable for achieving at least the level of results that comparable schools elsewhere in the state have achieved.[244]

The Deweyan traits of these educational accountability regimes are easy to spot. Preclusive first principles—for example, that racially balanced classrooms are required or are anathema; that more money or a clearer incentive structure is the solution; that phonics or whole-language is the best way to teach children

238. For a detailed discussion of how the NCLB can create a framework for reform that courts, legislators, educators, advocacy groups, and civil rights groups might be able to tap into, see Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 291-96. *See also* Editorial, *Rescuing Education Reform*, N.Y. TIMES, Mar. 2, 2004, at A22 ("The new law will need tinkering here and there. But its goal and its general road map for getting there are the right ones. For the effort to truly equalize education to succeed, Congress will need to fight off destructive schemes by lobbyists and bureaucrats of both parties who are working hard to undermine the new initiative and to preserve the bad old status quo.").

239. *See* Liebman & Sabel, *Public Laboratory*, *supra* note 39, at 234, 251.

240. *See id.* at 251.

241. *See id.* at 236.

242. *See id.* at 231-57.

243. *See id.* at 297-300.

244. For a proposal for court monitoring of this sort, see Liebman & Sabel, NCLB, *supra* note 49, at 1743-48.

to read—are suspended while collaborative problem-solving takes place under discipline imposed by continuous monitoring and public reporting of success or failure in improving outcomes.[245] Solutions and measures of success and failure are provisional, "experimental," and validated or not by experience. Public opinion about how to improve education in the "special situations" in which every classroom, school, district, and state finds itself is generated jointly and publicly at each of those levels, and is based on "evidence," not "beliefs" that developed habitually from static associations and "masquerade as eternal" and "absolute."[246]

The reform process, and the equal protection it affords, is also recognizably Madisonian. Local classrooms, schools, districts, and states innovate under the eye of monitors at higher levels all the way up to the federal Department of Education. In doing so, the local actors commit themselves to the goals the higher level identified when establishing the regime and implement the higher level's initiative. In doing so, however, the local actors retain maximal freedom to innovate and continuously provide the higher level with useful "local information" and "the assistance of [local] codes."[247]

More importantly, local problem-solvers have strong incentives to attend to the interests of local minorities, and there is reason to expect that such attention will become habitual over time. Inattention will predictably penalize the local problem-solving community in the monitoring process in two ways. First is the Madisonian penalty: higher-level monitors are likely to have a more extended, less partial perspective than the locals, making them sympathetic to the minority community and suspicious of decisional processes and solutions that freeze it out. Second is the Deweyan reason: failing to tap the information and proposals of each community affected by the public school system will keep schools and districts from succeeding as well in meeting educational challenges as comparable institutions that do tap those sources.[248]

States like Kentucky and Texas and the federal No Child Left Behind Act go even further. By demanding that results be publicly measured and reported not only school-by-school but also for various subpopulations defined by race, ethnicity, economic status, and special educational status, these regimes explicitly design the monitoring structure to assure the broadening of interests

245. *See supra* notes 148-151 and accompanying text.

246. *See* DEWEY, *supra* note 53, at 203; *supra* notes 97-100 and accompanying text.

247. THE FEDERALIST NO. 56, *supra* note 5, at 347-48 (James Madison); *see supra* notes 15-17 and accompanying text; *see also* Gráinne de Búrca, *Reappraising Subsidiarity's Significance After Amsterdam* (1999), *at* http://www.jeanmonnetprogram.org/papers/99/990701.html (discussing the core "subsidiarity" principal adopted by the European Community, which requires the center to structure any initiatives it adopts so that, consistent with the goal of solving the problem at issue, the initiative maximizes the freedom of local entities to design and implement their own solutions).

248. *See supra* notes 88, 92 and accompanying text.

that Madison hoped would be the "happy effect" of his national negative.[249] Instead of being expected to intuit, localities are informed by law that the effect of their activities on each minority community will be a matter to which higher level monitors will closely attend. No matter how parochial a locale's governing majority, therefore, it will no longer be able to avoid exposure not only of its purposeful "oppression" of minority children, but also of its passive ignorance of their needs and of better practices for educating them that experimentation can reveal. This evidently is what the Bush Administration had in mind when it declared its "commitment" (through its adoption of the NCLB) to "eliminate the achievement gap," rather than hiding it within statewide averages, and in so doing to attack the "soft bigotry of low expectations."[250]

2. *Minimizing Workplace Discrimination*

Today, much workplace discrimination takes forms that are difficult to prove, or to classify as such even when all the facts are known. Typically, actions that systematically disadvantage minorities and women are informal, discretionary, and undocumented. Often, they are spread across a number of supervisors and co-workers and occur in settings in which private employers can hire and fire workers at will based on idiosyncratic evaluation methods, performance standards, and workplace culture.[251]

