

On the eve of the Constitutional Convention in 1787, a member of the Virginia delegation wrote a memorandum to its chairman, enumerating the defects of the national and state governments under the Articles of Confederation and offering “some outlines of a new system.”¹ The famous memo was written by the “Father of the Constitution,” James Madison, to the “Father of His Country,” George Washington, both of whom urged the abandonment of the Articles as essential to the nation’s survival. At age thirty-six, Madison was “not so much a member of the generation that made the Revolution,” states historian Jack Rakove, “as he was of the generation that the Revolution made.”² Madison came to the Convention as an experienced Virginia legislator, former delegate to the Continental Congress, and a political theorist *extraordinaire*. “The drafting of this memorandum,” writes Rakove, “was essential to Madison’s self-assigned task of formulating a working agenda that would allow the coming convention to hit the ground running.”³ And that it did. His “working agenda” spawned the Virginia Plan of Government that, with its emphasis on a strong national government in a federal system, provided the foundation for the U.S. Constitution. “Vices” is a “truly remarkable as well as historic document,” stresses Rakove. “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.”⁴

1. Failure of the States to comply with the Constitutional requisitions.

This evil has been so fully experienced both during the war and since the peace, [and] results so naturally from the number and independent authority of the States, and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to, the object of the present System.

2. Encroachments by the States on the federal authority

Examples of this are numerous, and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation.⁵ Among these examples are the wars and Treaties of Georgia with the Indians — The unlicensed [trade] compacts between Virginia and Maryland,⁶ and between Pen^a. [Pennsylvania] & N. Jersey — the troops raised and to be kept up by Mass^{ts}. [Massachusetts].⁷

3. Violations of the law of nations and of treaties.

From the number of Legislatures, the sphere of life from which most of their members are taken,⁸ and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly, not a year has passed without instances of them in some one or other of the States.

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¹ James Madison to George Washington, 16 April 1787.

² Jack Rakove, “James Madison and the Constitution,” *History Now*, September 2007 (Gilder Lehrman Institute for American History), at www.gilderlehrman.org/historynow/09_2007/historian2.php.

³ *Ibid.*

⁴ *Ibid.*

⁵ I.e., where any localized goal of a state shall induce it to act beyond its authority in the confederation.

⁶ The interstate commerce pact arranged by Virginia and Maryland, without federal government involvement, at the 1785 Mount Vernon Conference.

⁷ Due to Shays’s Rebellion of 1786-1787 and similar farmers’ revolts in other New England states.

⁸ I.e., from a more common, less educated and self-disciplined citizenry.

The Treaty of peace — the treaty with France — the treaty with Holland have each been violated. [See the complaints to Congress on these subjects.] The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.

As yet foreign powers have not been rigorous in animadverting [criticizing] on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst. [against] those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.⁹

4. Trespasses of the States on the rights of each other.

These are alarming symptoms, and may be daily apprehended [witnessed] as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports — of Maryland in favor of vessels belonging to her own citizens — of N. York in favor of the same.

Paper money, installments of debts, occlusion [blockage] of Courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States.¹⁰ As the Citizens of every State, aggregately taken, stand more or less in the relation of Creditors or debtors to the Citizens of every other States, Acts of the debtor State in favor of debtors affect the Creditor State in the same manner as they do its own citizens who are relatively creditors towards other citizens. This remark may be extended to foreign nations. If the exclusive regulation of the value and alloy of coin¹¹ was properly delegated to the federal authority, the policy of it equally requires a control on the States in the cases above mentioned. It must have been meant

1. to preserve uniformity in the circulating medium¹² throughout the nation.
2. to prevent those frauds on the citizens of other States and the subjects of foreign powers which might disturb the tranquility at home or involve the Union in foreign contests.

The practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the federal articles, is certainly adverse to the spirit of the Union and tends to beget retaliating regulations, not less expensive & vexatious in themselves than they are destructive of the general harmony.

5. want of concert [lack of unity] in matters where common interest requires it.

This defect is strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause? Instances of inferior moment¹³ are the want [lack] of uniformity in the laws concerning naturalization & literary property [copyright]; of provision for national seminaries [colleges and universities], for grants of [business] incorporation for national purposes, for canals and other works of general utility, w^{ch}. [which] may at present be defeated by the perverseness of particular States whose concurrence is necessary.

