



DAVID MOSS

MARC CAMPASANO

James Madison, the ‘Federal Negative,’ and the Making of the U.S. Constitution

On June 8th, 1787, at the Constitutional Convention in Philadelphia, delegates from across the United States began discussing a curious proposal to expand federal power over the states. James Madison of Virginia had suggested that the new constitution include a “federal negative,” which would give Congress the authority to veto any law passed by a state legislature. He viewed this as a critical safeguard against unchecked power at the state level. In late May, Madison’s Virginia delegation had presented a plan for the constitution that included a watered-down version of the federal negative. Now, in June, Charles Pinckney of South Carolina revived the original version, calling it “the corner stone of an efficient national Government.”¹

Not everyone agreed with Pinckney’s assessment, however. Opponents charged that Madison’s federal negative would allow Congress to “enslave the states” and let “large States crush the small ones.”² Indeed, the question of how much power – and what types of power – to vest in the federal government went to the very heart of the debate that unfolded in Philadelphia that summer.

The Constitutional Convention of 1787 capped a tumultuous period in American history. In 1783, after eight years of war, Britain formally recognized its former colonies as the independent United States of America. Within just a few years, however, the triumphant Americans found themselves facing calamities on many fronts, ranging from federal insolvency and widespread economic recession to an armed rebellion in western Massachusetts. Said George Washington, the hero of the Revolutionary War, “I am really mortified beyond expression that in the moment of our Acknowledged Independence we should, by our conduct, verify the predictions of our transatlantic foe, & render ourselves ridiculous & contemptible in the eyes of all Europe.”³

Sharing Washington’s frustration and embarrassment, James Madison came to believe that the economic and social turmoil plaguing America in the mid-1780s could be traced to defects in the Articles of Confederation, which had been adopted as the nation’s governing document in 1781. After extensive research on past republics and confederacies, Madison concluded that the theory of state sovereignty underlying the Articles was deeply flawed: lodging nearly all power in the states was a recipe for disaster. What was needed, Madison argued, was an entirely new constitution that would create a strong but limited central government with well-defined powers, including the power to veto state laws. Whether Madison could persuade his fellow delegates at the Constitutional Convention was

Professor David Moss and Research Associate Marc Campasano prepared this case. This case was developed from published sources. Funding for the development of this case was provided by Harvard Business School and not by the company. HBS cases are developed solely as the basis for class discussion. Cases are not intended to serve as endorsements, sources of primary data, or illustrations of effective or ineffective management.

Copyright © 2016 President and Fellows of Harvard College. To order copies or request permission to reproduce materials, call 1-800-545-7685, write Harvard Business School Publishing, Boston, MA 02163, or go to www.hbsp.harvard.edu. This publication may not be digitized, photocopied, or otherwise reproduced, posted, or transmitted, without the permission of Harvard Business School.

far from clear, but there could be little doubt how much was at stake as the new nation struggled to find its footing in Philadelphia.

Toward a New Nation^a

The United States began as thirteen British colonies located along the eastern seaboard of North America. The region possessed an abundance of natural resources – especially land – and the typical colonist lived well by world standards. One prominent historian maintained that as of 1774 the colonists' living standards were “probably the highest achieved for the great bulk of the population in any country up to that time.”⁴ Between 1650 and 1750, the total population of the North American colonies increased from 50,000 to 1.2 million; and by 1770, the population had nearly doubled again, reaching over 2 million (see **Exhibit 1**). Over three-quarters of the population worked in agriculture, and about two-thirds of white male farmers owned their own land. Blacks, nearly all of whom were slaves, comprised about one-fifth of the population as of 1770. Although slavery was legal in all of the colonies, most slaves worked in the South, typically cultivating rice and tobacco for export. Cotton was not yet an important crop.

Although disputes occasionally arose between the colonies and the mother country, before the 1760s they were few and far between. The British Government controlled trade and foreign policy, but otherwise left the colonists a great deal of authority over their own affairs. Although in principle most colonies were run by governors appointed by the British crown, in practice the colonies' elected assemblies enjoyed considerable power and discretion. Apart from a few import duties that were set in Britain, these assemblies decided local tax policy themselves.⁵ The colonists were legally required to trade within the British Empire in most cases but still benefitted from guaranteed markets for their agricultural products, from access to English manufactured goods, and from the protection of the British military.

“Taxation without Representation”

This mutually beneficial relationship only began to deteriorate as the British felt new financial pressures in the 1760s. After concluding a very long but ultimately successful war against French and Native American forces on North American soil in 1763, the British Government determined that the colonists were vastly under-taxed. Compared to citizens of the British Isles, the American colonists paid next to nothing in taxes. British officials, who faced a dramatically enlarged national debt after the French and Indian War, believed that the Americans should begin to share the costs of their own defense (see **Exhibit 2**).⁶

In 1764, therefore, the British Parliament passed the Sugar Act, which placed new regulations on the colonial sugar trade and imposed heavy taxes on a number of popular colonial imports, including wine and silk. Although some New Englanders attempted to fight the edict by refusing to buy British goods, their non-importation campaign failed to achieve widespread acceptance. The colonists' response was far more dramatic the following year, when the British passed the Stamp Act, which levied taxes on nearly all types of colonial documents from newspapers to licenses. Incensed colonists reacted violently, burning effigies of British officials and physically threatening tax collectors. In most places, the colonists' tactics effectively blocked implementation of the Stamp Act. The non-importation campaign also took on new life during the crisis and began exacting a heavy toll on British exporters.

^a Portions of this case borrow heavily from David Moss, “Constructing a Nation: The United States and Their Constitution, 1763-1792,” HBS Case No. 9-795-063 (Boston: Harvard Business School Publishing, 1994).

In the emerging rebellion, the colonists coalesced around the principle of “no taxation without representation.” The British Parliament had seized the power to tax from the monarchy in the Glorious Revolution of 1688, and this right was often celebrated as a foundation of British freedom and parliamentary democracy. The colonists viewed the new taxes in North America as a violation of these same ideals because they had no elected representatives in Parliament. The British government strenuously disagreed, claiming that the colonies *did* have a voice in Parliament through the principle of “virtual representation.” This idea, championed by Chancellor of the Exchequer George Grenville, suggested that each Member of Parliament represented the whole empire, not only those who voted him into office.⁷

Although Parliament bowed to political pressures at home and repealed the Stamp Act, the conflict was by no means over. British military commanders in North America began redeploying troops from the interior to the coastal cities in response to the colonists' increasingly organized resistance. Meanwhile, Parliament passed the Townshend Acts in 1767, which levied a variety of new taxes on colonial imports, riling the colonists once again. By 1770, tempers were so short in Boston that nervous British troops fired on an unruly group of demonstrators, killing five of them. The “Boston Massacre” only further inflamed the colonists' feelings of injustice and mistrust.

After yet another tactical retreat in 1770, involving the repeal of most of the Townshend duties, Parliament passed the Tea Act in 1773. The Tea Act offered special advantages to British traders who re-exported tea to the colonies. Its primary purpose was to eliminate smuggled Dutch tea from the American market and thus bolster Britain's troubled East India Company. As a byproduct, it also severely undercut New England merchants who had enjoyed a lucrative trade in smuggled tea, and it effectively re-imposed an existing tax on tea imports, which the smuggling operations had circumvented. Convinced that these new British rules further infringed on their independence, the colonists again resorted to violence. They threatened incoming ships carrying tea, and, one night in December, dramatically dumped 105,000 pounds of British tea cargo into the Boston Harbor. Outraged at the “Boston Tea Party,” the Royal Government immediately shut down Boston's port and attempted to place Massachusetts under military rule. Declared King George III, “The die is now cast. The Colonies must either submit or triumph.”⁸

As the King suspected, dissent was now spreading rapidly and threatening to become a full-scale rebellion. In September 1774, representatives from twelve colonies (all except Georgia) met in Philadelphia for a “Continental Congress,” which quickly revived and intensified the non-importation campaign. Massachusetts citizens began establishing their own governmental institutions the very same year. The boiling resentment between the Americans and the British came to a head on April 19th, 1775, when the first shots of the American Revolution were fired just outside of Boston, on the Lexington town green. To their astonishment, British military leaders soon discovered that the American rebels – though highly unconventional and undisciplined by traditional standards – constituted a formidable challenge.