Actionable bias also frequently coincides with conditions—poor management, erratic hiring practices, and odious employee behavior—that are sub-optimal from a business perspective and ought to be cured along with bias but are not legally actionable.[252] Under traditional rule-based enforcement regimes, in which lists of particular illegal practices accrete slowly over time, forbidden practices may not yet have joined the list when discrimination is suspected, particularly in developing areas such as sexual harassment. In such settings, employers worried that comprehensive solutions they adopt for both the legal and business aspects of the problem may be legally unnecessary or insufficient may choose to leave the problem unaddressed and hide any aspects

249. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 PAPERS OF JAMES MADISON, *supra* note 1, at 317, 318; Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF JAMES MADISON, *supra* note 1, at 382-84.

250. U.S. DEP'T OF EDUC., REACHING OUT . . . RAISING AFRICAN AMERICAN ACHIEVEMENT—NO CHILD LEFT BEHIND, http://www.nclb.gov/start/facts/achievement_aa.html (last visited July 30, 2002).

251. Sturm, *supra* note 49, at 466-75 (defining and describing first- and second-generation employment discrimination).

252. Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 281 ("Organizational practices that create gender bias can also cause organizational dysfunction. Racial, gender, and ethnic injustice may be best remedied by addressing these underlying institutional arrangements. . . . Issues of racial and gender bias are deeply connected to other concerns such as health and safety, worker participation, working conditions, and long term economic sustainability of a community.")

of it they fear could be actionable.[253]

As Professor Sturm has described in detail, the Supreme Court has responded to this problem in the sexual harassment/hostile environment context by establishing an enforcement regime that is strongly experimentalist and, in the sense discussed above, Madisonian.[254] Absolving itself of the function of listing the various hostile environments that do and do not violate Title VII's prohibition of discrimination in the "terms [and] conditions . . . of employment,"[255] the Court has ruled that "no single factor" is decisive[256] and has recognized an affirmative defense for employers who "exercise[] reasonable care to avoid harassment and to eliminate it when it might occur."[257] The result is that employers seeking to avoid sexual harassment liability have an incentive to devise their own codes of conduct and enforcement regimes to curb sexual harassment and any associated practices they choose to tackle at the same time. Along with intermediate actors such as insurance companies and civil rights lawyers, courts monitor the plans to determine whether they meet the "reasonable care" standard.[258]

In the shadow of the Supreme Court's decisions, companies seeking to demonstrate reasonable care have adopted anti-discrimination regimes to break patterns of workplace behavior that the companies believe are associated with

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253. Sturm, *supra* note 49, at 475-78 (describing the limits of a "rule based" approach). Professor Sturm explains:

> In a rule enforcement process, problems tend to be redefined as discrete legal violations with sanctions attached. Fear of liability for violation of ambiguous legal norms induces firms to adopt strategies that reduce the short-term risk of legal exposure rather than strategies that address the underlying problem. They accomplish this in significant part by discouraging the production of information that will reveal problems, except in the context of preparation for litigation. Under the current system, employers producing information that reveals problems or patterns of exclusion increase the likelihood that they will be sued. Thus, lawyers counsel clients not to collect data that could reveal racial or gender problems or to engage in self-evaluation, because that information could be used to establish a plaintiff's case.

Id. at 476.

254. *See id.* at 479-89, 556-64.

255. 42 U.S.C. § 2000e-2(a)(1) (1994); *see* Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 78 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986).

256. *See* Oncale v. Sundowner Offshore Serv., Inc, 523 U.S. at 81-82; Harris v. Forklift Sys., Inc, 510 U.S. at 23; Sturm, *supra* note 49, at 480-82.

257. Faragher v. City of Boca Raton, 524 U.S. at 806 ("It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (concluding that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms," so employers should be rewarded for efforts "to promote conciliation rather than litigation in the Title VII context" and that "limiting employer liability" based on reasonable efforts to head off violations "could encourage employees to report harassing conduct before it becomes severe or pervasive") (citations omitted).

258. *See infra* notes 38 & 49 and accompanying text; *cf.* Sturm, *supra* note 49, at 479 ("Although the elements of this [new] structural approach have been set forth in recent cases, the Court has not yet fully articulated the conceptual framework that ties these elements together and explains their significance.").

sexual harassment and other gender- and race-focused bias. Although the Supreme Court does not require companies seeking the "reasonable care" safe harbor to publicize their plans, intermediate actors—insurance companies, industrial psychologists, consultants, and civil rights lawyers—have developed expertise in designing and implementing such regimes and thus informally pool information among employers about effective techniques.[259] Employer activity also may be monitored by groups of employees who serve on grievance committees or operate hiring, career development and training programs, which in addition provide auxiliary sites of innovation.[260] Although the EEOC has not yet done so, it too could pool information, benchmark results, and identify best practices.[261]

