

the southern states, where “habitual distinctions . . . have always existed among the people,” he wrote. Instead, the tendency to monarchical ideas was coming from eastern states traditionally possessed of “leveling principles.” The former New England impulse to less hierarchical government had been “entirely eradicated” by Shays’s Rebellion.¹¹⁷

Washington’s own view on “monarchical government” he expressed cautiously. “I am also clear,” he wrote to Madison, “that even admitting the utility—nay the necessity of the form—yet that the period is not arrived for adopting the change without shaking the peace of this country to its foundation.”¹¹⁸ Saying that the time was not right for a return to monarchical government hinted that Washington was open to such a development at some future time. If Congress “fritter[ed]” its powers, “then, and not till then, in my opinion” could monarchy “be attempted without involving all the evils of civil discord.”¹¹⁹

The explanation for Washington’s sympathy to the possibility of monarchy lay in his reduced confidence in the public. “I confess . . . that my opinion of public virtue is so far changed,” he wrote to Madison in his unencoded letter, “that I have my doubts whether any system without the means of coercion in the sovereign, will enforce obedience to the ordinances of the general government.” In the light of national experience under the Articles, the sovereign—by which Washington clearly meant a king, not the people—must have the power to enforce the laws. Without obedience, he concluded, “everything else fails.”¹²⁰ Madison had written to Jefferson a couple of weeks earlier that the national crisis had “tainted the faith of the most orthodox Republicans.”¹²¹ Washington was a case in point.

Madison took note. For the first time, he expressed some concern about whether Washington should actually attend the whole convention. On April 15, 1787, Madison wrote to Randolph proposing that Washington should be advised “to postpone his actual attendance until some judgment can be formed of the result of the meeting.”¹²²

Madison and Randolph had been laboring for five months to convince Washington to come. Yet Madison offered only a weak explanation for this proposal that would almost reverse what they had accomplished, telling Randolph that Washington’s friends would not wish “that he should participate in any abortive undertaking.” Madison added that, by appointing Benjamin Franklin to its delegation, Pennsylvania had created the opportunity for “putting sufficient dignity into the chair” by having

Franklin, not Washington, preside.¹²³ Franklin was known to believe in a weak executive made up of several members. Washington, lauded globally for not seeking a crown after the Revolution, had been so affected by Shays’s Rebellion and the states’ unwillingness to help the federal government that he was flirting with monarchism. Far from wanting to preserve Washington’s dignity, Madison now preferred to have the inveterate republican Franklin chair the convention.

Vices

As for his own preparation, Madison as usual proceeded systematically. In April, serving in Congress, he had written an essay on what he called the “vices” of the political system of the United States. It turned the same exacting lens on the United States that he had focused a year earlier on the vices of other ancient and modern republics.

What he found was devastating. In twelve numbered points, Madison painted a picture of a confederacy too weak to accomplish anything. First and most significant, he noted that the states did not comply with perfectly “constitutional” requisitions for funds set by Congress. This problem had been “so fully experienced both during the war and since the peace” that it could not be doubted by anyone. The same problem of member noncompliance could be seen “in every similar confederacy”—and it was “fatal” to its object.¹²⁴ Indeed, Madison wrote, because Congress under the articles had no ability to sanction violation of its laws or coerce states, the system lacked “the great vital principles of a political constitution.” The United States under the Articles was “in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and sovereign states.”¹²⁵

How had the drafters of the Articles failed to anticipate that the states would ignore Congress? Madison offered a simple answer. The drafters had suffered from “a mistaken confidence” in the “justice, the good faith, the honor, [and] the sound policy” of the state legislatures, imagining they would put aside self-interest. Such confidence, he wrote, “does honor to the enthusiastic virtue of the compilers.”¹²⁶

But reality had shown that virtue had nothing to do with it. All laws adopted at the national level would affect different member states differently. Individual states would think of “their own interests and rights,” not those of the United States as a whole. Each state would imagine the

others likely to defect from a general agreement, and the result was a complete breakdown.¹²⁷

The rest of the problems were no less serious. The Articles of Confederation had a different legal status from place to place, so that when state laws contradicted congressional pronouncements, it was not clear which controlled.¹²⁸ The country had no unified foreign policy. States were violating international treaties as well as the "rights" of other states, for example by favoring trade from some states over others and treating imports from other states the same way they did foreign imports.¹²⁹ There was no national trade policy and no realistic possibility of collective action to create one.¹³⁰