Managing the War Effort

By the time the American colonists formally declared their independence from Britain on July 4, 1776, the philosophical question about what form of government was best had become a pressing practical one. British administrative structures began crumbling in the early 1770s as the rebellion took hold, leaving the colonists little choice but to erect new governmental institutions. Revolutionary leaders in most states established ad hoc legislative bodies in order to raise taxes and form militias. Through the pivotal year of 1776, seven states adopted formal constitutions, and most of the others soon followed. By embracing these new legal frameworks, “Americans had discovered a way to

legalize revolution.”⁹ Significantly, all of the state constitutions were grounded on the principle of popular sovereignty and, in most cases, extended suffrage to all white males who owned at least a small amount of property.¹⁰

Although most governmental authority and responsibility remained firmly lodged at the state level, the Continental Congress played an important role in coordinating the war effort against Britain – for example, by creating the Continental Army and appointing George Washington of Virginia as its Commander-in-Chief. Over the course of the war, the army never reached the full strength that many national leaders envisaged.¹¹ The American people largely distrusted centralized military power, especially given their experience under British rule. Reflecting this anxiety (and adding to the challenge of managing the war effort), the Americans fielded fourteen distinct force structures during the war: thirteen state militias and the Continental Army itself.¹²

Financing the war effort proved equally challenging, especially since it was unclear whether the Continental Congress had the legal authority or the popular support necessary to levy taxes. Perhaps as a consequence, Congress initially financed the war at least in part through extensive issues of paper money (see **Exhibit 3**). The bills, known as “Continental,” were ostensibly backed by future tax revenues rather than gold or silver. From 1775 until 1780, when the printing stopped, Congress had issued well over \$200 million in paper currency, triggering severe depreciation and bringing the phrase “not worth a Continental” into common parlance (see **Exhibits 4 and 5**).¹³ The scientist and statesman Benjamin Franklin, however, argued that the inflation was not such a bad thing: “The general Effect of the Depreciation among the Inhabitants of the States, has been this, that it has operated as a *gradual Tax* upon them. ... Thus it has proved a Tax on Money, a kind of Property very difficult to be taxed in any other Mode; and it has fallen more equally than many other Taxes, as those People paid most who being richest had most Money passing thro’ their Hands.”¹⁴

Although issues of paper money covered a large portion of federal spending until 1780 (see **Exhibits 3-6**), the Continental Congress also financed the war through borrowing – particularly from France, Spain, and Holland, but also from domestic creditors. Because investors were naturally wary about loaning large sums to a new government, interest rates rose as wartime borrowing accelerated.¹⁵

Like Congress, most states initially tried to avoid levying taxes, relying instead on paper money to finance the war effort. As inflation rose, however, many states finally began imposing higher taxes. In some cases, wartime taxes exceeded those collected under British rule, provoking citizens to protest, evade payment, and even occasionally riot. Ultimately even these higher taxes proved insufficient, forcing states to rely on extensive borrowing and, in some cases, continued use of the printing press to finance the war.¹⁶

Forging a Confederation

As early as 1775, a number of political leaders, including Benjamin Franklin, had suggested that the authority of the Continental Congress should be grounded in a written constitution. Lawmakers began working on such a document in June 1776, based on the general understanding that the states would be left to manage their internal affairs while Congress would handle foreign affairs. Several significant points of contention emerged during the drafting process, however, including whether more populous states would have more votes in Congress and whether slave populations would be counted when calculating each state’s share of wartime expenses.

As the summer of 1776 came to a close, the drafting process was largely abandoned – in part because several core issues remained contentious, but also because the military situation was becoming

increasingly dire.¹⁷ British forces seized control of New York City that August, and the city became a stronghold for colonists loyal to Britain. General Washington fled with his troops to Pennsylvania, but over the winter captured Trenton and Princeton in New Jersey. In October 1777, the British took Philadelphia, the nation's capital, but this victory proved costly to the British in both money and lives as a result of their generals' poor coordination and George Washington's clever maneuvering. Although Washington's army faced starvation conditions at Valley Forge in Pennsylvania that winter, the Americans' strategic position had already begun to improve in October of 1777, when the American General Horatio Gates succeeded in halting a British army descending from Canada in the Battle of Saratoga.¹⁸

That same month, members of the Continental Congress resumed work on a governing document. Worsening inflation as well as the potential for an alliance with France renewed the desire for a formal accord to undergird and clarify Congress's authority. Lawmakers ultimately resolved their differences by agreeing that each state would have one vote in the unicameral Congress, war expenses would be distributed based on the value of each state's land and improvements, and Congress would not manage state boundaries or western lands. Representatives finally completed drafting the document, called the Articles of Confederation, in mid-November 1777.¹⁹

As the war gradually turned in the Americans' favor, individual states began ratifying the Articles. Virginia moved first, approving the document near the close of 1777, and Maryland completed the process as the last state to ratify in early 1781.²⁰ Just seven months later, the British Commander Lord Cornwallis found himself surrounded by American forces and their newfound French allies, and he surrendered to General Washington at Yorktown, Virginia, on October 17, 1781.²¹ Although the war was not yet officially over, it was now rapidly winding down, and the victorious Americans increasingly turned their attention to matters of domestic governance.

"A Firm League of Friendship"

The Articles of Confederation, which announced that each state "retains its sovereignty" and that together the states would form "a firm league of friendship with each other," vested limited authority in a national Congress without creating either a chief executive or a judiciary. Specifically, the Articles conferred upon Congress the exclusive power to declare war, to enter into treaties and alliances, to settle disputes between the states, to regulate weights and measures, to oversee a national postal system, and to borrow. Nowhere, however, did the Articles grant the national government superiority relative to the states or the means to compel them to follow its laws.

Although the Articles placed relatively few restrictions on the states, there was a clear attempt to prevent them from discriminating against each other's citizens. The people of each state, the document declared, "shall be entitled to all privileges and immunities of free citizens in the several States; and ... shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof...." Significantly, the Articles also left virtually all control over both foreign and interstate commerce with the states, rather than with Congress.

While permitting the various states to collect taxes and impose tariffs, and requiring the federal government to honor its war debts, the Articles did not grant Congress the power to levy taxes. Instead, according to the Articles, "All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State."

Finally, in terms of representation, the Articles granted each state delegation one vote in Congress and mandated that all members of the body (who could not hold office for more than three years out of six) would face election every year. On important bills, nine votes out of thirteen would be necessary for passage, and unanimous consent of the states would be required in order to amend the Articles themselves.

A "Critical Period"

Although 1781 was a glorious year for the young United States, with the victory at Yorktown and the ratification of the Articles of the Confederation, the struggle to establish a viable nation had only just begun. Indeed, the new nation faced enormous challenges after the war came to a close. One of Harvard's student commencement speakers in 1787, John Quincy Adams, declared that during this "critical period," Americans found themselves "groaning under the intolerable burden of ... accumulated evils."²² Similarly, John Jay of New York had warned in a letter to George Washington the previous year, "Our affairs seem to lead to some crisis, some revolution – something that I cannot foresee or conjecture. I am uneasy and apprehensive; more so than during the war. ... The case is now altered; we are going and doing wrong...."²³ Anxiety was in the air during this "critical period," and with good reason.

Congress's Limited Power

One of the first major problems to become apparent, even before the war officially ended, was the appallingly weak financial position of the new federal government. Congress had accumulated \$27 million in debt during the war.²⁴ Yet under the Articles it was unable to impose national taxes or force the states to provide funds. In 1781, Congress collected only \$422,000 of \$5 million requested from the states, with no contribution at all from Georgia, the Carolinas, or Delaware.²⁵ Two years later, after persistent attempts to put Congress's fiscal house in order, Superintendent of Finance Robert Morris resigned in frustration, declaring, "It can no longer be a doubt to Congress *that our public credit is gone.*"²⁶

Congress could not pay its expenses, or its debts, without reliable income. Soldiers expecting payment for their wartime service were particularly alarmed, and several officers in Newburgh, New York, even threatened mutiny until George Washington himself intervened, delivering a moving speech to his officer corps in defense of the republic. Although a frightened Congress temporarily calmed the waters by enacting an expansive military pension in 1783, Pennsylvania soldiers who were tired of waiting for compensation literally ran Congress out of Philadelphia later that same year.²⁷ Lacking funds well into the decade, Congress repeatedly defaulted on its debt obligations, both foreign and domestic.²⁸ At the urging of anxious creditors, Congress began transferring some of its debt burden into the more capable hands of the states. Several states had already been servicing parts of the national debt since 1780, and many state leaders viewed the assumption of the national debt as an expression of the "right to take care of [their] subjects."²⁹ By the middle of the decade, Pennsylvania, Maryland, and New Jersey alone had assumed \$9 million dollars of the national debt. Since states had the authority to tax their citizens, most were more successful at managing this debt than Congress had been. Congress did resume some interest payments in 1784, but paid creditors in new certificates rather than specie (i.e., gold or silver). These certificates – essentially a replacement of new debt for old – were naturally unpopular with recipients and quickly depreciated in value.³⁰