Of particular interest is the role played by civil rights lawyers. Given the lawyers' familiarity with practices elsewhere, companies sometimes hire them to draft anti-discrimination plans. Companies also achieve the same result indirectly by agreeing to consent decrees in lawsuits the lawyers bring on behalf of company employees.[262] Often, these decrees are experimentalist in design.[263] Pursuant to them, companies set targets for preferred outcomes, monitor the success of different work sites in meeting the targets, benchmark high performance levels and best practices tied to them, and oversee modifications where performance is below par.[264] The decrees may do double duty as remedies for the mismanagement, ineffective hiring practices, and inadequate supervision that accompany workplace bias.[265] Courts remain on call to monitor the decrees, or to step in when settlement efforts fail. But their job is made easier by the framework such consent decrees provide, the information they generate, and their elaboration of the "reasonable care"

259. *See* Sturm, *supra* note 49, at 524-30.

260. *See id.* at 530-35 ("By bringing together employees with common experiences, these [employee] groups facilitate the identification of exclusionary patterns. They also enable employees to interact with their employer as a group, which both elevates the urgency of responding and diffuses the target of any retaliation.").

261. *See id.* at 551-53 (describing failures of the EEOC, but also how at least some local EEOC offices have distributed model policies and taken a somewhat more structural perspective).

262. *See id.* at 527-30.

263. *See id.* at 563 & nn.367-68 ("[C]ourts have overseen the formulation, approval, and implementation of consent decrees, some of which contain many of the characteristics of effective problem-solving . . . .").

264. *See id.* at 511-19 (describing a consent decree in which Home Depot agreed to (i) computerize its promotion process so that the qualifications and job preferences of all employees seeking promotion are available both to management when making training and promotions decisions and to class counsel who has an ongoing role in monitoring compliance; (ii) track data on who is and is not eventually promoted, with "trip wires" announcing a problem when qualified candidates are passed over; (iii) monitor patterns by race and ethnicity of training provided, job preferences expressed, promotions requested, job interviews granted, and promotions awarded; (iv) develop interview protocols to minimize the "steering" of minority candidates; (v) adopt benchmarks for the inclusion of minorities in various positions; and (vi) measure and improve the participation of minorities in employment decision making).

265. *See id.* at 487-89 & n.92, 510-20.

standard when considered in the aggregate.[266]

The workplace discrimination context reveals how far public problem-solving can carry equal protection beyond Madison's ambition while remaining faithful to his structural approach. Under the Court's cases, it is mainly private, market-oriented entities, not state legislatures, that are the local innovators. And it is the national judiciary, supplemented by a variety of private intermediaries, not Congress, that fills the role of central monitor. Still, the Madisonian analogy holds. The national government uses local entities not otherwise affiliated with it to implement its regulatory program by requiring them to initiate their own solutions, subject to national oversight, under general norms that are fleshed out over time by local experience.[267] As a result, the "consultations" and "affections" of entities not otherwise likely to be sympathetic to the national objective (here, freeing the workplace of gender and race bias) are mobilized in service of the national goal.[268]

The Court's solution is doubly Madisonian. As noted, the Court has adapted Madison's brand of cooperative federalism to a broad array of national and local, public and private institutions. Moreover, the *reason* the Court has taken these steps is to provide an "interior" or structural cure for defects Madison presciently identified in the alternative, "exterior" or admonitory approach to equal protection that was later adopted by the Fourteenth Amendment and its allied civil rights acts.[269] Recognizing the difficulty of judicially decreeing that employers heed the "obscure and equivocal" words of Title VII's "parchment barrier" to bias,[270] the Court has substituted structural mechanisms that hardwire attentiveness to the interests of minority employees into businesses' everyday operation. In other words, in the workplace discrimination context (as also as in the public school context), at least part of the problem being solved, in the course of which equal protection is assured, is equal protection itself.

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266. *See id.* at 487-88. Police departments have begun to adopt similar remedial plans to head off Justice Department investigations, settle civil rights litigation, or comply with state laws seeking to end racial profiling and other abusive police practices. *See* Garrett, *supra* note 49, at 76-81, 92-95. These plans typically rely on the collection of data regarding the race of people stopped by the police; a problem-solving process for evaluating and responding to the data, including an "early warning" system that identifies "problem" officers and precincts; and monitoring by participants at periodic public meetings, outside overseers, or even civil rights groups. *Id.* at 81-96 (describing racial profiling consent decrees governing the Los Angeles Police Department and the New Jersey State Police).

267. *See Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4; *supra* notes 15-17 and accompanying text.

268. THE FEDERALIST NO. 46, *supra* note 5, at 296 (James Madison); *see Madisonian Equal Protection*, *supra* note 1, at Subsection IV.C.4; *supra* notes 9-15 .