And the confederacy did not protect the states, as Shays's Rebellion demonstrated. According to "republican theory," Madison wrote, the majority was supposed to exercise both the right to rule and the actual power to do it. But in reality, a minority with military organization could conquer a majority. One-third of the population could defeat the other two-thirds. Madison added a distinctive southern concern to the lesson he was drawing from Massachusetts: "Where slavery exists the republican theory becomes still more fallacious." In slave states, the rulers might not even be a majority. The federal government should be empowered to protect the majority of citizens in a free state—and if necessary, the white minority in a slave state.¹³¹

By the spring of 1787, Madison also had a dim view of state legislatures. They had passed too many laws, "a nuisance of the most pestilent kind." The laws, he believed, should be one-tenth as long, in which case they would be ten times more useful.¹³² They were unjust, favoring the temporary interests of the majority over the long-term interests of the whole. This was a challenge to "the fundamental principle of republican government, that the majority who rule in such governments, are the safest guardians of the public good and private rights." Nothing could be more basic to the future of the United States as a republic. If justice could not be assured under conditions of majority rule, then Washington's instincts were correct, and the country would have to revert to monarchy.

Madison divided the challenges to majority rule into the threat from the elected legislature and from the people themselves. There were, he said, three reasons to serve in a legislature: ambition, personal interest, and public good. Election was supposed to weed out those motivated by self-interest, but self-interested legislators could mask "base and selfish

measures . . . by pretexts of public good and apparent expediency." And they could do it again and again. Similarly, the "honest but unenlightened representative" could easily become "the dupe of a favorite leader, veiling his selfish views under the professions of public good."¹³³

This was a devastating criticism of the elected legislature, but it was nothing compared to Madison's profound critique of republican government derived from "the people themselves." He formalized the concerns he had first raised in his letter to Monroe. "All civilized societies," he wrote, "are divided into different interests and factions." The divisions included "creditors or debtors—rich or poor—husbandmen, merchants and manufacturers—members of different religious sects—followers of different political leaders—inhabitants of different districts—owners of different kinds of property etc. etc." According to republican principles, the majority, "however composed" at a particular moment of legislation, would make the law. This led to a basic problem: "Whenever therefore an apparent interest or common passion unites the majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals?"¹³⁴

Madison was suggesting—in the form of a novel, general rule about politics¹³⁵—that republicanism itself might have a fatal flaw. Given that there were multiple interests in society, there would be a constant pressure for those temporarily in the majority to violate the rights of those in the minority. If that was true, republicanism would inevitably produce injustice. Its premise—that majority rule was a good system that would preserve rights—was simply naïve. And if that was true, nothing could save the United States except abandoning the republican form of government.

Enlargement

There were three motives that might restrain the majority from oppressing the minority, Madison suggested. All were sadly inadequate. The majority might know "their own good"; but it was "found by experience to be too often unheeded."¹³⁶ The majority might be concerned about their reputations; but this would not work at the level of the majority taken as a whole. Reputation depended on "public opinion"—and within a particular society, public opinion was simply the opinion of the majority. Thus, "the standard is fixed by those whose conduct is to be measured by it."¹³⁷ Religion might in theory motivate self-restraint, but "when indeed

religion is kindled into enthusiasm, its force like that of other passions, is increased by the sympathy of the multitude." Even when there was no religious fervor in the community, "religion in its coolest state, is not infallible, [and] it may become a motive to oppression as well as a restraint from injustice."¹³⁸ Republicanism seemed condemned by experience, if not by logic.

Here, in the most important passage of his essay on vices, Madison took the first steps toward the solution that would become the cornerstone of his constitutional thought. He imagined three people who formed a little society in which any two of them could make a decision affecting the third. "Will the latter be secure?" he asked rhetorically. The answer was no: "The prudence of every man would shun the danger." Two thousand people would be just as likely "to encroach on the rights of one thousand."

But, Madison now for the first time¹³⁹ suggested, "an enlargement of the sphere" might be "found to lessen the insecurity of private rights." Bigger was better—or at least might be. It had been a commonplace of the theory of republics that they could exist only on a small scale, in which every citizen could vote for himself or alternatively elect officials who would be close to the people he represented. Building on a conjecture made by the Scottish enlightenment thinker David Hume, Madison was turning the received view on its head.¹⁴⁰

Why would a larger republic be any less susceptible to the problem of majority violation of minority rights than in the small republic? The answer was that "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." In the larger community, he wrote, "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."¹⁴¹

Here in its essence was the radical, original claim about expansion that Madison would develop and expand over the next several years. It had at least three elements.