Congress's weakness under the Articles was also evident in its inability to enforce the terms of the Treaty of Paris, the peace agreement between Britain and the United States that officially brought the

war to a close in September 1783.³¹ With Congress lacking any real coercive power, the states defied important provisions of the treaty designed to protect loyalists from abuse and ensure payment of private debts to British creditors. Furious about these blatant violations, the British retaliated by keeping troops garrisoned in frontier forts on American soil, also in clear contravention of the treaty.³²

Beyond treaty violations, the states frequently flouted the Articles of Confederation – for example, by enacting laws that discriminated against out-of-state merchants. As a case in point, New York laid heavy duties on New Jersey and Connecticut merchants who did business in New York City, provoking retaliatory sanctions from the victimized states.³³ At the same time, numerous states imposed tariffs on their neighbors, dramatically impeding interstate commerce.³⁴

Beggar-thy-neighbor policies at the state level also sharply limited American effectiveness in negotiations over international trade. Because Congress lacked the power to impose tariffs and thus to retaliate against trade protection, it lacked the necessary bargaining power to negotiate a reasonable trade treaty with a foreign power. In fact, the British Government simply refused to negotiate with Congress at all, recognizing early on that Congress was virtually powerless and that the various states could easily be played off against one another. The result was that British goods poured into the states while American exports to Britain remained severely depressed by pre-war standards (see **Exhibit 8**). American commercial interests actively looked for alternative markets, particularly in Continental Europe, but they faced the same obstacles again and again. As John Adams, the American liaison to Great Britain (and John Quincy Adams's father), struggled to respond to Britain's aggressive posture, he fretted that a sound commercial standing for the United States would "never be secured until Congress shall be made supreme in foreign commerce."³⁵

Immediately after the war, several "nationalist" politicians who worried about the consequences of an enfeebled Congress had suggested enhanced powers for the national government. In his role as Finance Superintendent, for example, Robert Morris of Pennsylvania proposed several amendments to the Articles that would have authorized national taxes, and James Madison of Virginia supported an amendment to grant Congress the power "to employ the force of the United States as well by sea as by land" to ensure compliance with national laws.³⁶ Such proposals, however, consistently failed to win the unanimous consent of the states that was required to amend the Articles (Rhode Island, sometimes referred to as "Rogue Island," was a frequent dissenter), and the nationalists' energy soon faded after 1783, at least temporarily.³⁷

Other critics of Congress, meanwhile, harbored even more radical ideas for restoring order. In the middle of the military pension dispute, Colonel Lewis Nicola wrote to George Washington about the officers' grievances. Most famously, he suggested that an American monarchy be erected with Washington as king. Washington responded that if Nicola had "any regard for your Country, concern for yourself or posterity – or respect for me, to banish these thoughts from your Mind & never communicate, as from yourself, or anyone else, a sentiment of the like nature."³⁸

Recession and Rebellion

Amidst such political turmoil – and perhaps in part because of it – the American economy soon took a turn for the worse. Historians continue to debate the extent of the economic downturn in the mid-1780s, but nearly all agree that it was a difficult period and some believe that the downturn may have been extremely sharp. The most pessimistic estimates suggest that per capita GNP fell by more than half. If so, then the economic collapse in the mid-1780s was even worse than that experienced between 1929 and 1933 (the worst phase of the Great Depression). According to two scholars of the period,

"While the extent of the reduction in gross national product remains uncertain, it is clear that per capita product fell and that it fell enough to affect all levels of society."³⁹

One consequence of the downturn is that many individual debtors found it difficult to make good on their obligations. Their woes were only compounded by the fact that the federal government, as well as a number of states, had fallen behind on servicing their own debts, leaving many former soldiers who had accepted bonds and certificates as payment for their wartime service in a tough financial squeeze. Many of these former soldiers had no choice but to sell their government certificates to speculators at deep discounts. In Massachusetts, for example, a farmer who had served in the Revolutionary army complained in a local newspaper that neither vendors nor workers would accept the government notes at par. "[T]he necessities of my family," he lamented, "obligated me to alienate [the notes] at one quarter of their original value."⁴⁰ Adding to the burden, many state governments raised taxes to pay off war debts, pushing numerous taxpayers with heavy financial commitments of their own to the breaking point.⁴¹

With countless farmers petitioning for debt relief, several state legislatures responded around 1786 by issuing substantial amounts of paper money, thereby allowing debtors to repay their debts in inflated currency. Rhode Island took the policy to its logical extreme, inducing rapid inflation and imposing penalties on creditors who refused to accept payment in the sharply depreciated paper money. Within a year, Rhode Island's paper dollar was worth only 16 cents in gold.⁴² Although other states exercised more restraint, creditors across the country claimed that their property was being confiscated as a result of the inflationary policies.⁴³ In Virginia, James Madison warned that paper money "affects the Rights of property as much as taking away equal value in land."⁴⁴

In contrast to Rhode Island, neighboring Massachusetts remained committed to both fiscal and monetary conservatism. The state legislature raised taxes to repay its debts and resolutely avoided a policy of inflation. The resulting pressure on small farmers was enormous, and many lost their property in court-ordered foreclosures. One former Continental Army officer, Daniel Shays, was so angry about the plight of farmers in the state that in late August of 1786 he led a small rebellion in western Massachusetts, its ranks eventually surging to over 2000 men. His goal was to prevent the courts – either through force or intimidation – from seizing the delinquent farmers' property. Although rumors circulated that the rebels intended to unseat the state government, nothing of the sort ever happened and the uprising was ultimately put down in early 1787. There is little doubt, however, that the newly elected legislature in Massachusetts heard Shays' message, for they quickly passed a variety of relief measures including a moratorium on debts.

In the minds of many Americans, moreover, the crisis in Massachusetts epitomized all that was wrong with the new Confederation. Economic elites who had never been very comfortable with the idea of broad-based democracy wondered whether they were headed for a future of class warfare and even mob rule. George Washington saw the whole episode as a terrible embarrassment: "To be more exposed in the eyes of the world & more contemptible than we already are, is hardly possible," he lamented.⁴⁵ Particularly after the nation's extraordinary triumph over the British, what could explain its shocking fall from grace in the eyes of so many Americans, including the hero of the Revolution himself?

Madison's Diagnosis

This question of what had gone wrong captivated James Madison, a Virginia statesman who had been active in both national and state politics throughout the revolutionary and postwar eras. Born in

1751 into an affluent slaveholding family^b, Madison has been described as possessing “a keen and inquiring mind coupled with a voracious intellectual appetite.”⁴⁶ He attended the College of New Jersey, which later became Princeton University, and went on to study with its president, John Witherspoon.

Although physically diminutive and reserved in personality, Madison had a penchant for politics and political battles. Frustrated upon returning from New Jersey in the early 1770s that his own Virginia Anglican Church was a source of intolerance against other denominations, he furiously denounced its “diabolical, hell-conceived principle of persecution.”⁴⁷ Not long afterward, as the rebellion against Britain took hold, Madison began to assist county and state governments, and at the age of 25 helped to write Virginia’s state constitution.⁴⁸ Elected to the Continental Congress in 1780, Madison had borne witness to its various deficiencies, and he was disappointed when his nationalist projects failed to take hold. After rejoining the Virginia legislature in 1784, he and his allies successfully defeated proposals both to declare Christianity the state religion and to expand issuances of paper money. Nevertheless, the mere existence of these movements likely contributed to his growing unease about the direction of American politics.⁴⁹

In March 1784, Madison asked his friend Thomas Jefferson, then in Paris on a diplomatic mission, to send him whatever books “may throw light on the general Constitution & droit public [public law] of the several confederacies which have existed.”⁵⁰ Madison reasoned that by understanding why past confederations had succeeded or failed, he could better identify what ailed the American confederation. By January 1786, he had received two trunks of books in English, French, and Latin at Montpelier, his family’s plantation estate.⁵¹ Sitting in his library, Madison began working through the books, conducting a thorough historical review spanning thousands of years. The lessons he gleaned would shape his thinking on the young American republic as well as his arguments at the Constitutional Convention in Philadelphia the following year.

History as a Guide

The books on Madison’s reading list included, among others, recent French works in the Enlightenment *philosophie* tradition and numerous classical Greek texts.⁵² The confederations he surveyed ranged from the Amphyctionic and Achaean confederacies of ancient Greece to the Belgic confederacy in the Netherlands (also known as the United Netherlands), which was still in place in the 1780s.

