

# James Madison and the Constitution

by Jack Rakove



James Madison, by A. Newsam, lithograph by Peter S. Duval (Philadelphia: C. S. Williams, 1846). (Library of Congress Prints and Photographs Division)

James Madison had just turned twenty-five when he took up his first public office as a delegate to the Virginia provincial convention that endorsed American independence and then adopted a new constitution and an accompanying Declaration of Rights. He was just turning twenty-nine when he first took his seat in the Continental Congress in 1780, where he served over three years without once returning home. He had just turned thirty-six and was back in Congress when he set himself the task of preparing a working agenda for the Federal Convention that would assemble at Philadelphia in May of 1787.

Madison was not so much a member of the generation that made the Revolution as he was of the generation that the Revolution made. Like Alexander Hamilton and the slightly older John Jay, his co-authors of *The Federalist*, he was one of the Revolution's "young men." The coming of independence and the political vocation he now discovered rescued him from the directionless life he had been leading since finishing his studies at the College of New Jersey (now

Princeton University) in 1771. In our time, the bookish Madison would have been a natural candidate for graduate school and university life. Reaching his mid-thirties, he would have just earned tenure and begun his next research project.

Instead, in April 1787, Madison began drafting a memorandum which he called *Vices of the Political System of the United States*. Viewed online, at the American Memory website of the Library of Congress, we see how much of a working paper it was. Madison placed twelve sub-headings on the left side of his pages, then, in his fine hand, sketched in his points in mostly brief paragraphs, with occasional cross-outs, while leaving room to come back and add further reflections. Only one item ("11. Injustice of the laws of states") gives way to an extended analysis, which knowing readers recognize as the forerunner of its better known restatement in *Federalist* 10. The next item, "Impotence of the laws of the states," is left blank. (It would be an interesting exercise to have students write a suitably Madisonian paragraph to supply his omission.)

Call it what we will—memorandum or working paper—*Vices of the Political System* is a truly remarkable as well as historic document. For one thing, it marks one of those rare moments in the history of political thought where one can actually glimpse a creative thinker at work, not by reading the final published version of his ideas, but by catching him

at an earlier point, exploring a problem in the privacy of his study. For another, it matters that this was not a merely academic exercise. The drafting of this memorandum was essential to Madison's self-assigned task of formulating a working agenda that would allow the coming convention to hit the ground running.

It matters, too, that Madison's compilation expressed the two great talents that made him the preeminent political thinker of his generation. On the one hand, there were the lessons he could draw from his own extensive involvement in public affairs since 1776, at both the state and national levels of government. But Madison sought not only to enumerate problems but to identify their causes. Here his memorandum, concise as it was, revealed deeply reflective and analytical qualities of mind, a capacity not only to draw lessons from experience but to think abstractly, to move beyond the surface of events to search for their underlying causes and explanations.

Madison's twelve items can be divided into three clusters of points. The least innovative appear in the first six items, which basically summarize the conventional wisdom of the mid-1780s on all the obvious defects of the Articles of Confederation. Here Madison did not attempt to break new ground, but simply reviewed the lack of formal powers that reduced Congress to a condition of "imbecility" (as observers at the time often remarked) or that left the states free to ignore its decisions and go their own way. This section pointed the way toward identifying the specific areas of governance in which the Articles failed to provide Congress with the authority and resources it needed either to carry out its assigned duties or to pursue obvious matters of national interest.

Arguably the most innovative section of the memorandum was to be found in the concluding four items, which respectively addressed the "multiplicity," "mutability," "injustice," and "impotence of the laws of the states." It was here that Madison first rebutted the idea that republican governments, like the ones the Americans had created in 1776, could rely on the civic virtue—meaning the restraint and prudence—of their citizens as the best security against misrule. Republican citizens were as vulnerable to the sway of self-interest and passions as the subjects of other regimes, Madison reasoned. In the smaller compass of the states, it was easier for popular majorities to form, and once formed, to impel government to take actions harmful to the legitimate rights and interests of minorities. It followed that a well-constructed national government should be given some means of intervening within the states individually, in order to prevent the popular (and populist) majorities who would still rule there from enacting laws harmful to individual and minority rights.

This analysis led to a critical expansion in Madison's agenda for the convention. Throughout the 1780s, the principal goal of the proponents of federal constitutional reform had been to give Congress the further powers it needed to operate independently of the states, especially in the realms of raising revenue and regulating commerce. Madison's critique of state legislation led to a more radical conclusion. The point of reform, as Madison now saw it, was not only to free Congress from its dependence on the states, but also to find ways to use the authority of the national government to moderate and control the activities of the states. In Madison's own view, the best way to do this would be to give

the national legislature a negative (what today we would call a veto) over the laws of the states.