⁹ I.e., because of the dire consequences of treaty violations, it should be nearly impossible for a state (part of the whole) to do so with the federal government (the whole) having no power to prevent or redress it.

¹⁰ States were passing a multitude of laws that favored their own citizens in dealing with the massive war debt, shortage of money, loss of trade outlets, and deepening economic depression after the 1783 peace treaty.

¹¹ Congress had no power to regulate the states' creation of money (legal tender) as coin or paper, or to control the value of money used in the nation.

¹² Money (as coins and/or paper) used for the legal payment (legal tender) for goods and services.

¹³ I.e., examples of less significance than those of commercial affairs.

6. want [lack] of guaranty to the States of their Constitutions & laws against internal violence.

The confederation is silent on this point and therefore by the second article the hands of the federal authority are tied. According to Republican Theory,¹⁴ Right and power being both vested in the majority are held to be synonymous. According to fact and experience a minority may, in an appeal to force, be an overmatch for the majority.

1. If the minority happen to include all such as possess the skill and habits of military life, & such as possess the great pecuniary resources, one third only may conquer the remaining two thirds.
2. One third of those who participate in the choice of the rulers may be rendered a majority by the accession of those whose poverty excludes them from a right of suffrage, and who for obvious reasons will be more likely to join the standard of sedition than that of the established Government.
3. Where slavery exists, the republican Theory becomes still more fallacious.

7. want [lack] of sanction to the laws, and of coercion in the Government of the Confederacy.

A sanction is essential to the idea of law, as coercion is to that of Government.¹⁵ The federal system, being destitute of both, wants [lacks] the great vital principles of a Political Constitution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity of commerce and of alliance between so many independent and Sovereign States. From what cause could so fatal an omission have happened in the articles of Confederation? from a mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals — a confidence which does honor to the enthusiastic virtue of the compilers as much as the inexperience of the crisis apologizes for their errors. The time which has since elapsed has had the double effect of increasing the light and tempering the warmth with which the arduous work may be revised. It is no longer doubted that a unanimous and punctual obedience of 13 independent bodies to the acts of the federal Government ought not be calculated on. Even during the war, when external danger supplied in some degree the defect of legal & coercive sanctions, how imperfectly did the States fulfill their obligations to the Union? In time of peace, we see already what is to be expected. How indeed could it be otherwise?

In the first place, Every general act of the Union must necessarily bear unequally hard on some particular member or members of it.

Secondly, the partiality of the members to their own interests and rights, a partiality which will be fostered by the Courtiers of popularity, will naturally exaggerate the inequality where it exists and even suspect it where it has no existence.

Thirdly, a distrust of the voluntary compliance of each other may prevent the compliance of any, although it should be the latent disposition of all.

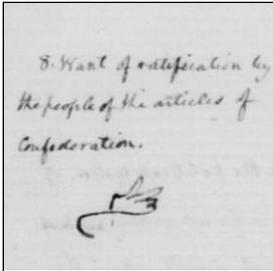
Here are causes & pretexts which will never fail to render federal measures abortive. If the laws of the States were merely recommendatory to their citizens, or if they were to be rejudged by County authorities, what security, what probability

¹⁴ Not referring to the Republican Party created in 1854. "Republican" political theory valued government by the people, primarily through elected representatives, thereby equating the *power* to govern with the *right* to govern. History shows, Madison argued, that those without the elected right to govern could exercise power to the detriment of the nation's unity and security. This could happen if the minority were composed of (1) men with military training and resources; (2) the numerous nonproperty-holders who have no vote; and (3) the slaves with no citizen status or right to vote. See also "Vice" #11.

¹⁵ The power to punish is as essential to the efficacy of law as the power to compel obedience is to the proper functioning of government.

would exist that they would be carried into execution? Is the security or probability greater in favor of the acts of Cong^s. [Congress] which depending for their execution on the will of the state legislatures w^{ch}. are tho' nominally authoritative, in fact recommendatory only.

8. Want of ratification by the people of the articles of Confederation.



In some of the States the Confederation is recognized by and forms a part of the constitution. In others however it has received no other sanction than that of the Legislative authority. From this defect two evils result:

1. Whenever a law of a State happens to be repugnant to an act of Congress, particularly when the latter is of posterior date to the former, it will be at least questionable whether the latter must not prevail; and as the question must be decided by the Tribunals of the State, they will be most likely to lean on the side of the State.
2. As far as the Union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution by virtue of which they are become one sovereign power, so far it seems to follow from the doctrine of compacts that a breach of any of the articles of the confederation by any of the parties to it absolves the other parties from their respective obligations, and gives them a right if they choose to exert it, of dissolving the Union altogether.