Madison took careful notes on each confederation’s structure and operations, specifically commenting on the deficiencies he perceived in each. He noted that several confederation governments had been unable to control their members, even in policy areas where they held explicit authority. For example, he pointed out that Athens and Sparta had waged their many wars against each other while co-members of the Amphyctionic confederacy, despite the federal authority’s prerogative to mediate such conflicts.⁵³ The central authority of the Belgic confederacy, meanwhile, had to consult 52 different cities—and sometimes procure their unanimous consent—when negotiating any treaty, causing long delays and easy manipulation by foreign powers. With each member city able to hold up the whole, the confederacy proved exceedingly slow in enacting policies. Madison believed that such “[a] weak constitution must necessarily terminate in dissolution for want of proper powers.”⁵⁴

^b Although Madison would later speak out against slavery, he never freed his own slaves. Significantly, he also wrote a precursor to the infamous Three-Fifths Compromise for the Articles of Confederation, though the provision was not adopted.

"Vices of the Political System of the United States"

Having completed his historical investigation of confederations from around the world, Madison began preparing a critique of the new confederation in America. The resulting 1787 document, entitled "Vices of the Political System of the United States," identified a range of national failings and attributed them to deficiencies "radically and permanently inherent in ... the present System."⁵⁵

He began by highlighting the states' persistent violations of the Articles of Confederation, such as their breaches of international treaties and their regular refusal to honor Congress's requests for funds. Although Madison criticized the states for these actions, he mainly faulted the Articles for denying the national government the capacity to enforce its policies. The authors of the Articles, he wrote, had trusted too much "that the justice, the good faith, the honor, [and] the sound policy"⁵⁶ of the state legislatures would obviate the need for such enforcement power at the federal level. "A sanction is essential to the idea of law, as coercion is to that of Government," he explained, and without either he believed the existing system had little to recommend it.⁵⁷

Even the state legislatures' constitutional actions, Madison lamented, had often undercut the national interest. He complained that the states had regularly failed to pursue "concert in matters where public interest require[d] it," particularly in setting uniform commercial policies.⁵⁸ Instead, they had passed laws to limit interstate trade or to support debtors at the expense of out-of-state creditors, which pit states and citizens against each other in a manner Madison called "destructive of the general harmony."⁵⁹

In the final section of "Vices," Madison went beyond merely listing the country's problems and proposed an explanation as to why there had been so much "injustice" in the states' laws (see **Appendix**).⁶⁰ In doing so, he rejected the traditional assumption – perhaps most strongly associated with Montesquieu and his studies of the ancient Greek republics – that republican government worked best on a small scale.⁶¹ Madison began by observing that all communities contained various factions such as economic classes, religious groups, and political parties. If a single faction, or a small concert of factions, won control of a legislature, "what [was] to restrain them from unjust violations of the rights and interests of the minority, or of individuals?" Madison suggested that small republics, with less competition among political groups, were more vulnerable to this problem of tyranny of the majority. In large republics, by contrast, "[t]he Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert." With diverse factions tempering each other's influence, he suggested, a larger republic's legislature would enact sounder and fairer policies.

Implicit throughout "Vices" was Madison's longing for constitutional reforms that would strengthen the national government and expand its influence over the states. He clearly articulated his desire to grant Congress powers of "sanction" and "coercion."⁶² But his frustrations about the states' failure to work together implied that the federal government required not only greater enforcement power, but also a broader span of authority. Notably, he wished to see an "enlargement of the sphere" of democratic policymaking to weaken the influence of faction, implying a shift in power from the state to the national level.⁶³ Such changes would be impossible under the current system, however, because the states' "sovereignty, freedom, and independence" were enshrined in the Articles of Confederation.⁶⁴ Madison thus intimated that only fundamental changes to the nation's constitution – or perhaps a completely new one – would be sufficient to correct the republic's flaws.

Vision for a New Constitution

By the time he completed "Vices," Madison had begun describing potential constitutional reforms in his correspondence with other national leaders.⁶⁵ Together, these proposals comprised a program that would "lead to such a systematic change" in American governance, he wrote, that it would replace, rather than merely alter, the Articles of Confederation.⁶⁶

Madison's proposed system would be built on "a due supremacy of the national authority" and would leave the states with enough power to be "subordinately useful."⁶⁷ To that end, he sought to grant the national government "positive and compleat authority in all cases which require uniformity," such as the setting of trade regulations and customs rates.⁶⁸ This federal supremacy would extend to new judicial and executive branches of the national government, each superior to the analogous state institutions. To further bolster the national government's authority, Madison proposed a "right of coercion" against delinquent states that would enable the federal government to carry out its laws "by force."⁶⁹

As a further check on the states, Madison proposed that Congress hold a veto over state laws "in all cases whatsoever."⁷⁰ He explained his reasoning in a letter to Jefferson:

The effects of this provision would be not only to guard the national rights and interests against invasion, but also to restrain the States from thwarting and molesting each other, and even from oppressing the minority within themselves by paper money and other unrighteous measures which favor the interest of the majority.⁷¹

Madison believed that this veto, which scholars call the "federal negative," was essential to Congress's supremacy under his model.⁷² "Without this defensive power," he warned, "every positive power that can be given on paper will be evaded & defeated."⁷³

In addition to suggesting new powers for Congress, Madison also recommended modifications to its structure and mechanisms of representation. His proposal would split the existing unitary Congress into two houses: one elected by the people or state legislatures and another "to consist of a more select number, holding their appointments for a longer term."⁷⁴ Within those houses, Madison desired a "change [to] be made in the principle of representation" to foster greater equality between the states.⁷⁵ Although each state was nominally equal in Congress under the Articles' one-state-one-vote system, the larger states had always enjoyed more clout in national affairs due to their legislatures' greater "weight and influence."⁷⁶ Madison hoped to see these inequalities reduced "under a system...which would operate without the intervention of the State legislatures."⁷⁷

The Constitutional Convention of 1787

An emerging national "consensus" for constitutional reform would soon give Madison the chance to present his ideas on a national stage.⁷⁸ In 1785, as the individual states struggled against Britain's trade laws, support had grown for an amendment to the Articles of Confederation that would grant Congress new powers over international trade. At Madison's recommendation, a convention met the following September in Annapolis to discuss such an amendment, but only five states sent representatives.⁷⁹ Although the conference remained brief because of sparse attendance, the conferees suggested that another meeting be held the next year to discuss a wider array of constitutional issues. Congress sat on this recommendation for months. Some observers say that it was ultimately propelled to action only by fears of general unrest stemming from Shays' Rebellion. Whatever the cause,

Congress in February 1787 formally called for a new convention in Philadelphia "for the sole and express purpose of revising the Articles of Confederation."⁸⁰

Madison was one of 55 delegates who attended the Convention that began on May 25. George Washington presided over the Convention, and every state except Rhode Island sent a delegation. Seated in a central location from which he could easily hear all members and take detailed notes, Madison was a leading contributor to the discussions.⁸¹ Throughout the debates, he shared the theories he had derived from his extensive study of republics and confederacies, and peppered the debate with arguments he had rehearsed in "Vices of the Political System." Georgia delegate William Pierce described Madison as "blend[ing] together the profound politician, with the Scholar... the best informed Man of any point in debate."⁸²

Madison's outsized influence over the Convention was further enhanced by his Virginia delegation, which presented a preliminary outline for the new constitution, inspired heavily by Madison's own recommendations. The "Virginia Plan," as it became known, dominated early discussions at the Convention.

The Structure of the New Government under the Virginia Plan

The Virginia Plan included Madison's proposal for a bicameral Congress, specifying that the American people would elect the lower house, which in turn would select members of the upper house from candidates nominated by the state legislatures. State representation in Congress would be "proportioned to the Quotas of contribution [taxes], or to the number of free inhabitants."⁸³ The delegates quickly agreed to the bicameral structure, but remained at odds over how to select the members of each house.⁸⁴

Some delegates worried about giving the people too much power. According to Elbridge Gerry of Massachusetts, the United States already suffered from an "excess of democracy." The people of his home state, he asserted, had been "misled into the most baneful measures and opinions" by "pretended patriots," and these episodes had convinced him of the dangers of too much democracy.⁸⁵ Agreeing that the people were unqualified to choose their congressmen, South Carolina's Charles Pinckney proposed that the selection of the lower house be left to the state legislatures instead.⁸⁶

Supporters of a popularly elected house, meanwhile, were quick to invoke democratic ideals in its defense. It was only just, Virginia's George Mason argued, that "every class of the people" be represented in the government.⁸⁷ Madison, responding to Pinckney's proposal, spoke at length on his theory of faction and the virtues of a large republic. He repeated the criticisms of faction-prone state legislatures that he had developed in "Vices." Keeping state politics out of the lower house of Congress, he maintained, would "enlarge the sphere," ensuring a greater variety of interests.⁸⁸ Ultimately, Madison and his allies prevailed on this issue: Pinckney's proposal was rejected, and control over selecting the lower house was placed in the people's hands.