First, Madison was arguing that the bigger the political society, the more different political, economic, and religious interests would exist within it. This was not self-evidently true: The creditor-debtor relationship, for example, might have just two basic components no matter how many creditors or debtors were aggregated. It might possibly be true of

religious sects, at least in the United States and especially among Protestants; but in other places, whole nations might be Catholic, or all belong to a single Protestant denomination.

Second, Madison was suggesting that divergent interests would "check each other," that is, that different minority interests would actively block one another from controlling policy. He did not explain precisely how this checking process would work. But the implication was that none would want the others to be in control. So long as none of the interests could command an actual majority, the proposition could potentially be valid.

Third, Madison was arguing that common interests would have more difficulty organizing in a larger republic. In the United States of 1787, more space meant slower communication. But this was also a counterintuitive argument in favor of expanding the republican structure from the state level to the federal. It would ordinarily have been counted as a significant disadvantage in a republic that people could not easily communicate or organize within it. And it was far from clear that the difficulties posed by distance would serve the interests of minorities, rather than of the majority. Members of a potentially oppressive majority might well be more effective at organizing nationally than members of minority groups.

Madison's claim, then, was not obviously correct—far from it. But it led him to a highly original conclusion about what should be done to make republican government work. "The great desideratum in government," he wrote, "is such a modification of the sovereignty as will render it sufficiently neutral between the different interests and factions, to control one part of the society from invading the rights of another."¹⁴²

This was a "desideratum" that had not yet been accomplished by politics or those who studied it, including Hume—and Madison was self-consciously breaking new ground by proposing a way to achieve it. The idea was to modify the very seat of power so that the sovereign government would not be controlled by any interest in particular and the majority would not violate the rights of the minority. The goal was protection. The mechanism was government neutrality as between interests, factions, and parties.

"At the same time," Madison added, there was one further precaution that must be taken. The government must also be "sufficiently controlled itself, from setting up an interest adverse to that of the whole society."¹⁴³ A government that was neutral between different interests could easily

become self-interested. "In absolute monarchies," Madison observed, "the prince is sufficiently neutral towards his subjects, but frequently sacrifices their happiness to his ambition or his avarice." Monarchy solved the problem of majority oppression by denying the majority ultimate power. Yet at the same time it made the king into a potential oppressor, because he himself was not checked or balanced.¹⁴⁴

Here Madison offered a wisp of precedent for his idea of the extended republic: "As a limited monarchy tempers the evils of an absolute one; so an extensive republic meliorates the administration of a small republic." Monarchy had been tweaked and improved in Britain by limiting the powers of the king through a parliament and guarantees of rights. Republicanism, he was proposing, could now be tweaked and improved by limiting the powers of the majority. The comparison was intriguing. But it also raised a deeper question, one that Madison chose to ignore: If a limited monarchy offered neutrality as between factions while controlling the monarch's tendency to absolutism, why not adopt limited monarchy instead of extended republicanism?

Madison closed his private reflections with a final objective. By modifying "the process of elections" that presently existed, Madison hoped to "extract from the mass of the society the purest and noblest characters which it contains." These leaders would "feel most strongly the proper motives" of good government, and would also be "the most capable to devise the proper means of attaining it."¹⁴⁵

Writing for himself, Madison made no effort to hide his belief that there was a natural elite who would govern not out of self-interest but on behalf of the general good. The democratic process did not automatically choose the members of that elite, however. They had to be "extract[ed] from the mass of the society" by some more precise and effective means than the ordinary elections that took place in the states.¹⁴⁶ Madison did not argue that it was possible to change the motives of already elected representatives. Rather, the solution, if any existed, must lie in choosing those of character and relying on them to govern.

Madison's two desiderata had in common the aspiration to neutrality, self-restraint, and virtue. When it came to the problem of majority interests, his goal was to make the sovereign neutral, and he conjectured that expansion might make it harder to oppress minorities. When it came to selecting representatives, his goal again was a neutral, publicly interested government, and he hoped to find a method of election that would choose

pure and noble men to bring it about. Madison's desired ends were wholly idealistic. The means he proposed to use were guardedly more realistic—and still undeveloped. Having stated his goals, Madison now needed a plan to achieve them.

The Plan

Madison's essay on the vices of the United States was designed to clarify the problems of republicanism and describe what fixes were needed. In a series of letters to Jefferson, Edmund Randolph, and Washington, Madison laid out what was becoming his plan of action for Philadelphia—and the practical challenges of getting it adopted.