269. *See Madisonian Equal Protection*, *supra* note 1, at Section V.B; *supra* Parts I-II.

270. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 PAPERS OF JAMES MADISON, *supra* note 1, at 295, 297; THE FEDERALIST NO. 37, *supra* note 5, at 229 (James Madison).

IX. EVOLVING EQUAL PROTECTION

We have described how Madisonian and Deweyan equal protection emerges from experimentalist remedies, but the question remains whether experimentalism can better satisfy our modern equal protection commitments, which may be more richly developed than both Dewey and Madison's economized "interior" notions of equality and the "exterior" rigid, rule based equal protection jurisprudence enforced tepidly by our federal courts. We submit that, through the pragmatic approach described, experimentalist equal protection can provide for more effective equal protection along all of the dimensions that equality typically is conceived today, broadly grouping modern theories of equality to include: (1) equality in results and in resources,[271] (2) equal concern and respect, or citizenship,[272] (3) equality of process and in participation,[273] (4) equality through integration,[274]and (5) anti-subordination[275] (including the notion that discrimination evolves and is cultural and context-specific)[276] and stigmatic harm.[277]

First, experimentalist equal protection aims at needs and at equality of resources, opportunity and results in a way that our prior regimes never did, more in line with Rawls's difference principle requiring that a rising tide lift all boats, than the economized Madisonian conception of the common good.[278] We have described in the education context strong sanctions to prevent schools from persistently lagging behind improvement and performance goals, combined with information pooling and resource sharing in the form of grants

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271. Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Michael Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

272. John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1160 (1978); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5-11 (1977) (proposing principle of equal citizenship to guide equal protection doctrine).

273. JOHN HART ELY, DEMOCRACY AND DISTRUST 135-77 (1980) (describing representation of minorities and participation in the political process as the central equal protection goal); *see also* Liebman, *supra* note 10, at 1552-56.

274. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

275. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1012-16 (1986).

276. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Standards of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1114 (1997) (arguing that status regulation and discrimination evolve and that legal standards fail to keep pace); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355-56 (1987) (advocating an equal protection test that would focus on not just racial stigma, but the "cultural meaning" of the alleged racial discrimination).

277. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13-14, 34-35 (2000); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993).

278. *See* JOHN RAWLS, A THEORY OF JUSTICE 302 (rev. ed. 1999); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

that provide schools with the tools to remedy poor results.[279] In the workplace discrimination context, incentive to avoid litigation encourages employers to dedicate resources to grievance procedures, and to expand racial and gender diversity in recruiting, career development, and training programs for minorities.[280] More importantly, unlike traditional historically-bound understandings of what the Equal Protection Clause requires, not only do experimentalist remedies achieve better results and publicly measure how well the needs of those worse off are met, the remedy does not end with remedying past discrimination, but instead requires steady progress towards meeting and then surpassing ameliorative goals.

Second, experimentalist equal protection aims at equal concern and respect, through equality of participation in line with Dewey's optimism about human potential and the potential of a truly public community. The approach thus accomplishes Madison's "equal citizenship" goal, but in the more sociable Deweyan manner of also making that citizenship meaningful by creating regular opportunities for broad participation in community decisionmaking.[281]

Third, as to political process and participation, the remedy precisely targets what Madison diagnosed as the inability of our federal government to prevent factional abuse at the local level and instead creates alternate structural incentives to provide relief and actively enfranchises minority sub-populations by soliciting their input and direct participation. Fourth, as to the theory that integration should be the goal of equal protection, experimentalism promotes integration in several senses; in diversity of participants in problem-solving itself, in measuring the effects of the remedy and ensuring that it reaches all disadvantaged sub-populations, and finally, as in the workplace context, the remedy can include explicit benchmarking of efforts to diversity the subject-institution.[282]

Fifth, experimentalist equal protection hones in on discrimination that would stand out as violating strict scrutiny, and indeed provides a scrutiny far better informed where showing purposeful discrimination may be prohibitively difficult,[283] but on the other hand, experimentalist data collection and public reporting requirements render transparent conduct of relevant actors that systemically disadvantages any groups. The result better satisfies the anti-subordination principle as well, by monitoring and making public whether any group is persistently treated as "second-class citizens," and structurally

279. *See supra* Subsection VII.C.1.

280. *See supra* Subsection VII.C.2.

281. *See* Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 60-62 (1977); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247-49 (1983).

282. *See supra* note 264 (describing the Home Depot consent decree). *See also* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000).