The Senate (as the conferees called the upper house) would be built on less democratic principles. Many delegates envisioned the Senate as the more careful and deliberative house, containing "the most distinguished characters, distinguished for their rank in life and their weight of property."⁸⁹ Madison predicted that the Senate, given its makeup, would stand as a vital bulwark against tyranny of the majority, even as American society evolved and (in his estimation) the proportion of poor laborers increased over time:

In framing a system which we wish to last for ages, we sh^d not lose sight of the changes which ages will produce. An increase in population will of necessity increase the

proportion of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of the blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this Country, but symptoms, of a leveling spirit ... have sufficiently appeared ... to give notice of the future danger. How is this danger to be guarded agst on republican principles? How is the danger in all cases of interested coalitions to oppress the minority to be guarded agst? Among other means by the establishment of a body in the Gov^t sufficiently respectable for its wisdom & virtue, to aid on such emergences, the preponderance of justice by throwing its weight into the scale.⁹⁰

Although the delegates largely agreed on the desired character of the Senate, there was considerable debate over how members of the upper house should be selected. Mirroring Pinckney's earlier idea for the lower house, John Dickenson of Delaware suggested that the state legislatures should select their senators, asserting that "[t]he preservation of the States in a certain agency is indispensable."⁹¹ He hoped that the Senate, selected in this way, would be a body through which the states could exert an additional check on federal power. Madison opposed Dickenson's suggestion because he preferred a small Senate comprised of just a few elite leaders. Under Dickenson's proposal, the smallest states would each have at least one senator and, because Madison and his Virginia colleagues favored proportional representation, larger states would require proportionally larger numbers of senators, as in the lower house.⁹² The Virginia Plan had ingeniously avoided this problem by granting election of the Senate to the lower house. In this way, *votes* for senators would be proportionally distributed among the states, while the final number of senators selected could remain small. Although Madison attempted to rally support for his model by reminding listeners of the state legislatures' role in the paper money crises, the delegates ultimately endorsed Dickenson's method of selection instead.⁹³

Beyond the bicameral legislature, the Virginia Plan also included a new national executive branch with "a general authority to execute the National laws." When James Wilson of Pennsylvania moved that the executive be vested in one person, rather than a small council, there was "a considerable pause" in the discussion. Americans had been ruled by one man before, the King of England, and there was concern that Wilson's proposal might prove to be "the fœtus of monarchy."⁹⁴ Wilson countered that a council would involve "nothing but uncontroled, continued, & violent animosities," whereas a unitary executive would be steadier and more decisive. Wilson also reassured the Convention that the executive's powers would be sufficiently limited that he could never rule like a king; instead, he would more closely resemble the governors to whom Americans had already entrusted their state operations.⁹⁵ In the end, the assembly agreed with Wilson that a single executive would be best, in part because nearly all assumed that George Washington, whom they admired and trusted, would become the first president.

Elbridge Gerry of Massachusetts next recommended granting the executive veto power over laws passed by Congress. The Virginia Plan would have conferred this power to a "Council of Revision" made up of the executive and members of the judicial branch, but Gerry wished to separate the judiciary from the laws it would be asked to rule upon. Delegates had already expressed anxiety about the creation of a single executive, and the prospect of empowering it still further immediately provoked opposition. As a matter of democratic principle, critics resisted "enabling any one man to stop the will of the whole."⁹⁶ They also feared that veto power would, in practice, give the executive nearly absolute control over the entire government.⁹⁷ This issue, like so many others, was ultimately settled through compromise: the executive would have veto power, but two-thirds votes in both houses of Congress could override it.

National Supremacy?

As the delegates gradually worked out the structure of the new federal government, they also had to decide on its role vis-à-vis the states. Indeed, one of the first general principles voted on was “that a *national* Government ought to be established consisting of a *supreme* Legislative, Executive & Judiciary.” Gouverneur Morris of Pennsylvania “explained the distinction between a *federal* and *national, supreme* government; the former being a mere compact resting on the good faith of the parties; the latter having a complete and *compulsive* operation. He contended that in all Communities there must be one supreme power, and one only.”⁹⁸ Perhaps not surprisingly, some delegates wondered if the notion of national supremacy over the states went too far. Pinckney even questioned whether this new dynamic was intended to “abolish the State Governments altogether,” though Edmund Randolph, the leading presenter of the Virginia Plan, assured him that it was not.⁹⁹ After relatively brief deliberation on the issue, the convention voted to endorse the supremacy provision.

A closely related issue was how to draw a dividing line between the powers of Congress and those of the states. The Virginia Plan proposed that Congress have “Legislative power in all cases to which the State Legislatures were individually incompetent.” Some delegates, however, worried this language was excessively vague. To combat concerns that the convention was “running into an extreme in taking away the powers of the States,”¹⁰⁰ many delegates believed that Congress’s authority should be limited by specifically enumerating its powers. Madison largely agreed with them, but made clear that in any future discussions of such powers “he would shrink from nothing which should be found essential to such a form of Government as would provide for the safety, liberty, and happiness of the community.”¹⁰¹ With the understanding that specifics might be discussed at a later date, the convention voted at the end of May in favor of the Virginia Plan’s language on Congress, empowering it to act where the states “were individually incompetent.”

The Federal Negative

Madison’s proposal for a Congressional veto over state laws – his “federal negative” – finally took center stage at the Convention on June 8. While his original proposal would have applied in “all cases whatsoever,” Madison’s Virginia colleagues had included a narrower version in the Virginia Plan that limited Congress’s veto only to state laws “contravening in the opinion of the National Legislature the articles of Union.” The Convention had assented to this more limited federal negative early on and without argument.¹⁰² On June 8th, however, Pinckney suggested extending the veto to “all laws which [Congress] should judge to be improper,” in line with Madison’s original conception. Pinckney doubted that the Virginia Plan’s more limited approach would be sufficient to keep the states in line and that “a universality of the power was indispensably necessary to render it effectual.” He judged the absolute approach that he was proposing to be “the corner stone of an efficient National government,” without which Congress would prove unable to enforce its policies.¹⁰³

Madison seconded Pinckney’s motion. He warned that a limited federal negative, intended to nullify only unconstitutional state laws, was liable to become “a fresh source of contention” between the states and the federal government, as they battled over the question of constitutionality. Perhaps most troubling, while such disagreements might necessitate that Congress impose its decisions by force, Madison questioned whether such federal coercion would be feasible:

Could the national resources, if exerted to the utmost, enforce a national decree against Massachusetts, abetted, perhaps, by several of her neighbours? It would not be possible. A small proportion of the community, in a compact situation, acting on the defensive, and at one of its extremities, might at any time bid defiance to the national authority.¹⁰⁴

Fortunately, Madison predicted, an absolute federal negative would eliminate such potentially violent disagreements. "The negative would render the use of force unnecessary," he declared. "The States could of themselves pass no operative act, any more than one branch of a legislature, where there are two branches, can proceed without the other. But in order to give the negative this efficacy, it must extend to all cases."¹⁰⁵

Wilson joined Pinckney and Madison in supporting the absolute federal negative, stressing that excessive state independence threatened national unity. He reviewed the history of American attitudes toward federalism, noting that an early confidence that the United States would "bury all local interests & distinctions" had gradually dissolved under the "jealousy & ambition" of the state governments. "Leave the whole at the mercy of each part," he asked, "and will not the general interest be continually sacrificed to local interests?"¹⁰⁶

Opponents of the absolute negative expressed horror at the thought of so explicitly sacrificing the states' control over their own affairs. While Gerry saw the usefulness of vetoing paper money laws, he feared that an absolute negative would allow Congress to "enslave the states." Any insidious interests with clout in Congress – even foreign operators, Gerry suggested – might oppress the states if Congress were granted such power.¹⁰⁷

Critics also argued that an absolute negative would *enable* interstate abuses rather than curtail them. Gerry worried that the more populous states, which had greater influence in Congress, might use the negative to impose their will on smaller states, potentially even dissuading new states from joining the union. Delaware's Gunning Bedford offered his own state as an illustration of Gerry's point: under proportional representation, Pennsylvania and Virginia would together control one-third of Congress, while Delaware would control just one-ninetieth. "Will not these large States crush the small ones [with the negative]" he asked, "whenever they stand in the way of their ambitious or interested views?"¹⁰⁸

With both sides having made their case, the proposal was finally put to a vote at the end of the day's session on June 8, 1787. Whether Madison's notion of an absolute federal veto over state laws would live or die was now up to the 55 delegates who together comprised the Constitutional Convention in Philadelphia.