The letter to Jefferson was the most general and systematic, and also the least detailed. Jefferson could be expected to be sympathetic to the effort to save republicanism, but skeptical of any efforts to compromise along the way. Still in Paris as ambassador, Jefferson would not attend the convention; his support was personally important to Madison, but not politically so. It is therefore noteworthy that Madison stressed his core idea of a national "negative," or veto power, that would allow Congress to reverse any state law, thus blocking the tyranny of local majorities. Madison had to suspect that Jefferson would not like the idea of a new national body with the capacity to control the people's representatives in the states. Yet his respect for Jefferson—and his confidence in the originality and power of his new idea—led him to present his views frankly.

"Over and above the positive power of regulating trade and sundry other matters in which uniformity is proper," he wrote, he intended "to arm the federal head with a negative *in all cases whatsoever* on the local legislatures."¹⁴⁷ This "negative" would make Congress truly supreme, but Madison believed the "defensive" power to negate state laws was utterly necessary. "Experience and reflection have satisfied me," he wrote, that without it, "however ample the federal powers may be made, or however clearly their boundaries may be delineated on paper, they will be easily and continually baffled by the legislative sovereignties of the states." Congress must either dominate the states or be dominated by them.¹⁴⁸

A federal veto that could be effectuated by delegates of Congress located in the states, and ratified by the whole Congress later, amounted to a massive transformation of the system of government as it existed under the Articles. Madison was reaching for the stars. His goal was, he said,

“not only to guard the national rights and interests against invasion, but also to restrain states from thwarting and molesting each other.”¹⁴⁹ And he told Jefferson that a national veto would stop state majorities “from oppressing the minority within themselves by paper money and other unrighteous measures which favor the interest of the majority.” For Madison, the protection of “minority” creditors and property holders was now as strong a motive for the federal negative as uniformity—perhaps stronger.

Madison offered a further structural innovation. He proposed “to change the principle of representation in the federal system” so that different states would not all have the same number of votes in Congress. It was one thing for a weak Congress, dependent on the state legislatures, to rest on a system where large and small states had the same say. But since Madison’s proposal was meant to give Congress the ability to be “efficient without the intervention of the legislatures,” it would make no sense if a vote “from Delaware would be of equal value with one from Massachusetts or Virginia.” A Congress with real power would have to reflect the actual distribution of population and power among the states. “This change,” he wrote to Jefferson, “is therefore just.”¹⁵⁰

As Madison knew, however, when it came to constitutional reform, justice had little to do with it. Madison predicted to Jefferson that the proposal would also “be practicable.” He expected that the eastern states would like the idea of proportional representation in Congress because they were at present more populous, and that the southern states would like it because they expected to be more populous in the future. As for the small states, Madison was dismissive: “If a majority of the larger states concur, the fewer and smaller states must finally bend to them.”¹⁵¹

Madison closed his description of his plan to Jefferson with a general idea “to organize the federal powers in . . . separate departments.” Congress already exercised powers that were “frequently mismanaged from the want of such a distribution of them.” A federal government with real authority needed separation of powers even more.

Writing to Randolph three weeks later, Madison revealed his strategy. Where Randolph had proposed grafting new proposals onto the Articles, Madison proposed starting from scratch. “I am not sure that it will be practicable to present the several parts of the reform in so detached a manner to the states,” he gently explained. Some states might ratify all the proposed amendments as a package, while others would ratify only a

subset. His real reason for rejecting piecemeal ratification was that “in truth” his “ideas of reform strike so deeply at the old confederation, and lead to such a systematic change, that they scarcely admit of the expedient.”¹⁵²

Madison then described exactly what his deep reform ought to accomplish. “I hold it for a fundamental point,” he wrote, “that an individual independence of the states, is utterly irreconcilable with the idea of an aggregate sovereignty.” Madison had not said so to Jefferson in as many words, probably to avoid upsetting him. But Madison wanted nothing less than to abolish the states as individually independent sovereigns; and he did not think Randolph would balk as Jefferson might have done. It was not, he clarified, that he wanted to consolidate the states “into one simple republic,” a goal that would be “unattainable” as well as “inexpedient.” Instead what he wanted was a “middle ground” that would “support a due supremacy of the national authority” while also “leav[ing] in force the local authorities so far as they can be subordinately useful.”¹⁵³

Under the Articles, the states were sovereign and supreme, while Congress was subordinate. Under Madison’s allegedly “middle” way, the federal government would be sovereign and supreme, and the states would become subordinate. Their existence would be tolerated only insofar as they would be “useful.”

