

Madison... enclosed a copy of the Constitution and, in his seventeen <sup>DRS</sup> page letter, outlined a brief history of the convention, presented a perceptive analysis of the Constitution, and sketched a brilliant theory of republican politics in an extended republic. His extraordinary letter took the good-news/bad-news form, first tracing the remarkable "degree of concord which ultimately prevailed," making the agreement on the Constitution nothing "less than a miracle."<sup>46</sup> But most of the letter is an "immoderate digression" on his keen dissatisfaction with the omission in the Constitution of his protective device of a national negative on state laws.

On the plus side, the convention had discarded the confederation of sovereign states and replaced it with a union based directly on the people, extending to the general government the representative principle that was common to all the states, thus meeting the criticism of "the want of ratification by the people of the articles of Confederation."<sup>47</sup> This new Union was designed "1. to unite a proper energy in the Executive and a proper stability in the Legislative departments, with the essential characters of Republican Government. 2. To draw a line of demarkation which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them. 3. To provide for the different interests of different parts of the Union. 4. To adjust the clashing pretensions of the large and small States."

The second object, the due division of power between the general government and the state governments, "was perhaps of all, the most nice and difficult" problem, and the convention had achieved only a partial reform. There were constitutional restraints on the states: they could not coin money, issue paper currency, or violate contracts. But Madison thought that as valuable as these were, they fell "short of the mark." A national negative, he continued to insist, would have made it possible "1. to prevent encroachments on the General authority, 2. to prevent instability and injustice in the legislation of the States."

On the first point, he argued that "such a check in the whole over the parts" would give either "compleat supremacy" or "a controuling power" by which the general authority could be defended from encroachments by "the subordinate authorities, and by which the latter may be restrained from encroachments on each other." He concluded that the Constitution without the negative had substituted "a feudal system of republics" for "a Confederacy of independent States." His melancholy review of feudal constitutions had convinced him that in all of them there was "a continual struggle between the head and the inferior members," a contest that usually ended in the dominance of

46. JM to TJ, Oct. 24, 1787, below. See the important article by John Agresto, "'A System without a Precedent': James Madison and the Revolution in Republican Liberty," *South Atlantic Quarterly* 82 (1983): 129-44.

47. JM had singled out this basic shortcoming of the Confederation in his paper "Vices of the Political System of the United States"; see *PJM*, IX, p. 352. See Robert A. Rutland's editorial note to JM's "Vices" essay, *ibid.*, p. 346, and Gordon S. Wood, "Interests and Disinterestedness in the Making of the Constitution," in *Beyond Confederation*, pp. 69-109.

the latter. In terms of America's experience under the Confederation, he predicted that the dangers of encroachment under the new Constitution were more to be feared from the states than from the general government. Jefferson had suggested that judicial review would keep the states within their proper limits, but Madison would have preferred an early national veto to a later judicial review. It was more preferable "to prevent the passage of a law," he argued, "than to declare it void after it is passed."

On his second point, Madison emphasized that a constitutional negative would remedy "instability and injustice in the legislation of the States." His chief concern here was the federal protection of individual rights. The mutability and injustice of state laws, he told Jefferson, were "so frequent and so flagrant as to alarm the most steadfast friends of Republicanism," who sought "to secure individuals against encroachments on their rights."

In Madison's considered judgment, "the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects." During his recent service in the Virginia assembly, where majoritarian democracy often threatened minority or individual rights, he had become increasingly critical of the "vicious" character of state legislation, one of "the evils which viciate the political system of the U. S."<sup>48</sup>

Even though the central problem of the Confederation period had been the central government, the reformation of the political system of the United States came not so much from efforts to bolster the central government from above by adding new powers; instead, it came from creeping criticism of state sovereignty from below, from growing denials at the grass-roots level within the states that legislative sovereignty was the same thing as popular sovereignty—that is, denials that the representatives in the state legislatures were the sole or adequate spokesmen for the represented. In short, the attack on state sovereignty was an inside job—one done inside the states. And Madison, one of the leading attackers, spoke from his personal experiences as a member of the Virginia assembly.

The legislatures were not sovereign; the people were. By the exercise of the principle of representation, the people could delegate their authority to expand governmental power and, at the same time, protect individual liberty by reserving individual rights beyond the reach of even a legislative majority. However, Madison's ultimate defense, had it been adopted by the convention, was the national negative on state laws. Without it, the constitutional reform was only a "partial provision"; it was, moreover, "materially defective" since it did not give the general government the ultimate defense for individual liberties.