Exhibit 1 Estimated Population of American Colonies and States, 1650-1780

Colony/State	1780	1770	1760	1750	1700	1650
New Hampshire	87,802	62,396	39,093	27,505	4,958	1,305
Massachusetts	268,627	235,308	202,600	188,000	55,941	16,603
Rhode Island	52,946	58,196	45,471	33,226	5,894	785
Connecticut	206,701	183,881	142,470	111,280	25,970	4,139
New York	210,541	162,920	117,138	76,696	19,107	4,116
New Jersey	139,627	117,431	93,813	71,393	14,010	
Pennsylvania	327,305	240,057	183,703	119,666	17,950	
Delaware	45,385	35,496	33,250	28,704	2,470	185
Maryland	247,959	202,599	162,267	141,073	29,604	4,504
Virginia	538,004	447,016	339,726	236,681	58,560	18,731
North Carolina	270,133	197,200	110,442	72,984	10,720	
South Carolina	180,000	124,244	94,074	74,000	6,260	
Georgia	56,071	23,375	9,578	5,200		
TOTAL	2,631,101	2,090,119	1,573,625	1,186,408	251,444	50,368

Source: Adapted from *Historical Statistics of the United States*, Millennial Edition Online, eds. Susan B. Carter, Scott Sigmund Gartner, Michael R. Haines, Alan L. Olmstead, Richard Sutch, and Gavin Wright (Cambridge University Press, 2006), Series Eg 1-20 [hsus.cambridge.org].

Note: Massachusetts figures include Plymouth colony and Maine.

Exhibit 2 Tax Collections in the American Colonies under the British Revenue Laws, 1765-1774 (pounds sterling)

Year	Total of 1760s Acts	Sugar Act (1764, 1766)	Stamp Act (1765)	Townshend Act (1767)	Navigation Act (1673)
1765	17,383	14,091	3,292		2,954
1766	26,696	26,696			7,373
1767	34,041	33,844		197	3,905
1768	37,861	24,659		13,202	1,160
1769	45,499	39,938		5,561	1,294
1770	33,637	30,910		2,727	1,828
1771	31,761	27,086		4,675	1,446
1772	45,870	42,570		3,300	1,490
1773	42,103	39,531		2,572	2,517
1774	27,995	27,074		921	672

Source: Adapted from *Historical Statistics of the United States*, Series Eg 420-424.

Exhibit 3 Funding the War for Independence (millions of pounds sterling, estimated)

Source	Funds
Continental paper money	46
State paper money	64
Congressional domestic bonds	6
Congressional debt certificates	16
Foreign loans to Congress	10
State debt	23

Source: Adapted from Arthur H. Reede, *The Financing of the American Revolution* (Fairport, NY: Rochester Press, 1996), p. 103.

Exhibit 4 Continental Paper Money Emitted

Year	Currency emitted	Value in Gold
1775	\$6,000,000	\$6,000,000
1776	\$19,000,000	\$17,300,000
1777	\$13,000,000	\$4,530,000
1778	\$63,400,000	\$11,695,000
1779	\$124,800,000	\$5,964,000
1780 & 1781	\$1,592,222	

Source: Adapted from E. James Ferguson, *The Power of the Purse* (Chapel Hill: University of North Carolina Press, 1961), p. 30; and Reede, *The Financing of the American Revolution*, p. 324. The depreciated values for 1780 and 1781 are unavailable; Reede notes that these years technically saw the issue of a new currency intended to replace the old.

Exhibit 5 Continental Currency Required to Buy \$1 Specie (gold)

Month	Price
January 1777	\$1.25
July 1777	\$3.00
January 1778	\$4.00
July 1778	\$4.00
January 1779	\$8.00
July 1779	\$19.00
October 1779	\$30.00
January 1780	\$42.50
July 1780	\$62.50
January 1781	\$100.00
April 1781	\$167.50

Source: Adapted from Ferguson, *The Power of the Purse*, p. 32. These conversion rates are for "old" Continental currency, issued before 1780.

Exhibit 6 Congressional Spending (excluding foreign expenditures and expansion of floating debt), 1775-1781

Year	Spending (Continental currency)	Specie (Gold) Value
1775-1776	\$20,064,666	\$20,064,666
1777	\$26,426,333	\$24,986,646
1778	\$66,965,269	\$24,289,438
1779	\$149,703,856	\$10,794,620
1780	\$83,799,556	\$3,000,000
1781	\$13,654,983	\$1,942,465

Source: Adapted from Ferguson, *The Power of the Purse*, pp. 28-29. Some, but not all, of the spending was funded through currency emissions. The "Continental currency" values reflect mainly "old" Continental currency, issued before 1780. Congress issued a relatively small amount of new currency in 1780 and 1781, which traded at a more favorable conversion rate relative to gold.

Exhibit 7 Congress's Payments To, and Receipts From, the States during the War of Independence, expressed in specie (gold) value

State	Paid to state	Received from state
New Hampshire	\$440,974	\$466,544
Massachusetts	\$1,245,737	\$3,167,020
Rhode Island	\$1,028,511	\$310,395
Connecticut	\$1,016,273	\$1,607,295
New York	\$822,803	\$1,545,889
New Jersey	\$366,729	\$512,916
Pennsylvania	\$2,087,276	\$2,629,410
Delaware	\$63,817	\$208,878
Maryland	\$609,617	\$945,537
Virginia	\$482,881	\$1,963,811
North Carolina	\$788,031	\$219,835
South Carolina	\$1,014,808	\$499,325
Georgia	\$679,412	\$122,744

Source: Robert A. Becker, "Currency, Taxation, and Finance, 1775-1787," in Jack P. Greene and J. R. Pole (eds.), *A Companion to the American Revolution* (Malden, MA: Blackwell Publishing, 2004), p. 394.

Exhibit 8 American Exports and Imports, with England, 1700-1786 (pounds sterling)

Year	Exports	Imports
1700	395,021	344,341
1710	249,814	293,659
1720	468,188	319,702
1730	572,585	536,860
1740	718,416	813,382
1750	814,768	1,313,083
1760	761,099	2,611,764
1770	1,015,535	1,925,571
1771	1,339,840	4,202,472
1772	1,258,515	3,012,635
1773	1,369,229	2,079,412
1774	1,373,846	2,590,437
1775	1,920,950	196,162
1776	103,964	55,415
1777	12,619	57,295
1778	17,694	33,986
1779	20,579	349,797
1780	18,560	825,431
1781	99,847	847,883
1782	28,676	256,325
1783	314,058	1,435,229
1784	701,190	3,418,407
1785	775,892	2,078,744
1786	743,644	1,431,255

Source: Adapted from Historical Statistics of the United States, Series Eg 429 and 436.

Appendix

Excerpt from James Madison, "Vices of the Political System of the United States" (April 1787)

[Section] 11. Injustice of the laws of the States

If the multiplicity and mutability of laws prove a want of wisdom, their injustice betrays a defect still more alarming: more alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights. To what causes is this evil to be ascribed?

These causes lie

1. in the Representative bodies.
2. in the people themselves.

1. Representative appointments are sought from 3 motives. 1. ambition 2. personal interest. 3. public good. Unhappily the two first are proved by experience to be most prevalent. Hence the candidates who feel them, particularly, the second, are most industrious, and most successful in pursuing their object: and forming often a majority in the legislative Councils, with interested views, contrary to the interest, and views, of their Constituents, join in a perfidious sacrifice of the latter to the former. A succeeding election it might be supposed, would displace the offenders, and repair the mischief. But how easily are base and selfish measures, masked by pretexts of public good and apparent expediency? How frequently will a repetition of the same arts and industry which succeeded in the first instance, again prevail on the unwary to misplace their confidence?

How frequently too will the honest but unenlightened representative be the dupe of a favorite leader, veiling his selfish views under the professions of public good, and varnishing his sophistical arguments with the glowing colours of popular eloquence?