To Randolph, Madison admitted, as he had not to Jefferson, where he got the idea of a federal negative: from the British king, who had given charters to the colonies and retained the right to veto any legislation they might pass.¹⁵⁴ He proposed extending “national supremacy . . . to the judiciary department,” and creating “some national tribunals”—he used the plural—to hear cases involving foreigners or inhabitants of other states.¹⁵⁵

He was also much more explicit than he had been to Jefferson about the distribution of powers. The legislature should be divided into two houses, one elected by either the state legislatures “or the people at large,” the other “consist[ing] of a more select number, holding their appointments for longer terms and going out in rotation.” The federal negative would belong to the second, more select chamber. It might be worth adding a “council of revision,” a kind of supervisory body that would review the laws and include “the great ministerial officers.”¹⁵⁶

Madison stated expressly that “a national executive will also be necessary.” He insisted that he had “scarcely ventured to form my own opinion yet of the manner in which it ought to be constituted or of the authorities

with which it ought [to be] clothed."¹⁵⁷ If this was true, it was because Madison did not have a sweeping view of what the executive should be able to do on its own. The possible council of revision, coupled with the fact that the national veto would lie with the legislature, suggest that Madison had a rather modest executive in mind.

Having laid out his plan, Madison found himself confronted by its vast ambition. "I am afraid," he wrote to Randolph, "you will think this project, if not extravagant, absolutely unattainable and unworthy of being attempted."¹⁵⁸ Trying to reassure Randolph, and probably also himself, Madison repeated what he had rather hopefully told Jefferson: The changes would be welcomed by populous northern states as well as potentially populous southern states; and the small states must "ultimately yield to the predominant will." The only alternatives to republican reform were disastrous: "A much more objectionable form may be obtruded"—he meant monarchy—or the American "empire" would be partitioned "into rival and hostile confederacies."¹⁵⁹

To Washington, Madison sent a nearly verbatim copy of what he had proposed to Randolph, a sign that his thinking was coalescing into a concrete plan. In the middle of it, in direct response to Washington's hinted preference for monarchy, Madison inserted a justification for the national negative that was drawn from his essay on the vices of the Articles. "The greatest desideratum which has not yet been found for republican governments," he wrote, "seems to be some disinterested and dispassionate umpire in disputes between different passions and interests in the state." A king might be "neutral to the interests and views of different parties," as Washington had suggested. "But unfortunately he too often forms interests of his own repugnant to those of the whole."¹⁶⁰

The solution was the federal negative, which Madison named the "national prerogative," after the royal "prerogative" familiar from British constitutional terminology. The veto might "be sufficiently disinterested for the decision of local questions of policy, whilst it would itself be sufficiently restrained from the pursuit of interests adverse to those of the whole society."¹⁶¹ The negative was the centerpiece of Madison's constitutional plan because it represented, he believed, his original answer to the as-yet-unsolved core problem of republicanism. A central legislature, or at least the upper house of such a legislature, would not oppress minorities the way local majorities would.

There was a final component in Madison's letter to Washington that

had not appeared in his letter to Randolph. It related to Washington's expertise: the use of military force. "The right of coercion should be expressly declared," he wrote. Coercion could be accomplished by blockade: "With the resources of commerce in hand, the national administration might always find a means of exerting it either by sea or land."¹⁶² This was the same idea Madison had considered years earlier of compelling the states to obey Congress by blocking their trade routes.

Now, however, Madison accepted that this model might be hard to achieve: "The difficulty and awkwardness of operating by force on the collective will of the states, render it particularly desirable that the necessity of it might be precluded." He offered his new idea of the federal negative as a possible peaceful solution: "Perhaps the negative on the laws might create such a mutuality of dependence between the general and particular authorities, as to answer the purpose."¹⁶³ Madison, however, seemed to realize that this was putting the cart before the horse. A state unwilling to listen to the federal government would not be likely to obey a federal veto of one of its laws. He added another possibility: "or perhaps some defined object of taxation might be submitted along with commerce, to the general authority." But again, a federal taxing power would likely be ignored by a state already committed to ignoring its obligations under federal law.

In the end, Madison acknowledged, federal coercion might well have to take the form of military force. His bold, ambitious plan would move sovereign power from the state governments to a new national government that could force the states to obey. The result, if adopted as he intended, would utterly transform the structure of the United States.