Even without this ultimate defense, however, individual rights would be

48. JM to TJ, Oct. 24, 1787, below; JM, "Vices of the Political System of the United States," pp. 353-54. For JM's growing criticism of state legislation, see JM to TJ, July 3, 1784, above, Jan. 9, 1785, above, Jan. 22, 1786, above, Dec. 4, 1786, below, and Feb. 15, 1787, below.

more secure under the new general government than they were under the state governments—including Virginia's, which contained America's first Declaration of Rights. Why, Madison asked rhetorically, would this be so since both the states and the United States under the new Constitution were founded on the republican principle of majority rule and "are distinguished rather by the extent within which they will operate, than by any material difference in their structure?" He replied with his first extensive exposition to anyone outside the convention of his theory of an extended republic, a brilliant analysis of "the true principles of Republican Government," which would appear a month later, in elaborated form, as *The Federalist* Number 10, the most famous of *The Federalist* papers. Drawing on his observations of legislative abuses throughout the nation and on his frustrating years in the Virginia assembly, which he had summarized in "Vices of the Political System of the United States," he set his firsthand experience in the context of his study of the history of confederacies based on bundles of books shipped by Jefferson, particularly on his reading of David Hume's "Idea of a Perfect Commonwealth."<sup>49</sup>

Conventional political theory from Aristotle to Montesquieu had contended that republics could operate only in small geographical areas. Madison turned the traditional theory upside down. The chief advantage of a large republic over a small one, he argued, was the fact that it encompassed a greater number of interests, groups, parties, and factions scattered over a more extensive geographical sphere of government so that "no common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit" such as encroachment on individual liberties or private rights. "In a large Society," he told Jefferson, "the people are broken into so many interests and parties, that a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority of the whole." He concluded by arguing that divide and conquer, "the reprobated axiom of tyranny, is under certain qualifications, the only policy, by which a republic can be administered on just principles."

Liberty and justice, Madison believed, were the true ends of republican government, and he thought that "the same security seems requisite for the civil as for the religious rights of individuals." These were basic rights that no government could rightfully disregard. "The great desideratum in Government," he concluded, "is, so to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society to controul one part from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the entire Society. . . . In the extended Republic of the United States, the General Government

49. JM to TJ, Oct. 24, 1787, below. See the significant articles by Douglass Adair, "That Politics May be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist" and "The Tenth Federalist Revisited," in *Fame and the Founding Fathers*, pp. 3–26, 93–108. For a carefully argued revisionist analysis, see Edmund S. Morgan, "Safety in Numbers: Madison, Hume, and the Tenth Federalist," *Huntington Library Quarterly* 49 (1986): 95–112.

would hold a pretty even balance between the parties of particular States, and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interests."<sup>50</sup>

In his "immoderate digression," Madison linked the national negative to his theory of the extended republic, suggesting that the rejection of the former made the Constitution only a partial reform. His private letter to Jefferson marked his most pessimistic appraisal of the work of the Philadelphia convention.<sup>51</sup> But his momentary disappointment should not obscure the distinctive contribution that he made at the convention. Although his was not a magnetic personality, he had long ago lost his shyness in political discussions. Never a forceful speaker, he was a logical thinker who had analyzed the basic principles of republican government, steeped himself in the history of confederations, prepared himself more thoroughly than any other delegate for debate, and outlined the framework for discussion of a federal government that resulted in agreement on an extended republic.

Despite his doctrinaire and rear-guard defense of the federal negative, he clearly preferred the Constitution to the Confederation, which he feared might not "be kept alive . . . until the new one may take its place." Like Benjamin Franklin, who supported the Constitution "because I expect no better, and because I am not sure, that it is not the best,"<sup>52</sup> Madison quickly embraced the Constitution designed to create a more perfect Union. Three weeks after mailing his letter to Jefferson, he published his first *Federalist* paper, Number 10, which omitted any mention of the national negative and concentrated instead on demonstrating how an enlarged federal republic would "secure the public good, and private rights against the danger" of unjust factions "and at the same time . . . preserve the spirit and form of popular government." The Constitution, he proclaimed, provided "a republican remedy for the diseases most incident to republican government."<sup>53</sup>

In his reply, Jefferson understandably ignored Madison's digression on the national negative since he had already blasted it because the proposed patch did not match the hole. But he also ignored Madison's brilliant and perceptive theory of an extended republic that utilized governmental power as

50. JM to TJ, Oct. 24, 1787, below. See Lance Banning, "The Practicable Sphere of a Republic: James Madison, the Constitutional Convention, and the Emergence of Revolutionary Federalism," in *Beyond Confederation*, pp. 162–87.