2. A still more fatal if not more frequent cause lies among the people themselves. All civilized societies are divided into different interests and factions, as they happen to be creditors or debtors – Rich or poor – husbandmen, merchants or manufacturers – members of different religious sects – followers of different political leaders – inhabitants of different districts – owners of different kinds of property &c &c. In republican Government the majority however composed, ultimately give the law. Whenever therefore an apparent interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals? Three motives only 1. a prudent regard to their own good as involved in the general and permanent good of the Community. This consideration although of decisive weight in itself, is found by experience to be too often unheeded. It is too often forgotten, by nations as well as by individuals that honesty is the best policy. 2dly. respect for character. However strong this motive may be in individuals, it is considered as very insufficient to restrain them from injustice. In a multitude its efficacy is diminished in proportion to the number which is to share the praise or the blame. Besides, as it has reference to public opinion, which within a particular Society, is the opinion of the majority, the standard is fixed by those whose conduct is to be measured by it. The public opinion without the Society, will be little respected by the people at large of any Country. Individuals of extended views, and of national pride, may bring the public proceedings to this standard, but the example will never be followed by the multitude. Is it

to be imagined that an ordinary citizen or even an assembly-man of R[hode] Island in estimating the policy of paper money, ever considered or cared in what light the measure would be viewed in France or Holland; or even in Massts or Connect.? It was a sufficient temptation to both that it was for their interest: it was a sufficient sanction to the latter that it was popular in the State; to the former that it was so in the neighbourhood. 3dly. will Religion the only remaining motive be a sufficient restraint? It is not pretended to be such on men individually considered. Will its effect be greater on them considered in an aggregate view? quite the reverse. The conduct of every popular assembly acting on oath, the strongest of religious Ties, proves that individuals join without remorse in acts, against which their consciences would revolt if proposed to them under the like sanction, separately in their closets. When indeed Religion is kindled into enthusiasm, its force like that of other passions, is increased by the sympathy of a multitude. But enthusiasm is only a temporary state of religion, and while it lasts will hardly be seen with pleasure at the helm of Government. Besides as religion in its coolest state, is not infallible, it may become a motive to oppression as well as a restraint from injustice. Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the rights of the third? Will the latter be secure? The prudence of every man would shun the danger. The rules & forms of justice suppose & guard against it. Will two thousand in a like situation be less likely to encroach on the rights of one thousand? The contrary is witnessed by the notorious factions & oppressions which take place in corporate towns limited as the opportunities are, and in little republics when uncontrouled by apprehensions of external danger. If an enlargement of the sphere is found to lessen the insecurity of private rights, it is not because the impulse of a common interest or passion is less predominant in this case with the majority; but because a common interest or passion is less apt to be felt and the requisite combinations less easy to be formed by a great than by a small number. The Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert. It may be inferred that the inconveniences of popular States contrary to the prevailing Theory, are in proportion not to the extent, but to the narrowness of their limits.

The great desideratum in Government is such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions, to controul one part of the Society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole Society. In absolute Monarchies, the prince is sufficiently, neutral towards his subjects, but frequently sacrifices their happiness to his ambition or his avarice. In small Republics, the sovereign will is sufficiently controuled from such a Sacrifice of the entire Society, but is not sufficiently neutral towards the parts composing it. As a limited Monarchy tempers the evils of an absolute one; so an extensive Republic meliorates the administration of a small Republic.

An auxiliary desideratum for the melioration of the Republican form is such a process of elections as will most certainly extract from the mass of the Society the purest and noblest characters which it contains; such as will at once feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it.

Endnotes

- ¹ James Madison, *Notes of Debates in the Federal Convention of 1787* (Athens, OH: Ohio University Press, 1984), p. 88 (June 8th, 1787). Although Madison himself does not appear to have used the phrase "federal negative," he commonly used the word "negative" in describing the proposal (in a letter to Thomas Jefferson on March 19, 1787, for example, he wrote that it was necessary "to arm the federal head with a negative in all cases whatsoever on the local Legislatures"), and numerous historians have subsequently referred to Madison's proposal as the "federal negative" (see Alison L. LaCroix, "The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology," *Law and History Review*, May 2010, Vol. 28, No. 2, p. 462 and 462n29).
- ² James Madison, *Notes of Debates*, pp. 89, 91.
- ³ George Washington, "To David Humphreys, 22 October 1786," in Theodore J. Crackel (ed.), *The Papers of George Washington Digital Edition* (Charlottesville: University of Virginia Press, 2008).
- ⁴ Alice Hanson Jones, "Wealth Estimates for the American Middle Colonies, 1774," *Economic Development and Cultural Change*, 1970, Vol. 18, No.4, pt. 2, p. 130.
- ⁵ Edmund S. Morgan, *The Birth of the Republic, 1763-89* (Chicago: University of Chicago Press, 1977), pp. 8-9.
- ⁶ The so-called French and Indian War was part of a larger global conflict known as the Seven Years War. The total cost of this war to Britain was more than double its annual gross national product in 1760. See Nancy F. Koehn, *The Power of Commerce: Economy and Governance in the First British Empire* (Ithaca: Cornell University Press, 1994), p. 5.
- ⁷ Morgan, *Birth of the Republic*, pp. 16-19. See also, Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967), pp. 160-175.
- ⁸ Quoted in Merrill Jensen, *The Founding of a Nation* (Indianapolis: Hackett Publishing Company, 1986), p. 572.
- ⁹ Samuel Eliot Morison, Henry Steele Commager, and William E. Leuchtenburg, *The Growth of the American Republic* (New York: Oxford University Press, 1969), Vol. I, p. 209.
- ¹⁰ Several of the new constitutions were only slightly revised versions of existing colonial charters. See Donald S. Lutz, "State Constitution-Making, Through 1781" in Jack P. Greene and J. R. Pole, eds., *A Companion to the American Revolution* (Malden, MA: Blackwell Publishers Inc., 2000), pp. 270-271. Most states also created bicameral legislatures. See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina, 1998), pp. 197-256; Lutz, "State Constitution Making," esp. p. 274.
- ¹¹ Holly A. Mayer, "The Continental Army," in Greene and Pole, p. 309.
- ¹² Merrill Jensen, *The New Nation* (New York: Alfred A. Knopf, 1950), p. 30.
- ¹³ Robert A. Becker, "Currency, Taxation, and Finance, 1775-1787," in Greene and Pole, pp. 388-389. The extent of the inflation apparently occasioned some alarm in Congress. Benjamin Franklin wrote (most likely in 1780): "...the excessive Quantities which Necessity oblig'd the Americans to issue, for continuing the War, occasion'd a Depreciation of Value.... To put an End to this Evil, which destroy'd all Certainty in Commerce, the Congress first resolved to diminish the Quantity gradually by Taxes.... By these Taxes 15 Millions of Dollars, of the 200 Millions extant, are to be brought in monthly and burnt. ... Thirty Millions have already been so destroy'd" (Benjamin Franklin, "Of the Paper Money of America," [1780?], *The Papers of Benjamin Franklin*, Vol. 34, online version, accessed June 17, 2012, <http://franklinpapers.org/franklin/framedVolumes.jsp?vol=34&page=228b>).
- ¹⁴ Franklin, "Of the Paper Money of America."
- ¹⁵ E. James Ferguson, *The Power of the Purse* (Chapel Hill: The University of North Carolina Press, 1961), pp. 35-44.
- ¹⁶ Becker, "Currency, Taxation, and Finance," pp. 391-392.
- ¹⁷ Jack N. Rakove, "The Articles of Confederation, 1775-1783," in Greene and Pole, pp. 281-283.
- ¹⁸ Don Higginbotham, "The War for Independence, to Saratoga," in Greene and Pole, pp. 287-296.
- ¹⁹ Rakove, "The Articles of Confederation," pp. 283-284.
- ²⁰ Rakove, "The Articles of Confederation," p. 285.

- ²¹ Don Higginbotham, "The War for Independence, after Saratoga," in Greene and Pole, pp. 298-302.
- ²² Quoted in Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (New York: W.W. Norton & Company, 1969), p. 393.
- ²³ John Jay to George Washington, June 27, 1786, in *The Correspondence and Public Papers of John Jay*, Vol. III, 1782-1793 (New York: G. P. Putnam's Sons, 1891), p. 204. [<http://books.google.com/books?id=jVkSAAAAYAAJ>]
- ²⁴ Becker, "Currency, Taxation, and Finance," p. 394. In 1782, Congress consolidated all of its various forms of debt (paper money, military certificates, and so forth) into government bonds, arriving at the \$27 million figure.
- ²⁵ John Fiske, *The Critical Period of American History* (Boston: Houghton, Mifflin, and Company, 1898), p. 109.
- ²⁶ Robert Morris, "Letter to the President of Congress," in Francis Wharton (ed.) *The Revolutionary Diplomatic Correspondence of the United States* (Washington: Government Printing Office, 1889), Vol. 6, p. 309-311. Significantly, the role of "Superintendent of Finance" was not an executive branch position – none existed under the Articles.
- ²⁷ Fiske, *The Critical Period of American History*, pp. 109-118.
- ²⁸ Becker, "Currency, Taxation, and Finance," p. 395.
- ²⁹ Stephen Higginson, quoted in Ferguson, *The Power of the Purse*, p. 222.
- ³⁰ Becker, "Currency, Taxation, and Finance," pp. 395-396.
- ³¹ Higginbotham, "The War for Independence, after Saratoga," p. 305.
- ³² Fiske, *The Critical Period of American History*, pp. 135, 137.
- ³³ Fiske, *The Critical Period of American History* p. 152.
- ³⁴ Fiske, *The Critical Period of American History*, p. 149.
- ³⁵ Quoted in Fiske, *The Critical Period of American History*, p. 146.
- ³⁶ Fiske, *The Critical Period of American History*, pp. 108-109; and James Madison, "Proposed Amendment of Articles of Confederation" (March 12, 1781), in J. C. A. Stagg, ed., *The Papers of James Madison Digital Edition* (Charlottesville: University of Virginia Press, 2010).
- ³⁷ Mark D. Kaplanoff, "Confederation: Movement for a Stronger Union," in Greene and Pole, p. 463.
- ³⁸ Robert F. Haggard, "The Nicola Affair: Lewis Nicola, George Washington, and American Military Discontent during the Revolutionary War," *Proceedings of the American Philosophical Society*, June 2002, Vol. 146, No. 2, pp. 156-158.
- ³⁹ John J. McCusker and Russell R. Menard, *The Economy of British North America, 1607-1789* (Chapel Hill: University of North Carolina Press, 1985), pp. 373-376. For a less severe assessment of the postwar economic downturn, see Gordon S. Wood, *The Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1969), pp. 394-395.
- ⁴⁰ Quoted in William G. Anderson, *The Price of Liberty: The Public Debt of the American Revolution* (Charlottesville: University Press of Virginia, 1983), p. 33.
- ⁴¹ Woody Holton, "Did Democracy Cause the Recession That Led to the Constitution?" *The Journal of American History*, September 2005, Vol. 92, No. 2, p. 445.
- ⁴² Fiske, *The Critical Period of American History*, p. 190.
- ⁴³ Holton, "Did Democracy Cause the Recession?" esp. pp. 3-22.
- ⁴⁴ Quoted in James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992), p. 37.
- ⁴⁵ George Washington, "To Henry Lee, Jr., 31 October 1786," in Crackel, ed., *Papers of George Washington*.
- ⁴⁶ "People and Ideas: James Madison," [<http://www.pbs.org/godinamerica/people/james-madison.html>, accessed 15 July 2012].
- ⁴⁷ Quoted in Irving Brant, "Madison: On the Separation of Church and State," *William and Mary Quarterly*, Vol. 8, No. 1 (Jan. 1951), p. 5.