In between the initial summary of the manifest failings of the Articles of Confederation and this reactionary attack on lawmaking within the states, however, Madison inserted two other items in his list of vices. The first, item seven, had to do with the basic design flaw of the entire federal system: its reliance on the state governments to implement virtually all of the major decisions that Congress took. Item eight took up an entirely distinct question: whether a federal constitution ratified (as the Articles had been) only by the state legislatures, and not the people, could be regarded as legally superior to ordinary acts of state legislation.

Item seven was where Madison's intellectual gifts were most vividly displayed. In the space of a single brief paragraph, he explained why the lack of any authority in Congress to compel or punish delinquent states into doing their duty would forever render the existing Confederation ineffectual. He began by asking how the "compilers" of the Articles could have failed to give Congress the coercive authority it obviously needed. Thinking like a historian, he explained that failure in terms of the prevailing patriotic enthusiasm of the mid-1770s, when it was still plausible to assume that everyone would naturally do whatever it took to sustain the Revolution. He then offered a second kind of historical reflection, noting that the experience of the past decade had repeatedly demonstrated just how naïve that assumption of voluntary state compliance had been.

But then Madison shifted gears, put his historian's cap aside, and began reasoning as a true theorist. "How indeed could it be otherwise," he asked? His answers to this rhetorical question took the form of what we now recognize as game theory, a mode of analysis that did not formally exist at the time. The uniform and voluntary compliance of the states with national measures could not be relied upon, Madison reasoned, for three reasons. First, the states would rarely if ever have equal stakes in implementing any given decision, meaning that some governments would always try to shirk their federal duty. Second, there would always be state-based politicians—"courtiers of popularity," he called them—who would have interested or ambitious reasons of their own for arguing against the enforcement of national measures (we might say, running against Washington—the capital, not the person). Third, even where common interests did exist, doubts whether other states would comply in good faith with the national decision would discourage anyone from complying until they had determined whether the others would step forward.

"Here are causes and pretexts which will never fail to render federal measures abortive," Madison concluded, so long, that is, as the national government had to rely on the voluntary compliance of the states. Never is a long time in politics, but by adding game theory to historical analysis, Madison had fashioned a compelling case for abandoning the entire framework of the Confederation and replacing it with a national government that would act not upon or through the states but only on their citizens. Its decisions would take the form of law, not the recommendations or requisitions or resolutions of the Continental Congress. As such, they would be enacted, executed, and adjudicated by independent federal authorities. The states would certainly be part of the Union, and in one way or another,

they would doubtless influence its decisions. But the Union would act independently of the states, and be sufficient unto itself in reaching and implementing its decisions. It would become a fully articulated national government, with separate legislative, executive, and judicial branches. And because Americans generally adhered to the principle of bicameral legislatures, the existing Continental Congress would have to be replaced by assembly of two chambers, which in turn opened up the difficult question of what those two chambers would represent: people, property, states, or some combination of these different entities.

Between the drafting of the memorandum on the *Vices of the Political System* in early April 1787 and the actual convening of the Convention a month later, Madison continued to refine his ideas. Concurrent letters to Thomas Jefferson, still serving as minister to France, and to his two colleagues in the Virginia delegation, George Washington and Edmund Randolph, show how the general propositions of the memorandum were translated into particular proposals (like the negative on state laws). Madison had also concluded that the only just rule of national representation was one that was proportioned to the population of the states. When the other delegations were slow to trickle into Philadelphia in May, delaying the start of the Convention a good two weeks, Madison and his Virginia colleagues used the time to convert his ideas into the Virginia Plan that Randolph, as state governor, formally introduced on May 28. High on their list of priorities was a strategy for persuading or compelling the small states to give up their claim to an equal vote in either house of the new legislature.

Madison's defeat on this point in the misnamed Great Compromise was one of the two main reasons that he left the Convention initially disappointed with the Constitution it produced. The other was his colleagues' rejection of the proposed congressional negative on state laws, a measure to which he remained deeply attached, as a lengthy letter to Jefferson written five weeks after the Convention adjourned attests. Those two defeats, many scholars observe, suggest that we should not be too quick to call Madison the "Father of the Constitution." And indeed historians should always be cautious about ascribing too much agency to any individual's actions, especially when he or she is engaged in a process of collective deliberation and persuasion.

Even so, the agenda-shaping role that Madison set out to play when he drafted his working paper in the early spring of 1787 might suggest that his claims to constitutional paternity are well deserved. Short of abolishing the states entirely, it was about as expansive an agenda as anyone at the time could have conceived, and probably a much more ambitious one than any of his colleagues initially expected to see. Prudence and the sorry history of past efforts to amend the Articles of Confederation suggested that the Convention might do well to aim its sights lower. Madison, the political activist and creative political theorist, had reached a different conclusion, and the Convention followed in his wake. Whether it would have done so had he not raised its sights is a fair question we can never satisfactorily answer, but would still do well to ponder.

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