51. Charles Hobson's "The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government," *WMQ* 36 (1979): 215–35, is the most thorough treatment of JM's dissatisfaction, but it presses too hard the argument that it demonstrates his consolidationist desires. See Banning, pp. 169–71, 184, and Michael P. Zuckert, "Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention," *Review of Politics* 48 (1986): 166–210.

52. *Records of the Federal Convention*, Sept. 17, 1787, II, p. 643.

53. *PJM*, X, pp. 263–70. For a brilliant analysis of "Madison's cogency, penetration, knowledge, and range," see the enlarged edition of Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass., 1992), pp. 321–79, esp. 366–78.

a defense of liberty, perhaps because he was still wedded to the traditional view that republics could only operate in small geographical areas.<sup>54</sup> Skipping over Madison's penetrating analysis, he concentrated instead on what he liked and disliked about the proposed Constitution:

I like much the general idea of framing a government which should go on of itself peaceably, without needing continual recurrence to the state legislatures. I like the organization of the government into Legislative, Judiciary and Executive. I like the power given the Legislature to levy taxes; and for that reason solely approve of the greater house being chosen by the people directly. For tho' I think a house chosen by them will be very illy qualified to legislate for the Union, for foreign nations etc. yet this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves. I am captivated by the compromise of the opposite claims of the great and little states, of the latter to equal, and the former to proportional influence. I am much pleased too with the substitution of the method of voting by persons, instead of that of voting by states: and I like the negative given to the Executive with a third of either house, though I should have liked it better had the Judiciary been associated for that purpose, or invested with a similar and separate power. There are other good things of less moment.

In sharp contrast to Madison's tough-minded analysis of the nature of liberty and politics, Jefferson responded as a high-minded citizen of the Enlightenment, basing his objections on European standards of conventional wisdom and liberal political theory and stating them bluntly: "I will now add what I do not like." First, the Constitution had no bill of rights, and, second, it abandoned the principle of rotation in office, especially in the case of the president, who "will always be re-elected if the constitution permits it. He is then an officer for life"—in effect an elected monarch.<sup>55</sup> Thinking in traditional Whig terms, he viewed power as a threat to liberty. He seemed puzzled by the dilemma created by the obvious need to strengthen the central government and the threat that new powers might pose for the liberties of the people. He readily conceded the need for "a great addition to the energy" of the national government. But he also confessed, "I am not a friend to a very energetic government. It is always oppressive. The late rebellion in Massachusetts," he continued, recurring to one of his favorite doctrinaire themes, "has

54. When the Confederation Congress replaced with fewer and larger states the fourteen small states that TJ had proposed in his western Land Ordinance of 1784, he deplored the move as "reversing the natural order of things. A tractable people may be governed in large bodies," he wrote JM, "but in proportion as they depart from this character, the extent of their government must be less. We see into what small divisions the Indians are obliged to reduce their societies"; see TJ to JM, Dec. 16, 1786, below.

55. TJ to JM, Dec. 20, 1787, below. For a brief discussion of the contrast between TJ's "liberal conventionality" and JM's perceptive analysis, see Bernard Bailyn, "Boyd's Jefferson: Notes for a Sketch," *New England Quarterly* 33 (1960): 388-89, which has been reprinted in his *Faces of Revolution: Personalities and Themes in the Struggle for American Independence* (New York, 1990), pp. 22-41.

given more alarm than I think it should have done. Calculate that one rebellion in 13 states in the course of 11 years, is but one for each state in a century and a half. No country should be so long without one. Nor will any degree of power in the hands of government prevent insurrections." Citing upheavals in France, Turkey, and England, he contrasted "the ferocious depredations of their insurgents with the order, the moderation and the almost self extinguishment of ours."

To guard against oppressive government, Jefferson insisted on additional protection for the liberties of the people. "A bill of rights," he contended, "is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." Such a charter should provide "clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations."

Jefferson knew that Madison had already formed his own judgment on these points. From his distant post in Paris, he could not "pretend to decide what would be the best method of procuring the establishment of the manifold good things in this constitution, and of getting rid of the bad." He was pleased that the Constitution would be "duly weighed and canvassed by the people," since "it is my principle that the will of the Majority should always prevail. If they approve the proposed Convention," he concluded, "I shall concur in it cheerfully, in hopes that they will amend it whenever they shall find it work wrong."<sup>56</sup>