283. *See supra* note 271.

securing broad participation of minorities and benchmarks efforts to remedy discrimination and poor performance.[284] The experimentalist programs described adopt anti-subordination, race-conscious, affirmative, and remedial norms far beyond what courts have been willing to require or adopt, and not just to prevent discrimination, but for Dewey's and Madison's reason that human potential and thus diversity, "offers new ideas and approaches that can enhance institutions' capacity to perform and innovate."[285]

Admittedly, experimentalism avoids the Supreme Court's focus on uncovering stigmatic, race-based decision-making,[286] and rejects the rigid approach of exterior, command-and-control equal protection review in favor of preventing such classification before the fact. Purposive discrimination will prove far easier to uncover where public officials refuse to take action despite public data putting them on notice that a group is systematically disadvantaged. The approach involves people and communities interacting with each other to develop new perceptions and remedies,[287] and in doing so reaches more subtle or intersectional types of discrimination[288] and permits redefinition of norms surrounding equality and identity, based on the notion that just as the problem of discrimination is contextual and often rooted in particular groups and practices, so must be the solution.

What might be of concern to those reluctant to give up on the rights and rule-centered Fourteenth Amendment centered approach, is that in doing so, much of the remedy does not look like a guarantee of equality per se, or any like our equal protection jurisprudence. Instead the center often defines a problem using more mundane needs-based goals, such as improving reading comprehension in schools or reducing drop-out rates. The focus is on needs and not on rights, a shift in focus that some commentators have feared will undermine equality by distracting from the continuing centrality of race-and sex-based discrimination in our culture (with others countering that it is better to focus on needs and abandon an equal protection jurisprudence long unable to

284. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2429-30 (1994).

285. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Idea*, 84 CAL. L. REV. 953, 953-99, 1003-08, 1025 (1996) (describing how despite the broad assault on racial preferences, attention to diversity and inclusion provides for a better structured, participatory workplace, especially given the demands of the modern workplace for on-the-job learning, adaptability, diverse and creative problem-solving strategies, and for reaching diverse markets and populations).

286. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27 (1995) (rejecting "the surface appeal of holding 'benign' classifications to a lower standard [of scrutiny]" and applying strict scrutiny to federal affirmative action program); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (applying strict scrutiny to an affirmative action program based on the theory that racial classifications pose the central equal protection harm).

287. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 30-31 (2000).

288. *Lawrence*, *supra* note 276, at 319; Kimberle Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1297 (1991).

remedy intractable problems).[289] That long-standing critical theory and policy debate is avoided, where experimentalist remedies exist alongside the Equal Protection Clause, so nothing is lost. The experimentalist goal is "not to discard rights but to see through or past them"[290] and to push forward equality discourse by deconstructing and supplanting rigid, rule-based notions of what equality and equal protection consists in, with a more powerful, contextual and substance-focused approach.

On the other hand, the rights-based discrimination model illuminates that race and sex remain salient categories, which must be attended to explicitly through experimentalist remedial safeguards. Explicit benchmarking in experimentalist remedies thus far has been as to equality of results, in attaining performance goals, provision of pooled expertise and resources, and in achieving diversity. Though experimentalist remedies, as described, provide for broad participation and also an avenue for minorities who have little power to command attention locally to have a more respected place in the central monitoring agency's more "extended" constituency, the remedies do not explicitly measure participation to assess whether minorities actually meaningfully participate. Remedies up until now have simply required that decisions be made in consultation with outside groups, in open meetings. The only analysis of demographics of participants, how much they contribute, and whether their input is considered and adopted, has been by scholars measuring participation after the fact, and not in experimentalist regimes themselves.[291] That lack of explicit focus on participation values should be corrected.

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289. *See, e.g.*, PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 146-65 (1991); Gerald N. ROSENBERG, THE HOLLOW HOPE (1991) (debunking the view that the Supreme Court and federal courts were instrumental in securing civil rights, and questioning whether courts are an effective means of securing change); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 3 (1987) ("[T]he salvation of racial equality has eluded us again."); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1376-81 (1988) (claiming that civil rights law has failed to remedy discrimination and permits subordination of people of color); Susan Sturm, *supra* note 49, at 475-78 (expressing doubts about the ability of courts, lawyers, and rule-based approaches generally to remedy employment discrimination).

290. Strum, *supra* note 49, at 164.

291. Archon Fung conducted such demographic analysis of monthly community police-beat meetings in Chicago and found, surprisingly, that wealth, class, and race did not correspond with participation, and in fact many poor marginalized neighborhoods with less social capital had the greatest success with community policing. *See* ARCHON FUNG, STREET LEVEL DEMOCRACY 30-50 (1999), *at* http://www.archonfung.net/docs. Fung also found that in community school meetings, while African American and Hispanic people may be less likely to vote, higher percentages of African American and Hispanic parents participated in such meetings. *Id.* at 38. Fung noted the CHICAGO COMMUNITY POLICING EVALUATION CONSORTIUM, COMMUNITY POLICING IN CHICAGO, YEAR FOUR: AN INTERIM REPORT 130 (Illinois Criminal Justice Authority, 1997) stated "it is not the case that better-off places with a home-grown capability for handling problems are also the beats where community policing is working best. . . To the contrary, four of the most highly rated beats [in terms of community policing] are to be found among those with relatively little community capacity." Thus, "Chicago reverses a common pattern across the country, one in which participation in civic affairs and even crime prevention is higher in better-educated, homeowning, and white neighborhoods." FUNG, *supra*, at 21.