9. Multiplicity of laws in the several states.

In developing the evils which vitiate the political system of the U. S.,¹⁶ it is proper to include those which are found within the States individually as well as those which directly affect the States collectively, since the former class have an indirect influence on the general malady and must not be overlooked in forming a complete remedy. Among the evils then of our situation may well be ranked the multiplicity of laws from which no State is exempt. As far as laws are necessary, to mark with precision the duties of those who are to obey them and to take from those who are to administer them a discretion which might be abused, their number is the price of liberty.¹⁷ As far as the laws exceed this limit, they are a nuisance: a nuisance of the most pestilent kind. Try the Codes of the several States by this test, and what a luxuriancy of legislation do they present. The short period of independence has filled as many pages [with laws] as the century which preceded it. Every year, almost every session adds a new volume. This may be the effect in part, but it can only be in part, of the situation in which the revolution has placed us. A review of the several codes will show that every necessary and useful part of the least voluminous of them might be compressed into one tenth of the compass [space], and at the same time be rendered tenfold as perspicuous [clear/lucid].

10. mutability of the laws of the States.

This evil is intimately connected with the former yet deserves a distinct notice as it emphatically denotes a vicious legislation. We daily see laws repealed or superseded before any trial can have been made of their merits: and even before a knowledge of them can have reached the remoter districts within which they were to operate. In the regulations of trade this instability becomes a snare not only to our citizens but to foreigners also.

¹⁶ I.e., in compiling a list of the defects under the Articles that diminish the authority of Congress to nil.

¹⁷ I.e., to pass laws that detail what citizens must or must not do, but fail to give adequate decision-making authority to the people who must enforce the laws, is a price we pay for having achieved our independence. Patriot leaders were as concerned about the preponderance of arbitrary and ill-considered legislation by the states as they were about the lack of power in the federal government.

11. Injustice of the laws of States.¹⁸

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.

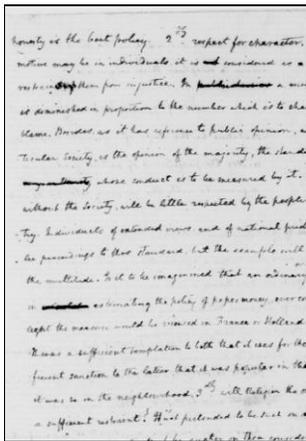
1. ambition
2. personal interest.
3. public good.

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 [i.e., political wiles and schemes] 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 colors of popular eloquence?¹⁹

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 [farmers], 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



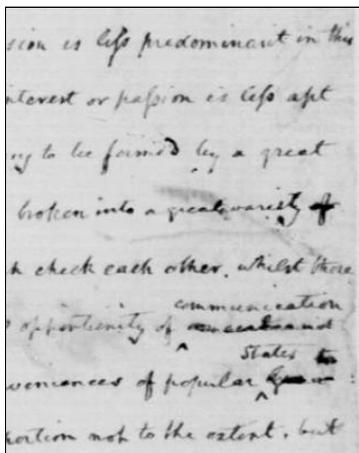
¹⁸ Madison expanded on the potential dangers of a “tyranny of the majority” in Federalist 10.

¹⁹ I.e., a demagogue.

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 [beyond] the Society will be little respected by the people at large of any Country. Individuals of extended [broad] 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 assemblyman of R. 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 Mass^{ts} 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 [and] to the former that it was so in the neighborhood.

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 [group] 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 [i.e., as individuals]. When indeed Religion is kindled into enthusiasm [excessive religious zeal], 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 uncontrolled by apprehensions [fears/threats] of external danger. If an enlargement of the sphere [number of people in the community] 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 [necessity] in Government is such a modification of the Sovereignty [governing power]²⁰ 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, and at the same time sufficiently controlled 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 controlled 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 [improvement] 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.

12. Impotence of the law of the States

[notes end here]

I have sought for middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.

James Madison to George Washington, 16 April 1787

Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it.

James Madison, *The Federalist* #10, 22 November 1787

²⁰ Bracketed addition of "governing power" in Madison original.