⁴⁸ James Madison, *a Biography in His Own Words*, edited by Merrill D. Peterson (New York: Newsweek, 1974), pp. 14-41.

⁴⁹ Peterson, *James Madison*, p. 90 and Ketcham, *James Madison* (New York: The MacMillan Company, 1971), p. 172.

⁵⁰ James Madison, "To Thomas Jefferson, 16 March 1784," in Stagg, ed., *Papers of James Madison*.

⁵¹ James Madison, "Notes on Ancient and Modern Confederacies," (April-June? 1786) in Stagg, ed., *Papers of James Madison*, editor's note.

⁵² Ketcham, *James Madison*, p. 183.

⁵³ Madison, "Notes on Ancient and Modern Confederacies."

⁵⁴ James Madison, *Federalist XX*, p. 171.

⁵⁵ James Madison, "Vices of the Political System of the United States," in Stagg, ed., *Papers of James Madison*, Section 1.

⁵⁶ Madison, "Vices," Section 7.

⁵⁷ Madison, "Vices," Section 7.

⁵⁸ Madison, "Vices," Section 5.

⁵⁹ Madison, "Vices," Section 4.

⁶⁰ Madison, "Vices," Section 11.

⁶¹ Charles F. Hobson, "The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government," *The William and Mary Quarterly*, April 1979, Vol. 36., No. 2, p. 225; George Klosko, *History of Political Theory: An Introduction, Volume II: Modern*, 2nd edition (Oxford: Oxford University Press, 2013), pp. 249-251. See also Jacob T. Levy, "Beyond Publius: Montesquieu, Liberal Republicanism, and the Small-Republic Thesis," *History of Political Thought*, Vol. 27, No. 1, 2006, pp. 50-90.

⁶² Madison, "Vices," Section 7.

⁶³ Madison, "Vices," Section 11.

⁶⁴ Articles of Confederation, Article 2.

⁶⁵ Madison completed "Vices" in April 1787. In March, he wrote a letter to Thomas Jefferson describing several of the proposals discussed here. See Madison, "To Thomas Jefferson, 19 March 1787," in Stagg, ed., *Papers of James Madison*.

⁶⁶ Madison, "To Edmund Randolph, 8 April 1787," in Stagg, ed., *Papers of James Madison*.

⁶⁷ Madison, "To George Washington, 16 April 1787," in Stagg, ed., *Papers of James Madison*..

⁶⁸ Madison, "To George Washington, 16 April 1787."

⁶⁹ Madison, "To George Washington, 16 April 1787."

⁷⁰ Madison, "To Thomas Jefferson, 19 March 1787." Emphasis in original.

⁷¹ Madison, "To Thomas Jefferson, 19 March 1787."

⁷² In his letters, Madison compared the federal negative to the powers of the King of Great Britain. During the colonial era, the Privy Council, made up of the king and his councilors, could review colonial court decisions and legislative acts and approve or reject them. Reviews of court decisions required an appeal from a colonist about a specific case, but legislative acts could be examined and negated at the Council's whim. Madison based the federal negative on this second power. (LaCroix, "The Authority for Federalism," pp. 464-466, 472.)

⁷³ Madison, "To George Washington, 16 April 1787."

⁷⁴ Madison, "To Edmund Randolph, 8 April 1787."

⁷⁵ Madison, "To George Washington, 16 April 1787."

⁷⁶ Madison, "To George Washington, 16 April 1787."

⁷⁷ Madison, "To George Washington, 16 April 1787."

⁷⁸ Kaplanoff, "Confederation," p. 468.

⁷⁹ Madison may have prepared his "Notes on Ancient and Modern Confederacies" for consultation at this conference ("Notes," in Stagg, editor's commentary).

⁸⁰ Kaplanoff, "Confederation," pp. 467-468.

⁸¹ Ketcham, *James Madison*, p. 195.

⁸² Quoted in Kevin R. C. Gutzman, *James Madison and the Making of America* (New York: St. Martin's Press, 2012), p. 49.

⁸³ The Virginia plan appears in Madison, *Notes of Debates*, pp. 30-33 (May 29th). Because Delaware's delegates had been instructed not to agree "to any change of the rule of suffrage," discussion of proportional representation of the states was postponed to a later period beyond the scope of this case (pp. 37-38). Kaplanoff, "The Federal Convention and the Constitution," in Greene and Pole, p. 472, clarifies that "Quotas of contributions" meant taxes.

⁸⁴ Madison, *Notes of Debates*, p. 38 (May 31st).

⁸⁵ Madison, *Notes of Debates*, p. 39 (May 31st).

⁸⁶ Madison, *Notes of Debates*, p. 73 (June 6th).

⁸⁷ Madison, *Notes of Debates*, p. 40 (May 31st).

⁸⁸ Madison, *Notes of Debates*, p. 77 (June 6th).

⁸⁹ John Dickinson, in Madison, *Notes of Debates*, p. 82 (June 7th).

⁹⁰ Madison, *Notes of Debates*, pp. 194-195 (June 26).

⁹¹ John Dickenson, in Madison, *Notes of Debates*, p. 84 (June 7th).

⁹² Madison, *Notes of Debates*, p. 83 (June 7th).

⁹³ Madison, *Notes of Debates*, pp. 86-87 (June 7th).

⁹⁴ Edmund Randolph (VA), in Madison, *Notes of Debates*, p. 45-46 (June 1st).

⁹⁵ Madison, *Notes of Debates*, p. 59 (June 4th).

⁹⁶ Roger Sherman, quoted in Madison, *Notes of Debates*, p. 62 (June 4th). Sherman would be the author of the "Great Compromise," through which the Virginia Plan with its proportional state representation scheme for the Congress was combined with the competing New Jersey Plan, which gave each state equal representation. The resulting plan called for one proportional chamber and one with equal numbers of delegates for each state.

⁹⁷ Madison, *Notes of Debates*, pp. 62-65 (June 4th).

⁹⁸ Madison, *Notes of Debates*, pp. 34-35 (May 30th).

⁹⁹ Madison, *Notes of Debates*, p. 34 (May 30th).

¹⁰⁰ Pierce Butler, quoted in Madison, *Notes of Debates*, p. 44 (May 31st).

¹⁰¹ Madison, *Notes of Debates*, p. 44 (May 31st).

¹⁰² Madison, *Notes of Debates*, p. 44 (May 31st).

¹⁰³ Madison, *Notes of Debates*, p. 88 (June 8th).

¹⁰⁴ Madison, *Notes of Debates*, pp. 88-89 (June 8th).

¹⁰⁵ Madison, *Notes of Debates*, p. 89 (June 8th).

¹⁰⁶ Madison, *Notes of Debates*, pp. 90-91 (June 8th).

¹⁰⁷ Madison, *Notes of Debates*, pp. 89-90 (June 8th).

¹⁰⁸ Madison, *Notes of Debates*, p. 91 (June 8th).