Participation may often require shoring up through additional protections, as "democratizing initiatives often encounter resistance from officials who are reluctant to share authority or subject themselves to additional public scrutiny."[292] Unless participation is measured and attended to, that crucial feature of the remedy may languish. Experimentalist remedies should benchmark the ability of an intermediate level monitor to secure participation of minority groups; create chanisms sensitive to whether certain groups feel excluded and the ability to remedy such exclusion and prevent perceptions of exclusion; and develop measures of how meaningful minority participation is, and how successful are efforts to prevent exclusion.

Further, in doing so a monitor must attend to difference, to affirmatively welcome members of marginalized groups to participate, just as employers do by making efforts to diversify job applicants, because otherwise they may feel alienated from the process or remain skeptical that their input will be considered.[293] As Sturm and Guinier note:

> Research consistently shows that ignoring patterns of racial and gender exclusion causes these patterns to recur and dominate. A proven method of minimizing the expression of bias in decision making consists of reminding decision makers of the risk of bias or exclusion and requiring them to engage in fair, unbiased decision making.[294]

Experimentalist remedies should make use of ongoing efforts to create further structural reminders preventing bias. This could take the form of measuring participation by race to monitor exclusion combined with efforts at maintaining diversity, adding grievance procedures as in workplace remedies, and ensuring that problem-solving places a premium on diverse viewpoints. Such efforts by a monitor should also remain contextual and focused on local efforts to solve concrete problems. The diverse communities of people suited to cooperate in solving problems of policing may be very different from those suited to workplace, environmental, or education reform.[295] Different remedies will call together different communities, but in each, explicit attention can be paid to difference and inclusion.

This suggests additional accountability mechanisms can be continually developed as best practices to monitor the monitor itself. Recall that Madison placed too much confidence in the ability of Congress to free itself from

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292. Archon Fung, *Deliberation Where You Least Expect It: Citizen Participation in Government*, *in* CONNECTIONS 30-33 (Fall 2003).

293. *See* Sturm & Guinier, *supra* note 285, at 1027 ("Many members of marginalized groups predicate their willingness to participate in collaborative conversation on the majority's recognition of the ongoing significance of group-based exclusion. For members of historically excluded groups, a meaningful program of inclusion is a prerequisite to participating in ventures that benefit the whole community.").

294. *Id.* at 1028.

295. "The role diversity plays in the functioning of particular institutions will vary, depending on the institution's mission, demographics, and history. Diversity, like race, is not a static, fixed concept, but rather one that takes on meaning in the context of particular circumstances and projects." *Id.*

factional influence, particularly where the development of the two-party system undercut the impartiality of the national government. As described, Madison believed in redundant structural safeguards, like his Council of Revision, which would serve as a meta-safeguard to guarantee the impartiality of Congress in its exercise of the veto. Any monitor can fall victim to faction, but structural mechanisms such as public reporting, participation and benchmarking can diagnose and prevent such failures.

This discussion indicates one final area for future work, and that is evaluating relative success of different monitors at achieving equal protection goals, whether some monitors may be better suited to accomplish equality-goals than others, and what kinds of safeguards best assure their success. Experimentalist remedies described solicit interactive participation of different and sometimes overlapping monitors, including state and national legislators, judges, executive and administrative officers, and citizens. In each remedy there is some center, and the ability of that monitor to collaborate with other participants will in large part determine the success of the remedy. One concern might be that in situations where the central agency is chiefly located in the courts (for example, Kentucky school programs), and where the courts are still chiefly motivated by "external" equal protection mandates, one might expect less attention to informal patterns of discrimination, disparate impact, or other local discrimination, than in situations where the central monitoring power is located in an administrative body that explicitly benchmarks whether minority sub-populations achieve better results (as the EEOC could do, but has not in the employment context). Perhaps intermediate level monitors at the state level may do a better job of reaching local patterns of discrimination than distant federal monitors. Future work on best practices should critically examine the relative empirical success of different monitors in including the concerns of neglected local minorities and fostering their meaningful participation in problem-solving efforts, whether courts, administrative agencies, legislatures or other entities best serve as central monitors, and what characteristics and practices account for their success. Similar work could focus on the roles of stakeholding intermediate groups, such as citizens' groups, civil rights groups, insurance companies, and public policy groups.

All of the above is to indicate that sustaining meaningful experimentalist equal protection will require ongoing attention not just to remedial results narrowly defined, but process-values and equal protection goals including those of participation, inclusion, disparate impact on minority groups, avoiding stigma, and whether minority needs are heard and redressed. What is so significant about experimentalist equal protection, though, is that such discussion and analysis of merits of different accountability mechanisms and additional remedial safeguards can occur at all. Where so often in the past our institutions have only rarely and grudgingly explicitly taken note of race,

gender, or of any difference, more optimism may be possible in an experimentalist regime, where better results across the board of attending to inequality and securing broad participation can be measured and observed. Problem-solving can push the evolution of equal protection norms and remedies beyond rigid categories and past solutions. Experimentalism, because it is data driven, creates the possibility for a deeper examination of the actual workings and results of local solutions, and empirical evaluation of success in achieving equal protection goals or whether discrimination or inequality remains unseen by the central agency. Experimentalist equal protection will continue to pose new ways of benchmarking or monitoring that can uncover local discrimination more effectively, promising a rich and hopeful road ahead in which we can progressively rethink and improve institutional design, remedies and scholarship and theory of equal protection. That evolving process will also bring together new problem-solving communities and perhaps also something like what Dewey meant when he hoped his method could bring together a "Great Community."[296]

X. CONCLUSION

James Madison was right about the danger local majority oppression of minorities poses to the stability of republics. "Injustice"—"the stronger faction . . . readily unit[ing] and oppress[ing] the weaker"—remains the "mortal disease" of democratic polities.[297] Madison also was right that the problem cannot be effectively solved through judicially enforced "exterior" admonitions, for example, to forbear discriminating against minorities in the workplace or to afford minorities the equal protection of the law.[298] For Madison, we never should hope for equal protection to arise as an afterthought, after state action runs its course and does its damage, cementing in place factional control of a group or coalition, which courts can only dislodge with great difficulty and at great political cost.

But Madison was wrong about his preferred structural, or "interior," solution to the problem: a power in Congress to negative state legislation in all cases whatsoever.[299] Madison himself had foreseen that members of Congress acting without the veto would "too frequently display[] the character rather of partisans of their respective States than of impartial guardians of a common interest."[300] Yet, there is little reason to think members of Congress would have

296. *See* Liebman, *supra* note 57, at 290-93.

297. THE FEDERALIST NO. 10, *supra* note 5, at 77 (James Madison); THE FEDERALIST NO. 51, *supra* note 5, at 320, 353.

298. *See Madisonian Equal Protection*, *supra* note 1, at Section V.B; *supra* Part I-II.

299. *See supra* Part I.

300. THE FEDERALIST NO. 46, *supra* note 5, at 296-97 (James Madison); *see Madisonian Equal Protection*, *supra* note 1, at Section IV.C; *supra* Part II.

done better while exercising the veto. And as burdensome and impractical as the veto would have been both for Congress and for state legislators, it still would have left most discriminatory "expedients"—all save state "laws"—outside the ambit of congressional control.[301] Nor was Madison able to explain to the satisfaction of his colleagues how continuous, cooperative interaction between different levels and branches of government, as opposed to their use merely to check and constrain each other, could inculcate equal protection virtue among either local or national officials.[302]

As we demonstrate here, however, all is not lost and there is much more to gain. Recent developments in public administration reveal that Madison's veto is not the only available "interior" remedy for the majority oppression to which republics are prone, nor are only *constitutional* solutions within the range of political and administrative practicality. On the contrary, something so humble as practicality itself—the need for robust inter-governmental interaction to solve otherwise intractable public problems—has driven a host of national, state, and local agencies of government to adopt *voluntarily* modern-day Madisonian equal protection.[303] Tracking Madison's interactive federalism,[304] these agencies have concluded that the best available solution to an array of public problems is what we call "democratic experimentalism."[305] Like Madison's veto and other aspects of his cooperative federalism, these experimentalist regimes rely on the supra-local definition of problems, local innovation to solve them, supra-local review to keep the local solutions accountable, supra-local use of the "local information" and "codes" obtained in the review process to re-generalize the problem and desired solution, the dispersion to other localities of information and codes generated elsewhere and of the re-generalized statement of the problem and solution, additional local innovation, and so on.[306] Participation in this process, moreover, induces the broadening changes in the habits and perspectives of cooperating state and national problem-solvers that John Dewey's pragmatism made intelligible and believable 150 years after Madison's efforts to explain the same transformations had baffled his colleagues at the Convention.

It thus is the process of continuous cooperation in the definition and solution of problems large and small that itself leads "effectual[]" equal protection to emerge.[307] As Madison understood, this result is not the product of "parchment" admonitions to respect thy neighbor nor of after-the-fact

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301. *See supra* notes 28-29 and accompanying text, *Madisonian Equal Protection*, *supra* note 1, at Section VII.B.

302. *See id.*

303. *See supra* Section VII.C.

304. *See supra* notes 15-17 and accompanying text.

305. *See supra* notes 53-54 and accompanying text.

306. *See supra* Parts V-VII.

307. *See* Letter to Thomas Jefferson (Sept 6, 1787), *in* 10 PAPERS OF JAMES MADISON, at 163.

judicial wrist slapping when the admonitions are ignored.[308] But neither does equal protection emerge, as Madison sometimes seemed to suggest, from an Olympian perspective that the extended republic automatically bestows on national legislators, and that the national negative would have foisted on state legislators.[309]

Rather, as Dewey recognized—albeit without Madison's knack for embodying his psycho-social insights in practical governance structures—it is the accountable problem-solving of Madison's cooperative federalism itself that enhances interaction and respect between majority and minority. Because local problem-solving in experimentalist regimes takes place under the watchful eye of officials attuned to progressively more "extended" constituencies, the likelihood of parochial majoritarian exclusion of local minorities from the decision making process and from the range of interests being considered is diminished—just as Madison foresaw.[310]

More important, however, as Dewey theorized, is the fact that the central monitor's focus of attention is on local success in defining and solving problems, and that success is defined comparatively—by how much similarly situated entities accomplish—creates even stronger dispositions towards equal protection and respect. To attain success in such regimes, *actual*—not just respectfully inquiring but productively extractive—attention must be paid to those most victimized by the seemingly intractable problems at issue, who have crucial information about how to define the problem and often have developed suggestive strategies for moderating it; to people with ideas that have not been tried before, who, as Dewey pointed out, are disproportionately likely to be minorities and others outside the mainstream;[311] to the resources, techniques and opportunities for cooperation offered by orthogonal disciplines, which often serve different constituencies and take different perspectives from the discipline that traditionally is in charge;[312] and to solutions that have unpredictably succeeded elsewhere, where constituencies and decision making processes may be more open than those in the majority of locales where the same problem has resisted solution.

Most important, finally, is the seamless way in which this problem-focused process of learning what is wrong and how to fix it integrates local, central, and distant participants, intermingles their various contributions, and synthesizes innovations that are unrecognizable as any as the participants' original

308. *See supra* notes 33-36 and accompanying text.

309. *See supra* notes 27-29 and accompanying text; *see also Madisonian Equal Protection*, *supra* note 1, at Section VII.B.

310. *See supra* notes 9-13 and accompanying text.

311. *See supra* note 88 and accompanying text.

312. An example is the interaction of the helping and adversarial professions and of therapeutic and coercive perspectives in developing treatment plans that are the core mechanism of drug courts and problem-solving courts generally. *See* Dorf & Sabel, *Drug Treatment Courts*, *supra* note 49, at 867.

conception. Madison did not spell out what such a positive vision of democracy would look like far beyond preserving the republic from dissolution, but Dewey looked beyond survival and saw in this approach a true democratic community and leaves us with a fundamental optimism about human potential in democracy. Experimentalism suggests that equal protection and also liberty and fraternity emerge out of a common enterprise, where equal protection, viewed structurally, builds not as a constraint on democracy's turbulent excesses, but from the means of everyday problem-solving of groups and institutions. That way, equal protection norms, rules, and remedies may be defined not just by law but by practice, beginning with the best practices that experimentation suggests. What this suggests for governing institutions, is rather than a state that is "only an umpire to avert and remedy trespasses of one group upon another," the experimentalist method goes beyond merely "settling conflicts," such that through participatory problem-solving "a large public interest is generated."[313] The "good state," "places a discount upon injurious groupings" that engage merely in "negative struggle," and instead "facilitates mutually helpful cooperations" and with the equal protection benefit, "creates respect for others and for one's self."[314] At the limit, as Dewey prophesied, this experimentalist process may transform a "Great Society"—a jumble of distinct constituencies that are habitually antagonistic to each other or at best warily respectful—into a "Great Community" defined by a common interest that its members continuously hammer out through cooperatively designed solutions to jointly specified problems.[315]

Given such an underlying notion of democracy, premised on participation and a belief in common interest that may be constructed through experimentation, it not surprising, therefore, in some of the best-developed of these regimes—ones, for example, that seek to improve the instruction of poor and minority school children,[316] diminish discrimination against women and minority employees,[317] and discourage racial profiling and other police abuses[318]—the problem being solved and specified through this equally protective process is equal protection itself.[319]

313. *See* DEWEY, *supra* note 53, at 73.
314. *Id.* at 72.
315. DEWEY, *supra* note 53, at 146-47.
316. *See supra* Subsection VII.C.1.
317. *See supra* Subsection VII.C.2.
318. *See* Garrett, *supra* note 49; Livingston, *supra* note 49.
319. *See supra* Part VIII.